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,

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 219, 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

FACTUM OF THE ATTORNEY GENERAL OF CANADA

(for a list of the solicitors and their Ottawa agents, please see inside front page)

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FACTUM OF THE ATTORNEY GENERAL OF CANADA

PART I

1. The Attorney General of Canada accepts as

correct the facts set out in Part I of the Appellant's factum, as modified by paragraph 3 of the Respondent's factum.

2. Subject to paragraph 3 herein, the Attorney General of Canada accepts as correct the facts set out in Part I of the Respondent's factum.

3. While he accepts the facts set out in paragraph 2 of the Respondent's Factum, the Attorney General of Canada states that the evidence discloses no elements of mobility in this matter at a time material to the issues raised by this appeal. It appears that the Respondent has been living continuously in the province of Ontario since sometime during 1979 when he articled with two Toronto law firms. Since then, there is no indication in the record that he has ever moved from that city. The Respondent only became a permanent resident of Canada and, hence, first entitled to make a claim under subsection 6(2) of the Canadian Charter of Rights and Freedoms (hereinafter referred to as "the Charter of Rights"), on April 1, 1981. By that date, the evidence suggests that the Respondent had already been in Canada for 46 months and that he had had a fixed residence in Ontario for at least 18 months.

Affidavit of Joel Skapinker, preamble and paras. 2, 4 and 5, Case On Appeal, pp. 21 and 22

The Immigration Act, 1976, S.C. 1976-77, c. 52, s. 2, definition of "permanent resident"

The Law Society Regulations, R.R.O. 1980, Reg. 573, s. 22(4)

PART II

POINTS IN ISSUE

4. The Attorney General of Canada intervened in this appeal on the basis of the constitutional question stated as follows:

> Is Section 28(c) of The Law Society Act, R.S.O. 1980, Chapter 233, insofar as it excludes from its benefit persons having the status of permanent residents of Canada, inoperative and of no force and effect by reason of Section 6 of the Constitution Act 1982?
>
> Dans la measure où l'alinéa 28(c) de The Law Society Act, R.S.O. 1980, chapitre 233, exclut les personnes qui ont le statut de résidents permanents du Canada, est-il inopérant et sans effet en raison de l'article 6 de la Loi constitutionnelle de 1982?
>
> Order of The Right Honourable The Chief Justice of Canada, March 23, 1983, Case on Appeal, p. 13 at 14

5. In the particular circumstances of the present case, this constitutional question raises three issues:

(a) Does paragraph 6(2)(b) of the Charter of Rights apply in a case such as this, having no aspects of inter-provincial mobility?

(b) If so, is paragraph 28(c) of The Law Society Act saved by paragraph 6(3)(a) of the Charter of Rights on the ground that it is a law "of general application in force in a province"?

(c) If not, is paragraph 28(c) of The Law Society Act such a reasonable restraint "as can be demonstrably justified in a free and democratic society" under section 1 of the Charter of Rights?

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It is the position of the Attorney General of Canada that the first two questions should be answered in the negative. No submissions will be made in respect of the third question.

PART III

ARGUMENT

A. Section 6(2)(b) - Inter-provincial Mobility Rights Only

6. The Attorney General of Canada respectfully submits that the majority in the Ontario Court of Appeal erred in concluding that paragraph 6(2)(b) of the Charter of Rights applies where, as here, it is sought to exercise the right conferred thereby in the claimant's province of origin and as a right unrelated to inter-provincial mobility.

Reasons for Judgment, Grange J.A., Case on Appeal, p. 45, ll. 18-30; p. 48, ll. 38 to p. 49, l. 10

7. The impugned provisions of The Law Society Act state:

> 28.(c) the persons, being Canadian citizens or other British subjects,
>
> (i) who are members on the 31st day of December, 1980, or
>
> (ii) who after that day successfully complete the Bar Admission Course and are called to the bar and admitted and enrolled as solicitors, or
>
> (iii who after that day transfer from a jurisdiction outside Ontario and are called to the bar and admitted and enrolled as solicitors;
>
> are members and entitled to practise law in Ontario as barristers and solicitors;

The Law Society Act, R.S.O. 1980, c. 233, s. 28(c)

8. The relevant provisions of the Charter of Rights are as follows:

> 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> Mobility Rights
>
> 6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.
>
> (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
>
> (a) to move to and take up residence in any province; and
>
> (b) to pursue the gaining of a livelihood in any province.
>
> (3) The rights specified in subsection (2) are subject to
>
> (a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
>
> (b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

> (4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

Canada Act 1982 (U.K.), c. 11, The Constitution Act, 1982, Part I

9. Subsection 52(1) of the Constitution Act 1982 provides as follows:

> 52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Canada Act 1982 (U.K.), c. 11, Constitution Act, 1982, Part VII

10. It is respectfully submitted that the clear, and only, intention of subsection 6(2) of the Charter of Rights was to prohibit any province from erecting barriers against persons resident outside the province which would prevent such persons from coming into the province to live or work. This provision was never intended to address purely intra-provincial issues of any kind. Arnup J.A., in his dissenting judgment in the Court of Appeal, stated it as follows:

> The nub of the problem in this case is: what is meant by the right given in cl. (b) of s-s.(2) - the right "to pursue the gaining of a livelihood in any province? In my view, this is not a "right to work" clause. It is a clause intended to prevent the erection by any

province of barriers established to keep out persons from another province seeking to enter its work force as part of a provincial policy to establish or preserve a preference for its own residents. The permanent resident who goes to another province has a right to pursue the gaining of a livelihood there ... but must comply with the local laws concerning the qualifications ... (except laws discriminating on the basis of past or present province of residence).

Reasons for Judgment, Arnup J.A. (dissenting), Case on Appeal, p. 57 at 62, ll.18 to 43

The Court of Appeal Decision is now reported as: Re Skapinker and The Law Society of Upper Canada (1983), 145 D.L.R. (3d) 502 (Ont. C.A.)

Malartic Hygrade Gold Mines Ltd. v. The Queen in Right of Quebec (1982), 142 D.L.R. (3d) 512 (Que. S.C.) at 520, 521 per Deschênes C.J.S.C.

Re Allman and Commissioners of the Northwest Territories (1980), 144 D.L.R. (3d) 467 (N.W.T.S.C.) at 479-480

Black v. Law Society of Alberta (1983), 144 D.L.R. (3d) 439 (Alta. Q.B.)

Basile v. Attorney General of Nova Scotia (1983), 148 D.L.R. (3d) 382 (N.S.S.C.T.D.)

11. On the other hand, the majority of the Court of Appeal and the Respondent both maintain that the rights conferred by paragraph 6(2)(b) of the Charter of Rights apply intra-provincially and in the absence of any aspect of mobility, in effect establishing a "right to work".

Reasons for Judgment, Grange J.A., Case on Appeal, p. 40 at 45, l. 32 to p. 46, l. 16; p. 48, l. 38 to p. 49, l. 10

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Reasons for Judgment, Arnup J.A. (dissenting) Case on Appeal, p. 57 at 62, l. 24; and at p. 63, ll. 14-41

Respondent's Factum, pp.8 - 11, paras. 12-16

12. It is respectfully submitted that this latter interpretation, denying the exclusively inter-provincial character of subsection 6(2) of the Charter of Rights, is flawed by two principal errors. First, this construction
20 requires that paragraph 6(2)(b) be construed in isolation, in disregard of the context in which it appears. Secondly, this interpretation deprives the words "in any province" in paragraph 6(2)(b) of any meaning whatsoever. Each of these errors is considered separately below.

(i) Paragraph 6(2)(b) in Context

13. It is submitted that the Appellant and Arnup, J.A., dissenting in the court below, are both correct in approaching the interpretation of paragraph 6(2)(b) of the Charter of Rights by examining that provision "on the context of section 6 as a whole". While it is axiomatic
30 that, wherever possible, words in a statute must be interpreted in their ordinary and grammatical sense, it is

equally true that the legislation in question must be read in its entirety before it can be said whether "words are or are not clear and unambiguous". So, the House of Lords held in Attorney General v. Prince Ernest Augustus of Hanover, [1957] A.C. 436 per Viscount Simonds at page 461:

> For words, and particularly general words, cannot be read in isolation: their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use "context" in its widest sense, which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in pari materia, and the mischief which I can, by those and other legitimate means, discern the statute was intended to remedy.

And further at p. 463:

> On the other hand, it must often be difficult to say that any terms are clear and unambiguous until they have been studied in their context. That is not to say that the warning is to be disregarded against creating or imagining an ambiguity in order to bring in the aid of the preamble. It means only that the elementary rule must be observed that no one should profess to understand any part of a statute or of any other document before he had read the whole of it. Until he has done so he is not entitled to say that it or any part of it is clear and unambiguous.

So, too, in D.P.P. v. Schildkamp, [1971] A.C. 1 (H.L.) Lord Upjohn stated at pp. 22-23:

> The argument of counsel for the appellant was straightforward. Reading subsection (3) he submits truly that its terms are perfectly clear and simple. There is no ambiguity; the subsection clearly applies so as to create an offence on the part of a person knowlingly carrying on a business with intent to defaud creditors of the company or creditors of any other person or for any fraudulent purpose, and the circumstances that the company may subsequently have been would up is quite irrelevant. The subsection plainly applies as a matter of language to the case where there has been no subsequent winding up. Looking at that subsection alone, I agree. Naturally he relies upon the contrast between subsection (1) where there is a reference to winding up and subsection (3) where there is not; a point to which I shall return later.
>
> But, my Lords, this, in my opinion, is the wrong approach to the construction of an Act of Parliament. The task of the court is to ascertain the intention of Parliament: you cannot look at a section, still less a subsection, in isolation, to ascertain that intention; you must look at all the admissible surrounding circumstances before starting to construe the Act. (emphasis added)

Appellant's Factum, p. 5, para. 16

Reasons for Judgment, Arnup, J.A. (dissenting) Case on Appeal, p. 57 at 57, ll. 18, p. 62, ll. 45 to p. 63, ll. 12

Driedger, Construction of Statutes (2nd Ed., 1983) p. 89

14. When one reads paragraph 6(2)(b) in the context of both section 6 and the Charter of Rights as a whole, it becomes clear, it is submitted, that that paragraph confers strictly extra-provincial rights. Looking first at section 6 alone, it will be seen that all the other provisions relate to inter-jurisdictional mobility rights. Thus:

(a) subsection 6(1) deals with mobility rights in the international setting; even the right to "remain in ... Canada" is a mobility right in the sense that it affords a protection against unwanted mobility;

(b) paragraph 6(2)(a) deals with the right to move from one province to another and to establish a residence in any province;

(c) paragraph 6(3)(a), in limiting the mobility rights conferred by subsection (2), provides that no law of general application in a province may "discriminate ... primarily on the basis of province of present or previous residence", a protection that is only required for persons who have crossed an inter-provincial border;

(d) likewise, paragraph 6(3)(b), which permits the enactment of "reasonable residency requirements

as a qualification for the receipt of publicly provided social services", allows a limitation on the mobility rights conferred by subsection (2) that is only necessary where there is inter-provincial mobility; and,

(e) in subsection 6(4), provincial governments are authorized to introduce affirmative action programs "in a province" in favour of disadvantaged "individuals in that province", but only where the local unemployment rate exceeds the national average. Since this provision creates an exception to subsections (2) and (3), it permits affirmative discrimination in favour of residents of one province against persons originally resident in another province, which, again, relates to inter-provincial mobility rights.

15. It is clear from the foregoing that, in all of the other provisions of section 6, the rights, the exceptions to the rights, and the exceptions to the exceptions each relate to inter-jurisdictional mobility. The Attorney General of Canada therefore submits that, in this context, the most reasonable and consistent interpretation of paragraph 6(2)(b) is that it, too, was intended to apply solely in cases of inter-provincial mobility.

16. The Respondent argues in paragraph 11 of his factum that the structure of subsections 6(2) and 6(3) of the Charter of Rights is as follows:

> (1) "A statement in principle of the substantive rights guaranteed is set out in clauses 6(2)(a) and 6(2)(b);"
>
> (2) "An exception to those rights is set out in the opening words of subsection 6(3) ..."; and
>
> (3) "An exception to the exception is set out in the concluding words of clause 6(3)(a)..."

The Respondent then dismisses the Appellant's and Arnup J.A.'s interpretation of paragraph 6(2)(b) as a right related to inter-provincial mobility on the grounds that it is:

> ...contrary to the plain words of the provision, even when other parts of the section are considered...
>
> (emphasis added)

and that it is not

> in accordance with the clear structure of the statement of the rights and exception set out in the whole of section 6.
>
> Respondent's factum, p. 9, para 13

17. With respect, it is submitted that this argument is fallacious and begs the question. Until it is established what the "substantive rights guaranteed ... in

clause ... 6(2)(b)" are, it does not follow from the Respondent's logic that Arnup, J.A.'s interpretation of paragraph 6(2)(b) is inconsistent with "the clear structure" of section 6 as a whole. Indeed, for the reasons set out at length in paragraphs 14 and 15 herein, above, the very reverse is true. In effect, contrary to the Respondent's submission that this interpretation is based on the structure or context of section 6 as a whole, the underlined words above make it clear this is really an interpretation based on the literal or "plain meaning" of a few words only of paragraph (2)(b) of section 6, read without regard to the context in which they appear. This is the approach to statutory interpretation that was criticized in the two House of Lords decision cited above.

See paragraph 13 herein, supra

18. In addition to the conclusions that can be drawn from an examination of paragraph 6(2)(b) in the context of section 6 as a whole, further support for the Attorney General's interpretation of that provision as a right exclusively related to inter-provincial mobility is to be derived from its context within subsection 6(2). There can be no doubt, it is submitted, that paragraph (a) of subsection (2) relates only to inter-provincial mobility. Moreover, in the context of paragraph (a), it is the words "in any province" that convey the sense of mobility. Given this fact, the parallel structure of the two paragraphs as equal and subordinate parts of subsection (2), and the repetition of the identical words "in any province" in the two paragraphs, it is respectfully submitted that the grammatical form and syntax of this subsection tend to corroborate the interpretation of paragraph 6(2)(b) as an inter-provincial mobility right only.

19. There is another contextual reason why, in the respectful submission of the Attorney General of Canada, the Appellant's contention that paragraph 6(2)(b) relates only to inter-provincial mobility is sound. Both Grange J.A., speaking for the majority of the Court of Appeal, and the Respondent argue that paragraph 6(2)(b) is not limited to cases having an inter-provincial aspect. His Lordship stated this conclusion most succinctly as follows:

> "The reason, however, that to me seems to militate most strongly against the confining of cl. 6(2)(b) to persons on the move is that to do so would give a person who moved to another province rights that he would not have possessed had he stayed at home. I cannot accept that the drafters of this constitutional document had any such intention. The right was given to a person having the status of a permanent resident in any province and I believe that it was intended that he could exercise it in his province of origin or in another as he chose."
>
> Reasons for Judgment, Grange J.A., Case On Appeal, p. 40 at 48, l 38 to p. 49, l 10; and see ibid., pp. 45-47
>
> Respondent's Factum, p. 2, para. 2; pp. 8-12, paras. 12-17

20. In effect, as Arnup J.A. recognized in his dissenting judgment in the Court below, once the right conferred by paragraph 6(2)(b) is severed from any notion of trans-border mobility, it becomes "a right to work". Thus, His Lordship stated:

> It appears to me that the difference between my view and that of Grange J.A. on this point is in what we respectively

> see as the essential purpose of cl. (b). He sees it as emphasizing the right to work ...
>
> In my view, the right is a right not to have provincial barriers thrown up against one who wants to work.
> (emphasis added)
>
> Reasons for Judgment, Arnup, J.A. (dissenting) Case on Appeal, p. 57 at 62, ll. 14-42.

21. The Attorney General of Canada respectfully submits, however, that paragraph 6(2)(b) of the Charter of Rights was not intended to create a bare "right to work" unrelated to mobility and, further, that the majority of the Ontario Court of Appeal erred in law in concluding that it does.

22. On its face, the scope of a right to work is broader than that of a mobility right, which is merely one, albeit an important, aspect thereof. In this respect, it will be noted that the French text says that every Canadian citizen and permanent resident has the right to "gagner leur vie", not merely the right to "pursue the gaining of a livelihood". The precise content of such an alleged right is far from clear. Since, in the analysis of the Ontario Court of Appeal, it would not be linked with mobility, it must be more fundamentally economic in nature. Does such a "right" impose a correlative "duty" on government to provide work or the means of obtaining it and, if so, on which level of government? Whatever such a right may comprise, in a time of chronic high unemployment, a constitutional right to work itself is potentially far more important and significant than simply the right to move about the country

in search of work. Certainly, there would be no reason to believe a bare right to work would be restricted to the relatively straight-forward kind of situation that arose in the case at bar.

See French text of section 6 of the Charter of Rights in Appendix A, p. 33

23. It is respectfully submitted that the Appellant is correct in its contention that it is unreasonable to conclude that the framers of the Charter would have buried such a broad and potentially significant right as a right to work as a mere paragraph in the midst of a lengthier but less important section, relating to mobility rights.

Appellant's Factum, p. 5, paras 17-18

24. Moreover, it would be illogical and contrary to all normal canons of statutory interpretation to construe paragraph 6(2)(b) as a right substantively unrelated to the rights conferred in the rest of the section. That paragraph is grammatically and structurally subordinate to the rest of section 6. If paragraph (2)(b) is interpreted as a right exclusively related to inter-provincial mobility, it remains grammatically and logically consistent with the rest of the section. If, on the other hand, it is interpreted as conferring an intra-provincial right to work, it becomes semantically independent and logically unrelated to the rest of the section.

(ii) "In any Province" rendered tautological

25. The second principal error, it is respectfully submitted, which both the majority of the Ontario Court of Appeal and the Respondent make in their approach to paragraph 6(2)(b) is that, by interpreting that provision as a right unrelated to mobility, they deprive the words "in any province" of all meaning. It is further submitted, however, that this Court should avoid interpreting the Charter of Rights so as to render any part thereof tautological. Thus, in Hill v. William Hill (Park Lane Ltd.), [1949] A.C. 530 (H.L.) it was held at 546-7:

> ...though a Parliamentary enactment (like parliamentary eloquence) is capable of saying the same thing twice over without adding anything to what has already been said once, this repetition in the case of an Act of Parliament is not to be assumed. When the legislature enacts a particular phrase in a statute the presumption is that it is saying something which has not been said immediately before. The rule that a meaning should, if possible, be given to every word in the statute implies that, unless there is good reason to the contrary, the words add something which would not be there if the words were left out.

26. If, as Grange J.A. concludes, it was the intention to create a right to work to apply within the confines of a single province, in cases having no inter-provincial aspects, then, it is submitted, it would

have been sufficient, and more appropriate, to enact that:

> every citizen ... and every ... permanent resident of Canada has the right ... to pursue the gaining of a livelihood

deleting any reference to "in any province". If the Respondent's interpretation of the provision were correct, the words "in any province" would be redundant, adding nothing "which would not be there if the words were left out".

Hill v. William Hill (Park Lane Ltd.), [1949] A.C. 530 at 546-7

27. It is further submitted that, in every other instance where it was intended to extend rights or freedoms uniformly throughout the country, the drafters of the Charter of Rights omitted any geographical references. Thus, in those sections dealing with Fundamental Freedoms, Legal Rights, Equality Rights, and so on, the Charter is silent about geographical or territorial units. For example, the following provisions confer rights that are to be enjoyed everywhere in the country yet, without exception, they make no mention of territorial boundaries:

Legal Rights

> "7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> 8. Everyone has the right to be secure against unreasonable search or seizure.
>
> 9. Everyone has the right not to be arbitrarily detained or imprisoned.

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Equality Rights

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination ..."

See generally, Charter of Rights, ss. 2, 7-14, 15

28. In each of these instances, it is submitted, the drafters of the Charter of Rights recognized that it would be unnecessary or tautological to insert words like "in any province" because these rights would be understood to apply everywhere in the country, without more.

29. It follows that, in those few cases where geographical references were made, the intention was to create rights that would apply only under narrower or different circumstances. By this reasoning, the rights conferred by paragraph 6(2)(b) do not extend everywhere throughout the country. Since one must assume, however, that the framers of the Charter would not have created a right that affects everyone as directly as the right to work and yet apply it unevenly across the country, it must be concluded that paragraph 6(2)(b) does not establish a right to work.

Canadian Charter of Rights and Freedoms, ss. 16(2), 17(2), (18(2), 19(2), 20(1) and s. 6

30. If the Respondent's interpretation of paragraph 6(2)(b) renders certain words therein

tautological, the one interpretation thereof which gives full meaning to every word, in a manner consistent with the scheme of the Charter as a whole, is that paragraph 6(2)(b) only guarantees rights in the case of a citizen or permanent resident who wishes to cross a provincial border to pursue the gaining of a livelihood. Interpreted in that way, the eliptical words "in any province" add meaning to the paragraph by connoting mobility. They do so because, in the case of a person in one province who relies on paragraph 6(2)(b) to "pursue the gaining of a livelihood" in another, the phrase necessary confers a right to cross the border of the second province. On any other interpretation, however, those neutral words lose all meaning.

31. Both Grange J.A., speaking for the majority in the Court below, and the Respondent have suggested alternative drafting for subsection 6(2) of the Charter of Rights which, they say, would better achieve the result that the Appellant and the Attorney General of Canada submit was intended by the present text. Thus, His Lordship proposed:

> It would have been easy to combine the two clauses to provide the right 'to move to, to take up residence in and to pursue the gaining of a livelihood in any province', or even to leave the two rights separate and reword clause (b) so as to read 'to pursue the gaining of a livelihood in that province'. Either of these alternatives might well be interpreted to associate the benefit given with a move to another province.

Reasons for Judgment, Grange J.A., Case on Appeal, p. 40 at 46, ll. 26 to ll. 37

and see: Respondent's Factum, p. 10, para. 14

32. It is respectfully submitted, however, that these alternative proposals for the drafting of paragraph 6(2)(b) would not improve the clarity of the present text and, indeed, in all likelihood, would reduce the scope of the existing rights. Under the second of the modifications suggested above, for example, the independence which presently exists between the rights conferred under the two paragraphs of subsection 6(2) might well be lost. Under the existing text, a citizen or permanent resident has the right to pursue a livelihood in a second province (under paragraph (b)) without first moving to that province (under paragraph (a)). Thus, a person could continue to live in Ottawa while pursuing a livelihood in Hull. If the lower Court's amendment were adopted, however, he would only have the right to work in "that" province, namely, the province previously identified as the province to which he had moved under paragraph (a). The first suggestion above would probably have the same effect, as well.

33. The present wording, on the other hand, maintains the independence of the two rights conferred by subsection 6(2) and, by the use of the phrase "in any province", makes it clear that the right in paragraph (b) is one to be exercised only as part of a right of mobility.

34. It is likewise submitted that the legislative draftsman successfully achieved, with three short words, what the Respondent would have required a dozen words to accomplish in proposing to substitute "without discrimination on the basis of province of present or previous residence", for "in any province".

Respondent's Factum, p. 10, para 14(b)

35. One further objection to the Appellant's interpretation of paragraph 6(2)(b) raised by the Respondent and the Court below should be addressed. As indicated in the passage from Grange J.A.'s judgment quoted in paragraph 19 above, it is contended that to confine the rights conferred by paragraph 6(2)(b) to persons on the move is to give them rights that those who stay at home cannot enjoy.

36 Arnup J.A. responded to this concern in his dissenting judgment by pointing out that, although the right conferred under paragraph 6(2)(b) "only has significance when the person wants to move to another province, ... it exists as a right possessed both by the person who wants to move and the one who does not" (Court' emphasis). It is respectfully submitted that this view is correct and that it is equally true of most of the other rights guaranteed under the Charter. For example, the majority of Canadians never require the protection of the Legal Rights contained in sections 7 to 14 of the Charter of Rights but, when they do, the rights are available to be relied on. Moreover it is submitted that the Appellant's interpretation of paragraph 6(2)(b) is neither technical or legalistic nor one that blunts or thwarts the proper implementation of the Charter of Rights. Rather, it is a construction that gives full effect to paragraph 6(2)(b), in a manner consistent with the language of the legislation.

Reasons for Judgment, Arnup, J.A. (Dissenting), Case on Appeal, p. 57 at 63, ll. 35-41

Minister of Home Affairs v. Fisher, [1980] A.C. 319

The Queen v. Therens (1983), 23 Sask. R. 81 (Sask. C.A.)

37. To summarize the Attorney General of Canada's position on the first issue in this appeal, it is respectfully submitted that paragraph 6(2)(b) of the Charter of Rights only applies in cases involving inter-provincial mobility and, thus, since the Respondent's attempts to become admitted to the Bar did not involve moving from his place of permanent residence in Ontario, his constitutional rights were not infringed by section 28(c) of The Law Society Act.

B. Laws of General Application in a Province

38. In the alternative, if this Honourable Court should decide that the rights conferred under paragraph 6(2)(b) of the Charter of Rights can be exercised as a right unrelated to inter-provincial movement, then it falls to determine whether section 28(c) of The Law Society Act is saved by paragraph 6(3)(a) of the Charter of Rights as a "law...of general application in force in a province...".

39. Language similar to that used in paragraph 6(3)(a) appears in section 88 of the Indian Act, the relevant part of which provides:

> 88. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province...
>
> Indian Act, R.S.C. 1970, c. I-6, s. 88

40. Section 88 has been the subject of judicial comment on numerous occasions and was considered by this Court recently in Kruger et al v. Her Majesty the Queen. In that case, relied on in both the majority and dissenting judgments in the Court below, Dickson J. spoke for this Court in enunciating a test for the identification of "laws of general application", as follows:

> There are two indicia by which to discern whether or not a provincial enactment is a law of general application. It is necessary to look first to the territorial reach of the Act. If the Act does not extend uniformly throughout the territory, the inquiry is at an end and the question is answered in the negative. If the law does extend uniformly throughout the jurisdiction the intention and effects of the enactment need to be considered. 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 few laws which have a uniform impact. The line is crossed, however, when an enactment, though in relation to another matter, by its effect, impairs the status or capacity of a particular group. The analogy may be made to a law which in its effect paralyzes the status and capacities of a federal company, see Great West Saddlery Co. v. The King. Such an act is no "law of

general application". See also Cunningham v. Tomey Homma.(emphasis added)

Kruger and Manuel v. Her Majesty the Queen, [1978] 1 S.C.R. 104 at 110

41. In the Court of Appeal, Grange J.A., for the majority, applied these criteria to the case at bar and concluded that The Law Society Act failed the second branch of the Kruger test, stating:

> "The line is crossed" because the status of permanent residents is impaired. The section purports to take away from them the rights given to them under the Charter. They are the only people so treated. It is not a law of general application; when its effect is examined, it applies only to permanent residents of Canada.

In his dissent, Arnup J.A. applied the same test but reached the opposite conclusion, holding:

> In my view the "status or capacity" of permanent residents of Canada is not impaired. If the right to pursue the gaining of a livelihood is an aspect of "capacity", that right was always subject to laws of general application, and as already observed, it is no less a law of general application simply because a particular group is gravely affected by it.

Reasons for Judgment, Grange J.A., Case on Appeal, p. 40 at 52, ll. 6-18

Reasons for Judgment, Arnup J.A., (dissenting) Case on Appeal, p. 57 at 66, ll. 14-26

42. The Attorney General of Canada respectfully submits that certain aspects of the Kruger test for distinguishing "laws of general application", developed in the context of the Indian Act, are inappropriate when applied to the same words used for a different purpose in the Charter of Rights. It has been held by this Court, for example, that the expression "laws of general application" in section 88 of the Indian Act refers only to provincial legislation, excluding the statute law of Canada. That result was dictated, however, by the specific context in which the words are used in the Indian Act, including factors which are not present in the Charter of Rights. It is respectfully submitted that neither the particular test laid down in Kruger and Regina v. George, nor the language of section 88 necessarily determine the meaning of the phrase "laws of general application" in section 6 of the Charter of Rights.

Regina v. George (1966), 55 D.L.R. (2d) 386 (S.C.C.) at 397-98 per Martland J.

43. Similarly, the Kruger test ought not to be applied in deciding cases under paragraph 6(3)(a) of the Charter of Rights so as to render legislation inoperative merely because, whether by "object and purpose" or "by its effects", the impugned act discriminates in some manner among persons subjected to it. Paragraph 6(3)(a) expressly contemplates that, as Arnup J.A. said, "a law may discriminate on a particular basis and still be of 'general application', but it must not discriminate on the basis of province of residence". Indeed, paragraph 6(3)(a) goes farther, saying that only laws of general application that discriminate primarily on the basis of province of residence are excluded. Thus, in Malartic Hygrade Gold Mines Limited

v. The Queen in Right of Quebec, section 59 of the Act respecting the Barreau du Québec had the specific effect of discriminating against all advocates from provinces other than Quebec, although, it was held, not primarily on the basis of their province of residence, but rather professional competence. That case proceeded, without argument on this issue, on the basis that the Act respecting the Barreau du Québec was nevertheless an Act of general application in force in the province of Quebec.

Reasons for Judgment, Arnup J.A. (dissenting) Case on Appeal, p. 57 at 65, ll. 40-45

Malartic Hygrade Gold Mines Ltd. v. The Queen in Right of Quebec, supra at 520, 522-527, per Deschênes C.J.S.C.

44. Section 28(c) of The Law Society Act, "in object and purpose", is not a law "in relation to" permanent residents as a particular class or group. By its own terms, it is a law prescribing qualifications for membership in the Ontario Bar and is directed to all the world, including all aliens generally.

45. On the other hand, whatever the object or purpose of section 28(c) might be and regardless of the terms in which that object is expressed, this section of The Law Society Act has the clear effect of impairing the rights of permanent residents as a class. Generally speaking, under the Immigration Act, 1976, only two classes of persons can work in Canada without an employment authorization, namely, citizens and permanent residents. Even British subjects cannot work without an authorization unless they are also permanent residents. Section 28(c) of The Law Society Act, therefore, effectively discriminates against one of the only two groups which, practically speaking,

could expect to "pursue the gaining of a livelihood" as a member of the Law Society of Upper Canada when it denies permanent residents the right to practise law.

Immigration Regulations, 1978, P.C. 1978-486, as am., s. 18(1)

46. Moreover, permanent residents are not just any identifiable group in Canadian society. They comprise one of the two classes, citizens and permanent residents, to whom constitutional rights were guaranteed under subsection 6(2) of the Charter of Rights. The Attorney General of Canada respectfully submits that no law that, by its intent or effect, discriminates against permanent residents by denying them the very rights conferred upon them under paragraph 6(2)(b) of the Charter is a "law of general application" within the meaning of paragraph 6(3)(a) of the Charter of Rights.

47. If section 6 of the Charter of Rights applies to this case, then the Attorney General of Canada respectfully submits that, to the extent that paragraph 28(c) of The Law Society Act denies rights to persons having the status of permanent residents of Canada, in derogation of the rights conferred upon them under paragraph 6(2)(b) of the Charter, paragraph 28(c) of The Law Society Act is not a law of general application and is inoperative and of no force and effect.

PART IV
ORDER SOUGHT

48. It is respectfully submitted that the constitutional question in these proceedings should be answered in the negative.

All of which is respectfully submitted.

OTTAWA, this 17th day of February, 1984.

J.H. Sims

Of Counsel for the Attorney General of Canada

LIST OF AUTHORITIES