Court File No. 19955/19956

IN THE SUPREME COURT OF CANADA

B E T W E E N :

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

Co-Respondent

- and -

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

Intervenors

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PART I — STATEMENT OF FACTS

1. This is an application by the Canadian Association of University Teachers and the Ontario Confederation of University Faculty Associations pursuant to Rule 18 of the Rules of the Supreme Court of Canada for leave to intervene in the instant appeal.

2. The Canadian Association of University Teachers (CAUT) is a national organization representing 26,000 professors and professional librarians on campuses across the country. The organization was formed in 1951 to protect the rights of academics. CAUT's purposes include promoting the interest of teachers and researchers in Canadian universities, advancing the standards of their profession, and seeking to improve the quality of higher education in Canada.

3. CAUT has consistently taken a strong interest in matters affecting both their members, and society at large, in respect of equal opportunity and discriminatory practices. It has been CAUT's position that the protection against discrimination is integrally related to the defence of academic freedom. In particular, CAUT has been involved in advancing the interest of its members with respect to the protection against discrimination in all aspects of the university, hiring appointment and promotion policies, has support of the institution of affirmative action programs for women faculty, and the abolition of forced retirement at age 65. As well, CAUT has advocated that non-discriminatory criteria be utilized in the appointment of the university faculty where it is able.

4. The Ontario Confederation of University Faculty Associations (OCUFA) is an organization composed of 23 university faculty associations in the Province of Ontario, which together represent 12,000 university faculty and librarians. OCUFA's mandate is to express the views of university professors to the government and to the public, to seek and maintain the quality of higher education in Ontario, and to advance the professional and economic interest of teachers and researchers in Ontario universities.

5. OCUFA has of necessity taken a strong interest in equality rights and non-discrimination, in order to advance and protect the interest of its members. In this connection, the OCUFA has consistently lobbied for the hiring of more women faculty members, and the institution of affirmative action programs, and the abolition of forced retirement based on age.

6. In the particular area of age discrimination, both CAUT and OCUFA appeared before and presented written submissions to the Ontario Ministry of

Labour Task Force on Mandatory Retirement, chaired by Dean Ianni of the University of Windsor Law School, which is investigating the effects of the abolition of mandatory retirement. As well, CAUT and OCUFA have assisted individual faculty members who are desirous of challenging their mandatory retirement under s.15(1) of the Charter. To this end, CAUT and OCUFA have supported court challenges presently underway in Ontario in the case of McKinney et al. v. The University of Guelph et al. The McKinney case involves a challenge to the Human Rights Code provision preventing individuals aged 65 or older from complaining to the Human Rights Commission concerning age discrimination in employment, and a direct challenge to the decision of the respondent universities to mandatorily retire university faculty and librarians. Oral argument before the Ontario Court of Appeal was completed May 13, 1987. In addition, CAUT component faculty associations in British Columbia are involved in litigation challenging similar mandatory retirement policies at the University of British Columbia, which was the subject of a court decision in Harrison and O'Connell v. the University of British Columbia. The Harrison case is also presently subject to appeal before the British Columbia Court of Appeal.

7. None of the appellants to date which have filed such facta have advanced the position with respect to the interpretation of the equality rights provisions of the Charter which CAUT and OCUFA wish to place before this Court for its consideration. In addition, the respondent Andrews does not intend to advance the position with respect to the interpretation of s.15(1) which CAUT and OCUFA wishes to place before the Court.

PART II — THE POINTS IN ISSUE

8. The Canadian Association of University Teachers and the Ontario Confederation of University Faculty Associations respectfully request that they be granted leave to intervene in the instant appeal in order to file a joint written submission, of not more than 20 pages, pursuant to Rule 18 of the Rules of the Supreme Court of Canada on the following grounds:

(a) The Canadian Association of University Teachers and the Ontario Confederation of University Faculty Associations have a

legitimate concern and interest in the issues before the Court in that the determination of the scope of the guarantee of equality rights under the Canadian Charter of Rights and Freedoms will have significant impact on university faculty in Canada.

(b) The submissions to be put forward by the CAUT and OCUFA may be of assistance to this Court in the resolution of the issues in dispute on appeal and would not otherwise be fully presented to this Court.

PART III — ARGUMENT

A. The Principles to be Considered by the Court on Applications to Intervene Respecting Charter Issues

9. It is respectfully submitted that the Court should exercise its discretion pursuant to Rule 18 of the Rules of the Supreme Court to permit a party to intervene on an issue involving an interpretation application of the Canadian Charter of Rights and Freedoms in a broad and liberal fashion for the following reasons:

(i) The Canadian Charter of Rights and Freedoms constitutes the supreme law of Canada, and as a result, any interpretation of its meaning or effect may fundamentally alter the legal and institutional structure of Canada;

(ii) The enactment of the Canadian Charter of Rights and Freedoms, inter alia, places limitations upon the powers of legislation and government to take actions which may affect individuals, minority groups and associations. This process of constitutional adjudication will involve a delicate balancing of the interests of individuals and groups against the interests of the state. Accordingly, the Court will require an appreciation of the impact that its determination will have on Canadian society, and representatives of all affected elements of society should be allowed to participate in that process.

(iii) It is especially important to ensure broad-based participation in constitutional adjudication when the issues are being considered

by this Court for the first time. Broad-based participation will ensure that the appropriate legal principles are developed and that all the relevant sources are placed before the Court for its consideration.

(iv) In constitutional litigation, given that the rights concerned are rights which are guaranteed to all citizens, it is especially important that the adversary nature of the proceedings not limit or restrict the consideration of the Court with respect to the points in issue. As a result, where the parties to an appeal are unlikely to fully canvass the legal issues which arise as a result of the appeal, the Court should be entitled to grant intervener status to a party which may advance a position which differs from that advanced by the parties before the Court and which may be of assistance to it in its deliberations.

Skapinker v. The Law Society of Upper Canada (1984), 53 N.R. 169 (S.C.C.)

Southam Inc. v. Hunter (1984), 55 N.R. 241 (S.C.C.)

10. Accordingly, it is respectfully submitted that in applications for intervention pursuant to Rule 18 in cases involving issues of the interpretation of the Canadian Charter of Rights and Freedoms, the Court should grant intervener status to any person or group where:

(i) the objects or activities of the party seeking leave to intervene are such that it has a legitimate concern or interest regarding the issues or outcome of the case before the Court; or

(ii) the party seeking leave to intervene may, by reason of the nature of its submissions, make a useful contribution to the adjudication of the issues in dispute before the Court.

11. It is respectfully submitted that the above test is consistent with the criteria developed by the Supreme Court of Canada in granting standing in constitutional cases prior to the introduction of the Charter, particularly where the interpretation advanced by the parties seeking leave to intervene would not otherwise be before the Court.

Minister of Justice of Canada et al. v. Borowski (1982), 130 D.L.R. (3d) 588

Thorson v. Attorney-General of Canada et al. (No. 2), [1975] 1 S.C.R. 138, 43 D.L.R. (3d) 1

Nova Scotia Board of Censors v. McNeil, [1976] 2 S.C.R. 265, 55 D.L.R. (3d) 632

12. It is respectfully submitted that the above test is consistent with the practice of the United States Supreme Court, which has acknowledged the importance of participation of all affected interests in the resolution of constitutional disputes. Amicus curiae participation before the United States Supreme Court is an accepted feature of constitutional litigation in that forum.

> "Most of the cases before this Court involve matters that affect far more people than the immediate record parties. I think the public interest in judicial administration will be better served by relaxing rather than tightening the rule against amicus curiae briefs."

per Mr. Justice Hugo Black in an order adopting revised rules of the Supreme Court, 346 U.S. 945, 947 (1954)

Angell, The Amicus Curiae - American Development of English Institutions, 16 Int. and Comp. Law Q. 1017 (1967)

O'Connor and Epstein, Amicus Curiae Participation in U.S. Supreme Court Litigation: An Appraisal of Hakman's "Folklore", 16 Law & Soc. R. 311, 316 (1981-82)

B. CAUT and OCUFA Have a Legitimate Concern Regarding the Issues or Outcome of the Case

13. It is respectfully submitted that the judgment under appeal raises for consideration by this Court for the first time the question of whether, in order to prove a violation of section 15(1) of the Canadian Charter of Rights and Freedoms, it is necessary for an applicant to establish that the legislative or governmental action complained of is unfair or unreasonable. In addition, the case on appeal places in issue the relationship between section 15(1) and section 1 of the Charter. As a result, the decision of the Court may have far-reaching consequences with respect to the nature of the protection which the equality rights provision of the Charter guarantees, and will fundamentally affect the interests of faculty which CAUT and OCUFA represent.

C. The Submissions of CAUT and OCUFA May be of Assistance to the Court in the Resolution of the Issues Under Appeal

14. CAUT and OCUFA propose to argue, inter alia, that in the Andrews case, Madam Justice McLachlin of the B.C. Court of Appeal :

(1) erred in holding that in order to establish a violation of section 15(1) of the Charter with respect to a legislative classification based on both enumerated and unenumerated grounds, an applicant must establish that the legislative classification under challenge is unreasonable or unfair. In this respect, CAUT and OCUFA will, if leave to intervene is granted, submit that, at least insofar as groups enumerated under section 15(1) of the Charter are concerned, a legislative classification directly based on enumerated grounds is per se discriminatory, and must be justified under section 1 of the Charter;

(2) erred in holding that the application of section 1 of the Charter in relation to section 15 is limited to extreme circumstances such as times of war. In this connection, CAUT and OCUFA intend to submit that section 1 requires that, where a classification is based on an enumerated ground, the government is required to justify the use of such classification in accordance with the requirements of section 1 set out by the Court in Oakes and subsequent decisions;

(3) erred in holding that the absence of a requirement of fairness or reasonableness in section 15(1) would result in all legislative classifications having to be justified under section 1 of the Charter, deprive the phrase "without discrimination" of content, and subsume the other rights and freedoms guaranteed by the Charter. In this connection, it would be the submission of CAUT and OCUFA that an interpretation of section 15(1) of the Charter which distinguishes between enumerated grounds on the one hand, and unenumerated grounds on the other, does not deprive the phrase "without discrimination" of content, does not require the Government to justify all distinctions between individuals under section 1, and does not subsume the other rights and freedoms defined by the Charter. Rather, the approach urged by CAUT and

OCUFA is consistent with the meaning of discrimination as generally understood in Canada and under human rights legislation, and would require the government to justify discrimination under section 1 where the group adversely affected by legislative or governmental classifications is an enumerated one. In short, it is the position of CAUT and OCUFA that legislative or governmental classifications which adversely affect individuals by virtue of membership in an enumerated group are inherently discriminatory, or discriminatory per se, and must therefore be justified under s.1 of the Charter.

D. The Right to Equality Before the Law

15. Rule 32 of the Supreme Court Rules entitles the Attorneys-General of the provinces and of Canada to intervene and make submissions on constitutional questions simply by filing a notice of intention to intervene. However, in order to participate, other persons must apply pursuant to Rule 18 for leave to intervene before it may be heard by the Court.

16. It is respectfully submitted that, given that the Attorneys-General of the provinces and of Canada are entitled to intervene as of right where a Charter issue has been raised, the failure to grant intervener status to affected persons would be inconsistent with the right to equality before the law and equal protection of the law as guaranteed by section 15 of the Canadian Charter of Rights and Freedoms. This is especially true in the present case where several provincial Attorneys-General have intervened, and together with the Law Society of British Columbia and the intervener Federation of Law Societies of Canada, are likely to file facta and make submissions involving a restrictive interpretation of section 15(1) of the Charter. Given that the process of constitutional adjudication involves a delicate balancing of the interests of the individuals and groups against those of the state, it is respectfully submitted that the guarantee of equality before the law requires that representatives of affected elements of society be given the same right to intervene and file facta as is presently afforded to provincial and federal Attorneys-General.

17. So far as practice before the United States Supreme Court is concerned, the state has no higher right, in practice, to participate in a case to which it is not a party than does any other interested person. While a state Attorney-General may file a factum without leave of the court, other interested persons are given leave to file amicus curiae briefs as a routine matter.

PART IV — ORDER REQUESTED

18. The Canadian Association of University Teachers and the Ontario Confederation of University Faculty Associations respectfully request leave of this Court to intervene with respect to the interpretation of section 15(1) of the Charter as summarized in this Memorandum of Argument.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Jeffrey Sack, Q.C. of
Sack, Charney, Goldblatt & Mitchell

of counsel for the Applicants,
Canadian Association of University
Teachers and the Ontario Confederation
of University Faculty Associations

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1. Minister of Justice of Canada et al. v. Borowski (1982), 130 D.L.R. (3d) 588, p.4
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3. Skapinker v. The Law Society of Upper Canada (1984), 53 N.R. 169 (S.C.C.), p.4
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