

IN THE SUPREME COURT OF CANADA
(in Appeal from the Court of Appeal for the Province of British Columbia)

BETWEEN:

19955

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 KINERSLEY

Co-Respondent

— and —

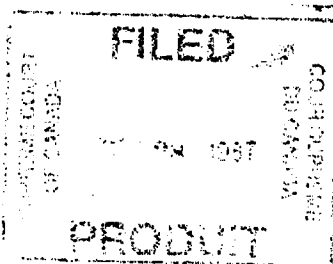
THE ATTORNEY GENERAL OF ALBERTA
THE ATTORNEY GENERAL OF SASKATCHEWAN
THE ATTORNEY GENERAL OF ONTARIO
PROCUREUR GÉNÉRAL DE LA PROVINCE DE QUÉBEC
FEDERATION OF LAW SOCIETIES OF CANADA
— FÉDÉRATION DES BARREAUX DU CANADA

Intervenants

FEDERATION FACTUM

Fraser & Reatty
P.O. Box 100
First Canadian Place
Toronto, Ontario
M5X 1B2
(416) 863-4635

Solicitors for the Federation
(Intervenant)



Gowling and Henderson
160 Elgin Street
Ottawa, Ontario
K1N 8S3
(613) 232-1781

Ottawa Agents for the
Solicitors for the Federation
(Intervenant)

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PART I:

FACTS

1. The facts are not in issue. Counsel adopts Part I of the Factum of the Appellant the Law Society of British Columbia and adds the following.

10 2. The members of the Federation are the 11 Provincial Law Societies of Canada. Counsel here appears for the Law Societies other than the Law Society of British Columbia pursuant to the Order of McIntyre J., dated April 21st 1987, permitting the Federation to intervene.

Appendix "A" : page 9

20 3. The remaining 10 Provinces all have, as a requirement for admission to the Law Society, proof of Canadian citizenship. Two Provinces have the alternative qualification of permanent resident; but one that intends to become a citizen. These are:

Manitoba

30 An applicant for admission who is not a Canadian citizen must give the Manitoba Law Society an undertaking that he will become a Canadian citizen at the earliest possible date; if the applicant fails to become a Canadian citizen within a period of 4 years after lawfully being admitted to Canada for permanent residence, he ceases to be entitled to carry on in practice and his name shall be
40 struck off the Rolls.

New Brunswick

50 A permanent resident may be called provided he files with the New Brunswick Law Society a declaration under oath that he has applied, or intends, as soon as he is eligible, to apply for Canadian citizenship.

Appendix "B": Provincial Law Society Statutes - commencing page 11

PART II
POINTS IN ISSUE

4. Counsel adopts Part II of the Factum of the Appellant the Law Society of British Columbia and desires to contend that citizenship does not fall within S.15 of the Charter at all.

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PART III
ARGUMENT

5. Counsel supports the argument of the Law Society of British Columbia but respectfully presents hereunder an additional alternative submission.

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6. It is submitted that the threshold question which the learned Justice of Appeal presents, after discussion of general principles, is wrongly decided. Madame Justice McLachlin devotes but one paragraph to her important decision that distinction on the basis of citizenship is capable of falling within S.15 of the charter.

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Reasons: Case, page 104 (foot) to page 105 (top).

7. To support her conclusion that citizenship falls within the general wording of S.15, the learned Justice advances only two reasons:

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- and
- (a) the XIV Amendment to the U.S. Constitution,
 - (b) that citizenship possesses characteristics similar to ethnic origin.

8. As to (a), we are construing our Constitution, not America's. Section (1) of the Rēconstruction Amendment XIV refers to citizenship. S.15 does not. The XIV Amendment was passed as a result of the U.S. Supreme Court's decision in

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Scott v Sandford (1857) 60 US 393

Tribe: American Constitutional Law
1978, page 278

10 9. As to (b), one is born with ethnic origin. No one has a choice. Citizenship may be deliberately acquired. In Canada it is relatively easy.

10. It is submitted that the construction placed by the learned Justice on S.15 of the Charter is not supportable.

Counsel proceeds to consider the parts of S.15 separately

20 S.15(1)

11. What is complained of by Andrews is the distinction between the status of a citizen of Canada and that of a permanent resident. It is contended that this is discrimination.

30 12. It is submitted that such discrimination as may exist does not fall within the ambit of S.15(1) of the Charter.

40 13. The discrimination is not based on any of the particularised headings of S.15(1). Andrews would have exactly the same complaint if, as a permanent resident, he had been a Chinese Buddhist, a Pakistan Muslim or an African agnostic. The complaint is that as a permanent resident he did not have the status of a Canadian citizen and therefore was not entitled to be admitted to the Law Society of British Columbia.

50 14. The particularised headings of S.15(1) have in common that they describe human characteristics beyond the control of the individual. As such the persons referred to are thought worthy of protection against discrimination.

15. Citizenship does not fit into those particularised headings. It is difficult to contend that citizenship was left out by accident when citizenship is mentioned in other parts of the Charter referred to hereafter.

10 16. Can, then, Andrews fit himself into the general introductory wording of S.15(1)? It is submitted he can not, because by the Charter itself a distinction between the status of a citizen and that of a permanent resident has been recognised. See:

- S.3 Citizens rights to vote
- S.6(1) and (2) Mobility rights
- 20 S.23(1)(2) and (3) Childrens' language of instruction.

17. It is submitted that the framers of the Charter did not intend that S.15 could be invoked to invalidate the distinction otherwise made in the Charter between citizens and permanent residents.

30 18. Otherwise the rights given to Canadian citizens by the sections of the Charter referred to in paragraph 16 above are liable to be held to infringe or deny the rights of permanent residents. This cannot be intended.

40 19. It is conceded that permanent residents have rights given by the Charter. It is not possible to interpret those sections which commence (awkwardly) "everyone", "any person", "every individual", "any member of the public", or "anyone" - as indeed in S.24 - as excluding permanent residents. Presumably these wide descriptions include students, visitors, Convention refugees, those admitted by Minister's permits, event, possibly, aliens illegally in Canada.

50 20. The Court does not have to decide the meaning of, or the reason for, the sporadic wide descriptions. But Counsel points out that if a qualification of citizenship is held to be

discriminatory against permanent residents, it may also be discriminatory against other categories of persons who have residence in Canada.

S.15(2)

10 21. Alternatively, it is submitted that the Citizenship Act 1974-75-76 c.108 is a law that has as its object the amelioration of disadvantaged individuals ... etc., within the meaning of S.15(2) of the Charter.

20 22. Prior to 1947 the only badge of citizenship was British subject, whether a person was born in Canada or elsewhere in the Commonwealth. Aliens who acquired the status of landed immigrant were able to become British subjects by naturalisation after a residency period of 5 years.

30 23. This was altered by the Canadian Citizenship Act 1946, 10 George VI, c.15. This provided for citizenship broadly confined to those born in Canada and others born abroad who had 5 years residence in Canada. The latter had to obtain a Certificate of Citizenship as proof of citizenship, e.g. to obtain a Canadian passport.

40 24. The present Act, the Citizenship Act S.C. 1974-75-76, c.108, improves the position of the alien:

40 - (By the Immigration Act, S.C. 1976-1977, c.52 the term "landed immigrant" is abandoned in favour of "permanent resident".)

- By the Citizenship Act, permanent residents may obtain citizenship with 3 years residence instead of the former 5: S.5(1)(b).

50 - Even the requirement of 3 years residence may be waived by the Minister: S.5(3).

- There is provision for special cases: S.5(4).

- A right of appeal: S.13(3)
- Special Citizenship Courts are established with citizenship Judges: S.25.
- Real and personal property may be acquired and disposed of by a person not a citizen in the same manner as by a citizen: S.33.
- A person who is not a Canadian citizen is triable at law in the same manner as if he were a Canadian citizen: S.34.

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25. To summarise the above, the Citizenship Acts have removed the advantage that British subjects born other than in Canada had historically enjoyed. This ameliorated the conditions of individuals and groups set out in S.15(2) of the Charter. The present Act continues the amelioration process by making it easier for aliens to become citizens of Canada. Aliens of whatever nationality are on the same footing in obtaining citizenship.

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General

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26. In emigrating to British Columbia, Andrews had two main qualifications: English as a native tongue and a successful career in law at Oxford University.

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27. By virtue of these, it is submitted that he obtained a short-cut to the Bar and was not required to go through 3 years of a Canadian Law School. Consequently, after completing articles and a Bar Admission Course, he had not fulfilled the residency requirement of 3 years under the Citizenship Act.

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28. The point is that there can be few persons in the position of Andrews. Generally speaking, it is submitted, young people from abroad who wish to make Canada their home and practice the law, go through 3 years of Law School here. Afterwards, the length varying with the Provinces, they may have to go through a period of articling and a Bar Admission Course. In this manner

they easily qualify as citizens for the 3 year period and may be admitted to the Law Society of the Province.

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29. On the other hand, if this Court should strike down citizenship as a qualification for membership in the legal profession, the decision will likely mean that Federal and Provincial Statutes requiring citizenship for appointment to other public offices are rendered vulnerable. Such a result can affect thousands upon thousands of people.

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30. The Secretary of State for Canada conducted a survey of the Federal and Provincial Statutes up to the year 1977 and identified approximately 90 Federal Statutes and more than 500 Provincial Statutes that contain references to requirements or privileges dependent on citizenship. The Report was published under the title "Citizenship as Legal Access" in February, 1979. Counsel has had access to a copy from the Secretary of State's Library. Catalogue: SOS Cit.Br. 1979 (1), c.3.

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31. It is only natural that Parliament and the Legislatures should find citizenship a sensible and useful qualification for public office of all kinds.

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32. The Law Societies view it as important that lawyers should be citizens, or at least those who undertake to become citizens. The Law Societies view it as undesirable that some of their members should neither be committed to, nor connected with, the Government of Canada.

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PART IV
ORDER REQUESTED

33. It is submitted that the appeal should be allowed and the Petition dismissed.

All of which is respectfully submitted

TORONTO
May 1987

P.B.C. Pepper
P.B.C. Pepper
Federation Counsel

PART V
LIST OF AUTHORITIES

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- 1. Canadian Citizenship Act 1946, 10 George VI, c.15 5
- 2. Citizenship Act 1974-75-76 c.108 5
- 3. Citizenship as Legal Access - Secretary of State Library: SOS Cit.Br. 1979(1) c3 7
- 4. Scott v Sandford (1857) 60 US 393 3
- 5. Tribe: American Constitutional Law, 1978, page 278 3

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