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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 231, 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 GÉNÉRAL DU QUÉBEC,
FEDERATION OF LAW SOCIETIES OF CANADA
— FEDÉRATION DES BARREAUX DU CANADA,
JOHN CALVIN RICHARDSON

Intervenants

FEDERATION FACTUM

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FEDERATION FACTUM

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PART I:
FACTS

1. The facts are short and not in issue. Counsel adopts Part I of the Appellant's Factum.

2. The members of the Federation are the 10 Provincial Law Societies et La Chambre des Notaires du Quebec. Attached, as Appendix "A" to this Factum, are extracts from the various Provincial Statutes dealing with the qualifications for admission to the legal profession, listed geographically from West to East; also the Territories.

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

Manitoba.

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

New Brunswick.

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

PART II
POINTS IN ISSUE

Counsel adopts Part II of the Appellant's Factum and supports the dissenting Judgment of Arnup J.A. in the Court of Appeal.

PART III
ARGUMENT

Citizenship.

5. Until the end of World War II the only badge of citizenship was that of British subject. Citizenship itself is of recent origin and resulted from the passage of the first Canadian Citizenship Act, S.C. 1946, Chapter 15. That has been supplanted by the Citizenship Act, S.C. 1974-1975-1976, Chapter 108.

6. The term "permanent resident" is of even more recent origin. The phrase did not appear in the Immigration Act, 1946. It is a defined term in the Immigration Act, S.C. 1976-1977, Chapter 52.

7. By S.2(1) "permanent resident" means a person who

(a) has been granted landing,

(b) has not become a Canadian citizen,

and

(c) has not ceased to be a permanent resident pursuant to subsection 24(1).

By subsection 24(1) a person ceases to be a permanent resident when:

(a) he leaves or remains outside Canada with the intention of abandoning Canada as his place of permanent residence; or

(b) a deportation order has been made against him and such order is not quashed or the execution thereof is not stayed pursuant to subsection 75(1).

8. A permanent resident under the Immigration Act does not have the rights of a citizen and may be refused entry or deported for, inter alia, breach of terms imposed on becoming a permanent resident, or if he be found guilty of a serious criminal offence. See particularly S.4; S.27(1); S.19 attached hereto as Appendix "B".

9. It follows that a permanent resident is a person who, has been given permission to come into Canada to establish permanent residence, has not become a citizen, has not abandoned Canada and has neither been refused subsequent entry nor been deported.

10. The briefest perusal of S.27 and S.19 of the Immigration Act gives the flavour of the many reasons which may result in a report to the Deputy Minister on the behaviour of a permanent resident which may lead to an enquiry and a deportation order. A permanent resident, unlike a citizen, has unsecure rights. He may remain such a resident throughout his life but his status does not improve short of citizenship. This may be contrasted with the concept of domicile under the Immigration Act, 1952. Permanent residents could then achieve the more protected status of domicile after residence in Canada for 5 years .

Wydrzynski: Immigration Law and Procedure
Chapter 8, Canada Law Book 1983
See also p.28 to p.29: p.202 to p.209

11. Because of the new 1946 concept of citizen (plus perhaps the questionable status of permanent resident and the apparent lack of any requirement that a permanent resident become a citizen), it is understandable that both Parliament and the Legislatures should provide that citizenship be a qualification for offices established by various and many Statutes.

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

13. Federal Statutes. A director of Air Canada, the Canadian Broadcasting System, or the Canadian National Railway has to be a citizen.

Air Canada Act, S.C. 1977-1978, c-5 S.7
Broadcasting Act, R.S.C. 1970, c. B-11, s.35
Canadian National Railways Act, R.S.C. 1970, c. C-10, s.6(2)

The Public Service Employment Act, R.S.C. 1970, c. P-32, s.16(3) makes citizenship a qualification in competitions under the Act. This is carried into many other Federal Statutes, e.g. The Supreme Court Act, R.S.C. 1970, c. S-19, s.12(2).

Provincial Statutes. Examining those in Ontario, a person cannot serve on a jury unless he or she is a Canadian citizen. It seems as though this is true of most other Provinces.

Juries Act, R.S.O. 1980, Ch.226, S.2 and S.6(2)

A member of a Public Library Board must be a citizen.

Public Libraries Act, R.S.O. Ch.414, S.4, S.7(5), S.46(2)

So must a Notary.

The Notaries Act, R.S.O. 1980, Ch.319, S.2(1).

14. Attention is drawn to the widespread use of citizenship as a qualification for office since the Court's decision in the case at Bar may have broader implications than its effect on the legal profession.

15. It is also submitted that the provisions of

The Judges Act, R.S.C. 1970, c. J-1, s.3 (amended S.C. 1976-1977, c.25, s.1)

and, indeed, S.5 of the Supreme Court Act which, providing for the appointment to the Bench of Barristers of at least 10 years standing at the Bar of any of the Provinces, contemplated that, at the time of passage, such members of the Bar were citizens at the time of appointment.

16. A note of requirements to become a member of other professions in Ontario is attached as Appendix "C".

17. The position in the United States and the United Kingdom is not without interest but Counsel submits that it has little relevance to the interpretation of the Charter and has therefore relegated a discussion to Appendix "D".

Reasons of the Court of Appeal

18. Counsel supports the dissenting Reasons of Arnup J.A. in the Court of Appeal (Reasons: Case, p.57) and, since he follows others in argument, is content to summarize as follows:

(a) S.6 of the Charter has to be read as a whole. On the discussion of the weight to be attributed to the heading, it is submitted that "mobility rights" as that heading ought not to be disregarded.

Driedger: 1983 edition, p.138-p.141.

(b) S.6(2)(b) is not a right to work clause.

Reasons: Case, p.62, line 22 et seq.

(c) S.28(c) of the Law Society Act is, in any event, a law of general application.

Reasons: Case, p.64, line 19 - line 24

19. Turning now to the majority Reasons of the Court of Appeal, it is submitted that Grange J.A. erred in his approach to the Charter. He first enquired whether S.28(c) of the Law Society Act was inconsistent with S.6(2)(b) of the Charter and, having answered that question in the affirmative (Reasons: Case, p.45, line 28 - line 30), only then considered whether S.28(c) was nonetheless saved from invalidity on the basis that it was a "law of general application" in the Province in the sense of S.6(3)(a).

20. This approach loses sight of the fact that the provisions of S.6(3) are by way of qualification upon the

rights set out in S.6(2) and not by way of exception or saving provisions to those rights. S.6(4) is a saving provision but S.6(3) is not.

21. It is submitted that the right approach should be first to determine the meaning of S.6(2)(b) having regard not only to its wording (and arguably the heading under which it appears) but also to:

(i) the qualification on S.6(2)(b) by S.6(3), and

(ii) the co-existence of the rights set out in S.6(2)(b) with other rights included in the Charter, in particular those set out in S.15 (discussed later).

22. Considering then S.6(2)(b) with S.6(3)(a), the right to gain a livelihood in any Province is subject to laws of general application in that Province, other than such laws that discriminate on the basis of provincial residence. The conclusion has to be that the right in S.6(2)(b) is intended to be limited to the pursuit of gaining a livelihood free of restrictions based on provincial residence.

23. It is in this light that S.28 of the Law Society Act should be examined. It is submitted that S.28 is a law of general application and one that does not discriminate on the basis of provincial residence. As to 'laws of general application', Counsel relies on the Kruger case and may refer to:

B.C. Power v A.G.B.C. (1936) 47 D.L.R. (2d) 633 at p.681 - 684

24. Grange J.A. was also troubled that a citizen or permanent resident who moved from one Province to another had greater rights than he would have if he had stayed at home - on the view of S.6(2)(b) urged by Mr. O'Brien.

Reasons: Case, p.48, line 39 - p.49 (top)

25. This is not so. If such a person does not leave his home Province he cannot be denied a right to earn a livelihood in that Province primarily on the basis that he is resident within the Province. The possibility of such legislation is so outlandish as to be ignored. If such a person moves to another Province or commutes to work in another Province, his course of conduct is such that he is susceptible to a possible form of restriction by that other Province upon his pursuit of the gaining of a livelihood to which a local resident of that Province could not be subject. He might be prevented from earning a living because of his out-of-Province origin or, if he commutes into the Province, because of his maintenance of his out-of-Province residence. It is submitted that that is exactly what S.6(2)(b) strikes at in the case of such a mobile individual, i.e. the citizen or permanent resident. It cannot fairly be said that such a person who moves has greater rights than his neighbour who stays at home.

Citizenship as a qualification for the legal profession

26. In 1978 the Attorney General of Ontario established the Professional Organization Committee (P.O.C.) which reported in 1980. A work paper on the subject "Citizenship and Professional Practice in Ontario" was prepared by E.B. Murray for the P.O.C. This thoughtful paper summarized arguments pro and con as to the requirement of citizenship as a criterion for Call to the Bar and concluded by recommending that there be no citizenship requirement. The P.O.C. did not accept this recommendation and stated in its report:

> "....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."
>
> Appellant's Factum: p.20

27. The P.O.C. did not recommend a nationality requirement for any of the professions other than law, but did recommend that the governing bodies of these professions should have such a requirement since these bodies were exercising delegated legislative powers.

28. The Law Society of Upper Canada made a submission to the P.O.C. and on this subject submitted:

> "There is moreover a very practical reason for requiring Canadian citizenship. To a substantial degree Canadian industry and commerce is a branch plant economy and there can be little doubt that if the attorneys of the parent companies located in the United States could become lawyers in Ontario without having to become citizens, the consequences would be most unsatisfactory. The development of a strong banking, industrial, commercial and natural resources bar would be inhibited and there would be an adverse effect upon the growth of indigenous Canadian jurisprudence."

See also: Lenoir - Citizenship as a Requirement of the Practice of Law in Ontario. 13 Ottawa Law Review, p.527 at p.528 and p.544. Lenoir is a member of the California Bar.

The E.B. Murray paper is obtainable from the Ontario Government Bookstore, 880 Bay Street, Toronto.

29. On a practical basis, no doubt eleven Attorneys General would be greatly relieved if the Court could be persuaded to make a declaration that a requirement of citizenship for any office is justified under S.1. of the Charter.

30. In the alternative, Counsel asks consideration of a narrower declaration to the following effect:

> Provincial legislation requiring applicants for admission to the legal profession to be:
>
> (i) Canadian citizens, or
>
> (ii) Permanent residents who intend to apply for citizenship
>
> is justifiable under S.1 of the Charter.

Note on S.15 of the Charter.

31. It is tempting to argue that S.6 should not be interpreted in a manner which would protect against discrimination (so as to lead to a declaration that the citizenship provision of S.28 of the Law Society Act is of no force and effect) on the ground that discrimination is the subject matter of S.15 which does not come into force until April of 1985. This approach found favour with Murray J. (B.C. Trial Division) in considering S.7 of the Charter.

R. v Speicher (1983) 150 D.L.R. (3rd) 167

32. But this merely postpones the ultimate consideration. A better argument is that S.15 will not apply to S.6 at all since S.6 is the one section in the Charter which provides for discrimination. It gives rights to citizens and permanent residents to the exclusion of the rest. Other sections commence with general wording:

'everyone'
'any person'
'every individual'
'any member of the public'
'anyone'

Hogg: Canada Act 1982 Annotated p.14

33. Whatever the reason for this quaint and jarring change of phraseology, it is submitted that none of those listed above are candidates for the rights guaranteed by S.6 unless that person or individual etc., is also a citizen or permanent resident. The hoi polloi is excluded.

34. This argument goes to quarantining S.6 from S.15. Support is had from S.33(1) which omits S.6 from those sections of the Charter which may be sidestepped by appropriate Federal or Provincial legislation, but S.33(1) includes S.15.

35. If the above is a true interpretation, it follows:

(a) the discrimination authorised by S.6(2), namely the rights given to citizens and permanent residents and denied to all others, can neither be struck down nor sidestepped.

(b) Provincial laws of general application which affect the taking up of residence or the gaining of a livelihood in a Province may be discriminatory so long as they are not discriminatory among persons primarily on the basis of Province of present or previous residence.

36. Finally, it cannot be the intention of the House of Commons and Senate in passing the Resolution, or the United Kingdom Parliament in passing the Canada Act 1982, that S.15 of the Charter should operate as a kind of time-bomb which would serve to blow up another section of the Charter, i.e. S.6. S.15 ought to be interpreted as being aimed at behaviour outside that expressly permitted by other provisions of the Charter.

37. Whether this is so or not, Counsel submits that sub-sections (2), (3) and (4) of S.6 contain particular and peculiar provisions of the Charter which may merit interpretation in isolation. The spirit of these subsections is to ensure mobility of citizens in the Provinces by prohibiting Provincial restrictions based upon a citizen's present or previous residence. That permanent residents of Canada are included may be taken as the desire of the Government of Canada to encourage the reasonable aspirations of those who are candidates for citizenship by allowing them, equally with citizens, to move freely and pursue the gaining of a livelihood.

38. But against that desire must be balanced the Provincial desire to foster those matters in Provincial jurisdiction which it values (e.g. an independent Canadian legal profession) by laws of general application.

The Constitution Act 1867, S.92; 4, 6, 7, 8, 10, 11, 13, 14, 16.

Residential requirements for Citizenship

39. It is submitted that the 3-year residence required of a permanent resident to become a citizen works little hardship on the immigrant who comes to Canada both intending to become a citizen and to study law here.

40. The normal Law School curriculum is itself 3 years and the immigrant may qualify for citizenship while studying.

41. The immigrant who happens also to be a foreign law graduate may choose to go to a Canadian Law School. He at least, in the common law Provinces, is required to study Statutes, practices etc., and to pass the examinations set by the Federation Committee on Foreign Accreditation. He then has to go through an articling period (in Ontario, 1 year) and likely a Bar Admission Course (in Ontario 6 months). These educational requirements vary in the Provinces but it nevertheless takes the foreign graduate a substantial portion of the 3 years to qualify. Similarly it is understood that a French speaking immigrant, qualified elsewhere as a lawyer, would have to satisfy Quebec authorities of his knowledge of Federal law and Quebec law before being called to the Bar of Quebec or being admitted as a Notary.

Skapinker

42. Skapinker is such a law graduate and he chose to go to a Canadian Law School. He came to Canada in June of 1977 on a Minister's permit and apparently spent the next 2 years reading law at McGill University and obtaining LL.B and LL.M degrees; this is to his credit.

Skapinker - Affidavit: Case, p.21

43. But Skapinker did not apply for permanent residence until April 1st, 1981.

Immigration Record: Case, p.23 (foot)

This would be immediately after he completed his articles and the Bar Admission Course.

The Intervenant - Richardson.

44. Richardson is in a different plight. He is a U.S. citizen who has fulfilled all requirements for Call to the Bar of Ontario, except that of citizenship and he forthrightly states that he does not intend to become a citizen of Canada. Although admitted as a permanent resident he does not state whether he intends to reside in Canada or in the United States where he is a member of the Massachusetts Bar.

45. Importantly, he does not state whether or not he is prepared, on Call to the Bar of Ontario, to swear or affirm the oath of allegiance; or appear to have considered whether, if he does, it may be taken under U.S. law as a voluntary renunciation of his U.S. citizenship.

Affidavit of John Calvin Richardson (filed).

46. The report "Citizenship as Legal Access" (supra, paragraph 12), states at page 6:

> "Oaths of Allegiance
>
> Many of the statutes listed in the study require oaths of allegiance and oaths containing nationality declarations. These oaths are in fact a form of nationality requirement, since the capacity to swear or affirm them is circumscribed by the individual's nationality. One cannot legitimately swear or affirm allegiance to someone who is not one's sovereign, nor declare to possess a nationality one doesn't have; a landed immigrant could become stateless by taking an oath not allowed by his present country of citizenship; and a dual citizen might risk losing one citizenship by taking an oath that pertains to the other."

Law Society of Upper Canada - Oath of Allegiance: Appendix "E"

Afroyim v Rusk (1966) 387 U.S. 253

PART IV
ORDER REQUESTED

47. It is submitted by the Federation, intervenant, that the appeal of the Law Society of Upper Canada ought to be allowed and the Judgment at first instance restored.

(1) On the reasoning of Arnup J.A. dissenting in the Court of Appeal for Ontario, or

(2) On the grounds that it is demonstrable that Provincial Legislation requiring applicants for admission to the legal profession to be:

(a) Canadian citizens or

(b) Permanent residents who intend to apply for citizenship

is justified under S.1 of the Charter.

All of which is respectfully submitted

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Federation Counsel

Toronto
February 1984

PART V
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