17537

No. 17537

IN THE SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal for the Province of Ontario)

IN THE MATTER OF an application by Joel Skapinker under Sections 6, 24 and 52 of The Constitution Act 1982;

AND IN THE MATTER OF a constitutional challenge to Section 28(c) of The Law Society Act, R.S.O. 1980, Chapter 233;

AND IN THE MATTER OF the Supreme Court of Ontario Rules of Practice, Rules 10, 11, 611 and 612 of The Interpretation Act, R.S.O. 1980, Chapter 291, Section 29;

RE: THE LAW SOCIETY OF UPPER CANADA

Appellant
(Respondent)

- and -

JOEL SKAPINKER

Respondent
(Applicant)

- and -

THE ATTORNEY GENERAL OF CANADA,
THE ATTORNEY GENERAL OF BRITISH COLUMBIA,
THE ATTORNEY GENERAL OF ONTARIO,
THE ATTORNEY GENERAL OF SASKATCHEWAN,
LE PROCUREUR GENERAL DU QUEBEC,
FEDERATION OF LAW SOCIETIES OF CANADA
- FEDERATION DES BARREAUX DU CANADA,
JOHN CALVIN RICHARDSON

Intervenants

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for the Appellant (Respondent)

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APPELLANT'S FACTUM

PART I

Statement of Facts

1. The Respondent Joel Skapinker, a citizen of South Africa, came to Canada in June of 1977 and was made a permanent resident of Canada on April 1, 1981. At the time of his arrival

in Canada, he held law degrees from the University of Witwatersrand in Johannesburg, South Africa, and from the University of London, England. After arrival in Canada, he obtained the degrees of LL.B. and LL.M. from McGill University and during the years 1979 and 1980, articled with a Toronto law firm. In 1980 to 1981, he attended and successfully completed the Bar Admission Course of The Law Society of Upper Canada, and aside from the fact that he was not yet a Canadian citizen, had satisfied the requirements that would entitle him to be called to the Bar of Ontario.

2. Section 28 of The Law Society Act, (R.S.O. 1980, c. 233, see Appendix "A"), required among other things that applicants for call to the Bar be Canadian citizens or other British subjects. The Respondent had applied for Canadian citizenship but would not be eligible to obtain his citizenship until in or about the month of April, 1983.

3. The Respondent claimed that by virtue of Section 6(2)(b) of The Canadian Charter of Rights and Freedoms, Section 28(c) of The Law Society Act was inoperative and of no force and effect to the extent that it discriminates between Canadian citizens and permanent residents of Canada.

4. At all material times, the Respondent was a resident of Ontario and the evidence put forward in his Affidavit did not disclose any element of mobility.

5. The application was heard by The Honourable Mr. Justice Carruthers, who, on July 16, 1982, dismissed the application.

6. The Respondent then appealed to the Court of Appeal for Ontario, and with the consent of The Law Society, the appeal was expedited and heard by the Ontario Court of Appeal on

December 7, 1982, when Judgment was reserved. Subsequently, on January 27, 1983, the majority in the Court of Appeal allowed the appeal and made a declaratory order as requested. (see formal Order, Case on Appeal, P. 38).

7. Leave to appeal to this Court was granted on the 2nd day of February, 1983, (see Order, Case on Appeal, P. 6), and since that time, the following parties have intervened in this appeal:-

The Attorney General of Canada
The Attorney General of British Columbia
The Attorney General of Ontario
The Attorney General of Saskatchewan
Le Procureur General Du Quebec
Federation of Law Societies of Canada
- Federation Des Barreaux Du Canada
John Calvin Richardson

8. Subsequent to leave to appeal being granted, the Respondent, upon undertaking to complete his application for citizenship, was called to the Bar of Ontario in April of 1983, and has since become a Canadian citizen.

9. The Affidavit of the Intervener John Calvin Richardson, reveals the following facts:-

He was born in the United States, is still an American citizen, and is a member of the Bar of the State of Massachusetts. He has lived in Canada since 1968 and is a permanent resident of Canada. He received a Bachelor of Law Degree in 1980 from Queen's University in Kingston, Ontario, was articled to a law firm in Toronto from July, 1980 to the end of June, 1981, and successfully completed the Bar Admission Course of The Law Society of Upper Canada. He is not a Canadian citizen and does not intend to become a citizen of Canada. He has been advised by The Law Society of Upper Canada that his application

to be admitted as a barrister and solicitor will not be accepted unless he becomes a citizen of Canada or submits an undertaking to become a Canadian citizen at the earliest opportunity.

10. An Order staying the operation of the Court of Appeal Order was made in the Supreme Court of Ontario by The Honourable Mr. Justice Montgomery, on April 15, 1983, (see copy of Order, Case on Appeal, P. 17).

PART II

Errors Alleged in the Judgment Appealed From

11. The majority in the Court of Appeal erred in interpreting Section 6(2)(b) of The Canadian Charter of Rights and Freedoms as if it stood separate and apart from the other parts of Section 6, and as if it establishes a right to pursue the gaining of a livelihood that is unrelated to movement from one province to another.

12. The whole of Section 6 of the Charter, including its heading, should have been looked at in determining its meaning.

13. The majority in the Court of Appeal erred in holding that The Law Society Act, Section 28(c) (R.S.O. 1980, c. 233) was not a law of general application in Ontario.

14. It should have been found that the requirement of Canadian citizenship for members of the Bar of Ontario can be demonstrably justified in a free and democratic society.

PART III

Argument

15. The Appellant submits that the majority in the Court of Appeal have erred in interpreting Section 6(2)(b) of the Charter

in isolation from the other parts of the section. In support of this submission, reference will be made to Glenn v. Schofield (1928) S.C.R. 208 at 210 - 211.

16. The Appellant submits that for a proper interpretation of Section 6(2)(b), it is necessary to look at the whole of that section, including the heading which precedes it.

17. As pointed out in the dissenting Judgment of The Honourable Mr. Justice Arnup, at Page 62, L. 20 - 30, Section 6 of the Charter should not be interpreted as establishing, as a separate right, the "right to work".

18. The Appellant further submits that if there was an intention to enact as a part of the Charter of Rights the "right to work" as a separate right, it would be too important a right to be buried in a subsection of another provision that otherwise deals with mobility rights.

19. The Appellant further submits that if there was an intention to establish as a separate right the "right to work" it would have been plainly stated that it was a Canada wide right and the reference to "any province" would be inappropriate. While it is possible by a reference to Section 30 of the Charter to extend the meaning of "province" to include the territories, this would be a most awkward way of proclaiming such an important right.

20. The majority in the Court of Appeal have acknowledged that the argument that is contrary to their interpretation of the Charter of Rights "has much force". (See Reasons for Judgment, Mr. Justice Grange, Case on Appeal, P. 46, L. 12). Four reasons are then given for rejecting the Appellant's argument. The

Appellant submits that the reasons given by Mr. Justice Grange for rejecting the argument are not convincing. These reasons are now dealt with in the order in which they are stated.

First Reason

"what the subsection plainly says"
(A.C., P. 46, L. 18 - 20)

The Appellant submits that this was the wrong approach. The subsection's main meaning cannot be taken as a guide to interpretation without looking at the other parts of the section.

Second Reason

"clause (b) is separated from clause (a) which clearly implies a movement from province to province and it would have been easy to join the two clauses"
(A.C., P. 46, L. 20 - 30)

The Appellant submits that subclauses (a) and (b) are joined by the use of the word "and" and they are both subclauses of subsection (2) and that they are not two separate clauses as is suggested.

Third Reason

"subsection (3) refers to rights"
(A.C., P. 46, L. 39 - 43)

The Appellant submits that this can have no significance. No matter how one separates or reads together the various parts of subsection (2) it is appropriate to use the word "rights" in the plural in subsection (3) since subsection (2) speaks of: (1) the right to move to any province; (2) the right to take up residence in any province; and (3) the gaining of a livelihood;

Fourth Reason

"the confining of clause 6(2)(b) to persons on the move,.....would give a person who moves to another province rights that he would not have possessed had he stayed at home"

(A.C., P. 48, L. 40 - 45)

This proposition would appear to be based on the erroneous assumption that before the enactment of the Charter, a person who stayed at home did not have the right to pursue the gaining of a livelihood. The Appellant submits that this in turn, supports the proposition that if a right isn't to be found in the Charter, it doesn't exist. The Appellant submits that the only problem that has ever existed in Canada which could have prompted the enactment of subsection (2) of Section 6 of the Charter has been the problem that has sometimes arisen in the past, when some provinces have attempted to deny employment to transient workers who come into the province to work on certain projects. Subsection (4) of Section 6 lends support to this interpretation and to the object that was to be achieved by the enactment of Section 6(2).

21. The Appellant further submits that the use of the terms "citizen" and "permanent resident" of Canada in subsection (2) of Section 6 was to distinguish these persons as a group from aliens, transients or visitors who would require a work permit to work in Canada, and it was not intended to give special rights to permanent residents as a class, as has been found by the majority in the Court of Appeal.

22. While it may not be necessary to look at the heading that precedes Section 6 "Mobility Rights" to interpret the true meaning of the section, the Appellant submits that the authorities

do not support the view that the heading should be entirely disregarded. On this point, reference will be made to the following authorities:-

> Canadian Charter of Rights and Freedoms - Commentary, Tarnopolsky and Beaudoin, 1982, Page 247, where Pierre Blache states, "the wording of sub-s. 6(2)(b) is in perfect accord with the title of the section, as it deals with the place where one may gain livelihood and grants the right to do so "in any province". The object of the section is to abolish the barrier raised by provincial borders. The section is not intended to do more, and one must not read into it a right to work which would assume the abolition of several other obstacles."
>
> Lawrie v. Rathbun, (1879) 38 U.C.Q.B. 255 at 260;
>
> D.P.P. v. Schildkamp, (1971) A.C. 1 at P. 28;
>
> Lloyd's Bank Ltd. v. Secretary of State for Employment, (1979) 2 All E.R., 573 at 577 where Talbot, J. stated, "It would seem therefore that it is permissible to look at the cross-heading and to take it into account in considering the words of the enactment that it governs, although care must be taken not to attach more weight to it than to the words of the section, and it should not be a controlling factor in the construction of the section."

23. The Appellant submits that in dealing with the significance to be attached to the heading, the judges in the Court of Appeal should not have attached significance to the decision in Attorney General of Canada v. Jackson, (1946) S.C.R. 489 because the section of the statute that was being considered in that case was not part of the statute as it was originally enacted. It was added by way of amendment and a place had to be found for it, and as was pointed out by Mr. Justice Rand, the new section could just as easily have been placed under a different heading and it might have been enacted as a separate statute, whereas in this case, the Charter has been carefully prepared as a complete document and Section 1 makes reference to "the rights and freedoms set out in it", thus it is to be expected that the different rights shall be found under

the headings which follow.

24. The Appellant submits that the majority in the Court of Appeal have erred in reaching the conclusion that Section 28 of The Law Society Act is not a law of general application and that the majority have misinterpreted the decision in this Court in Kruger and Manuel v. The Queen, (1978) 1 S.C.R. 104. Mr. Justice Grange states at Page 52 of the Reasons, (when dealing with Section 28 of The Law Society Act),

> "It is not a law of general application; when its effect is examined, it applies only to permanent residents of Canada".

In the Manuel case, Mr. Justice Dickson stated,

> "The law must not be 'in relation to' one class of citizens in object and purpose. But the fact that a law may have graver consequence to one person than to another does not on that account alone make the law other than one of general application. There are a few laws which have a uniform impact".

The Appellant submits that the majority have misinterpreted and misapplied this statement of the law and the Appellant adopts the reasoning of Mr. Justice Arnup where he deals with this point in his Reasons for Judgment at the bottom of Page 64 and the top of Page 65, A.C., and of Mr. Justice Carruthers at Page 34 - 36 A.C.

25. The Appellant further submits that the statement of Mr. Justice Grange that, when the effect of Section 28 of The Law Society Act is examined, "it applies only to permanent residents of Canada" is erroneous. The effect of Section 28 extends not only to permanent residents of Canada, but also to nationals of other countries, visa visitors to Canada, holders of work permits in Canada, and other persons, including for example

American lawyers residing in the United States, who might find it to their advantage to be members of the Bar of Ontario.

26. The Appellant further submits that when Mr. Justice Dickson in the Kruger case spoke of "one class of citizens" he was referring to a fixed and identifiable class of people (in that case Indians). It is submitted that it would be erroneous to refer in the same context to "permanent residents" as constituting a "class" of people for the simple reason that the words "permanent resident" describe an everchanging group of people, most of whom eventually become citizens. For the same reason, it might be said that single people and married people in Canada do not constitute separate "classes" of the kind to which Mr. Justice Dickson made reference in the Kruger case.

27. The Appellant further submits that being called to the Bar involves substantially more than the mere right to pursue the gaining of a livelihood. When a person is called to the Bar he becomes an officer of the Court. He must respond to calls for his services when requested to do so by the Court or by an impecunious client whether or not Legal Aid may be available. When functioning as an officer of the Court, a lawyer is not necessarily pursuing the gaining of a livelihood.

28. The Appellant submits that the Ontario legislation dealing with this point should be looked at in determining whether or not the Law Society Act is of general application. Reference will be made to the following:

Statutes Revision Act, Statutes of Ontario, 1979, c. 109 (see Appendix "B");

Re Ontario Medical Act, (1907) 13 O.L.R. 501 at 505 where Chief Justice Moss stated, "I am not one of those who are of the opinion that the Ontario Medical Act is an act not passed in the public interest. That it is a public act in the fullest sense and not merely a private act is shown by its inclusion in the Revised Statutes".

29. If, for the reasons given by the majority in the Court of Appeal, The Law Society Act is not an act of general application, then by the same reasoning many other statues, both provincial and federal, would fail to qualify as acts of general application. For example, see the following legislation:-

Notaries Act, R.S.O. 1980, c. 319, s. 2;

Public Officers Act, R.S.O. 1980, c. 415, s. 1;

Regulation 791, s. 32 under the Ontario Police Act;

Regulation under the Royal Canadian Mounted Police Act Consolidated Regulations of Canada, 1978, Volume XV, c. 1391, s. 51(1) & (2);

(Note that the above acts require citizenship as a condition of employment although under the last mentioned regulation, there is a power to appoint someone who is not a Canadian citizen to the Royal Canadian Mounted Police Force where Canadian citizens are not available).

30. If it should become necessary to decide the question the Appellant submits that the requirement of Canadian citizenship for members of the Bar of Ontario can be demonstrably justified in a free and democratic society. The Appellant submits that the requirement is more plainly obvious in relation to members of the Bar than it is in legislation respecting voting rights. See the Canada Elections Act, R.S.C. 1970 (1st Supp.) c. 14, s. 14(1)(b) and Ontario Elections Act, R.S.O. 1980, c. 133, s. 10(1)(b), and see also the Charter of Rights itself, s. 3, which guarantees voting rights only to citizens of Canada.

31. The question of whether lawyers ought to be Canadian citizens has been the subject of much investigation and inquiry in Ontario, and as recently as 1980, the matter was dealt with at length in the report of the Professional Organizations Committee (a provincial inquiry). An extract from the report of this Committee appears as Appendix "C" hereto.

32. The Appellant further submits that no assistance can be obtained from American cases based upon a constitution that differs markedly from the Canadian Constitution, nor can any useful conclusion be drawn because of changes that were made in the laws of the United Kingdom connected with its entry into the European Common Market.

33. In addition to the authorities mentioned above, reference will also be made to the following authorities:-

Malartic Hygrade Gold Mines Ltd. v. The Queen 1982, 142 D.L.R. (3d), 512;

Basile v. Attorney-General of Nova Scotia (1983) 148 D.L.R. (3d), 382 at 383 and 384;

Re Allman et al. And Commissioner of the Northwest Territories (1983) 144 D.L.R. (3d) 467 at 479 - 480;

Black v. Law Society of Alberta (1983) 144 D.L.R. (3d) 439 at 444 - 445;

Poirier v. Simmonds, July 6, 1983, FCTD, Judge Mahoney (not yet reported)

Reference Re Anti-Inflation Act, (1976) 2 S.C.R. 373

Comments made in the House of Commons by the Minister of Justice in introducing the Resolution which gave rise to the legislation; (See Appendix "D").

PART IV

Nature of the Order Requested

34. The Appellant will ask that the appeal be allowed and that the Order of the Court of Appeal be vacated and set aside, and the dismissal of the application be restored.

All of which is respectfully submitted,

BRENDAN O'BRIEN
Of Counsel for the Appellant

List of Authorities

16. Malartic Hygrade Gold Mines Ltd. v. The Queen 1982, 142 D.L.R. (3d) 512; 12

17. Basile v. Attorney-General of Nova Scotia (1983) 148 D.L.R. (3d), 382 at 383 and 384; 12

18. Re Allman et al. and Commissioner of the Northwest Territories (1983) 144 D.L.R. (3d) 467 at 479 - 480; 12

19. Black v. Law Society of Alberta (1983) 144 D.L.R. (3d) 439 at 444 - 445; 12

20. Poirier v. Simmonds, July 6, 1983, FCTD, Judge Mahoney (not yet reported) 12

21. Reference Re Anti-Inflation Act, (1976) 2 S.C.R. 373 12

22. Comments made in the House of Commons by the Minister of Justice in introducing the Resolution which gave rise to the legislation (See Appendix "D") 12