

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  
(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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IN THE SUPREME COURT OF CANADA

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PART I

STATEMENT OF FACTS

1. The Attorney General of Saskatchewan adopts the  
statement of facts set out in the factum of the Appellant.

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PART II

POINTS IN ISSUE

10 2. The point in issue in this appeal, as set out in the  
Notice of Constitutional Question (Appeal Book, pp. 13-14),  
is:

20 Is section 28(c) of The Law Society Act, R.S.O. 1980,  
Chapter 233, insofar as it excludes its benefits from  
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?

30 3. The position of the Attorney General of Saskatchewan  
is that this question should be answered in the negative.

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PART III

ARGUMENT

10 4. The Attorney General of Saskatchewan proposes to  
address the following questions:

- (1) Is clause 28(c) of The Law Society Act  
inconsistent with subsection 6(2) of the Canadian  
Charter of Rights and Freedoms?
- 20 (2) If so, is the clause nevertheless saved by virtue  
of subsection 6(3) of the Charter?
- (3) If the clause is not so saved, can it  
nevertheless be characterized as a "reasonable  
limit prescribed by law as can be demonstrably  
justified in a free and democratic society"  
30 within the meaning of section 1 of the Charter?

(1) Clause 28(c) and Subsection 6(2) of the Charter

40 5. Subsection 6(2) of the Charter provides:

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.

50 6. The Attorney General of Saskatchewan submits that

there are three conceivable interpretations-which can be placed upon the words of the above subsection.

10 7. The first interpretation - the most sweeping one - is that the subsection creates two unrelated rights, one dealing with mobility and residence and the other dealing with the right to pursue a livelihood. Under this interpretation, paragraph (b) would constitute a "right to work" guarantee quite apart from the question of mobility.

20 8. The second interpretation - the narrowest one - is that the subsection creates one mobility right with two components: the right to move to and take up residence without regard for provincial barriers and, upon doing so, the right to pursue the gaining of a livelihood without  
30 regard for provincial barriers. Under this interpretation, paragraph (b) would constitute a right to be free from provincial barriers in the pursuit of one's livelihood, but this right would only attach once one had moved and taken up residence in the province in which one sought to pursue  
40 that livelihood.

50 9. The third interpretation - one which is neither as broad as the first nor as narrow as the second - is that the subsection creates two distinct rights, both of which



are related to the concept of mobility. Under this interpretation, the right contained in paragraph (b) would be the right to be free from provincial barriers in the pursuit of one's livelihood regardless of whether one had or had not moved to the province in which one sought to pursue that livelihood.

10. Although, it is submitted, section 28(c) of The Law Society Act would be valid under both the second and third interpretations of section 6(2) of the Charter, the Attorney General of Saskatchewan submits that the third interpretation is the one which ought to be adopted by this Court. It is the interpretation which is best supported in light of (a) the wording of section 6 and its placement within the Charter; (b) the legislative history of the section; and (c) the policy implications of the above interpretations.

(a) The wording of section 6 and its placement in the Charter

11. It is submitted that the first possible interpretation of section 6(2)(b) (see paragraph 7) ought not to be adopted by this Court. Had it been intended to create in the Charter an independent right to pursue work, the drafters could hardly have chosen a more obscure method of

doing so than burying that right in paragraph (b) of subsection 6(2).

10 12. Section 6 is preceded in the Charter by the heading "Mobility Rights". Unlike some other headings in the Charter, this one is quite specific. Regardless of the importance which may be placed upon the words of the heading themselves, it is submitted that the heading is at least indicative of the drafters' perception of the kind of rights they were creating in section 6. In other words, 20 had it been their intention to create in section 6 a right to pursue work quite independent of the notion of mobility, it is most unlikely that they would have been content to use the heading "Mobility Rights".

30 13. Furthermore, the wording of paragraph (b) itself militates against such an interpretation. Had it been intended that paragraph (b) would create a right to pursue work independent of the notion of mobility, there would have been no need to include in that clause the words "in 40 any province". No such qualifying words are used elsewhere in the Charter in connection with general rights and freedoms. Paragraph (d) of section 2, for example, speaks of "freedom of association", not "freedom of association 'in any province'". Section 8 grants everyone "the right 50

to be secure against unreasonable search and seizure", not  
"the right to be secure against unreasonable search and  
seizure 'in any province'". The words "in any province",  
it is submitted, were placed in paragraphs (a) and (b) of  
subsection 6(2) for a specific purpose: to make clear that  
the rights bestowed by those two subsections were not  
absolute rights to move and take up residence or to pursue  
work but rather were rights to do so without regard for  
provincial barriers.

14. It is submitted that the second possible  
interpretation of section 6(2)(b) (see paragraph 8) also  
ought not to be adopted by this Court. Had it been  
intended that the right to pursue work be consequent upon  
the exercise of the right to move and take up residence,  
these rights would have been placed in one paragraph, not  
two. The fact that subsection 6(2) includes two paragraphs  
and, furthermore, that the words "in any province" are  
contained in each, is not consistent with the  
interpretation that the subsection creates one mobility  
right comprising two components, the second of which is  
contingent upon the first.

15. In summary, it is submitted that an analysis of the  
wording of subsection 6(2) supports the view that the

subsection creates two distinct rights, both related to the concept of mobility.

(b) The legislative history of section 6

10 16. The Attorney General of Saskatchewan submits that an appreciation of the historical background which led to the enactment of section 6 is an important aid to the interpretation of that section.

20 Reference Re: Authority of Parliament in Relation to the Upper House ["The Senate Reference"], [1980] 1 S.C.R. 54 at 66.

30 17. That historical background is concisely stated by Professor John Laskin in "Mobility Rights Under the Charter" (1982), 4 Supreme Court L.R. 89 at 93-95:

40 Though they may also be seen as derived 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 interprovincial 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. Many of the most notorious examples were collected by the federal government in a discussion paper entitled Securing a Canadian Economic Union in the Constitution, published in 1980 during the constitutional discussions.

50 ... The concluding three subsections of section 6 are the remnants of the much more ambitious proposals for promoting the Canadian economic union initially put forward by the federal government. They would have seen a constitutional prohibition, in a revised

section 121 of the Constitution Act, 1867, of all federal and provincial laws or practices - subject to certain exceptions - discriminating against persons, goods, services or capital on the basis of province of origin or of destination. Citizens and permanent residents would also have been accorded the right to acquire and hold property in any province without discrimination based on province of residence.

10           There was little chance that these proposals would attract broad provincial support, and as the negotiations proceeded, the scope of the protection contemplated for the Canadian economic union steadily diminished. The section 121 proposal was left for a subsequent stage of constitutional reform, and at the urging of Prince Edward Island, reference to the right to acquire and hold property was omitted from what became section 6(2) of the Charter. Finally, pursuant to the final federal-provincial agreement of November 5, 1981, the affirmative action provision, section 6(4), was added.

20           18. Based upon this historical background, Professor Laskin later (at pp. 97-98) considers the possible interpretations which might be placed upon paragraph (b) of subsection 6(2) of the Charter:

30           That construction, however, raises the further question of the relationship between the two provisions of section 6(2). The discussion of section 6(2)(a) assumed that it has independent force; that is, that the Charter confers a right to move to and take up residence in any province whether or not the beneficiary of the right also wishes to pursue the gaining of a livelihood there. Is the right to pursue the gaining of a livelihood also an independent right? If so, while it is subject to the limitations permitted by sections 6(3) and 1 and to the affirmative action proviso in section 6(4), it is one that may be asserted not only by those who have recently migrated to a province, but also by permanent residents of the province and by non-residents who wish to remain non-residents while pursuing the gaining of a livelihood there. Again, 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. Its application to cross-border employment would, however, appear consistent with the concern for the suppression of barriers to interprovincial economic activity.

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(emphasis added)

19. This interpretation finds further support in the words of then Justice Minister, Jean Chretien, when introducing the Resolution which gave rise to the enactment of the Charter. Mr. Chretien said:

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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.

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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.

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Debates, House of Commons, Canada, 1st Session, 32nd Parliament, Volume III, at 3286 (reproduced in Appendix D of the Appellant's factum).

20. In summary, it is submitted that an appreciation of

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the historical background of section 6 leads one to the same conclusion as does an analysis of its wording and placement in the Charter: paragraph (b) of subsection 6(2) is aimed at preventing interprovincial barriers to the pursuit of a livelihood. It is not intended to create a general right to work; but neither is the right contained in paragraph (b) contingent upon the exercise of the right contained in paragraph (a).

(c) Policy considerations

21. The Attorney General of Saskatchewan submits that subsection 6(2) is intended to guarantee a particular form of equality rights. Specifically, it is intended to ensure that persons have the right to move about the country and to seek employment without discrimination based upon their province of present or previous residence.

22. Yet the Respondent is attempting to rely upon the subsection to protect himself from an entirely different form of discrimination: discrimination based upon citizenship. Protection from this form of discrimination might well be available to the Respondent under section 15 of the Charter when that section comes into force. Simply because the Respondent might be protected in the future

under section 15, however, is no reason for stretching the meaning of subsection 6(2) to protect him in the interim.

10 23. The consequences of interpreting paragraph (b) of  
subsection 6(2) as a general "right to work" provision  
could be very grave indeed. Such an interpretation would  
permit citizens and permanent residents to call into  
question any condition affecting their right to engage in a  
trade, occupation, or calling. Conditions such as those  
governing professional accreditation, the marketing of  
20 goods, the licensing and regulation of businesses, and the  
zoning of commercial property would all be subject to  
attack. In short, a consideration of the policy  
implications of such an interpretation make it all the more  
difficult to believe that the drafters would have created  
30 such a right in other than a clear and explicit manner.

(d) Conclusion

40 24. Based upon a consideration of the wording of section 6  
and its placement in the Charter, the historical background  
of the section and its policy implications, the Attorney  
General of Saskatchewan submits that the right created by  
paragraph (b) of subsection 6(2) is the right to pursue  
one's livelihood free from provincial barriers.  
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See Malartic Hygrade Gold Mines Ltd. v. The Queen (1982), 142 D.L.R. (3d) 512 (Que. S.C.) at 519-521.

10 25. It is therefore submitted that there is no  
inconsistency between clause 28(c) of The Law Society Act  
and subsection 6(2) of the Charter. Clause 28(c) in no way  
creates provincial barriers to employment. The only  
barriers it creates are those based upon citizenship. The  
clause prevents persons who are not Canadian citizens or  
20 British subjects from becoming practicing members of the  
Ontario Bar regardless of where those persons reside.

(2) Clause 28(c) and Subsection 6(3) of the Charter

30 26. Even if clause 28(c) of The Law Society Act were held  
to be inconsistent with subsection 6(2) of the Charter, it  
is submitted that the clause would nevertheless be saved by  
virtue of the limitation contained in paragraph (a) of  
subsection 6(3) of the Charter.

40 27. Subsection 6(3) provides in part:

The rights specified in subsection (2) are subject to  
(a) any laws or practices of general application  
in force in the province other than those that  
discriminate among persons primarily on the basis  
of the province of present or previous  
residence;...

28. As already indicated, clause 28(c) does not in any way "discriminate among persons...on the basis of the province of present or previous residence". Thus, unless clause 28(c) is not a "law of general application", it is protected from attack under subsection 6(2) by subsection 6(3).

29. The Attorney General of Saskatchewan submits that, whatever is meant by the expression "laws or practices of general application", those words must include laws or practices which apply to the public at large, notwithstanding that they apply differently to some persons than they do to others.

30. This is clear from the words of paragraph (a) which implicitly acknowledge that laws which discriminate among persons may nevertheless be "laws of general application". As stated by Professor Peter Hogg in his Canada Act, 1982, Annotated (1982) at p. 25:

There are some provincial laws which restrict entry to certain occupations to residents of the province...; 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.

31. It is submitted that The Law Society Act and, in particular, clause 28(c) is a "law of general application" for the simple reason that it is a general regulatory statute which, for a public purpose, applies to all persons who seek to become members of the Law Society. The fact that it distinguishes among such persons on the basis of their citizenship is of no consequence.

(3) Clause 28(c) and Section 1 of the Charter

32. Even if clause 28(c) of The Law Society Act were held to be inconsistent with subsection 6(2) of the Charter, and not saved by virtue of subsection 6(3), it is submitted that the clause should nevertheless be upheld as a "reasonable limitation prescribed by law as can be demonstrably justified in a free and democratic society" within the meaning of section 1 of the Charter.

33. Barristers and solicitors are officers of the courts. It is therefore reasonable to expect that, as such, they owe that special allegiance to Her Majesty which attaches to being a British subject. In the words of The Report of The Professional Organizations Committee of Ontario (1980):

The legal profession has special responsibilities to the community which it serves to uphold its legal

institutions and to promote the administration of justice by those institutions. To us, Canadian citizenship connotes a necessary and desirable commitment to our national institutions and traditions. Recent amendments to the Citizenship Act reduce, from five to three years, the requisite residence period necessary for citizenship. In most cases, this will mean that foreign-born applicants for admission to membership in the legal profession who have been able to satisfy Ontario training or transfer requirements will not face major impediments to entry as a result of a citizenship requirement, given the period of residence that these requirements will normally entail.

(Reproduced in Appendix C of the Appellant's factum)

See also Royal Commission Inquiry Into Civil Rights (Ontario, 1968), No. 1, Vol. 3 at p. 1176.

PART IV

NATURE OF ORDER SOUGHT

10 34. 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.

20 ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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James C. MacPherson

30 Andrew Petter  
Andrew Petter

Counsel for the Attorney  
General of Saskatchewan

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PART V

LIST OF AUTHORITIES

	<u>Page in Factum</u>
1. Debates, House of Commons, Canada, 1st Session, 32nd Parliament, Volume III, at 3286 (Reproduced in Appendix D of the Appellant's factum).	10
2. Hogg, P.W., <u>Canada Act, 1982, Annotated</u> (1982) at p. 25.	14
3. Laskin, J., "Mobility Rights Under the Charter" (1982), 4 Supreme Court L.R. 89 at 93-95:	8-10
4. <u>Malartic Hygrade Gold Mines Ltd. v. The Queen</u> (1982), 142 D.L.R. (3d) 512 (Que. S.C.) at 519-521.	13
5. <u>Reference Re: Authority of Parliament in Relation to the Upper House</u> ["The Senate Reference"], [1980] 1 S.C.R. 54 at 66.	8
6. Report of The Professional Organizations Committee of Ontario (1980) (Reproduced in Appendix C of the Appellant's Factum).	15-16
7. Royal Commission Inquiry Into Civil Rights (Ontario, 1968), No. 1, Vol. 3 at p. 1176.	16