

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)
BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA
APPELLANT
(RESPONDENT)

- and -

THE ATTORNEY GENERAL OF BRITISH COLUMBIA
APPELLANT
(RESPONDENT)

- and -

MARK DAVID ANDREWS
RESPONDENT
(PETITIONER)

- and -

GOREL ELIZABETH KINERSLY
RESPONDENT

- and -

THE ATTORNEY GENERAL OF ALBERTA, THE
ATTORNEY GENERAL OF SASKATCHEWAN, THE
ATTORNEY GENERAL OF ONTARIO, PROCUREUR
GENERAL DE LA PROVINCE DE QUEBEC
INTERVENORS

FACTUM OF THE ATTORNEY GENERAL OF SASKATCHEWAN
INTERVENOR

Brian Barrington-Foote
Deputy Attorney General
10th Floor, 1874 Scarth St.
Regina, Saskatchewan, S4P 3V7
Solicitor for the Intervenor,
the Attorney General of
Saskatchewan

Gowling & Henderson
Barristers & Solicitors
160 Elgin Street
Ottawa, Ontario, K1N 8S3
Ottawa Agents for the
Attorney General of
Saskatchewan

NAMES OF COUNSEL AND INTERVENORS

DAVIS & COMPANY
Barristers and Solicitors
2800 - 666 Burrard St.
Vancouver, B.C. V6C 2Z7
Solicitors for the Appellant
the Law Society of
British Columbia

OSLER, HOSKIN & HARCOURT
Barristers and Solicitors
1400 - 50 O'Connor St.
Ottawa, Ontario, K1P 6L2
Ottawa Agents for the Appellant
the Law Society of
British Columbia

D.W. SHAW, Q.C. COUNSEL

RUSSELL & DUMOULIN
Barristers and Solicitors
17th F., 1075 W. Georgia St.
Vancouver, B.C. V6E 3G2
Solicitors for the
Respondent

SCOTT & AYLEN
Barristers and Solicitors
1200 - 170 Laurier Ave. N.
Ottawa, Ontario K1P 5V5
Ottawa Agents for the
Respondent

D.G. COWPER COUNSEL

ATTORNEY GENERAL OF ALBERTA

GOWLING & HENDERSON
Barristers and Solicitors
160 Elgin Street
Ottawa, Ontario K1N 8S3
Ottawa Agents for the Attorney
General of Alberta

ATTORNEY GENERAL OF
SASKATCHEWAN

GOWLING & HENDERSON
Barristers and Solicitors
160 Elgin Street
Ottawa, Ontario K1N 8S3
Ottawa Agents for the Attorney
General of Saskatchewan

ATTORNEY GENERAL OF ONTARIO

SOLOWAY, WRIGHT, HOUSTON,
GREENBERG, O'GRADY, MORIN
Barristers and Solicitors
99 Metcalfe Street
Ottawa, Ontario K1P 6L7
Ottawa Agents for the Attorney
General of Ontario

PROCUREUR GENERAL DE LA
PROVINCE OF QUEBEC

NOEL, DECARY, AUBRY &
ASSOCIATES
Barristers and Solicitors
111 Champlain Street
Hull, Quebec J8X 3R1
Agents for the Procureur
General de la Province de
Quebec

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PART I

STATEMENT OF FACTS

1. The Attorney General of Saskatchewan accepts the facts as stated in the Factum of the Appellant, the Law Society of British Columbia, at pages 1 to 3 inclusive.

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PART II
POINTS IN ISSUE

2. The basic points in issue are reflected in the constitutional questions stated by the Chief Justice:

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(i) Does the Canadian citizenship requirement to be a lawyer in the Province of British Columbia as set out in section 42 of the Barristers and Solicitors Act, R.S.B.C. 1979, c. 26, infringe or deny the rights guaranteed by section 15(1) of the Canadian Charter of Rights and Freedoms?

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(ii) If the Canadian citizenship requirement to be a lawyer in the Province of British Columbia as set out in section 42 of the Barristers and Solicitors Act, R.S.B.C. 1979, c. 26, infringes or denies the rights guaranteed by section 15(1) of the Canadian Charter of Rights and Freedoms, is it justified by section 1 of the Canadian Charter of Rights and Freedoms?

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PART III

ARGUMENT

INTRODUCTION

10 3. The Attorney General of Saskatchewan submits that
the British Columbia Court of Appeal erred in concluding
that the citizenship requirements of the Barristers and
Solicitors Act are inconsistent with the Canadian Charter
of Rights and Freedoms. It is submitted that those
20 requirements do not violate section 15(1) of the Charter.
In the alternative, it is submitted that they are
justifiable pursuant to section 1 of the Charter. Each of
these points will be discussed in turn.

30 SECTION 15(1)

(a) Generally

40 4. The basic principles that govern the operation of
section 15(1) of the Charter must be established before
the specific issues raised by section 42 of the Barristers
and Solicitors Act can be considered. Section 15(1) reads
as follows:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

10 5. The language of section 15(1) presents some interpretational challenges. However, like any other provision of the Charter, it must be construed in accordance with the principles enunciated in R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 at p. 344:

20 In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of other specific rights and freedoms with which it is associated
30 within the text of the Charter. The interpretation should be, as the judgment in Southam emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore, as this Court's decision in Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357 illustrates, be placed in its proper linguistic, philosophic and
40 historical contexts.

6. The obligations to consider the "historical origins of the concepts enshrined" and the "purpose of the guarantee" are especially helpful in the construction of section 15(1). In that regard, it is crucial to note that section 15 springs directly from the traditional concerns that have led to the implementation of anti-discrimination and equality guarantees in many jurisdictions. These guarantees are not aimed at ensuring the universal application of the law per se. Their purpose is the elimination of those classifications that offend basic values of human worth and dignity.

7. This fundamental focus is reflected in the detailed wording of section 15(1). The section grants a single compendious right, i.e. the "right to the equal protection and equal benefit of the law without discrimination". The opening words of the section, "every individual is equal before and under the law", do not actually confer rights but rather they ensure that the section operates both with respect to the administration or application of the law and with respect to the substance or content of the law. In the alternative, the words "without discrimination" can be read as modifying all of the wording that comes before them. In either event, the language of section 15(1)

indicates that the section is breached only if there is "discrimination".

R. v. Le Gallant, [1986] 6 W.W.R. 372 (B.C. C.A.) at p. 380.

Regina v. Century 21 Ramos Realty Inc. and Ramos (1987), 58 O.R. (2d) 737 (C.A.) at pp. 759-760.

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8. The notions of "equality" and "discrimination" are intimately linked within the context of section 15(1). Equality is a relational concept. It has been interpreted in lower courts and in some American jurisprudence as meaning that "persons similarly situated must be similarly treated". A determination as to whether there has been a denial of equality therefore requires the identification of appropriate bases of comparison and at least some understanding of the reasons underlying the differential treatment in question because, as Dickson C.J.C. observed in R. v. Big M Drug Mart Ltd., supra, at p. 347, "the interests of true equality may well require differentiation in treatment".

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Regina v. Century 21 Ramos Realty Inc. and Ramos, supra, at pp. 756-757.

9. It follows, therefore, that an approach to section 15(1) involving only a formalistic view of "equality"

will not be satisfactory. This is most easily seen by
reference to a case like R. v. Swain. There the Ontario
Court of Appeal was faced with a section 15(1) challenge
to section 542(2) of the Criminal Code. That section
provides that persons acquitted by reason of insanity be
held at the pleasure of the Lieutenant Governor in
Council. It was attacked on the basis that it improperly
differentiated between persons acquitted by reason of
insanity vis a vis those who were acquitted simpliciter.
The Court of Appeal rejected the argument saying that the
two classes were not "similarly situated".

R. v. Swain (1986), 53 O.R. (2d)
609 (C.A.).

10. It is respectfully submitted that such an analysis
effectively begs or disguises the true nature of the
judicial inquiry. Surely the Court of Appeal actually
concluded that it was not invidious or unreasonable to
treat the two groups differently. The same result could
have been achieved more clearly by direct reference to the
basic considerations underlying section 15(1). These
considerations are captured in the concept of
"discrimination". As recently stated by Kerans J.A. in
Mahe et al. v. The Queen in Right of Alberta (Alta. C.A.
#19347, Aug. 26, 1987, unreported) at pp. 50-52:

I have grave reservations, however, about the usefulness of the 'similarly situated' test ... The test has been vigorously criticized, and at the very best should not be imported into Canada without consideration of the criticism ... the test accepts an idea of equality which is almost mechanical, with no scope for considering the reason for the distinction. In consequence, subtleties are found to justify a finding of dissimilarity which reduces the test to a categorization game ... I say that the key to s. 15 is the kind of distinction made, not the mere fact of distinction. Dworkin says, for example that the idea of equality is not merely that people be treated equally but that they be treated with equal respect ... Tarnopolsky says that the underlying ideal is to avoid invidious discrimination, by which he means distinctions which are offensive to generally accepted standards of human dignity.

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11. There are, of course, competing interpretations of what constitutes discrimination for the purposes of section 15. Discrimination can be read in a pejorative sense meaning invidiousness, unreasonableness or irrelevance. Alternatively, it can be read in a neutral sense, as meaning merely a distinction or classification.

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Re McDonald and The Queen (1985),
51 O.R. (2d) 745 (C.A.) at pp.
763-764.

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12. However, it is submitted that "discrimination" in the context of section 15(1) clearly means something more than the mere making of a distinction. It engages human

rights concerns and considerations of invidiousness. As stated by Professor Gold in "A Principled Approach to Equality Rights: A Preliminary Inquiry" (1982), 4 Supreme Court L.R. 131 at p. 147:

10 Discrimination involves not only burdening a particular individual or group per se; it involves the imposition of burdens for particular kinds of reasons. These reasons involve a denial of the essential worth and dignity of the class against whom the law is directed, a denial based upon unwarranted stereotypes about the capacities and roles of the members of that class ...

20 Re Headley and Public Service Commission Appeal Board (1987), 35 D.L.R. 568 (F.C.A.) at p. 575.

R. v. Le Gallant, supra, at p. 380.

13. The pejorative meaning of "discrimination" is confirmed and reinforced by the grounds of discrimination actually enumerated in section 15(1). Race, national or ethnic origin, colour, religion, sex, age and mental and physical disability share common features. They are characteristics which have historically formed the basis of oppressive treatment. They represent those grounds of discrimination typically found in human rights legislation in a wide variety of jurisdictions. In sum, they are all personal characteristics that are recognized as being, in general terms, bases of classification that are offensive to the basic human values of a free and democratic society.

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14. The use of the term "discrimination" and the nature of the enumerated grounds indicate clearly that section 15(1) was not intended to operate with respect to all kinds of differential treatment or with respect to all legislative classifications. Rather, it is a guarantee that government will not be allowed to classify individuals in ways that are offensive to human dignity.

15. It is submitted that the process of determining whether a classification is "discriminatory" within the meaning of section 15(1) requires consideration of a number of factors including: (a) the specific ground or characteristic on which the classification is based with particular reference to the question of whether the ground or characteristic reflects prejudice and raises human rights concerns, (b) the purpose or object of the law or government action in question, (c) the impact of the differential treatment on the individual, (d) the presence or absence of an aura of odium, and (e) the existence of unfairness, irrationality or arbitrariness in the classification scheme. These factors must be weighed together to determine whether the differential treatment under attack is in fact inconsistent with basic notions of human worth and dignity. Only differential treatment that is offensive in that sense will violate section 15(1).

16. With respect to the issue of the bases of differential treatment that might engage section 15(1), it is apparent that classifications based on factors that bear no similarity at all to the grounds enumerated in the section are extremely unlikely to be "discriminatory". Such classifications rarely, if ever, engage concerns about human worth and dignity.

Mahe et al. v. The Queen in Right of Alberta, supra, at p. 52.

Smith, Kline and French Laboratories Limited v. The Attorney General of Canada (1986), 34 D.L.R. (3d) 584 (F.C.A.) at p. 593.

Re Election Act (B.C.); Scott v. The Attorney General of British Columbia et al., [1986] 5 W.W.R. 207 (B.C. S.C.), at p. 213.

R. v. Hancock, 53 Sask. R. 203 (C.A.) at p. 204.

17. It is also apparent that classifications on enumerated grounds do not, ipso facto, constitute a violation of section 15(1). This conclusion flows logically from a recognition that the section is aimed only at invidious differential treatment. Accordingly, it is possible to make distinctions on the basis of an enumerated ground without being "discriminatory" within the meaning of the section.

R. v. Swain, supra, at pp. 646-647.

R. v. Johnstone (1986), 26 C.C.C. (3d) 401 (N.S. C.A.) at pp. 409-410.

R. v. Le Gallant, supra, at pp. 379-380.

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Century 21 Ramos Realty Inc. et al. v. The Queen, supra, at pp. 35-36.

Smith, Kline and French Laboratories Limited et al. v. The Attorney General of Canada, supra, at p. 591.

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18. The Court below has adopted a general test for discrimination that was expressed in the following words by McLachlin J.A.:

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The ultimate question is whether a fair-minded person, weighing the purposes of legislation against its effects on the individuals adversely affected and giving due weight to the right of the legislature to pass laws for the good of all, would conclude that the legislative means adopted are unreasonable or unfair.

Case on Appeal, at p. 103.

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19. It is submitted that this approach is generally correct. Section 15(1) does contain an internal limitation. However, in order to give effect to the purpose of section 15(1), the analysis undertaken within

10 the section might be explained better by reference to the factors enumerated in paragraph 15 above. In any event, it is necessary to emphasize that any section 15(1) inquiry must be undertaken in light of an over-riding concern about classifications that offend human rights values of personal worth and dignity.

(b) The Citizenship Requirement

20 20. The Attorney General of Saskatchewan relies on the argument of the Attorney General of British Columbia with respect to the issue of whether the citizenship requirements in the Barristers and Solicitors Act offend section 15(1).

30 SECTION 1

(a) Generally

40 21. Interpretations of section 15(1) that involve built in considerations of reasonableness or other justificatory considerations have been subject to criticism on the basis that they improperly defeat or supplant the role of section 1 of the Charter. It is submitted that such lines of criticism are not well founded.

22. It has been held that section 1 and the substantive provisions of the Charter must be kept analytically distinct. However, that does not mean that section 1 can or should be used to determine the construction to be placed on the substantive guarantees. Charter provisions must be fairly construed with appropriate resort to the principles of interpretation spelled out in Big M Drug Mart. The scope of section 1 and its application to the right in question should be considered quite independently.

R. v. Oakes, [1986] 1 S.C.R. 103
at 134.

23. Further, there is nothing unique or unusual about interpreting section 15(1) in a way that recognizes the existence of internal considerations of reasonableness or justification. Many sections of the Charter have similar features: section 2(c) ("peaceful assembly"); section 7 ("principles of fundamental justice"); section 8 ("unreasonable search and seizure"); section 9 ("arbitrary detention"); section 11(a) ("unreasonable delay"); section 11(b) ("reasonable time"); section 11(e) ("reasonable bail"); section 12 ("cruel and unusual punishment"); section 23 ("where numbers warrant").

24. Finally, considerations of "reasonableness" or "fairness" within the context of section 15(1) itself are not merely duplicative of the analysis under section 1. Section 1, as interpreted in Oakes, involves a relatively formal consideration of a number of justificatory criteria and is particularly concerned with matters of proportionality and rationality. The considerations internal to section 15 are not the same. They are focused on issues of invidiousness and the denial of human worth and dignity.

Section 1 Applied

25. The Attorney General of Saskatchewan relies on the arguments of the Attorney General of British Columbia and the Law Society of British Columbia with respect to the issue of whether the citizenship requirements in the Barristers and Solicitors Act are justifiable pursuant to section 1 of the Charter.

PART IV

NATURE OF ORDER REQUESTED

26. For the foregoing reasons, it is submitted that
this appeal should be allowed.

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ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Robert G. Richards

Robert G. Richards
Counsel for the Attorney General
of Saskatchewan

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LIST OF AUTHORITIES

1. "A Principled Approach to Equality Rights: A Preliminary Inquiry" (1982), 4 Supreme Court L.R. 131.
2. Mahe et al. v. The Queen in Right of Alberta (Alta. C.A., #19347, Aug. 26, 1987, unreported).
3. Re Election Act (B.C.); Scott v. The Attorney General of British Columbia et al., [1986] 5 W.W.R. 207 (B.C. S.C.).
4. Re Headley and Public Service Commission Appeal Board (1987), 35 D.L.R. 568 (F.C.A.).
5. Re McDonald and The Queen (1985), 51 O.R. (2d) 745 (C.A.).
6. R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295.
7. R. v. Century 21 Ramos Realty Inc. and Ramos (1987), 58 O.R. (2d) 737 (C.A.) at pp. 759-760.
8. R. v. Hancock, 53 Sask. R. 203 (C.A.).
9. R. v. Johnstone (1986), 26 C.C.C. (3d) 401 (N.S. C.A.).
10. R. v. Le Gallant, [1986] 6 W.W.R. 372 (B.C. C.A.).
11. R. v. Oakes, [1986] 1 S.C.R. 103.
12. R. v. Swain (1986), 53 O.R. (2d) 609 (C.A.).
13. Smith, Kline and French Laboratories Limited v. The Attorney General of Canada (1986), 34 D.L.R. (3d) 584 (F.C.A.).