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. 1990, 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 219, Section 29;

Re: THE LAW SOCIETY OF UPPER CANADA

Appellant
(Respondent)

- and -

JOEL SKAPINKER

Respondent
(Appellant)

- 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 DES BARREAUX DU CANADA
JOHN CALVIN RICHARDSON

Intervenants

FACTUM OF THE INTERVENANT THE ATTORNEY GENERAL OF ONTARIO

(For the names and addresses of the Solicitors for the parties and their respective Ottawa Agents see inside title page)

IN THE SUPREME COURT OF CANADA

Names and Addresses of the Solicitors for the Parties
and their respective Ottawa Agents

PHELAN, O'BRIEN, SHANNON & LAWER
101 Richmond Street West
Toronto, Ontario, M5H 1W1

Solicitors for the Appellant

HEWITT, HEWITT, NESBITT & REID
604 - 75 Albert Street
Ottawa, Ontario, K1P 5E7

Ottawa Agents for the Appellant

OSLER, HOSKIN & HARCOURT
P.O. Box 50
First Canadian Place
Toronto, Ontario, M5X 1B8

Solicitors for the Respondent

McTAGGART, ADMAS & MARTIN
703 - 100 Sparks Street
Ottawa, Ontario
K1P 5B7

Ottawa Agents for the Respondent

ROGER TASSE, ESQ., Q.C.
Deputy Minister of Justice
and Deputy Attorney General
of Canada
344 Wellington Street
Ottawa, Ontario

Solicitor for the Intervenant,
Canada

E.N. HUGHES, ESQ., Q.C.
Deputy Attorney General
of British Columbia
Victoria, British Columbia

Solicitor for the Intervenant,
British Columbia

BURKE-ROBERTSON, CHADWICK &
RITCHIE
Suite 1800
130 Albert Street
Ottawa, Ontario, K1P 5G4

Ottawa Agent for the Solicitor
for the Attorney General of
British Columbia

ARCHIE CAMPBELL, ESQ., Q.C.
Deputy Attorney General
of Ontario
Toronto, Ontario

Solicitor for the Intervenant,
Ontario

SOLOWAY, WRIGHT, HOUSTON,
GREENBURG, O'GRADY, MORIN
170 Metcalfe Street
Ottawa, Ontario, K2P 1P3

Ottawa Agenet for the Solicitor
for the Attorney General of
Ontario

RICHARD F. GOSSE, ESQ., Q.C.
Deputy Attorney General
of Saskatchewan
Regina, Saskatchewan

Solicitor for the Intervenant,
Saskatchewan

MAcDONALD, AFFLECK
100 Sparks Street
Ottawa, Ontario, K1P 5B7

Ottawa Agent for the Solicitor
for the Attorney General of
Saskatchewan

DANIEL JACOBY, ESQ.
Deputy Attorney General
of Quebec
Quebec, Quebec

Solicitor for the Intervenant,
Quebec

NOEL, DECARY, AUBRY & ASSOCIATES
95 Victoria Street
Hull Quebec, J8X 2A3

Ottawa Agent for the Solicitor
for the Attorney General of
Quebec

I N D E X

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 219, Section 29;

Re: THE LAW SOCIETY OF UPPER CANADA

Appellant
(Respondent)

- and -

JOEL SKAPINKER

Respondent
(Appellant)

- 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 DES BARREAUX DU CANADA
JOHN CALVIN RICHARDSON

Intervenants

FACTUM OF THE INTERVENANT
THE ATTORNEY GENERAL OF ONTARIO

PART I

THE FACTS

1. The Attorney General of Ontario makes no submissions in regard to the facts in this appeal.

2. The Attorney General of Ontario intervenes in this appeal by Notice of Intervention dated April 25, 1983 pursuant to the Order of the Right Honourable the Chief Justice of Canada dated March 23, 1983.

3. The Attorney General of Ontario did not intervene in the Court of Appeal hearing of this case.

PART II

POINTS IN ISSUE

4. The Constitutional question set by Order of the Right Honourable the Chief Justice of Canada reads as follows:

> Is section 28(c) of the Law Society Act, R.S.O. 1980, c.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?

10

5. The Attorney General of Ontario respectfully submits that the answer to this question is no.

PART III

THE LAW

A. Section 6(2) and (3) of the Charter

6. It is respectfully submitted that under the terms of section 6(2) and (3) of the Charter, the rights of a citizen and permanent resident of Canada to move to, take up residence in, and pursue the gaining of a livelihood in any province (or territory: s.30), may not be limited by a provincial law or practice which discriminates on the basis of province of present or previous residence. If section 28(c) of the Law Society Act so discriminates it infringes the rights guaranteed by section 6(2)(b) and is thereby of no force and effect.

7. What is in issue, therefore, is not the merits of Ontario's policy, manifested through legislative enactment, that only citizens of Canada or other British subjects may be admitted to the legal profession in Ontario. What is in issue is whether this legislative stipulation infringes a protected right held by permanent residents of Canada under section 6 of the Charter of Rights and Freedoms.

8. Section 6 of the Charter provides as follows:

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.

9. Section 28(c) of the Law Society Act, provides as follows:

28. Subject to sections 30,31,32,34,35, 36 and 38 ...

(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 pracise law in Ontario as barristers and solicitors;

10. Section 6 affords certain limited rights to Canadian citizens and permanent residents. The Attorney General of Ontario adopts the view that the words have created two separate, independent rights expressed in a parallel structure, with the word "and" as well as a semi-colon separating the two distinct elements. A semi-colon is a stop of intermediate value between a comma and a period, used to demarcate a separation between parallel component parts of a sentence. The parallel structure of two independent expressions separated in similar manner is to be found in subsections 6(3)(a) and (b). In section 6(3) reference is made to the "rights specified" in subsection (2): the plural form also indicates a reference to more than one right.

11. The Attorney General does not adopt the interpretation of section 6(2) which ties the right in section 6(2)(b) to pursue the gaining of a livelihood to the exercise of the right in section 6(2)(a) to move to and take up residence in any province. This argument is put forward to introduce a mobility requirement into the provision which on the facts the Respondent could not satisfy. (Appellant's Factum, page 6, lines 25 - 35).

12. The Attorney General adopts the view that the heading "Mobility Rights" reflects the intended meaning of the words used in section 6. Section 6(1) deals with the international mobility rights of citizens entering and leaving Canada. Subsections 6(2)(a) and (b) also deal with mobility rights but have an expanded application to permanent residents as well as to citizens. Subsection 6(2)(a) refers to the location of one's home in Canada. It affords the right to move to and take up residence in any province. Subsection 6(2)(b) provides an employment mobility right intended to counter the trend in Canada toward ten separate economies with impediments to the free flow of labour from province to province. This right to pursue the gaining of a livelihood "in any province" ("dans toute province") arises whether one resides in that province or not. On this view of section 6 there is no need to rely on the heading in aid of construction.

13. Subsection 6(3) circumscribes the extent of the rights delineated in subsection 6(2). It does so in the usual way that one section of a statute imposes limits on the more general terms to be found in another section of a statute: it states clearly which section is being limited in its scope and describes the extent of the limitation. Subsection 6(3) expresses two legislative thoughts. It first provides a limitation on the rights contained in subsection 6(2). It also provides a subcategory within that limitation which is stated <u>not</u> to have the function of limiting the rights contained in subsection 6(2). This is not a device whereby "an exception to the exception to the right" is elevated "to be the full right itself", a result which is apparently undesirable. (Respondent's Factum page 9, para. 12(2)). While the same result may have been produced by different drafting, for example, by indicating in subsection 6(2) that it was subject to subsection 6(3), or by duplicating the structure found in section 6(4) or 15(2), there is no rule of drafting that so requires.

14. Reading subsection 6(2) and (3) together, therefore, the right of the permanent resident is to pursue the gaining of a livelihood in any province free of discrimination primarily on the basis of province of present or previous residence but subject to laws of general application which may discriminate in other ways. This is the totality of the right which the Respondent may put forward as infringed by section 28(c) of the Law Society Act.

15. Subsection 6(3)(a) does not preclude all discrimination in regard to citizens and permanent residents in regard to pursuing the gaining of a livelihood. It does not even preclude all such discrimination on the basis of province of present or previous residence. The ambit of the right is more limited than that. The right afforded is to pursue the gaining of a livelihood in any province, subject to all laws of general application in force in a province which discriminates among persons, and even subject to all laws which discriminate incidentally on the basis of province of present or previous residence. Within the structure of section 6, laws of general application may make distinctions among persons and may discriminate among them. There is no assurance that permanent residents will in all situations enjoy the same employment opportunities as citizens. What is assured to permanent residents is that any discrimination will not be based primarily on province of present or previous residence. This is the extent of the Charter guaranteed right and this is the line that must not be crossed in legislation applying to permanent residents.

16. The following sources may be relied upon as support for the interpretation of section 6 of the Charter which the Attorney General of Ontario puts foward:

(a) Background material
(b) Academic commentary
(c) Pre-charter case law
(d) Charter case law

17. It is respectfully submitted that the lengthy, detailed debate of the Charter provisions is relevant to indicate the social, economic and political context in which the provision was formulated. The debates prior to the enactment of the Constitution Act, 1867, have been used for similar purposes:

Re Authority of Parliament in Relation to the Upper House, [1980] 1 S.C.R. 54, 102 D.L.R. (3d) 1

Di Iorio v. Warden of the Montreal Jail, [1978] 1 S.C.R. 152, at p. 200

A.G. Canada v. National Transportation Ltd., and A.G. Canada v. Canadian Pacific Transport Co. Ltd., S.C.C., October 13, 1983, at pp. 14-15 of Chief Justice Laskin's reasons.

18. In Reference Re Residential Tenancies Act [1981] 1 S.C.R. 714 at p.722, Mr. Justice Dickson favoured admissibility of material on the basis of relevance to the issues before the Court rather than on the basis of inflexible rules of admissibility of extrinsic evidence for purposes of characterization. The weight to be accorded to such material is for the Courts to determine:

> ... but at least they should, in my view, generally be admitted as an aid in determining the social and economic conditions under which the Act was enacted ... [references omitted] The mischief at which the Act was directed, the background against which the legislation was enacted and institutional framework in which the Act is to operate are all logically relevant ... [references omitted] (at p.723).

19. It is respectfully submitted that the wealth of material available on the development of the Charter guarantees may be of assistance to a Court in dealing with Charter issues. The Respondent to a certain extent concedes this in bringing forward the example of the construction workers in Ottawa and Hull in order to construe section 6(2)(b): (Respondent's Factum, page 10, para. 14(a)). The value of such reference is commented upon by B. Strayer, in The Canadian Constitution and the Courts (2e) pp.230-1:

> The Constitution Act, 1867, as it is now called, is an organic document that does require for its dynamic interpretation a generous consideration of the broad policies that underlay it at its inception so that these may be re-interpreted in the light of a changing society. What is being argued here is simply that efforts to distill the long term objectives of that Act from the factual circumstances surrounding its adoption are likely to be unproductive and possibly misleading.
>
> It may be otherwise with the interpretation of recent constitutional amendments including the Charter. Here the travaux préparatoires are numerous and well documented, including proceedings of federal-provincial meetings, parliamentary committees and parliamentary debates, and published official documents explaining the new provisions. Needless to

say there would be problems of what weight to attach to such evidence, but the sources are numerous and readily available. The Supreme Court has not hesitated to look at extrinsic evidence for the interpretation of the Statute of Westminster where the travaux préparatoires were also fairly numerous and readily available. In Re Resolution to Amend the Constitution[1] the majority which held the unilateral federal patriation initiative to be legal, made reference to the proceedings of Imperial Conferences of 1926 and 1930 and a Dominion-Provincial Conference of 1931 in interpreting the intended meaning of the subsequent Statute of Westminster, 1931.

1. [1981] 1 S.C.R. 753 (footnote renumbered)

Such reference has been made in the following cases:

Quebec Association of Protestant School Boards v. A.G. Quebec (No. 2), (1982), 140 D.L.R. (3d) 33 at p.53-4. (Que. S. Ct.), on appeal to S.C.C.

Re Federal Republic of Germany v. Rauca, [1983] 41 O.R. (2d) 225 at p. 244 (Ont. C.A.)

Re Jamieson and The Queen (1982), 142 D.L.R. (3d) 54 at p.62 (Que. S. Ct.)

20. The legislative record reveals that section 6 embodies a policy resisting the trend toward government discrimination against workers on the basis of province of residence. The examples discussed in the House of Commons are collected in the following excerpt from an article on section 6 of the Charter:

> Mobility rights were included in the Charter to create the economic union that Parliament and the legislatures of the provinces have failed to create within the scope of their powers in the Constitution Act, 1867. On both sides of the House, repeated condemnation was voiced towards preferential treatment of provincial residents or goods and outright exclusion of out-of-province residents or goods in government purchases or contracts, employment and other enterprises. Provincial government campaigning to prevent out-of-province residents taking away jobs in large projects such as the

James Bay project in Quebec,[1] Newfoundland's reservation of jobs on oil rigs offshore of Newfoundland for residents,[2] the fear of retaliatory legislation by other provinces,[3] the high rate of migration of residents from one province to another,[4] the exclusion of Hull, Quebec, painters from work in the national capital,[5] the exclusion of Ontario construction firms from Quebec construction projects,[6] the practice of the postal workers' union and the electrical workers' union to prevent movement of workers from one locality to another without the prior consent of their local[7]...

1 H.C.Deb., 32nd Parl., 1st sess., at 5316 (4th Dec. 1980)
2 H.C.Deb., 32nd Parl., 1st sess., at 3570 (9th Oct. 1980)
3 H.C.Deb., 32nd Parl., 1st sess., at 3396 (8th Oct. 1980)
4 H.C.Deb., 32nd Parl., 1st sess., at 7844 (3rd Mar. 1981)
5 H.C.Deb., 32nd Parl., 1st sess., at 3851 (20th Oct. 1980)
6 H.C.Deb., 32nd Parl., 1st sess., at 4024 (23rd Oct. 1980); H.C.Deb., 32nd Parl., 1st sess., at 2799 (11th Jul. 1980)
7 H.C.Deb., 32nd Parl., 1st sess., at 3609 (10th Oct. 1980).

(footnotes renumbered)

E.S. Binavince, "The Impact of the Mobility Rights: The Canadian Economic Union - A Boom or a Bust?" (1982) 14 Ottawa Law Review 340, at p.345-6.

21. In the House of Commons on October 6, 1980, the Minister of Justice made the following comments in regard to eliminating interprovincial labour discrimination:

> Our conception of Canada is one where citizens as a matter of right should be free to take up residence and to pursue a livelihood anywhere in Canada without discrimination based on the previous province of residence. In other words, no Canadian should be prevented from seeking a job anywhere in Canada merely on the grounds that he or she comes from another province. This right which is inherent in

> Canadian citizenship will be enshrined in the charter and will be binding on all governments.
>
> This does not mean that provinces cannot impose their normal laws on people who come or move to their province. It simply means that they cannot single out certain Canadians for harsher treatment just because they come from other parts of the country. In other words, there will be one Canadian citizenship not ten provincial citizenships.
>
> (1st sess. 32nd Parl., Vol. III, p. 3286)

22. The following comments made by the Minister of Justice before the Joint Committee demonstrate that section 6 was intended to reverse the trend in Canada toward ten individualized labour markets, each discriminating against persons seeking employment on the basis of province of residence:

> MR. CHRETIEN: On your first question, Mr. Lapierre, I must tell you that section 6 does not intend to standardize the statutes which govern the professions. This is a provincial jurisdiction and it will continue to be; it means that any profession, whether it be legal, medical or other, will still be governed by provincial statutes; the terms of reference will be established by the provinces.
>
> The only thing that section 6 does is that people who want to enter any such profession, cannot be barred from it if they are not a resident of the province; suppose that in order to become a plumber in Quebec, you must satisfy 25 conditions, any Canadian citizen who will meet those 25 conditions will be able to become a plumber in Quebec or a physician in Quebec.
>
> There should not be a 26th condition saying: "You must also be a Quebec citizen."
>
> The conditions will be established by the province based on the criteria which must be met within each specific profession. So, this section means that any Canadian citizen who meets those criteria may practise his career or profession in the province in question.

So, in no way is it the intention of the government to, as Mr. Laurin stated on the weekend, standardize all the professional criteria and control all professional organizations in Canada through the application of section 6.

* * * *

There is no organization provided for in section 6. All we do there is establish the principle that there can be no discrimination against people because of their place of origin in Canada. However, they must meet all the professional criteria established in the different provinces.

(Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, Issue No. 3:48-9, November 12, 1980)

* * * *

...What we say is that nobody can be refused a job just because he is not a resident of that territory or that province ...

(Minutes of Proceedings and Evidence etc., Issue No. 46:77, January 27, 1981)

23. Academic commentators have also viewed section 6 as restricting burdens on the free flow of labour across provincial borders. A number point out that section 6 was not intended to create a "right to work" but rather was intended to afford protection against laws which discriminate against citizens and permanent residents of Canada on the basis of province of residence:

(i) Peter W. Hogg, Canada Act 1982 Annotated, at pages 24-5:

Paragraph (b) of s.6(2) confers the right "to pursue the gaining of a livelihood in any province". (The word "province" includes a federal territory: s.30). In practice, while Canadians are unrestricted by law (as opposed to personal or financial considerations) in their freedom to move to and take up residence in any province (a right now guaranteed by paragraph (a)), the power "to pursue the gaining of a livelihood" is a different story. Each province has a distinctive regime of law for each industry, trade, profession or occupation; and variations in the certification

and licensing requirements constitute barriers to personal mobility. In Quebec there is the further barrier of language requirements. As well, health and pension benefits are often not portable between provinces. It seems likely that s.6(2)(b) will have little effect on this situation, because s.6(3)(a) exempts "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". There are some provincial laws which restrict entry to certain occupations to residents of the province (e.g., in Ontario, Architects Act, R.S.O. 1980, c.26, s.5; Professional Engineers Act, R.S.O. 1980, c.394, s.11; Surveyors Act, R.S.O. 1980, c.492, s.17); such restrictions are now vulnerable under s.6(2). But most certification, licensing, language, health-benefit or pension laws would easily fit into s.6(3). Indeed, s.6(3) even contemplates provincial laws which explicitly discriminate against non-residents, provided that residency is not the primary factor of discrimination.

(ii) Pierre Blache,"The Mobility Rights", in Tarnopolsky & Beaudoin ed. Canadian Charter of Rights and Freedoms, at pages 246-7:

What is the right "to pursue the gaining of a livelihood in any province" or "de gagner leur vie dans toute province"? It is not necessary to reside in a province in order to gain a livelihood there. However, this provision probably does not grant the right to work. The wording of subsection 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.

(Emphasis added)

(iii) J.B. Laskin, Mobility Rights under the Charter,(1982) 4 Sup. Ct. L.R. 89 at p.93:

> Though they may also be seen as dervied in part from the International Covenant, it was concern about the economic balkanization of Canada that was largely responsible for the inclusion in the Charter of provisions relating to inter-provincial mobility. An assortment of provincial and federal laws and policies, it has been argued, create barriers to interprovincial economic activity and subvert the operation of the Canadian economic union.

And at p.98:

> ... a purposive approach, sensitive to the origins of section 6(2) and to the disavowal by the framers of the Charter of broad guarantees of economic rights, should lead to the conclusion that, at the very least, section 6(2)(b) is not intended to be the source of a general right to work independent of interprovincial mobility.* (Emphasis added)
>
> (*Footnote: This point may not, in the end, be an important one, since the limitations on s.6(3) should screen out challenges not based on discrimination against non-residents).

24. The interpretation of section 6 as a means of preventing provinces from placing burdens on interprovincial mobility by prohibiting discriminatory laws based on province of present or past residence was adopted in:

> Malartic Hygrade Gold Mines Ltd., v. The Queen in Right of Quebec (1982), 142 D.L.R. (3d) 512 (Que. S. Ct.) per Deschênes C.J.S.C. at p.520:
>
> The purpose of [s.6(2)] is undoubtedly to give Canadian citizenship its true meaning and to prevent artificial barriers from being erected between provinces. It is understandable, however, that this provision cannot, in a country as large as Canada, have an absolutely uniform effect. Therefore, the Charter has provided a qualification of which the relevant portion for this issue is found in s.6(3)(a).

Deschênes C.J.S.C. turned to "the philosophy surrounding the adoption" of section 6 to aid in the "serious problem of interpretation". He quotes from the

Premier of Quebec's speech rejecting the Charter as a whole, and more specifically the pan-Canadian mobility rights contained in it. At page 522 he continues:

> Restrictive provisions of provincial legislation must, therefore, be analyzed in each case, if such provisions exist, in order to discover the true nature and basis of such legislation. If they really are based on extra-provincial residence, then the bar could not use such provisions against an attorney from another province: the Charter prevents this; but if they are based on legitimate considerations which have nothing to do with this concern for provincial protections, then they will have full force and effect pursuant to the Canadian Charter.
>
> It would seem that this was an honourable compromise which the Charter ratified with a view to a Canadian common market which takes into account regional characteristics.

25. In Black v. Law Society of Alberta (1983), 144 D.L.R. (3d) 439 (Alta. Q.B.) a similar approach to section 6 was adopted in the context of an application for an interlocutory injunction. McDonald J., decided that there was a serious issue to be tried as to whether a rule of the Law Society infringed a right protected under section 6 of the Charter. (The rule prohibited a member ordinarily resident in, and practising law in, Alberta from entering into partnership with anyone who was not an active member ordinarily resident in Alberta). At page 444 he stated:

> The effect of s.6(2)(b) is that every citizen and permanent resident of Canada has the constitutionally-guaranteed right 'to pursue the gaining of a livelihood in any province'. ... The effect is that there is a right on the part of a citizen or permanent resident to earn his living as he chooses in any province. Pursuant to subsection (3)(a), that right may be limited by 'any laws or practices of general application in force in a province'. A rule of the Law Society ... is a law of general application ... Such a law of general application will not have a valid limitative effect upon the right to earn a living if it discriminates among persons 'primarily on the basis of province of present or past residence'. (Reference to Malartic omitted).

26. In summary, therefore, it is respectfully submitted that an interpretation of section 6 which does not relieve against discrimination based on interprovincial mobility of some sort should be rejected unless it is the only possible interpretation of the words used.

27. The phrase "law of general application" is not new to Canadian constitutional law. A law of general application may discriminate but only up to a certain point. It may impose "graver consequences" on certain groups but it may not impair their actual status. That status often includes constitutionally protected rights or capacities:

(a) Indian Cases: Indians may not be deprived of their constitutional rights to hunt for food on unoccupied Crown land but are subject to laws of general application in regard to conservation and management of provincial wildlife resources.

Kruger & Manuel v. The Queen, [1978] 1 S.C.R. 104

R. v. Sutherland, [1980] 5 W.W.R. 456 (S.C.C.)

(b) Company Cases: Federally incorporated companies may not be precluded from exercising their federally derived powers in a province but are subject to laws of general application precluding them from carrying on specific businesses.

Great West Saddlery v. The King, [1921] 2 A.C. 91

A.G. Manitoba v. A.G. Canada (Manitoba Securities), [1929] A.C. 260

Canadian Indemnity Co. v. A.G. British Columbia, [1977] 2 S.C.R. 504

(c) Citizenship Cases: A Canadian citizen cannot be deprived of all rights to work in a province but is subject to the laws of general application which do not affect a necessary attribute of his status.

Winner v. SMT (Eastern) Ltd., [1951] S.C.R. 887

Morgan v. A.G. Prince Edward Island, [1976] 2 S.C.R. 349

28. These pre-Charter cases indicate that laws of general application may discriminate, or impose graver consequences, on some groups, but that there is a protected zone, usually constitutionally protected, which cannot be entered. If a law enters that zone and takes away rights protected in that zone, then it ceases to be a law of general application.

29. In the context of section 6(3)(a) the permitted and the prohibited type of discrimination are set out. The status, or constitutionally protected right of a permanent resident is the right to be free from discrimination based primarily on province of present or previous residence. Other types of discrimination are expressly permitted by making the right subject to laws of general application and even to laws which discriminate on the basis of present or previous residence but not primarily on that basis. A permanent resident is protected by section 6 from the expressly prohibited type of discrimination only. Other sections of the Charter, such as section 15 for example, may offer protection from other types of discrimination not in issue before this Honourable Court at this time.

30. The interpretation put forward by the majority of the Court of Appeal should be rejected for the following reasons:

(i) It ignores the mobility character of section 6(2)(b) which is in accord with the mobility character of every other subsection of section 6.

(ii) It does not give appropriate interpretive weight to the words "in any province" in subsection 6(2)(b) and 6(3)(a) which are in parallel structure to subsection 6(2)(a) and thus intended to provide a parallel meaning. Other guarantees in the Charter have no such geographic reference: Charter sections 2, 7 and 15.

(iii) It gives an expansive rather than the standard delimiting meaning to the opening words of subsection 6(3)(a) ("the rights specified in subsection (2) are <u>subject to</u> ..."). If any law which limits the assumed right afforded by subsection 6(2)(b) is, by virtue of that very limitation of the right, not a law of general application, then the assumed right in subsection 6(2)(b) would <u>never</u> be "subject to" a law of general application.

(iv) The word "those" in subsection 6(3) indicates that a law which discriminates on the basis of province of residence is "a law of general application". This is inconsistent with the Court of Appeal conclusion that a law which diminished the assumed right in subsection 6(2)(b) would not be a law of general application.

(v) There would be no reason to stipulate that laws which discriminated on the basis of province of residence were excluded from the laws of general application to which the right is made subject (by subsection 6(3)) if a law which so diminished the assumed right in subsection 6(2)(b) would not be a law of general application by virtue of diminishing the right by its own terms.

31. While the Court of Appeal majority gives no force to subsection 6(3), it elevates the subsection 6(2) right to a free standing right to pursue the gaining of a livelihood enjoyed by permanent residents of Canada. There is no indication in the pre-Charter discussions of the intention to create a right to work rather than a protection from interprovincial discrimination. A free standing right to work would have been a right so different from the other rights provided in section 6 that one would expect it to be included in a separate section. A constitutional guarantee of work in the current period of combined high inflation and unemployment would surely have been a matter of controversy and debate.

32. The Attorney General for Ontario submits that subsection 6(2) and (3) be read together. The right is the right to be free from a particular type of discrimination, i.e. discrimination based primarily on province of present or previous residence. Other types of discrimination are permitted by the terms of subsection 6(3) which makes the right <u>subject</u> to laws of general application in regard to pursuing the gaining of a livelihood. The prohibited ground of discrimination, or zone of constitutionally protected rights, is made express by the prohibition of discrimination based on province of residence. The extent of the right protected in subsection 6(2)(b) is defined by the extent of the discrimination which is prohibited. This interpretation takes into account the intended interprovincial mobility protection and accords subsection 6(3) the function of a limiting clause.

B. Section 28(c) of the Law Society Act

33. Section 28(c) of the Law Society Act provides that only Canadian citizens or other British subjects who are otherwise qualified may be admitted to the Society and to the practice of law in Ontario. The fact that the Respondent resided in the province of Quebec before moving to Ontario is irrelevant to the application of section 28(c) to him. Section 28 makes no reference to province of present or previous residence and does not discriminate between persons primarily on that basis. Therefore, this provision does not come within the clear and express prohibition in Charter section 6(3) of discrimination based primarily on province of residence.

Appellant's Factum, page 2, para 4
Respondent's Factum, page 2, para 2

34. It is respectfully submitted that section 28(c) of the Law Society Act is a law of general application within the meaning of section 6(3)(a) and does not infringe the Charter rights of the Respondent.

C. Section 1 of the Charter

35. In view of the preceding submissions, the Attorney General of Ontario takes no position in regard to section 1 of the Charter other than to point out that many other provinces have similar requirements and that two Ontario Commissions after reviewing this requirement have recommended its retention.

R. Lenoir, Citizenship as a Requirement for the Practice of Law in Ontario, (1981) 13 Ottawa Law Review 527, at 536

Report of the Professional Organizations Committee to the Attorney General of Ontario, (April, 1980) p. 157 ff.

Royal Commission Inquiry into Civil Rights, Report No. 1, Vol. 3, pp. 1172-1177 (McRuer Report)

PART IV

ORDER REQUESTED

36. The Attorney General of Ontario respectfully seeks a negative response to the constitutional question set down in this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

L.E. Weinrib

Lorraine E. Weinrib
Counsel for the Attorney
General of Ontario, Intervenant

M.D. Lepofsky
Counsel for the Attorney
General of Ontario, Intervenant

LIST OF AUTHORITIES

1. Re Authority of Parliament in Relation to the Upper House, [1980] 1 S.C.R. 54, 102 D.L.R. (3d) 1

2. Di Iorio v. Warden of the Montreal Jail, [1978] 1 S.C.R. 152

3. A.G. Canada v. National Transportation Ltd., and A.G. Canada v. Canadian Pacific Transport Co. Ltd., S.C.C., October 13, 1983, at pp. 14-15 of Chief Justice Laskin's reasons

4. Reference Re Residential Tenancies Act [1981] 1 S.C.R. 714

5. B. Strayer, The Canadian Constitution and the Courts (2e)

6. Quebec Assocation of Protestant School Boards v. A.G. Quebec, (No. 2) (1982), 140 D.L.R. (3d) 33 (Que. S. Ct.)

7. Re Federal Republic of Germany v. Rauca, [1983] 41 O.R. (2d) 225 (Ont. C.A.)

8. Re Jamieson and The Queen (1982) 142 D.L.R. (3d) 54 (Que. S. Ct.)

9. E. Binavince, "The Impact of the Mobility Rights: The Canadian Economic Union - A Boom or a Bust?" (1982) 14 Ottawa Law Review 340

10. Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, Issues Nos. 3:48-9, November 12, 1980 and 46:77, January 27, 1981

11. Peter W. Hogg, Canada Act 1982 Annotated

12. Pierre Blache, "The Mobility Rights in Tarnopolsky & Beaudoin ed. Canadian Charter of Rights and Freedoms

13. J.B. Laskin, "Mobility Rights Under the Charter" (1982) 4 Sup. Ct. L.R. 89

14. Malartic Hygrade Gold Mines Ltd., v. The Queen in Right of Quebec (1982), 142 D.L.R. (3d) 512 (Que. S. Ct.)