19956

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

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I N D E X

PART I

STATEMENT OF FACTS

1. The Appellant, the Attorney General of British Columbia, accepts the facts set out in the Factum of the Appellant, the Law Society of British Columbia.

PART II

POINTS IN ISSUE

1. 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 Canadian Charter of Rights and Freedoms?

2. 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 Canadian Charter of Rights and Freedoms, is it justified by s. 1 of the Canadian Charter of Rights and Freedoms?

PART III

ARGUMENT

1. The Appellant, the Attorney General of British Columbia, agrees generally with the approach to s. 15 of the Charter adopted by the British Columbia Court of Appeal. It is submitted, however, that the Court of Appeal erred in concluding that the Respondent had discharged his onus of proving that the citizenship requirement in s. 42 of the Barristers and Solicitors Act was unreasonable or unfair and therefore in violation of s. 15 of the Charter.

2. Section 15 applies to both the administration of the law ("equality before the law") and to the content of the law ("equality under the law"). This interpretation is consistent with the "explanatory note" which accompanied the final draft of s. 15 when it was tabled in the House of Commons: see Elliott, "Interpretating The Charter - Use of The Earlier Versions As An Aid" (1982), U.B.C. L. Rev. 11 @ 38. Professor Elliott says (@ p. 17) that the explanatory note suggests "that the phrase 'equal before and under the law' is intended to describe not the scope of the right to equality as such, but the spheres of governmental activity

to which the right to equality can be applied".

3. The right guaranteed in s. 15 is "the right to equal protection and equal benefit of the law [both in its administration and content] without discrimination".

4. The phrases "equal protection and benefit" and "without discrimination" are "interacting expressions, colouring each other ... and hence to be considered together as a compendious expression of a norm.": Miller et al v. The Queen, [1977] 2 S.C.R. 680 @ 690. These phrases capture two essential elements of the norm of equality guaranteed in s. 15. A law violates s. 15 because of the choice of certain criteria upon which a burden is imposed or a benefit is bestowed and the unreasonableness or unfairness of that criteria given the purpose of the law.

5. The Court of Appeal's inquiry was similarly in two steps. The Court first considered whether the criteria of "citizenship" was "capable of falling with s. 15": Case, p. 104 and concluded that it was "a potential ground of discrimination under s. 15": Case, p. 105. The Court of Appeal then considered the "ultimate question": Case, p.

103, which asked whether this criteria was "unreasonable or unfair": Case, pp. 103, 105. This requirement that the criteria must be reasonable is also implicit in the aphorism that those who are "similarly situated be similarly treated": Case, pp. 96-97.

6. There are not an infinite kind of criteria which might be discriminatory. Rather, the criteria enumerated in s. 15 of the Charter are illustrative, albeit not exhaustive, of the kinds of criteria that might be discriminatory. Any law which classifies on one of the enumerated grounds or on grounds similar thereto, these triggers s. 15 scrutiny. Such law must then pass the test of reasonableness as articulated by the Court of Appeal. Conversely, a law which classifies neither on the enumerated grounds nor on grounds akin thereto does not pass this threshold test in s. 15 and therefore the Court need not and ought not scrutinize the reasonableness or fairness of the legislative classification.

7. This analytical approach to s. 15 was expressly adopted in three recent decisions of the British Columbia Supreme Court: Scott v. A.G.B.C., [1986] 5 W.W.R. 207;

A.G.B.C. v. Husband Prov. J. and Page (1986) 4 B.C.L.R. (2d) 295 and Beltz v. Law Society of B.C., [1986] 1 W.W.R. 427 @ 437. Indeed in: B.C.T.F. et al v. A.G.B.C. et al, [1987] 1 W.W.R. 527 @ 535 the B.C. Court of Appeal suggested that the enumerated grounds may, in fact, be exhaustive. And in Milk Board v. Clearview Dairy (Unreported B.C.C.A., Mar. 4, 1987, Reg. No. CA005312), the B.C. Court of Appeal rejected the s. 15 claim brought by a corporation on the ground, inter alia, that "a corporation has no race, national or ethnic origin, colour, religion, sex, age, mental or physical disability nor any other comparable quality". (emphasis added) See, however Wilson and Maxson v. Medical Services Commission of B.C. et al, [1987] 3 W.W.R. 48 @ 83 (B.C.S.C.) where this "threshold test" was not applied.

8. It is submitted that the purpose of s. 15 was to constitutionalize the values that found protection and were enhanced by human rights legislation enacted by the provincial Legislatures and the federal Parliament as well as by states pursuant to international law - all of which provide the historical and philosophical basis for s. 15. The grounds enumerated in s. 15 are similar to those that are specifically included and prohibited in such human rights (or anti-discrimination) legislation or conventions,

all of which have a "closed list" of such prohibited grounds. (See e.g. Human Rights Act, S.B.C. 1984, c. 22, the Newfoundland Human Rights Code, R. S. Nfld. 1974, c. 22; Human Rights Code, S.P.E.I. 1968, c. 2, Human Rights Act, S.M. 1974, c. H175; Saskatchewan Human Rights Code, R.S.S. 1978, c. S-24.1, Ontario Human Rights Code, R.S.O. 1980, c. 340, Human Rights Act, S.N.S. 1969, c. ; Alberta Bill of Rights, S.A. 1972, c. A-16; Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12; Human Rights Act, S.N.B. 1971, c. 8); the European Convention for the Protection of Human Rights and Freedoms, Article 14; Universal Declaration of Human Rights, Article 2; The International Covenant on Civil and Political Rights, 1966, Article 2; Quebec Charter of Rights and Freedoms, R.S.Q. 1977, c-C-12; The International Convention of the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195; The International Convention on the Elimination of All Forms of Discrimination Against Women, UNGRA Res. 34/180, GAOR, 34th Sess., Supp. 46, p. 193; ILM 33, Article 1; I.L.O Convention Concerning Discrimination in Respect of Employment and Occupation (No. 111), 362 U.N.T.S. 31, Article 1(a), (not yet ratified by Canada).

9. Tarnopolsky in Discrimination and The Law (1982) @ 840 summarizes his review of the Canadian legislation:

> "To reiterate, the various anti-discrimination statutes in Canada prohibit specific actions taken 'because of' certain specified grounds and thereby provide illustrations of what is 'discrimination' against someone."

10. Like human rights legislation, s. 15 will likely be interpreted to prohibit both direct and indirect discrimination on the enumerated grounds and grounds akin thereto.

Reference: Ontario Human Rights Commission and O'Malley v. Simpson Sears (1965), 64 N.R. 161 (S.C.C.)

Re Blainey and Ontario Hockey Association et al (1986), 54 O.R. (2d) 513 (Ont. C.A.)

11. It is significant that although the 14th Amendment of the U.S. Constitution does not have a "without discrimination" clause, the U.S. Supreme Court has, with rare exceptions, found violations of the 14th Amendment only when there have been legislative classifications similar to the enumerated grounds in s. 15. All other classifications have been subjected to what is called the "mere rationality test" and such classifications have nearly always been held

valid. There is, in effect, "minimal scrutiny in theory and virtually none in fact": G. Guenther, "Forward: In Search of Evolving Doctrine on a Changing Court: A Model for New Equal Protection", (1982) 86 Harv. L. Rev. 1 @ 8: W. Cohen, Federalism in Equality Clothing: A Comment on Metropolitan Life Insurance Co. v. Ward (1985), 38 Stan. L. Rev. 1.

12. This approach to s. 15 does not "limit the effect of that guarantee to the law as it stood before [its] adoption": Alberta Union of Provincial Employees et al v. Attorney General of Alberta (Unreported S.C.C., April 9, 1987, p. 14, per McIntyre, J.), and yet it is a construction consistent with "the nature, history, traditions, and social philosophies of our society": Alberta Union of Provincial Employees, supra, @ p. 14.

See also: Cromer v. B.C.T.F., [1986] 4 B.C.L.R. (2d) 273 (B.C.C.A.)

13. This approach should be compared with this Court's interpretation of the Canadian Bill of Rights. This Court has held that the "existence of any forms of prohibited discrimination is not a sine qua non of the operation of s. 1 of the Bill of Rights": The Queen v. Burnshine, [1975] 1

S.C.R. 693 @ 700; and see also: Beauregard v. Canada (1986), 70 N.R. 1 @ 57 (S.C.C.). In no case however has the Supreme Court invalidated a law which involved a non-prohibited ground. Nor has the Court ever said that the list of potentially discriminatory grounds is infinite. However, even if s. 1(b) of the Canadian Bill of Rights could be violated by a legislative classification that was not similar to the prohibited grounds of discrimination, that would be due to the text of s. 1 of the Canadian Bill of Rights which is very different from s. 15 of the Charter. It will be noticed that the prohibited grounds of discrimination in the Canadian Bill of Rights are set out in the opening paragraph of s. 1 which purports to qualify all of the rights and freedoms set out in subsections 1(a) to 1 (f). It is understandable, therefore, that the existence of the prohibited grounds of discrimination could not be a sine qua non to a violation of s. 1(b) of the Canadian Bill of Rights because that would mean that these prohibited grounds would have to be a sine qua non to a violation of ss. 1(a), (due process), 1(c), (freedom of religion), 1(d), (freedom of speech), 1(e), (freedom of assembly and association) and 1(f), (freedom of the press). That would make no sense at all.

14. It is submitted that a different approach to s. 15 of the Charter is also justified because of the fundamentally different nature of the Charter and the Canadian Bill of Rights. The Charter, unlike the Canadian Bill of Rights, not only applies to all levels of government but is the supreme law of Canada. Inevitably the Charter will require the Courts "to enter the legislative sphere": Alberta Union of Provincial Employees, supra, @ 31, in a manner never contemplated by the Canadian Bill of Rights. However, it is submitted that this "intrusion into the field of legislation": Alberta Union of Provincial Employees, supra, @ 31, should only occur when expressly authorized by the Constitution and not by any "implication": Alberta Union of Provincial Employees, supra, @ 31. It is submitted that to interpret s. 15 of the Charter as "open-ended" is not only to "overshoot its purpose": R. v. Big M. Drug Mart, supra, @ 344, but is also inconsistent with the "character and the larger objects of the Charter itself": Big M. Drug Mart, supra, @ 344, which is founded on the fact that "Canadian society is to be free and democratic": R. v. Oakes, [1986] 1 S.C.R. 103 @ 136 (emphasis added).

15. If every legislative classification is potentially

discriminatory then no distinction will exist between the Court's legitimate function of scrutinizing legislation for its constitutionality and its illegitimate function in a democracy of scritinizing the wisdom, policy or merits of legislation viz its rationality, reasonableness or fairness: see Reference Re S. 94(2) of the Motor Vehicle Act, [1986] 1 W.W.R. 481 @ 489-490 (S.C.C.).

16. If s. 15 scrutiny was triggered by any legislative classification then the courts will inevitably and continually be thrust into the "bog of legislative policy-making": Curr v. The Queen, [1972] S.C.R. 889 @ 902. All laws draw distinctions on the basis of who we are or what we do. If the ultimate measure of equality is the rationality, reasonableness or fairness of the legislative distinction, then it will always be possible for someone to present a reasonable argument (often at great length and expense) that the Legislature would have acted rationally or reasonably or fairly only if it had redrawn its legislative lines to encompass or exclude certain individual or group of individuals.

17. It is also very likely that these claims, even if

ultimately unsuccessful, will be frequently made. Anyone who is charged pursuant to legislation and perhaps anyone who seriously objects to the policy of an enactment will be tempted to invoke s. 15:

> "Section 15, like the 14th Amendment in the U.S. Constitution will dwarf the other provisions of the Charter and be the central issue in virtually all Charter litigation. Laws which do not violate any other fundamental right or freedom, will almost always (if the U.S. experience is any guide) be alleged to violate s. 15 because the Legislature classified or failed to classify. Even though legislation does not violate any other sections, it will always be required to run the gauntlet of s. 15 and s. 1. In my view, this cannot have been the intention of the enactors of the Charter."

Reference: Case, p. 100

18. Indeed, this prophecy is in the process of being fulfilled. Section 15 has already spawned the kind of litigation that is not infrequently brought under the 14th Amendment of the U.S. Constitution. For example, the following legislative classifications have been alleged to be potentially discriminatory and thus violate the right to equality:

(a) a law which distinguishes between persons who work in a construction site of economic importance and those who do not: B.C. & Yukon Territory Building & Construction

Council et al v. A.G.B.C. and Expo 86 Corporation et al (1985), 66 B.C.L.R. 279 (B.C.S.C.);

(b) a law which distinguishes between persons who manufacture softdrinks in steel cans rather than tin cans: Aluminum Company of Canada Ltd. v. Her Majesty the Queen and Dofasco Inc. (1986), 55 O.R. (2d) 522 (Ont.Div.Ct.); Cp. Minnesota v. Cloverleaf Creamery Co., 449 US 596 (1986) where the challenge was to a law which distinguished between persons who sell milk in plastic containers rather than paper containers;

(c) a law which distinguishes between persons who are resident in one electoral district but registered in another and those who are not: Scott v. A.G.B.C., [1986] 5 W.W.R. 207 (B.C.S.C.);

(d) a law which distinguishes between persons who are criminal lawyers rather than real estate lawyers: Beltz v. Law Society of B.C. et al, [1981] 1 W.W.R. 527 (B.C.C.A.);

(e) a law which distinguishes between persons who have milk quota and those who do not: Milk Board v. Clearview Dairy Inc. (Unreported, B.C.C.A., March 4, 1987);

(f) a law which distinguishes between the taxpayer and the tax assessor: Coast Tractor and Equipment Ltd. v. Allan

Council et al v. A.G.B.C. and Expo 86 Corporation et al (1985), 66 B.C.L.R. 279 (B.C.S.C.);

(b) a law which distinguishes between persons who manufacture softdrinks in steel cans rather than tin cans: Aluminum Company of Canada Ltd. v. Her Majesty the Queen and Dofasco Inc. (1986), 55 O.R. (2d) 522 (Ont.Div.Ct.); Cp. Minnesota v. Cloverleaf Creamery Co., 449 US 596 (1986) where the challenge was to a law which distinguished between persons who sell milk in plastic containers rather than paper containers;

(c) a law which distinguishes between persons who are resident in one electoral district but registered in another and those who are not: Scott v. A.G.B.C., [1986] 5 W.W.R. 207 (B.C.S.C.);

(d) a law which distinguishes between persons who are criminal lawyers rather than real estate lawyers: Beltz v. Law Society of B.C. et al, [1981] 1 W.W.R. 527 (B.C.C.A.);

(e) a law which distinguishes between persons who have milk quota and those who do not: Milk Board v. Clearview Dairy Inc. (Unreported, B.C.C.A., March 4, 1987);

(f) a law which distinguishes between the taxpayer and the tax assessor: Coast Tractor and Equipment Ltd. v. Allan

Halliday et al (Unreported, B.C.S.C., March 24, 1987); and

(g) a law which distinguishes between persons who rent residential premises that are government subsidized and those who rent resident premises that are not subsidized: A.G.of Newfoundland v. Newfoundland & Labrador Housing Corp. (Unreported, Nfld. C.A., March 31, 1987)

19. It is submitted that judicial review which is directed solely to the rationality, reasonableness or fairness of a legislative classification, where the classification is not an enumerated ground or one similar thereto, cannot be reconciled with democratic theory. Dean John Hart Ely in Democracy & Distrust: A Theory of Judicial Review (1980 @ 103), argues persuasively that in a democracy judicial review should focus on the democratic process to ensure that the process does not dysfunction rather than on the outcomes of the process. A review of the reasonableness of every impugned legislative criteria and thus the outcome of the legislative process is not required by the text of the Constitution. It should not be read in.

See also: Linde, "Due Process of Law Making" (1975) 55 Neb. L. Rev. 197 @ 254:

> "As a Charter of government a Constitution must prescribe legitimate processes, not legitimate outcomes, if like ours (and unlike more ideological documents elsehwere) it is to serve many generations through changing times."

20. Professor Patrick Monahan claims that "the democratic conception" of judicial review propounded by Dean Ely and others in relation to the U.S. Constitution is even more compelling in Canada. In "Judicial Review And Democracy: A Theory of Judicial Review", (1987), 21 U.B.C. Law Rev. 87 @ 89-90 Professor Monahan states:

> "The claim which I defend is premised on a distinction between the substantive outcomes of the political process and the fairness of that process itself. In my view, the judiciary should not undertake the task of testing the substantive outcomes of the political process against some theory of the right or the good. The resolution of Charter issues is not to be found in the philosophies of John Rawls, Robert Nozick or Ronald Dworkin. Rather, the central focus of judicial review should be on the integrity of the political process itself. The judiciary should interpret constitutional guarantees in such a way that the opportunities for public debate and collective deliberation are enhanced. To put the matter simply, constitutional adjudication should be in the name of democracy, rather than right answers.
>
> Readers familiar with the American literature will recognize the similarlity between this argument and the work of John Hart Ely. ...
>
> My claim is that the representation - reinforcing theory of judicial review, although originally formulated in the American context, actually

offers a far more convincing account of the purposes underlying the Canadian Charter.

See also: Dickson, C.J., "The Democratic Character of the Charter of Rights" in Law and Politics Of The Judicial Process In Canada, (edited by F.L. Morton, (1984) @ 325-327):

"In this regard I commend to you a statement by the Committee on the Constitution of the Canadian Bar Association:

> 'A democracy is the basis and prerequisite for the operation of the supremacy of Parliament. That being so, it would seem justifiable to entrench in a constitution principles which are prerequisites to the existence of democracy. ...

21. A review of the rationality or reasonableness of legislative classifications "leads courts and counsel into a labyrinth of fictions:" Linde, supra, @ 207. Testing the law for rationality creates intractable difficulties that are intrinsic to the process of judicial review. Linde summarizes these difficulties as follows:

> "[T]he test depends on attributing a purpose to the law maker; but laws are often an accommodation of several unrelated purposes. Commonly, a law will push toward a goal only within the limits of objectives that may or may not be apparent in retrospect. Legislative declarations and legislative history cannot be relied on to reflect the actual balance of considerations that shaped the law, and often no such records are available. Although proponents might have wished for more and opponents for less, all that is certain about the law as a means to an end is that a majority could be found to undertake what the law in fact undertakes, no more, no less. That much is its

> immediate goal. If judicial review may hold a law invalid for failure to match some greater purpose, it places a premium on the manner in which the counsel and court phrase the supposed legislative goals. Many of our laws simply reflect old notions of right and wrong, or sympathy toward the equity of some particular claim to legislative consideration, without intending to achieve any pragmatic aim. Such a law may be unconstitutional if it pursues a goal that the Constitution forbids, but not because the values it reflects are merely sentimental, or parochial, or old fashioned, or foolish, rather than goal oriented. ... Finally, judicial review of rationality is irretrievably ambivalent about time - whether to match past facts to past purposes, or present facts to past purposes, or present facts to present purposes - because it is ambivalent about its premise, whether it means to review the one time reasonableness of lawmakers or the continuing reasonableness of laws." (pp. 220 - 222).

22. The comments of McIntyre, J. in Alberta Union of Provincial Employees, supra, @ 30 are an equally apt response to the claim that courts should review the rationality or reasonableness of all legislative classifications: "None of these issues is amenable to principled resolutions. There are no clearly correct answers to these questions. They are of a nature peculiarly apposite to the functions of the Legislature".

23. Furthermore, review of rationality involves important assumptions about the lawmaking process. Linde asserts that "no courts should invalidate an act of

government for failure to comply with the constitutional rule unless the rule is one with which the government should have complied, or should know how to comply with in the future" (p. 222). Linde suggests that if we were to take the formula of rational law making seriously it would impose on lawmakers demands which would involve an enormous requirement of time and which bear no relation to the reality of the lawmaking process: Linde, supra, @ pp. 222 - 224.

24. It might be argued that this threshold test would allow some entirely arbitrary and capricious laws to escape s. 15 scrutiny. A law, e.g., which stipulate that "only persons who drive red cars are entitled to a driver's licence" would seem entirely arbitrary but the legislative classification "those who drive red cars" is not similar to an enumerated ground and thus would not potentially discriminate. It is submitted, however, that it would be a grave mistake for the Court to approach and interpret s. 15 on the assumption that such legislation would ever be possible. It would not. Prior to the Charter the Legislature did not act in such arbitrary fashion. There is no reason to believe or assume that it would do so after the Charter.

25. In Oakes, supra, @ 136, Dickson, C.J. stated that when interpreting the Charter the "Court must be guided by the values and principles essential to a free and democratic society which I believe embody ... faith in social and political institutions which enhance the participation of individuals and groups in society". (emphasis added)

26. Dean Ely, (Democracy and Distrust, supra, @ 181-183, responds to critics of his theory of constitutional interpretation, which likewise leaves open the possibility of arbitrary laws remaining unreviewable, such as those which make it "a crime for any person to remove another person's gall bladder, except to save that person's life" as follows:

> "It is an entirely legitimate response to the gall bladder law to note that it couldn't pass and refuse to play any further. In fact it can only deform our constitutional jurisprudence to tailor it to laws that couldn't be enacted, since constitutional law appropriately exists for those situations where representative government cannot be trusted, not those where we know it can."

27. Professors Monahan and Petter in "Developments in Constitutional Law: The 1985-86 Term" (to be published in 9 Supreme Court Law Review) ask the questions "are laws ever

'irrational'?" (p. 59) and answer as follows:

> "Laws may be enacted for reasons we happen to disagree with, but it seems implausible to suppose that laws are enacted for no reason at all ... The only real function of the rational basis test is to make the judicial balancing of interests less apparent and thus seemingly more legitimate."

And see: Felix Cohen, "Transendental Nonsense and the Functional Approach" (1930), 33 Columbia L. Rev. 808 @ 819:

> "Taken seriously this conception [of a rationality standard] makes of our courts lunacy commissions sitting in judgment upon the mental capacity of legislators and, occasionally, of judicial brethren."

28. It is also obvious that if any truly draconion legislation was invoked the courts would be able to resort to s. 7 of the Charter which protects certain fundamental interests and s. 12 which is concerned primarily with arbitrary measures.

29. A "reasonableness" or "fairness" test involves a higher standard of scrutiny than a mere rationality test: Case, p. 103. An inquiry into the reasonableness or fairness of a legislative criteria also is patently and overtly an inquiry into the wisdom or policy of the law and

perhaps more so than would be the case if the inquiry was one of mere rationality. This higher level of scrutiny is justifiable, however, only if s. 15 review is triggered by laws that classify on the enumerated grounds or grounds akin thereto. Furthermore, if s. 15 is so construed then it makes sense to have a single test since all criteria which trigger s. 15 scrutiny will fall within either the "suspect" or "sensitive" category: Case, p. 105. This does not mean that the application of the test will yield the same result no matter what potentially discriminatory criteria is in issue. It will always be easier to demonstrate the unfairness or unreasonableness of a law which classifies on the basis of race than it will when the criteria is age or disability. See: City of Cleburne, Texas v. Cleburne Living Centre, 87 L Ed 2d 313 @ 327-329 (1985) per Stevens, J.

30. Judicial review of legislative classifications based on the enumerated grounds or grounds similar thereto is easy to reconcile with democratic theory - it is required by the text of the Constitution. There can be no question as to the legitimacy of judicial review in this context even though the ultimate test will inevitably be one of reasonableness or fairness. Even if s. 15 did not expressly enumerate these prohibited grounds, judicial review of such

"suspect" or "sensitive" classifications can be reconciled with democratic principles since such classifications may be motivated by prejudice and "prejudice against discrete and insular minorities may be a special condition which tends to curtail the operation of those political processes ordinarily to be relied upon to protect minorities": The United States v. Carolene Products Co., 304 US 144 @ 152-153, fn. 4 (1938).

31. Dean Ely recognizes the legitimacy of judicial review with respect to legislative classifications that are "race-like" (Democracy and Distrust, supra, @ p. 149) which includes classifications that relate to groups that "we know to be the object of widespread vilification, groups we know others (specifically those who control the legislative process) might wish to injure": (id @ p. 153). Hence, Dean Ely states that malfunctions in democratic process occur when, inter alia:

> "Though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.": (@ p. 103).

32. Professor Hans A. Linde (as he then was), in "Due Process of Lawmaking", supra, @ 201 - 203, argues that the Equal Protection clause of the 14th Amendment should allow for judicial review only with respect to "suspect classifications" although he admits that there is "room for debate about what the list of suspect classifications should include." (p. 201) He describes the purpose of judicial review with respect to such classifications as follows:

> "For what is it that 'suspect classifications' are suspected of? The suspicion, in that phrase, is suspicion of prejudice - not simply prejudgment based on ignorance and mistaken notions of fact, but invidious prejudgment, grounded in notions of superiority and inferiority, in beliefs about relative worth, attitudes that deny the premise of human equality and that will not be readily sacrificed to mere facts. The suspicion of prejudice focuses on the lawmaker's sense of values, not on his rationality." (p. 201).

33. Professor Monahan is of the view that "the norm of equality is designed to take account of the fact that certain groups and individuals possess unequal access to the political system.": Monahan, supra, @ 149. Although this concept is different from the concept of prejudice that Dean Ely espouses and which Professor Monahan criticizes, it nevertheless is consistent with the submission that s. 15 is

only triggered by laws which classify on the enumerated grounds or grounds similar thereto.

34. It is submitted that whether a particular legislative classification is akin to one of the enumerated grounds must be determined on a case-by-case basis. The common underlying factors of the enumerated grounds are that they refer to human characteristics that are essentially immutable, to groups which have been subject to a history of prejudice and have directly and perhaps systemmically been denied an equal voice in and equal access to the political process. The approach must at all times be a "generous rather than a legalistic one": R. v. Big M. Drug Mart Ltd., supra, @ 344.

35. Applying these criteria and employing a generous interpretation to s. 15 of the Charter, it is conceded that "citizenship" is a classification that triggers s. 15 scrutiny. Although not an immutable characteristic it is one, like religion, that may be difficult to change without fundamentally altering one's sense of identity; it might conceivably be used by a government as a colourable means of discriminating against persons on the basis of race or national origin; since citizenship is a precondition of

voting in both levels of government, non-citizens therefore have no formal access to the political process.

Reference: Case, pp. 104-105

See also: B.C.T.F. et al v. A.G.B.C. et al, supra @ 535

36. The ultimate question, therefore, is whether the classification of citizenship is in fact and in law discriminatory which in turn depends on whether it is "unfair or unreasonable, having regard to the purposes of the legislation and its effects on the individual": Case, p. 105.

37. The Appellant, the Attorney General of British Columbia, adopts the submissions of the Appellant, the Law Society of British Columbia, in paragraphs 13-14 of its Factum.

38. While the prerequisites for citizenship may well describe minimum qualities and committments that can reasonably be expected of a lawyer, it is the fact of being a citizen which is the important requirement in s. 42. Citizenship is more than the "sum of its parts". It is a very special status. It is an important badge with identifies members of the Canadian polity. It signifies

that a person is entitled to govern or at least play a important role in the structures or processes of government, broadly defined. In Sugarman v. Dougall, 413 US 34, 37 L Ed 2d 853, 93 S Ct 2842 (1973), Rehnquist, J. (dissenting) states at 866 and 870:

> "Citizenship meant something, a status in and relationship with a society which is continuing and more basic than mere presence or residence. ... If citizenship is not 'special', the Court has wasted a great deal of effort in the past."

And in Foley v. Connelie, 435 US 291, 55 L Ed 2d 287, 98 S Ct 1066 (1978), Burger, C.J. for the Court states at 55 L Ed 292:

> "The act of becoming a citizen is more than a ritual with no content beyond the fanfare of ceremony. A new citizen has become a member of a Nation, part of a people distinct from others. ... The individual, at that point, belongs to the polity and is entitled to participate in the processes of democratic decision-making. ... This is not intended to denigrate the valuable contribution of aliens ... It is no more than recognition of the fact that a democratic society is ruled by its people."

39. The Constitution itself recognizes and draws a distinction between citizens and non-citizens: s. 3 and s. 6 of the Constitution Act, 1982

40. The rationale of the citizenship requirement can therefore be described by reference to the following syllogism which was referred to by the Court of Appeal, Case, @ 108:

(a) persons who are involved in the processes or structures of government, broadly defined, should be citizens;

(b) lawyers are involved in the processes or structures of government;

(c) lawyers, therefore, should be citizens.

41. The Court of Appeal accepted the soundness of the first premise:

> "The requirement that only citizens be allowed to participate in the structures or processes of government is common in free and democratic societies. Aristotle defined a citizen as 'a man who shares in the administration of justice and the holding of office': Politics (Transl. E. Barker, Oxford Press 1948, Book 3, Chap. 1, 107-109), Case, p. 109

See also: D.F. Thompson, The Democratic Citizen, (Cambridge U. Press, 1970 @ 30):

> "To say that a system is democratic is to imply not only that the system is responsive to the interests of most of the citizens but also that the citizens share in governing (if only by selecting in a competitive system who shall govern between elections)."

42. The Court of Appeal also recognized that "it is this rationale which underlies the common requirement that legislators, voters, judges, police and senior civil servants be citizens": Case, p. 109.

43. The United States Supreme Court has recognized the validity of the citizenship requirement when imposed on persons involved in "governmental" or "political" functions. In Ambach v. Norwick, 441 US 68, 60 L Ed 2d 49, 99 S Ct 1589 (1979), Powell, J. stated for the Court at 60 L Ed 2d 55:

> "The rule for governmental functions, which is an exception to the general standard applicable to classifications based on alienage, rests on important principles inherent in the Constitution. The distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of the state. The Constitution itself refers to the distinction no less than 11 times ... indicating that the status of citizenship was meant to have significance in the structure of our government. The assumption of that status, whether by birth or naturalization, denotes an association with the polity which,

> in a democratic replublic exercises the powers of governance. ... The form of this association is important: an oath of allegiance or similar ceremony cannot substitute for the unequivocal legal bond citizenship represents."

44. It is submitted that the Court of Appeal erred in failing to hold that the Legislature could reasonably, and fairly conclude that lawyers are involved in the processes or structures of government, broadly defined, so as to justify the citizenship requirement.

45. It is submitted that the Court of Appeal did not attach sufficient weight and importance to the "dangerous powers" and "solemn duties" of the lawyer in British Columbia. It is submitted that the lawyer plays a vital role in the administration of law and justice and is, therefore, just as much a part of the governmental structures or processes as are judges, jurors, legislators, voters, civil servants and policemen: See, e.g. Provincial Court Act, R.S.B.C. 1979, c. 341, s. 5; Jury Act, R.S.B.C. 1979, c. 210, s. 3(1)(a); Police Act, R.S.B.C. 1979, c. 331, s. 12(5) as amended by the Charter of Rights Amendment Act, 1985, S.B.C. 1985, c. 60, s. 105; Constitution Act, R.S.B.C. 1979, c. 62, s. 30; Election Act, R.S.B.C. 1979, c. 103, s. 2(1)(a) as amended by Election Amendment

Act, 1984, S.B.C. 1984, c. 4, s. 2; Public Service Act, R.S.B.C. 1979. Indeed, in the United States even teachers are so regarded: Ambach v. Norwick, 441 US 68, 60 L Ed 2d 49, 99 S Ct 1589 (1979).

46. In Orkin, Legal Ethics, (1957) p. 17, the learned author states:

> "The lawyer, however, is more than a private citizen and may be taken to occupy a quasi-offical position. He is and has always been considered as being almost a public servant; thus Yates, J. in Mayor of Norwich v. Bray, [(1767), 4 Burr. 2109 @ 2115] said:
>
> > 'The Court must have ministers; the attorneys are its ministers.'"

47. It is submitted that the enactment of the Constitution Act, 1982 also enhances the role and importance of lawyers in Canadian society. The lawyer plays a critical function, second only in importance to the judges, in interpreting and applying the Constitution, which in turn will have profound implications for all Canadians.

48. The Charter itself recognizes the special place that lawyers have in Canadian society by guaranteeing a right to retain and instruct counsel in certain circumstances.

49. Similarly, the concept of privileged communications between a solicitor and his client "has long been recognized as fundamental to the due administration of justice": Solosky v. Government of Canada, [1980] 1 S.C.R. 821 @ 833.

50. It is submitted that the Court of Appeal also erred in substituting its judgment for that of the Legislature as to the proper definition of the political community. In Sugarman v. Dougall, 413 US 34, 37 L Ed 2d 853, 93 S Ct 2842 (1973) @ 37 L Ed 2d 860 the United States Supreme Court recognized "the State's broad power to define its political community".

51. It is submitted that the Court of Appeal erred in saying that:

> "The Legislature was not defining its political community by imposing a requirement of citizenship on lawyers in s. 42 of the Barristers and SolicitorsAct. Nothing is said in that section about the role lawyers play in governmental processes. Nor can we assume that it was the premise upon which the citizenship requirement was founded.": Case, p. 112

52. It is submitted that if the Court was of the view that the citizenship requirement would be valid, if it was

founded on the Legislature's judgment that lawyers are important players in the structures and processes of government, then the Court of Appeal should have attributed that rationale to the Legislature notwithstanding that "nothing is said in [s. 42 of the Barristers and Solicitors Act] about the role lawyers play in governmental processes". Legislation should be assumed to have a constitutionally valid rationale.

53. It is submitted that the Legislature in enacting the Charter of Rights Amendment Act, 1985, S.B.C. 1985, c. 68, eliminating as mandatory the requirement of citizenship as previously existed in the Barber Act, the Engineer Act, the Forest Act, the Forester Act, and the Optomistrist Act while at the same time maintaining that requirement for judges, jurors, police, legislators, voters, civil servants and lawyers in the Province of British Columbia demonstrates that the purpose of the citizenship requirement in all of the statutes in which it is now found is to identify persons who play an important role in the governmental process. It is also significant that the citizenship requirement has been imposed by the Legislature, rather than the Law Society, thus underlining its purpose as defining the political community.

54. The requirement that lawyers be citizens is surely more relevant in Canadian society today than the very common and presumably reasonable requirement that a lawyer be a British subject, which previously existed in British Columbia and still exists in other Provinces.

55. It is submitted that the following comments of learned Trial Judge are apt:

> "I think it understandable in Canada, which is both a country based, as the preamble to our Charter emphasizes, on the rule of law and a federal state in which the courts must review the work of the elected legislators, that there should be a desire that those engaged in the legal process be themselves citizens. I think it rational and reasonable that such a requirement should extend to all whose work is essential to the operation of the system: lawyers, jurors and judges alike.": Case, p. 81

56. In conclusion, therefore, it is submitted that the citizenship requirement in s. 42 of the Barristers and Solicitors Act is reasonable and fair and thus does not violate the provisions of s. 15 of the Charter. It is, therefore, unnecessary to rely on s. 1 of the Charter as a justification for s. 42 of the Barristers and Solicitors

Act. Were it necessary, the Attorney General submits that the Province has a legitimate interest in defining its political community to include the legal profession and that distinguishing members of the polity by reference to "citizenship" is a reasonable and proportionate means of attaining this objective.

Reference: Oakes v. The Queen, supra, @ 135

PART IV

NATURE OF ORDER SOUGHT

1. That the appeal be allowed and the Order of the British Columbia Court of Appeal set aside and the Petition of the Petitioner be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

J. Arvay

JOSEPH J. ARVAY, ESQ.
Counsel for the Appellant, the
Attorney General of British Columbia

DATED: this 11th day of May, 1987
Victoria, British Columbia

PART V

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