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, ATTORNEY-GENERAL OF NOVA SCOTIA, THE FEDERATION OF LAW SOCIETIES OF CANADA, CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS and ONTARIO CONFEDERATION OF UNIVERSITY FACULTY ASSOCIATIONS, COALITION OF PROVINCIAL ORGANIZATIONS OF THE HANDICAPPED, and THE WOMEN'S LEGAL EDUCATION AND ACTION FUND

Intervenors

FACTUM OF THE INTERVENORS, THE CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS AND THE ONTARIO CONFEDERATION OF UNIVERSITY FACULTY ASSOCIATIONS

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PART I — STATEMENT OF FACTS

1. The intervenors, the Canadian Association of University Teachers (CAUT) and the Ontario Confederation of University Faculty Associations (OCUFA), take no position with respect to the facts which give rise to this appeal.

PART II — POINTS IN ISSUE

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

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

PART III — ARGUMENT

A. The Decision of the B.C. Court of Appeal in Andrews

4. While the specific issue in this appeal concerns whether requiring Canadian citizenship as a prerequisite to the practice of law infringes s.15(1) of the Charter and, if so, whether the infringement can be justified under s.1, the appeal also raises broader issues concerning the scope of the equality guarantee in s.15(1) of the Charter. As the B.C. Court of Appeal noted in its decision, (1986), 27 D.L.R. (4th) 600 at 603, "the main controversy centres on what constitutes 'discrimination', and at what stage of the inquiry, if at all, recourse must be had to s.1 of the Charter".

5. In the course of reaching its decision in Andrews, the B.C. Court of Appeal contrasted two opposing views with respect to the proper interpretation of the term "discrimination" contained in s.15 of the Charter. According to the first view considered by the Court, which it referred to as the "neutral" approach, discrimination occurs whenever any legislative or governmental distinction is made. The second approach to discrimination considered by the Court would treat discrimination as "a synonym of 'unreasonable classification' or 'unjustifiable differentiation'". Under this approach, the interpretation of the term discrimination "incorporates principles of justification and reasonableness independently of those found within s.1" (pp.605-6).

6. The B.C. Court of Appeal rejected the "neutral" approach to s.15, on the basis that: (1) it would result in almost all statutes infringing s.15, since almost all statutes draw distinctions between individuals; (2) it would require the Government to demonstrably justify all laws which draw distinctions under s.1 of the Charter; (3) it would deprive the phrase "without discrimination" of content; and (4) it would have the effect of subsuming the other rights and freedoms defined by the Charter.

7. Rather than accepting this approach, the Court adopted the second approach to discrimination, holding that the term discrimination involves a "pejorative connotation". In the Court's view, in determining whether or not discrimination has occurred within the meaning of s.15, the reasonableness or

fairness of the impugned legislative distinction has to be assessed "having regard to the purposes and the effect on the complainant" (p.608), whatever the nature of the classification employed.

8. The B.C. Court of Appeal conceded that the relationship between s.15 and s.1 of the Charter would "arguably" be offended if the entire analysis was carried out under s.15. The Court attempted to deal with this difficulty by observing that "it may well be that generally discrimination cannot be justified in a free and democratic society", and in addition by offering the example of the internment of enemy aliens during times of war as the type of circumstance which might justify discriminatory legislation under s.1 of the Charter.

9. The Court also considered a third approach to s.15, which would allow some scope for the application of s.1 of the Charter. Under this approach which the Court referred to as the "prima facie case approach", any distinction classifying on the basis of an enumerated ground would give rise to a prima facie infringement of s.15, with the burden shifting to the respondent to justify the classification under s.1 of the Charter. The Court rejected this approach because in its view: (1) it failed to keep sections defining constitutional rights analytically separate from s.1, as required by the decision of this Court in R. v. Oakes; (2) it involved duplication of analysis under s.15 and s.1; and (3) some distinctions based upon enumerated grounds "may be so obviously justifiable that the inquiry should never proceed to section 1". Thus, the Court held that, with respect to any alleged infringement of s.15(1), whether on grounds specifically enumerated or otherwise, discrimination would not be established unless the applicant could prove the impugned distinction was unreasonable or unfair "having regard to the purposes and aims and its effect on persons adversely affected" (p.609).

10. As a result of its analysis, the Court concluded that, in determining whether any particular classification results in discrimination within the meaning of s.15(1), 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." (p.610)

B. Position of the Intervenors CAUT and OCUFA regarding the Interpretation of Section 15(1) of the Charter

11. It is the position of the intervenors CAUT and OCUFA that the B.C. Court of Appeal erred in its interpretation of the meaning of discrimination as it relates to the grounds specifically enumerated in s.15(1), and grounds akin thereto, in the following three respects:

(1) the Court erred in interpreting the term discrimination contained in s.15(1) by importing a requirement that a governmental classification involving grounds specifically enumerated, and grounds akin thereto, be unreasonable or unfair;

(2) the Court erred in failing to give any effect or meaning to the enumeration of specific grounds in s.15(1);

(3) the Court erred in failing to properly set out the relationship between s.15 and s.1 of the Charter.

12. In this respect, it is the position of the intervenors CAUT and OCUFA that, subject to s.15(2), where a legislative or governmental classification adversely differentiates between or adversely affects individuals on the basis of a ground or characteristic specifically enumerated in s.15(1) of the Charter, or a ground or characteristic akin to those specifically enumerated, s.15(1) of the Charter is infringed, and an obligation is placed upon the party seeking to uphold such discrimination to justify it in accordance with s.1 of the Charter.

C. The Interpretation of Discrimination under Section 15(1)

13. It is submitted that the interpretation of discrimination under s.15(1) of the Charter adopted by the B.C. Court of Appeal, which requires an applicant to establish in all cases that the impugned classification is unreasonable or unfair, is inconsistent with the general principles of interpretation applicable to constitutionally guaranteed rights and freedoms, in the following respects:

(1) the interpretation given by the B.C. Court of Appeal to s.15(1) of the Charter is narrow and restrictive, whereas constitutionally guaranteed rights and freedoms are to be interpreted in a broad and generous manner;

(2) the interpretation of the B.C. Court of Appeal is inconsistent with the text of s.15(1), its underlying purpose, the interests it was intended to protect, the historical origins of the prohibition against discrimination contained in s.15(1), and the cardinal values which s.15(1) of the Charter embodies.

Regina v. Big M. Drug Mart Ltd. (1985), 11 D.L.R. (4th) 321 (S.C.C.), per Dickson C.J. at pp.359-60:

> "This Court has already, in some measure, set out the basic approach to be taken in interpreting the Charter. In Hunter et al. v. Southam Inc. ... this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.
>
> 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 the other specific rights and freedoms with which it is associated with the text of the Charter ... At the same time it is important not to overshoot the actual purpose of the right of 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 ... illustrates, be placed in its proper linguistic, philosophic and historical context."

Hunter v. Southam (1985), 11 D.L.R. (4th) 641 (S.C.C.) at pp. 650-51

Regina v. Oakes (1986) 26 D.L.R. (4th) 200 per Dickson C.J., at p.212:

> "To identify the underlying purpose of the Charter right in question, therefore, it is important to begin by understanding the cardinal values it embodies."

14. It is well established that constitutionally guaranteed rights and freedoms should be given a broad and liberal interprepation. This would appear particularly true in the case of s.15, in light of the recognition that a "commitment to social justice in equality" is one of the underlying values and principles essential to a free and democratic society: R. v. Oakes, p.225. In this connection, the recognition given by our Courts to the primacy of human rights legislation, and to the corresponding need for a broad and purposive construction of its provisions, applies a fortiori to constitutional enactments. Thus, to an even greater extent in interpeting s.15 of the Charter, "we should not search for ways and means to minimize those rights and to enfeeble their proper impact"

> Action Travail Des Femmes v. Canadian National Railway Company et al., unreported, June 25, 1987, Supreme Court of Canada, at p.18.
>
> Craton v. Winnipeg School Division (1985), 21 D.L.R. (3d) 219 (S.C.C.)
>
> Ontario Human Rights Commission v. Simpson-Sears Ltd. (1986), 23 D.L.R. (4th) 321 (S.C.C.)

15. As recognized by the Ontario Court of Appeal in Re Blainey and Ontario Hockey Association (1986), 26 D.L.R. (4th) 728, per Dubin, J.A. at p.744, it is submitted that the prohibition against discrimination set out in s.15 is intended to ensure that those bodies subject to the Charter treat every individual "on a footing of equality, with equal concern and equal respect, to ensure each individual the greatest opportunity for his or her enhancement". In interpreting the guarantee of equality and non-discrimination afforded by s.15 of the Charter, it must be recognized that s.15, by its express terms, is intentionally broad and unique, extending not only to "equality before the law", but also to "equality under the law", "equal protection of the law", and "equal benefit of the law". Secion 15 guarantees equality in all of its manifestations, including its procedural and its substantive aspects. The breadth of the guarantee was specifically intended to overcome perceived limitations arising out of the language of s.1(b) of the Canadian Bill or Rights, and its interpretation by the courts.

See also: Reference re An Act to Amend the Education Act (1986), 25 D.L.R. (4th) 1 (Ont.C.A.), per Howland, C.J.O. and Robins, J.A. (dissenting on other grounds) at p.42:

> "In our view, s.15(1) read as a whole constitutes a compendious expression of a positive right to equality in both the substance and the administration of the law. It is an all-encompassing right governing all legislative action. Like the ideals of 'equal justice' and 'equal access to the law', the right to equal protection and equal benefit of the law now enshrined in the Charter rests on the moral and ethical principles fundamental to a truly free and democratic society that all persons should be treated by the law on a footing of equality with equal concern and equal respect."

Tarnopolsky, "The Equality Rights in the Canadian Charter of Rights and Freedoms" (1983), 61 Can. Bar Rev. 242

Eberts, "The Equality Provisions of the Canadian Charter of Rights and Freedoms and Government Institutions", in Beckton and MacKay, The Courts and the Charter (1985), 133 at pp.153-156

16. It is submitted that, by holding that discrimination based upon enumerated grounds, such as sex, race or age, has not occured until an applicant has demonstrated that the disadvantage complained is unreasonable or unfair, and by requiring that in making such a determination due weight be given to the "right of the legislature to pass laws for the good of all", the B.C. Court of Appeal has narrowed the meaning commonly afforded the term discrimination, and placed significant substantive and procedural barriers in the way of achieving the goal of equality enshrined in s.15. In failing to recognize that discrimination within the meaning of s.15 occurs where government employs a classification or distinction which adversely differentiates between or adversely affects individuals as a result of membership in an enumerated or protected group, the Court has failed to give s.15(1) an interpretation which fulfills the purpose of its broad guarantee of equality, and which constrains legislation or conduct inconsistent with that purpose.

17. It is submitted that the interpretation of discrimination advanced by the intervenors CAUT and OCUFA is consistent with the interpretation which Canadian courts have given to the term "discrimination" in the context of

human rights legislation. Canadian courts have held that discrimination occurs when an individual is treated adversely or denied benefits because of membership in a protected group, rather than being assessed on the basis of or in accordance with individual merit, ability or needs. As well, Canadian courts have recognized that discrimination against individuals occurs not only where a practice or rule overtly or on its face differentiates on a prohibited ground, but also where it has a discriminatory effect on individuals because of their membership in a protected group. The term discrimination is used not as a synonym for unreasonable or unfair classifications, but rather for classifications which adversely differentiate on a prohibited ground, or adversely affect individuals in a protected group. In this respect, it is submitted that the enumeration of prohibited grounds of discrimination in s.15(1) identical or akin to those contained in human rights legislation, and the use of the term discrimination itself, indicates the intention to incorporate in constitutional form the objectives and principles which underly human rights legislation.

Ontario Human Rights Commission v. Simpson-Sears Limited (1986), 23 D.L.R. (4th) 321 at p.329:

> "The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory."
>
> [emphasis added]

Action Travail Des Femmes v. Canadian National Railway Company et al., supra, pp.19-23 (discussion of "adverse effect discrimination").

Re Saskatchewan Human Rights Commission and Odeon Theatres Ltd. (1985), 18 D.L.R. (4th) 93 (leave to appeal denied), per Cameron J.A. at 99, and per Vancise J.A. at 110-115.

Re Blainey and Ontario Hockey Association, supra, at p.742:

> "Section 19(2) permits direct discrimination, resulting in the denial to Miss Blainey of the equal protection and equal benefit of the law and is inconsistent with s.15(1) of the Charter. Furthermore, on the record of these proceedings, it is females who are being denied the right to participate in athletic activities by reason of s.19(2). There is no evidence that males are being denied the right to full membership and participation in athletic organiza-

tions. Thus, s.19(2) results also in adverse effect discrimination on females."

Judge Rosalie Abella, "Limitations on the Right to Equality Before the Law", in de Mestral et al., The Limitation of Human Rights in Comparative Constitutional Law, 223 at 226:

> "Equality means that no one is denied opportunities for reasons that have nothing to do with inherent ability. It means equal access free from arbitrary obstructions. Discrimination means that an arbitrary barrier stands between a person's ability and his or her opportunity to demonstrate it.
>
> If the access is genuinely available in a way that permits everyone who so wishes the opportunity fully to develop his or her potential, we have achieved a kind of equality. This is what section 15 of the Charter affirms: equality defined as equal freedom from discrimination.
>
> Discrimination in this context means practices or attitudes that have, whether by design of impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics. What is impeding the full development of the potential is not the individual's capacity but an external barrier that artificially inhibits growth."
> [emphasis added; underlined passage relied upon by Supreme Court of Canada in Action Travail, supra, at p.23, quoting identical passage from the Abella Report]

Hunter, "Human Rights Legislation in Canada: Its Origin, Development and Interpretation" (1976), 15 U.W.O.L. Rev., pp.21-58 at pp.33-34:

> "Extracting a definition of discrimination for the purpose of Canadian human rights legislation from these decisions, it would be this: discrimination means treating people differently because of their race, colour, sex, etc. as a result of which the complainant suffers adverse consequences, or a serious affront to dignity; the motive for the discriminatory treatment, whether occasioned by economic or social considerations and whether those considerations are soundly or fallaciously based, is irrelevant, except possibly in mitigation of the penalty."
> [emphasis added]

13. Stated in other terms, while all institutions employ classifications and generalizations in carrying out their activities, legislative or governmental classifications which adversely diffentiate between or adversely affect individuals based on a characteristic specifically enumerated in s.15 constitute

discrimination, for which justification must be established under s.1 of the Charter. As this Court held in Ontario Human Rights Commission v. Simpson-Sears Limited, supra, at p.332:

> "Direct discrimination occurs ... when an employer adopts a practice or rule which on its face discriminates on a prohibited ground. For example, 'no Catholics or no women or no blacks employed here'... [A]dverse effect discrimination...arises when an employer...adopts a rule or standard which is on its face neutral...but which has a discriminatory effect upon a prohibited ground...in that it imposes, because of some special characteristic of the employee or group, obligations, penalties or restrictive conditions not imposed on other members of the workforce.""

In this respect, had it been intended that a requirement of unreasonableness or unfairness be imposed upon the meaning of discrimination, which departs from that developed under human rights legislation, the drafters of the Charter would have done so expressly, as was done, for example, in s.8 of the Charter, which protects against unreasonable search or seizure. Accordingly, to deprive an individual of a benefit, or otherwise disadvantage or adversely affect an individual, solely on account of an enumerated or protected characteristic, such as race, sex or age, is to discriminate against that individual within the meaning of s.15(1) and thus to commit a per se violation of s.15.

D. The Effect of Enumeration in Section 15(1)

(i) Enumerated Grounds

19. It is submitted that the B.C. Court of Appeal erred in Andrews in holding that it is necessary in all cases for an applicant to prove that a classification is unreasonable or unfair in order to establish that s.15(1) has been infringed. This requirement fails to accord any significance to the fact that specific grounds of discrimination are enumerated in s.15(1), since whatever the classification employed, the applicant is required to establish that the classification is unreasonable or unfair.

20. It is submitted that one of the primary pruposes underlying the enumeration of specific grounds of prohibited discrimination in s.15(1) is to ensure that an individual is not classified or treated adversely by reason of belonging to a particular protected group, unless such discrimination can be justified under s.1. In other words, subject to s.15(2) of the Charter, an individual is assured that he or she will be assessed on the basis of his or her worth, abilities and merit, and not on the basis of one of the enumerated grounds. Section 15(1) prohibits the use of these characteristics or attributes as proxies for the determination of individual capacities and needs.

> Headley et al. v. The Public Service Commission Appeal Board (1987), 72 N.R. 185 (Fed.C.A.), per MacGuigan, J. at pp.189-90:
>
> > "To put it more exactly, I find the internal limit 'discrimination' to be required in all cases, but in some cases, viz. those based on the enumerated grounds, the drafters have already made the fundamental determination that pejorative distinctions based on those grounds constitute discrimination, whereas in other cases the complainant has to prove that discrimination results. In all cases, however, the discrimination has to be more than trivial. In result, then, though not in concept, this analysis resembles the distinction drawn by American courts between strict scrutiny and minimal scrutiny. In Canada I believe the distinction is not made on the authority of the courts but on that of the Constitution itself.
> >
> > The Constitution itself, I believe, compels this distinction between enumerated and non-enumerated grounds. In particular, the fact that the drafters spelled out as grounds the principal natural and unalterable facts about human beings - race, national or ethnic origin, colour, religion (admittedly, not wholly a natural and unalterable fact), and sex - can only mean, I believe, that non-trivial pejorative distinctions based on such categories are intended to be justified by governments under section 15. In sum, some grounds of distinction are so presumptively pejorative that they are deemed to be inherently discriminatory." [emphasis added]

21. In this respect, it is instructive to compare the enumeration of prohibited grounds of discrimination in s.15(1) of the Charter with the Fourteenth Amendment to the U.S. Bill of Rights, which provides for the "equal protection of the law". It is submitted that s.15(1) of the Charter, in its language as well as in its historical and philosophical origins, differs markedly from the equal protection clause in the Fourteenth Amendment to the U.S.

Bill of Rights. Unlike s.15, the Fourteenth Amendment does not enumerate specific grounds of discrimination or identify those groups which at a minimum are protected. Rather, the determination by U.S. courts as to which classifications are to be treated as "suspect", and therefore inherently discriminatory, has been conditioned by the historical evolution of the Fourteenth Amendment as a response to the institution of slavery and the subordination of blacks in American society. Since the primary purpose of equal protection in the U.S. was and continues to be the elimination of racial discrimination, the paradigm for U.S. equal protection analysis is race. In order to legitimize judicial review of legislative classifications other than race, U.S. courts have looked to the extent to which other classifications are sufficiently analogous to racial classifications to warrant a meaningful level of judicial scrutiny.

> Walter S. Tarnopolsky, "The Equality Rights", in Tarnopolsky and Beaudoin, The Canadian Charter of Rights and Freedoms, pp.395-442, at p.401
>
> Lynn Smith, "A New Paradigm for Equality Rights", in Smith, ed. Righting the Balance: Canada's New Equality Rights, pp.351-407 at pp.363-66
>
> Attorney General of Ontario, Equality Rights Background Paper, at pp.75-80, and p.301

22. In Canada, however, courts interpreting the Charter are not constrained by this particular historical vision of equality and discrimination. Indeed, the inclusion of specific enumerated grounds in s.15(1) of the Charter was intended to avoid many of the difficulties which U.S. courts have faced in attempting to determine the extent of protection afforded by the Fourteenth Amendment to various groups. Having regard to the specific enumeration in the Charter of prohibited grounds of discrimination, and to the generally accepted understanding of discrimination as developed in the human rights context in Canadian society, it is not only legitimate but necessary that, in order to give effect to the purpose of s.15(1), Canadian courts recognize that enumerated classifications are inherently or per se discriminatory, and therefore justifiable only under s.1.

> Attorney-General of Ontario, Equality Rights Background Paper, p.301:

> "Constitutional adjudication under a provision as vague and open-ended as the U.S. equal protection clause forced the courts to balance competing interests with claims to judicial protection, and so the courts proceeded cautiously in choosing which among those interests were to receive special constitutional recognition. Section 15 of the Charter, however, singles out particular groups for special protection; to this extent the balancing process has already been performed."

Finkelstein, "Sections 1 and 15 of the Canadian Charter of Rights and Freedoms and the Relevance of the U.S. Experience" (1985-86), 6 Advocates Quarterly, 188 at p.192:

> "Third, the Fourteenth Amendment does not give the courts any guidance about what kinds of classifications should be most closely scrutinized. The provision is textually absolute. This may be contrasted with s.15(1) of the Charter which, while prohibiting all discrimination, at least sets out a list of categories for greater particularity. Canadian courts are put on notice that they should make a careful inquiry into the reasons and purpose behind any law which makes differentiations based upon any of the listed classifications."

23. In this respect, to the extent that it is suggested in the factum of the Attorney General of British Columbia that the sole purpose of enumeration was to indicate what other non-enumerated grounds are proctected by s.15(1), it is submitted that this view not only is unsupported by proceedings before the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, but also is contrary to ordinary rules of construction. While, as discussed more fully below, analysis of the grounds enumerated in s.15(1) may assist the courts in determining which other grounds should be entitled to similar protection, surely one of the primary purposes of enumeration, following upon extensive submissions by many groups and lengthy deliberations, was to ensure particular protection to the enumerated grounds themselves, not simply to facilitate the determination of what other non-enumerated grounds might also be included.

24. It has been held by some courts that, even where classfications are based upon grounds specifically enumerated in s.15(1) of the Charter, there is no infringement of s.15(1) of the Charter unless individuals are "similarly situated". This approach was also referred to, although not developed, in the Andrews decision itself, at p.605. However, it is submitted that, where the

Charter signals to the courts, by the enumeration of certain characteristics, that classifications based on such characteristics are inherently discriminatory, the courts are required to examine the justification for the discrimination under s.1 of the Charter, by inquiring into the sufficiency of the objectives allegedly served by the impugned classification, and by assessing whether the discriminatory treatment is necessary to achieve those objectives. Accordingly, so far as distinctions based on enumerated grounds are concerned, individuals who are classified and treated differently based upon such grounds are, by virtue of the language and purpose of s.15(1), per se similarly situated, and any such classifications are inherently discriminatory, subject only to s.15(2) of the Charter.

25. The need to be cautious in applying the similarly situated test to all classifications has been recognized by the Ontario Court of Appeal in Century 21 Ramos Realty and Her Majesty The Queen, (1987) 58 O.R. (2d) 737. In that case, the Court applied the similarly situated analysis to alleged discrimination based upon a non-enumerated ground, i.e. the existence of different grounds of appeal in criminal cases, depending upon whether the Crown elects to proceed summarily or by way of indictment. The Court cautioned that "it is not always clear whether persons are or are not similarly situated, and whether, even if they are not, this is relevant to a s.15 inquiry". As the Court went on to state at pp.756-57:

> "It is necessary to be cautious in this classification. It is usually possible to find differences between classes of persons and, on the basis of these differences, conclude that the persons are not similarly situated. However, what is perceived to be significant 'differences' between persons or classes of persons could be the result of stereotypes based on existing inequalities which the equality provisions of the Charter are designed to eliminate, not perpetuate. The effects of past discrimination between classes of persons can result in these classes in fact not being similarly situated ... While some of these situations may well require differential treatment in the interests of equality, it is important that some differences between the classes of persons not operate to prevent a valid s.15 equality analysis by concluding the classes are not similarly situated."

26. To the extent that some courts have relied upon the seminal article by Tussman and tenBroek in support of applying the "similarly situated" analysis, even in the context of enumerated classifications, it is to be noted that

Tussman and tenBroek emphasized that, with respect to classifications such as race, which are under U.S. equal protection analysis "suspect" in nature, the "similarly situated" analysis has no role to play. Rather, the concept of a suspect classification involves the recognition that it is per se or inherently discriminatory to treat people as dissimilarly situated on the basis of their membership in a protected group, and that compelling grounds must be shown to justify the utilization of such classification. Similarly, in terms of s.15, "similarly situated" analysis has no role to play with respect to enumerated classifications which are per se or inherently discriminatory.

> Tussman and tenBroek, "The Equal Protection of the Laws" (1948), 37 Cal. L. Rev. 341 at pp.353-356 (discussion of "forbidden" and "suspect" classifications)

(ii) Analogous Grounds

27. It is the submission of CAUT and OCUFA that legislative or governmental classifications which adversely differentiate between or adversely affect individuals on the basis of characteristics or attributes similar or analogous to those specifically enumerated in s.15(1) also constitute discrimination under s.15(1). This approach is supported by the following considerations:

(i) the language of s.15 employs the phrase "in particular", which clearly indicates that other grounds of discrimination are also protected, and suggests that regard should be had to the enumerated grounds in determining the existence of other grounds of discrimination which should be afforded similar protection;

(ii) the reference in s.15(2) of the Charter to "disadvantaged individuals or groups", in addition to those specifically enumerated, recognizes that there are groups other than those specifically enumerated for which affirmative action programs are warranted and, accordingly, who are equally deserving of protection against adverse and unequal treatment;

(iii) underlying the constitutional recognition of specific grounds of prohibited discrimination in s.15(1) is a political and moral consensus that individuals should have the opportunity to develop and enhance their potential as human beings without being impeded in their efforts simply because of differences based on intimate personal characteristics or human attributes. Thus, to the extent that individuals are

disadvantaged on the basis of personal characteristics or human attributes similar to those enumerated, the purpose of s.15 dictates that such adverse treatment be recognized as discrimination.

(iv) a recognition that discrimination occurs within the meaning of s.15(1) of the Charter where a classification adversely differentiates between or adversely affects individuals on the basis of an enumerated or analogous characteristic is consistent with the principles of a free and democratic society, which as discussed in Oakes, include respect for the inherent dignity of the human person, commitment to social justice and equality and enhancement of the participation of individuals and groups in society. To deprive individuals of benefits, or to impose burdens on those individuals, solely by reason of an enumerated or analogous characterisic or attribute, is inconsistent with human dignity, social justice, and equal participation.

28. In this appeal, the alleged ground of discrimination - citizenship - is not specifically enumerated in s.15(1) of the Charter. However, the intervenors CAUT and OCUFA do not take issue with the B.C. Court of Appeal's conclusion at p.610, that "citizenship possess characterics similar to one of the enumerated categories, ethnic origins". In other cases brought under s.15(1) of the Charter, issues will arise as to whether the particular classification or characteristic in question is sufficiently analogous to those enumerated in s.15(1). In this respect, Canadian courts will have to exercise caution in referring to U.S. experience under the Fourteenth Amendment, since as noted in paragraph 21, the approach of the U.S. Supreme Court has been conditioned by the fact that racial discrimination is the paradigm for determining which other groups are to be granted meaningful constitutional protection under the Fourteenth Amendment. Thus, both the open-ended language of the Fourteenth Amendment, and its historical underpinnings, have dictated the U.S. Supreme Court's approach in determining that classifications such as mental or physical disability, sex, age, illegitimacy or sexual orientation should not be subjected to the same level of scrutiny as racial classifications.

29. In contrast, by specifically including as prohibited grounds of discrimination in s.15(1) classifications based on sex, age and disability, it is clear that

s.15(1) envisages a more generous approach to protection against discrimination than under the Fourteenth Amendment. In this respect, it is apposite to note that Professor Ely, upon whom the Attorney-General of British Columbia relies in paragraph 31 of its factum, would seriously scrutinize classifications based on sex only if they were enacted before the New Deal, and would subject age-based classifications to minimal scrutiny: Democracy and Distrust, pp.160-170. Such an approach is entirely inconsistent with the enumeration of such classifications in s.15(1) of the Charter.

30. Thus, in determining what grounds of discrimination are analogous to those specifically enumerated in s.15(1), Canadian courts will have to look beyond "race-like" attributes, an approach which in the U.S. has limited the understanding of discrimination under the Fourteenth Amendment to prejudice based on animus or hostility. Indeed, as a result of this understanding of discrimination, U.S. courts have held that the Fourteenth Amendment protects only against intentional discrimination but not against adverse effects discrimination. Such an approach conflicts with the meaning of discrimination in Canada, and with the fact that s.15(1) of the Charter specifically enumerates not only race, but other prohibited grounds of discrimination, including sex, age and disability. Accordingly, in determining which groups or characteristics are analogous to those specifically enumerated, Canadian courts should have regard to various considerations, including the historical understanding of discrimination in Canada, the historical treatment of the group in question, the commitment of Canadian society to social justice and equality, and the text of the Charter itself, including s.15(2), which encompasses within the equality guarantee particular protection for disadvantaged groups. As Mr. Justice Hugessen observed:

> "The inquiry, in effect, concentrates upon the personal characteristics of those who claim to have been unequally treated. Questions of stereotyping, of historical disadvantagement, in a word, of prejudice, are the focus and there may even be a recognition that for some people equality has a different meaning than for others."
>
> Smith, Kline and French v. A.-G. Canada (1986), 12 C.P.R. (3d) 385 at 391

31. As noted in paragraph 6 above, in Andrews, the B.C. Court of Appeal expressed the concern that, because all statutes draw a distinction between individuals, not all distinctions should be considered discriminatory. Otherwise, according to the B.C. Court of Appeal, almost all legislative or governmental classifications would infringe s.15, and the government would be required to justify almost all legislation under s.1 of the Charter, thereby subsuming all other rights and freedoms guaranteed by the Charter. However, it is the submission of the intervenors CAUT and OCUFA that only those classification or distinctions which adversely differentiate between or adversely affect individuals because of enumerated or analogous characteristics are per se or inherently discriminatory. On this approach, the phrase "without discrimination", far from being deprived of content, is given a meaning consistent with the text and purpose of s.15(1), and with the meaning of discrimination developed by Canadian courts under human rights legislation.

32. Moreover, the approach of the B.C. Court of Appeal in Andrews does not avoid the need to review all legislative or governmental distinctions in order to determine whether they are justified, but in fact requires that an inquiry into the reasonableness and fairness of all classifications be performed under s.15. Once it is recognized, however, that only those distinctions which adversely differentiate between or adversely affect individuals based on enumerated or analogous grounds are per se discriminatory, the concern that all legislative classifications would automatically have to be justified under s.1 no longer exists, and the primary consideration leading the B.C. Court of Appeal to import a requirement of unreasonableness or unfairness into s.15(1) no longer applies. Those classifications which do not adversely affect individuals based on such grounds would not constitute per se infringements of s.15(1), and therefore would not automatically have to be justified by the government under s.1 of the Charter since, given the underlying human rights rationale of s.15 as discussed above, there is no basis for treating distinctions which adversely differentiate between or adversely affect individuals based on non-enumerated and non-analogous grounds of distinction as inherently or per se discriminatory.

(iii) Other Grounds

33. The vast majority of legislative or governmental classifications will not be based upon or involve enumerated grounds of discrimination or analogous human attributes or personal characteristics. For example, government must employ numerous classifications and distinctions in regulating purely economic and commercial activity, which have nothing to do with discrimination on the basis of enumerated or analogous characteristics. In this connection, it is of importance to note that in R. v. Edwards Books, [1986] 2 S.C.R. 713 at 772, Chief Justice Dickson noted that "legislative choices regarding alternative forms of business regulation do not generally impinge on the values and provisions of the Charter", and that "differential treatment ... based on a criterion such as the size of one's retail business ... is not in itself offensive to constitutional provisions, principles and purposes" (p.781).

34. It is submitted that it is not necessary for this Court in the instant appeal to determine what an applicant would have to prove in order to establish that legislative or governmental classifications involving non-enumerated and non-analogous grounds infringe s.15(1) of the Charter, provided that this Court is satisfied that citizenship is a ground analogous to those specifically enumerated. However, whatever the precise test which emerges for establishing discrimination on non-analogous grounds, it is the position of CAUT and OCUFA that having regard to the principles canvassed above, the resolution of this issue need not and should not preclude the courts from recognizing that, insofar as enumerated or analogous grounds are concerned, s.15(1) is infringed where a legislative or governmental classification adversely differentiates between or adversely affects individuals in respect of such grounds.

35. In its factum, the Attorney General of British Columbia submits that only distinctions involving enumerated or analogous grounds can infringe s.15(1) of the Charter. For their part, the intervenors CAUT and OCUFA submit that this Court should not at this time foreclose the possibility of there being circumstances in which distinctions involving non-analogous grounds

could violate s.15(1). In any event, given that the rationale for the B.C. Court of Appeal's decision to import a test of unreasonableness or unfairness was its concern that, otherwise, virtually all legislation would be discriminatory and would have to be justified under s.1, it is clear that if only enumerated and analogous grounds are potentially discriminatory, (as the Attorney General of British Columbia contends), then even this basis for importing a requirement of unreasonableness or unfairness ceases to pertain.

E. The Relationship Between Section 15(1) and Section 1 of the Charter

36. As noted above in paragraph 6, in Andrews the B.C. Court of Appeal held that, whether or not the alleged ground of discrimination is enumerated, the ultimate question in determining whether s.15(1) of the Charter has been infringed is:

> "Whether a fair-minded person, weighing the purposes of legislation against its effect 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."

It is submitted that this approach leaves little or no scope for the application of justificatory criteria under s.1 of the Charter. Indeed, the only example offered by the B.C. Court of Appeal of a circumstance which would come within s.1 of the Charter was the internment of enemy aliens during times of war. Nowhere in the proceedings before the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada was it ever suggested that the role of s.1 would be so restricted, indeed emasculated.

37. It is submitted that the B.C. Court of Appeal's approach in Andrews is entirely inconsistent with that taken by this Court in Oakes and subsequent cases respecting the proper relationship between those provisions of the Charter which guarantee rights and freedoms and s.1, which defines the basis on which guaranteed rights and freedoms can be limited. Indeed, the scrutiny of legislative means to determine whether they are reasonable or fair, and the weighing of the purpose of legislation against its prejudicial effect, which the B.C. Court of Appeal would consider in determining whether discrimination

has occured within the meaning of s.15(1), is the central element of the s.1 inquiry under Oakes.

38. In addition, it is submitted that the approach of the B.C. Court of Appeal in Andrews is inconsistent with the observation of Madam Justice Wilson in Re Singh and Minister and Employment and Immigration (1985), 17 D.L.R. (4th) 422 at 468 that: "It is important to remember that the courts are conducting this inquiry in light of a commitment to uphold the rights and freedoms set out in the other sections of the Charter." In this regard, given that government is responsible for the creation of the discriminatory classification which is the subject of scrutiny under the Charter, it is certainly in a better position, particulary in terms of knowledge and resources, to affirmatively establish why the impugned classification has been employed, and whether or not it can be justified.

> Smith, "A New Paradigm for Equality Rights", supra, pp.375-79
>
> Lederman and Ristic, "The Relationship Between Federal and Provincial Human Rights Legislation and Charter Equality Rights", in Smith, ed. Righting the Balance, supra, pp.102-4
>
> Eberts, "The Equality Provisions of the Canadian Charter of Rights and Freedoms and Government Institutions", in Beckton and MacKay, The Courts and the Charter (1985), 133 at pp.163-65

39. Furthermore, it is submitted that there is no meaningful distinction in the approach taken by the B.C. Court of Appeal between those factors which the applicant must establish under s.15(1) in order to prove that a classification is unreasonable or unfair, and those factors which the government must establish under s.1 to prove that an infringement is demonstrably justifiable as a reasonable limit. While the B.C. Court of Appeal suggests that the ternment of enemy aliens would be a circumstance which would require justification under s.1, it is not at all clear why, even adopting the Andrews approach, the existence of a wartime emergency would not support the conclusion under s.15 that an otherwise discriminatory provision is not unreasonable or unfair, having regard to "the right of the Legislature to pass laws for the good of all" (p.610).

40. It is important to note that, in Oakes itself, the Supreme Court of Canada held that a "rational connection" test should not be imposed upon the meaning of the right to be presumed innocent guaranteed by s.11(d) of the Charter. As the Court stated in the following terms at p.223:

> "I should add that this questioning of the constitutionality of the 'rational connection test' as a guide to interpreting s.11(d) does not minimize its importance. The appropriate stage for invoking the rational connection test, however, is under s.1 of the Charter. This consideration did not arise under the Canadian Bill of Rights because of the absence of an equivalent to s.1. At the Court of Appeal level in the present case, Martin J. has sought to combine the analysis of ss.11(d) and 1 to overcome the limitations of the Canadian Bill of Rights jurisprudence. To my mind, it is highly desirable to keep ss.1 and 11(d) analytically distinct. Separating the analysis into two components is consistent with the approach this Court has taken to the Charter to date."

Similarly, it is submitted that, where a classification or distinction disadvantages individuals on the basis of an enumerated or analogous ground, the appropriate stage at which to deal with matters of reasonableness and fairness is s.1. It is inappropriate to read the requirements of s.1 into the definition of the right guaranteed under s.15 and, in the process, redefine the meaning of discrimination.

41. As noted above in paragraph 9, in considering the relationship between s.15 and s.1 of the Charter, the B.C. Court of Appeal referred to the "prima facie case approach". The B.C. Court of Appeal was of the view that the prima facie case approach failed to keep the sections defining constitutional rights analytically separate from s.1 of the Charter since, under the prima facie case approach, an applicant is required to demonstrate only a prima facie infringement of s.15. It is submitted that this criticism does not apply to the interpretation contended for by the intervenors CAUT and OCUFA. Under the intervenors' approach, an applicant does not simply make out a prima facie case by demonstrating adverse treatment against individuals by virtue of membership in an enumerated or analogous group; rather, discrimination occurs, and s.15 is infringed, where a classification adversely affects an individual by virtue of membership in an enumerated or analogous group. Such a classification is inherently discriminatory, and constitutes a per se violation of s.15(1), which must then be justified under s.1 of the Charter.

42. The B.C. Court of Appeal also suggested that "a more minor criticism" of the "prima facie case approach" is that it involves some duplication of the analysis under s.15(1) and s.1 of the Charter. It is submitted, however, that the approach urged by the intervenors CAUT and OCUFA does not involve a duplication of analysis but, to the contrary, reserves a separate and distinct role for s.1, that is, scrutiny of the importance of the legislative objectives and of the proportionality of the measures employed in order to achieve those objectives.

43. In fact, it is the approach adopted by the B.C. Court of Appeal itself which requires duplication of analysis under s.15 and s.1 of the Charter. This point was most forcefully made by Mr. Justice Hugessen in Smith, Kline and French in the following terms, at p.393:

> "The difficulty I have with those decisions [Andrews and other decisions of the B.C. Court of Appeal], as I understand them, is that they conclude that the ultimate test as to whether any given legislative category is in breach of s.15 is whether it meets the twin standards of reasonableness and fairness. With respect, I find this test impossible to reconcile with the teaching of Oakes, supra. If a category must be shown to be unreasonable or unfair before it can be said to give rise to a breach of equality rights, it is difficult to see how there can ever be room for application of s.1. In my view, Oakes requires that any test of the content of s.15 must be both logically and analytically distinct from s.1."

Indeed, when applying s.1 in the Andrews case, the B.C. Court of Appeal referred to the very same factors it had already dealt with under s.15 (p.617).

44. The B.C. Court of Appeal also criticized the prima facie case approach on the basis that it would require obviously justifiable distinctions to be justified under s.1. However, it is submitted that, where a distinction is obviously justifiable, there is no reason why this justification should not take place under s.1, particularly when the alternative advanced in Andrews is to read s.1 into s.15, and redefine the term discrimination. Further, to the extent that the alleged infringement may be trivial or insubstantial, this Court has held in Edwards that, at least insofar as freedom of religion is concerned, trivial or insubstantial interference with constitutionally protected rights does

not amount to an infringement. There is no reason why a similar analysis might not be applied with respect to s.15.

F. Conclusion

45. On the basis of the foregoing, it is the position of the intervenors CAUT and OCUFA that, with respect to enumerated and analogous grounds, discrimination within the meaning of s.15(1) of the Charter occurs where a legislative or governmental classification adversely differentiates between or adversely affects individuals on the basis of such grounds. In other words, where the prohibited ground of discrimination is enumerated or analogous thereto, s.15(1) does not require that the applicant demonstrate that the adverse treatment complained of is unfair or unreasonable. Such a requirement, which was asserted by the B.C. Court of Appeal in Andrews, is inconsistent with the language and purpose of s.15(1), and with the proper relationship between s.15 and s.1 of the Charter. In summary, it is the submission of CAUT and OCUFA that:

(1) legislative or governmental distinctions which adversely differentiate between, or adversely affect, individuals based on membership in an enumerated or analogous group, are per se or inherently discriminatory, and must be justified under s.1;

(2) the approach of the B.C. Court of Appeal in Andrews is inconsistent with the general principles of interpretation pertaining to the Charter, which require that the rights and freedoms guaranteed therein be given a large and liberal construction, and not a narrow and restrictive one, and with the definition of discrimination under human rights legislation, i.e., adverse treatment of individuals based on their membership in a protected group;

(3) a requirement that all distinctions, whether based on enumerated grounds or not, be shown to be unfair or unreasonable fails to give any effect to the fact that s.15(1) specifies certain enumerated grounds of discrimination;

(4) such a requirement also leaves no meaningful room for s.1, since it is not possible to determine whether a particular measure is

unreasonable or unfair without having regard to the legitimacy and importance of the objectives it is designed to serve, and the extent to which such measure is necessary to attain those objectives, inquiries which the Supreme Court of Canada has already determined constitute the central core of the analysis under s.1 of the Charter.

PART IV — NATURE OF ORDER SOUGHT

45. The intervenors take no position with respect to whether the instant appeal should be allowed, except insofar as this Court may deem the submissions contained herein to be of assistance.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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September 21, 1987

PART V

LIST OF AUTHORITIES