No. 17537

IN THE SUPREME COURT OF CANADA

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

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

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

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

RESPONDENT'S STATEMENT

PHELAN, O'BRIEN, SHANNON & LAWER
101 Richmond Street, West
Toronto, Ontario M5H 1W1
(416) 368-1884

Solicitors for the Appellant

HEWITT, HEWITT, NESBITT & REID
604 - 75 Albert Street
Ottawa, Ontario K1P 5E7
(613) 563-0202

Ottawa Agents for the Appellant

OSLER, HOSKIN & HARCOURT
P.O. Box 50
First Canadian Place
Toronto, Ontario M5X 1B8
(416) 362-2111

Solicitors for the Respondent

McTAGGART, ADAMS & MARTIN
703 - 100 Sparks Street
Ottawa, Ontario K1P 5B7
(613) 237-6430

Ottawa Agents for the Respondent

I N D E X

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RESPONDENT'S FACTUM

PART I: FACTS

1. The Respondent accepts as correct the facts set out in paragraphs 1, 2, 3, 5, 6, 7 and 10 of the Appellant's Factum.

2. With respect to the facts stated in paragraph 4 of the Appellant's Factum, the Respondent agrees that at all material times he was a permanent resident of Ontario. The Respondent does not agree that the evidence does not disclose any element of mobility. If these facts are relevant, the Respondent states that the Affidavit of the Respondent discloses elements of mobility in his move to Montreal, Quebec from England and South Africa to study law and his move from Montreal, Quebec to Toronto, Ontario to pursue the practice of law, if possible.

Affidavit of Joel Skapinker,
paras. 2, 3 and 4, Case on Appeal,
pp. 21 and 22

3. With respect to the facts set out in paragraph 8 of the Appellant's Factum, the Respondent agrees that these facts are correct but states that they are not relevant to this appeal. At the time of the original Application in this matter and the Judgment of the Ontario Court of Appeal from which this Appeal is taken, the Respondent was not a citizen and the Appellant refused to admit him to the practice of law. At the time of the Application for Leave to Appeal to this Court, the fact that the Respondent would be eligible to become a Canadian citizen and intended to apply to do so before this Appeal could be heard was expressly raised before the Court, and both the Appellant and the Respondent asked the Court considering the Application to determine at that point whether the appeal would be moot if the Respondent did become a citizen prior to the hearing of the Appeal. The Chief Justice, for the Court hearing the Application for leave, stated that the fact that the Respondent would become a citizen prior to the hearing of the Appeal would not affect the hearing of the Appeal if leave was granted. The only effect would

be on costs, and the Court therefore incorporated into the Order granting Leave a term that the Respondent's costs be paid by the Appellant in any event, to which the Appellant agreed.

PART II: POINTS IN ISSUE

4. (1) Whether the provision of s.28(c) of The Law Society Act denying to a permanent resident of Canada the right to practice law in Ontario is inconsistent with clause 6(2)(b) of the Charter.

(2) If so, whether the provision is saved by clause 6(3)(a) of the Charter upon the ground that it is "a law of general application in force in a province".

(3) If it is not so saved, whether s.28(c) is such a reasonable restraint "as can be demonstrably justified in a free and democratic society" as provided in s.1 of the Charter.

PART III: ARGUMENT

5. Section 28(c) of The Law Society Act denies all persons who are not Canadian citizens or British subjects the right to practice law in Ontario. Section 28(c) 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 practice law in Ontario as barristers and solicitors;
>
> The Law Society Act, R.S.O. 1980, c. 233, s.28(c)

6. Sections 1 and 6 of The Constitution Act, 1982 (sections 1 to 34 of which constitute the Canadian Charter of Rights and Freedoms) provide 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.

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.

7. Section 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.

Interpretation of Clause 6(2)(b) of the Charter

8. It is submitted that, insofar as it affects permanent residents of Canada, the denial in section 28(c) of The Law Society Act to persons who are not citizens or British subjects of the right to practice law is inconsistent with the right guaranteed by clause 6(2)(b) to every person who has the status of a permanent resident of Canada to pursue the gaining of a livelihood in any province.

9. It is submitted that the proper basis for the interpretation of the Charter is to adopt a broad approach to give full effect to the language of the Charter to achieve its fundamental purpose - the protection of the individual. It is not to adopt an approach which narrows the express wording of the Charter to deny rights which would otherwise be recognized as protected by the Charter.

> Minister of Home Affairs v. Fisher, [1980] A.C. 319 at pp. 238-9.

10. It is submitted that the words of clause 6(2)(b) are precise and unambiguous to guarantee for permanent residents the right to pursue the gaining of a livelihood in Ontario, including the practice of law, subject only to the restrictions in subsection 6(3) and section 1 of the Charter.

> Driedger, The Construction of Statutes, 1974, pp. 1-13
>
> Maxwell on The Interpretation of Statutes (12th ed.), pp. 28-47

11. Subsections 6(2) and 6(3) of the Charter are clearly structured in the following manner:

> (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 clause 6(3)(a) ("The rights specified in subsection (2) are subject to (a) any laws or practices of general application in force in a province...");

(3) An exception to the exception is set out in the concluding words of clause 6(3)(a), which carves out of the exception some laws even though they might be considered to be of general application, so that such laws are still offensive to the rights guaranteed ("... other than those that discriminate among persons primarily on the basis of province of present or previous residence.")

Malartic Hygrade Mines Ltd. v. The Queen (1982) 142 D.L.R. (3d) 512 (Que. Sup. Cr.), at p. 521

12. The Appellant and Arnup J.A., dissenting, put forward two somewhat different interpretations of clause 6(2)(b):

(1) The Appellant supports the interpretation that clause 6(2)(b) guarantees "the right to pursue the gaining of a livelihood, [but] only to those moving from one province to another." This statement of the interpretation put forward by the Appellant is set out in the Judgment of Grange J.A. at p. 46, ll.8-10, of the Case on Appeal, before Grange J.A. sets out his reasons for rejecting it. This interpretation is also expressly supported by Arnup J.A. in his Judgment at p.62, ll. 31-42, of the Case on Appeal. The Appellant submits at pp. 5-7 of its Factum that this interpretation should not have been rejected by Grange J.A.. This interpretation involves reading the two clauses of subsection 6(2) as providing a unified right, guaranteeing a person the right concurrently to move to and take up residence in a province and pursue the gaining of a livelihood there, subject to the limitations in subsection 6(3). This interpretation has a mobility aspect, and, the Appellant submits, gives effect to the heading and the whole of

the section. As submitted below, this interpretation does violence to the clear words of subsection 6(2) and would create results which could not have been intended, but it does not narrow the right guaranteed by clause 6(2)(b) to simply what is saved from the exception set out in subsection 6(3): i.e. to be a right only to pursue the gaining of a livelihood without discrimination on the basis of province of present or previous residence.

(2) Later in his Judgment, at p.63, ll.31-32, of the Case on Appeal, Arnup J.A. sets out the somewhat different interpretation that "the right is a right not to have provincial barriers thrown up against one who wants to work." In substance, he states that the right is a right only to pursue the gaining of a livelihood without discrimination on the basis of province of present or previous residence. This interpretation in effect ignores the clear words of clause 6(2)(b), and goes to the exception to the exception found at the end of clause 6(3)(a) to find the entire substance of the right guaranteed in clause 6(2)(b). It elevates an exception to the exception to the right to be the full right itself.

13. It is submitted that the majority of the Ontario Court of Appeal was correct in rejecting these interpretations of the right guaranteed by clause 6(2)(b). Both interpretations are contrary to the plain words of the provision, even when other parts of the section are considered. An analysis of all the relevant parts of the section, set out in paragraph 11 above,makes it clear that neither interpretation is in accordance with the clear structure of the statement of the rights and exception set out in the whole of section 6.

14. Either interpretation could easily have been expressly set out in drafting the section, but they were not.

(a) The first interpretation, that the right to pursue the gaining of a livelihood in any province is dependent on the concurrent exercise of the right to move from one province to another, might have been more likely if the section had combined the two clauses to provide a right "to move to, take up residence and pursue the gaining of a livelihood in any province", or to provide a right to move to a province and pursue the gaining of a livelihood "in that province." Further, the drafting plainly indicates that clause 6(2)(b) creates a separate and distinct right from the right created by clause 6(2)(a). The two rights are set out in separate clauses, separated by a semi-colon and the word "and", and are referred to in the plural in section 6(3). If the right created in clause 6(2)(b) were not independent of the right created in clause 6(2)(a), persons residing in one province would not be guaranteed the right to work in another province, which, it is submitted, was intended to be one example of the exercise of the right guaranteed in section 6(2)(b) (e.g. construction workers in Ottawa or Hull seeking to work in the other city).

(b) The second interpretation does even greater violence to the careful wording of the section 6. If the intention had been to create merely "a right to pursue the gaining of a livelihood without discrimination on the basis of province of present or previous residence", the provision could have said just that. Section 15 of the Charter provided a clear example for such a statement of rights. The very different structure and wording of section 6 indicates that this interpretation should be

rejected in favour of what the provision actually states.

Charter of Rights, section 6

Driedger, The Construction of Statutes, 1974, pp. 109-11-2; 116-117; 123-131

15. Both interpretations further ignore the fact that the provision plainly states that the right is to pursue the gaining of a livelihood in "any" province ("toute province"), not "any other" province.

16. Both interpretations should be rejected also because they would give a person who moves to another province rights that he would not have possessed if he had stayed at home.

(a) The first interpretation clearly does so, for a person moving to another province would have the right to pursue the gaining of a livelihood there, subject to laws of general application except those based on residence. A person seeking work in his own province could not invoke section 6 at all to protect him in seeking to pursue the same livelihood as the person moving in from another province.

(b) The second interpretation suffers in substance from the same problem, as Arnup J.A. recognizes (at p. 63 of the Case on Appeal) when he states that under this interpretation "the right only has significance when the person wants to move to another province."

17. In paragraph 20, page 7, of its Factum, the Appellant submits that the proposition set out in paragraph 16 above is based on the erroneous assumption that before the Charter, a person did not have the right to pursue the gaining of a

livelihood, or the erroneous assumption that, after the Charter, if a right isn't found in the Charter, it doesn't exist. It is submitted that the proposition is in fact based on the true assumption that before the Charter, a person did not have a constitutionally protected right to pursue the gaining of a livelihood and after the Charter, if a right isn't found in the Charter, it doesn't exist as a constitutionally protected right capable of invalidating legislation of Parliament or the Legislatures.

18. The restriction in subsection 6(3) of the Charter (that the rights specified in subsection 6(2) are subject to laws of general application, except those that discriminate on the basis of residence) is an important restriction that prevents the right from becoming an open-ended right to work. It means that an individual must pass qualifications which affect everyone, such as knowledge, competence and character, but it cannot mean that a person can be excluded merely because he lacks the status of citizenship.

19. Both the majority of the Ontario Court of Appeal (Grange and Weatherston JJ.A.) and Arnup J.A. in dissent rejected the Appellant's argument that because section 6 appears under the heading "Mobility Rights", the rights guaranteed in that section should be construed accordingly. They held that the heading was to be used for convenience of reference only, and not as an aid to construction. As Grange J.A. stated for the majority (at p. 47 of the Case on Appeal):

> Secondly, I do not think the fact that s. 6 comes under the heading "Mobility Rights" much affects its interpretation. Both s-ss. (1) and (2) are certainly related to the mobility between provinces and clause (2)(b), even under the interpretation sought by the Applicant, would still have a mobility element. I am thinking of the position of a person resident in one province seeking employment in another province within

> commuting distance. But one does not need to find a mobility element in every clause simply because of the heading.

As Arnup J.A. stated (at p. 61 of the Case on Appeal):

> Put in its most succinct form, Mr. O'Brien's argument on the use of headings is that as we approach each portion of s.6 we can expect that that portion has something to do with "mobility" and should be construed accordingly. In my view, this approach would involve the use of the heading to control the interpretation of the section. This has never been a permissible use of a heading, even in cases of ambiguity in the enacting words.
>
> Without expressing any view concerning any other heading in the Charter, I am of opinion that the heading "Mobility Rights" is one to be used for convenience of reference only and not as an aid to construction.

20. It is submitted that the Ontario Court of Appeal was correct in holding that the heading of Section 6 of the Charter was to be used for convenience of reference only. Headings should not be used to limit provisions of general application. Headings may be used in a penal statute to protect the rights of an accused, but it is submitted that they should not be used in a constitutional Charter of Rights to take away rights which would otherwise exist. With non-penal statutes, at most headings may be resorted to where the language of a section is ambiguous, as part of the determination of the meaning which best suits the intention of the provision. However even then the words of the statute are to be given greater weight.

D.P.P. v Schildkamp, [1971] A.C. 1

Lloyds Bank Ltd. v. Secretary of State for Employment, [1979] 2 All E.R. 573 at p. 577.

Attorney-General of Canada v. Jackson, [1946] S.C.R. 489

Union Steamship v. Melbourne (1884), 9 App. Cas. 365 at p. 369

Dreidger, The Construction of Statutes (1974) at pp. 112-116

Craies on Statute Law, 7th ed., at pp. 207-210

Ontario Interpretation Act, R.S.O. 1980, c. 219, s.9

Canada Interpretation Act, R.S.C. 1970, c. I-23

21. Arnup J.A quoted (at p.59 of the Case on Appeal) the following passage from the Judgment of Kellock J. in Jackson:

> "Where the language of a section is ambiguous, the title and the headings of the statute in which it is found may be resorted to restrain or extend its meaning as best suits the intention of the statute, but neither the title nor the headings may be used to control the meaning of enacting words in themselves clear and unambiguous."

In para. 23, p. 8 of its Factum, the Appellant argues that the passage quoted is only relevant where there has been an amendment altering a statute by adding a provision, which provision is now the subject of judicial construction. In fact, Kellock J.'s judgment makes no reference to the fact that the provision in question was created by way of amendment, and the passage as to the proper use of headings in constructing a statute is stated as a general proposition.

Attorney-General of Canada v. Jackson, [1946] S.C.R. 489 at p. 495-96.

22. The legal position in the United States is similar: see Brotherhood of Railway Trainmen v. Baltimore & O.R. Co. (1947), 67 S. Ct. 1387 at p.1392:

> That the heading of s 17 fails to refer to all the matters which the framers of that section wrote into the text is not an unusual fact. That heading is but a short-hand reference to the general subject matter involved....

> But headings and titles are not meant to take the place of the detailed provisions of the text. Nor are they necessarily designed to be a guide or a synopsis. Where the text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most general manner; to attempt to refer to each specific provision would often be ungainly as well as useless. As a result, matters in the text which deviate from those falling within the general pattern are frequently unreflected in the headings and titles. Factors of this type have led to the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text.
>
> Brotherhood of Railway Trainmen v. Baltimore & O.R. Co. (1947), 67 S. Ct. 1387 (U.S.S.C.), at p.1392

See also:

> United States v. Roemer, 514 F. 2d 1377 (1975) 2d Cir. at p. 1380
>
> United States v. Carillo-Colmenero, 523 F. 2d 1279 (1975) (U.S. C.A., 5th Cir.) at pp.1282-83
>
> Habib v. Raytheon Co., 616 F. 2d 1204 (1980) (U.S.C.A., D.C. Circ.), at p.1210 (footnote 8)

23. A consideration of the other headings in the Charter makes it clear that the headings were inserted for convenience of reference only and not as an aid to interpretation. The headings are simply too loosely worded for any other use: i.e. "Fundamental Freedoms", "Democratic Rights", "Legal Rights". With a constitutional statute as important and complex as the Charter, it is submitted that it is the words themselves, not the headings, which must be looked to as defining the rights protected. It is further submitted that the words of clause 6(2)(b) unambiguously support the interpretation accepted by the majority of the Ontario Court of Appeal. In any event, it is further submitted that any use of headings is only part of a search for the true meaning and

intention of the provision, and that in interpreting a constitutional document created to guarantee individual rights, regard should be had to that underlying objective in interpreting the provisions. Headings should not be used to contradict that purpose and to deny the existence of rights which the words of the provision itself otherwise support.

24. If such is necessary, it is further submitted that the interpretation accepted by the majority of the Ontario Court of Appeal has a mobility element in it. Grange J.A recognized one aspect of such mobility in the passage quoted in paragraph 19 above. The present case itself demonstrates another mobility aspect. A permanent resident who is not a citizen, such as the Respondent, has by definition come to Canada from some other country, and he now seeks to pursue the gaining of a livelihood here. To give him the right to work, without discrimination on the basis that he is a permanent resident and not a citizen, recognizes an international mobility aspect into Canada of persons wishing to work here, subject to laws of general application.

25. The Appellant and Arnup J.A both refer to the case of Malartic Hygrade Gold Mines Ltd. v. The Queen (1982), 142 D.L.R. (3d) 512 in purported support of their interpretation of s. 6 of the Charter. It is submitted that Grange J.A was correct in holding that the issue in the present case did not arise in that case, since it dealt with the issue of whether an Ontario lawyer who had not passed the qualifications of knowledge and competence in Quebec law to be a member of the Quebec Bar, and who did not hold a permit for occasional practice, could practice in Quebec. Further, the issue in the present case was not discussed at all even in obiter dictum in the Judgment. The law was taken to infringe s.6(2)(b) and was admitted to be of general application, and the Court's discussion centered on the interpretation of the

concluding words of s.6(3), as to whether the law discriminated on the basis of province of residence. The Court's analysis of the whole of s.6 (142 D.L.R. (3d) at p.521) in fact supported the interpretation of the Respondent in the present case. Other cases dealing with s.6 of the Charter have also not dealt with the issue raised in the present case, although there are dicta which support the interpretation of the majority of the Ontario Court of Appeal in the present case. As in the Malartic case, they have agreed that s.6 protects interprovincial mobility, which it clearly does, but they have not held that s.6 does not protect the right recognized by the majority of the Ontario Court of Appeal in the present case.

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

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

Black v. Law Society of Alberta (1983), 144 D.L.R. (3d) 439 (Alta Q.B.) at pp.444-445

R. v. Puzzella, April 7, 1983, Ont C.A. (not yet reported; digested (1983), 2 C.R.D. 400 40-01)

Storey v. Zazelenchuk, Nov. 29, 1982, Sask. Q.B. (not yet reported, digested (1983), 2 C.R.D 325, 20-01)

Kingsbury v. Minister of Social Services, Nov. 30, 1982, Sask. Fam. Ct. (not yet reported, digested (1983), 2 C.R.D. 685-02)

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

26. The Appellant also relies on the comments made in the House of Commons in introducing the whole Resolution which gave rise to the Charter. It is submitted that such comments in the legislature should not be considered in aiding the statutory

construction of the Charter. Such comments are not admissible at all for such purpose. Even materials such as Royal Commission Reports, which are admissible in constitutional cases to show the factual context and purpose of the legislation, cannot be used to aid in the construction of the legislation, which is the purpose for which the Appellant cites the comments of the Minister. As Mr. Justice Dickson stated for the Court in the Reference Re Residential Tenancies Act (1981), 123 D.L.R. (3d) 554 at pp. 561 and 563:

> In my view a Court may, in a proper case, require to be informed as to what the effect of the legislation will be. The object or purpose of the Act in question may also call for consideration though, generally speaking, speeches made in the legislative at the time of enactment of the measure are inadmissible as having little evidential weight.
>
> It now seems reasonably clear that Royal Commission reports and the reports of parliamentary committees made prior to the passing of a statute are admissible to show the factual context and purpose of the legislation.
>
> .....
>
> Material relevant to the issues before the Court, and not inherently unreliable or offending against public policy should be admissible, subject to the proviso that such extrinsic materials are not available for the purpose of aiding in statutory construction. (emphasis added)
>
> As Chief Justice Laskin also stated in the Reference re Anti-Inflation Act, [1976] 2 S.C.R 373, at pp.387 and 391:
>
> All extrinsic materials filed in this Reference were subject to reserve by the Court as to their relevancy and as to their weight. They were addressed not to the construction of the terms of the Anti-Inflation Act but to its constitutional characterization, what was it directed to and was it founded on considerations which would support its validity under the legislative power to which it was attributed.
>
> .....

> There is no issue in this case as to the meaning of the terms of the legislation nor, in my opinion, is there any issue as to the object of the legislation.

In any event, the brief comments of the Minister do not say that s.6 does not include the right recognized by the Ontario Court of Appeal in the present case. They merely comment positively on the existence of the right preserved by the exception to the exception in s.6(3), to pursue a livelihood without discrimination based on province of residence, which was at that time the most politically controversial and therefore to be expected in such a debate.

See also: The Attorney General of Canada v. The Reader's Digest (Canada) Ltd., Selection du Reader's Digest (Canada) Ltee, [1961] S.C.R. 775 at p.785

Laws of General Application

27. It is submitted that the denial in section 28(c) of The Law Society Act to persons who are not citizens or British subjects of the right to practise law in Ontario is not a law "of general application".

28. It is submitted that a provision cannot be a law of general application if it is "in relation to" one class of persons in object and purpose, or if it, by its effects, impairs the status or capacity of a particular group. It cannot be aimed at a particular group. It cannot have effect only against a particular group, or limit or obliterate a right which members of that group would otherwise have. It cannot single out a group for special treatment.

> Kruger and Manuel v. The Queen (1977), 75 D.L.R. (3d) 434 (S.C.C.) at pp. 438-440 per Dickson J. 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. Ltd. v. The King, (1921) 2 A.C. 91. Such an act is no "law of general application"; see also Cunningham v. Tomey Homma [1903] A.C. 151

Apply these criteria to the case at bar. There is no doubt that the Wildlife Act has a uniform territorial operation.

Similarly, it is clear that in object and purpose the Act is not aimed at Indians.

.....

If, of course, it can be shown in future litigation that the Province has acted in such a way as to oppose conservation and Indian claims to the detriment of the latter -- to 'preserve moose before Indians' in the words of Gordon, J.A., in R. ex rel. Clinton v. Strongquill (1953), 105 C.C.C. 262, (1953) 2 D.L.R. 264, 8 W.W.R. (N.S.) 247 -- it might very well be concluded that the effect of the legislation is to cross the line

> demarking laws of general application from other enactments. It would have to be shown that the policy of such an Act was to impair the status and capacities of Indians." (emphasis added)

See also R. v. Sutherland, (1980) 5 W.W.R. 456 (S.C.C) per Dickson J. at p.459 as follows:

> "I do not think there is any doubt that s.49 of the Wildlife Act is beyond the constitutional competence of the province of Manitoba and is ultra vires in entirety. The provision cannot purport to be a law of general application. Section 49 has effect only against Indians and its sole purpose is to limit or obliterate a right Indians would otherwise enjoy. Indians are singled out for special treatment."

29. It is further submitted that a "law of general application" is one which affects the general public in the province. It cannot prevent one group of persons from carrying on a business or profession, based only on the fact of being a member of that group, as distinct from being based on individual characteristics which anyone in the general public might have. A law of general application need not affect all persons in the province, so long as it is general in relation to the kind of business or activity in question. A law of general application cannot discriminate against a particular group of persons with respect to that business or activity.

John Deere Plow Company Limited v. Theodore F. Wharton, (1915) A.C. 330 at pp. 340-343

Great West Saddlery Company Limited v. The King, (1921) 2 A.C. 91 at pp. 100, 114-115, 120-122

British Columbia Power Corporation Ltd. v. Attorney-General of British Columbia et al (1963), 47 D.L.R. (2d) 633, per Lett C.J.S.C. at p. 683:

> "It would appear that to be a law of general application, it is not necessary that the statute affect all persons in the Province, so long as it is general 'in relation to the kind of business in which the company engages in the province' ... or to put it another way, that a law which does not discriminate against Dominion companies as such is a law of general application.
>
> But to this I must add, as Mr. Brown contended, that although a statute purports to apply generally, yet if the powers given are capable of being applied in a discriminatory way, then the statute is one of special application and not of general application."

Regina v. Strongquill [1953], 8 W.W.R. (NS) 247 (Sask. C.A.), per Procter J.A. at p. 265.

Natural Parents v. Superintendent of Child Welfare et al (1976), 60 D.L.R. (3d) 148 (S.C.C.) at p. 155-156, per Laskin C.J.C.

Re Bell and Bell (1977), 16 O.R. (2d) 197 at p. 200

R. v. Haines (1980), 52 C.C.C. (2d) 588 at pp. 571, 573-574 (appeal dismissed without discussion of this issue: 63 C.C.C. (2d) 348)

30. It is submitted that laws of general application include such laws as general laws imposing taxes, or respecting the holding of land, or restrictions as to contracts to be observed by the public generally in the province, or laws causing the doing, by that public generally, of a particular act, or laws applicable to all residents regarding the terms and conditions of employment.

John Deere Plow Company Limited v. Theodore F. Wharton, [1915] A.C. 330 at p. 343

Great West Saddlery Company Limited v. The King, [1921] 2 A.C. 91 at pp. 100 and 120

Re Bell and Bell (1977), 16 O.R. (2d) 197 at p. 200

31. It is submitted that the denial in section 28 (c) of The Law Society Act to persons who are not citizens or British subjects of the right to practise law is, in object and purpose, in relation to one class of persons: namely, persons who are not citizens or British subjects. It is aimed at that group. Further, by its effects this provision impairs the status and capacities of that particular group. It does not affect the general public, but only members of that group. It obliterates a right which members of that group would otherwise have. It is not general in relation to the right to practice law, but discriminates against persons who are not citizens or British subjects. It does not merely have graver consequence to one person than another, on the basis of their individual characteristics, but paralyzes all members of a group, regardless of their individual characteristics, solely because they belong to that group. It is therefore submitted that section 28(c) is not a law of general application.

32. It is further submitted that section 28(c) purports to take away rights from all persons in a group expressly recognized as a group in the Charter, permanent residents, solely because they belong to that group, and for this further reason it is not a law of general application.

33. It is further submitted that by expressly providing that every citizen and every permanent resident of Canada have the right set out therein, clause 6(2)(b) of the Charter on its face prohibits discrimination between citizens and permanent residents with respect to the right to pursue the gaining of a livelihood in any province. It is further submitted that the wording of clause 6(2)(b) itself indicates that a provision that discriminates between citizens and permanent residents cannot be a law of general application in the province so as to fall within the limitation set out in subsection 6(3).

34. With respect to this issue, Arnup J.A., dissenting, stated as follows in holding that section 28(c) was a law of general application (at pp. 64-65 of the Case on Appeal):

> Whether s. 28(c) of the Law Society Act is "of general application" depends on how one formulates the issue. Is cl.(c) saying: "Only Canadian citizens or other British subjects may pursue the gaining of a livelihood in Ontario" or is it saying: "all applicants for call to the bar in Ontario must be Canadian citizens or other British subjects"? In my view, the latter wording is a proper paraphrase of s. 28(c) of the Act, and therefore the clause is of general application.

It is submitted that the above authorities clearly establish that it is the substance of the law, and its objects, purpose and effect, which must be examined. Whether formulated positively or negatively, the objects, purpose and effect of section 28(c) are the same and show that it is not a law of general application by the criteria set out above.

35. With respect to the Appellant's submissions in paragraph 26, page 10, of its Factum, it is submitted that when Mr. Justice Dickson in the Kruger case spoke of "one class of citizens", he was not referring to a permanently fixed and identifiable class of persons, so as to exclude a group such as persons who are not citizens or British subjects, whose members could change (by becoming citizens). As stated by the Appellant, Mr. Justice Dickson was referring to Indians, as defined in the Indian Act. In fact, the persons who are "Indians" within the meaning of the Indian Act are a changing group over time, with members entering and leaving: for example, a woman who has been an "Indian" ceases to be so when she marries a person who is not an Indian (s. 12(1)(b) of the Indian Act), and any person who has been an "Indian" ceases to be so if he chooses to become enfranchised

(i.e. a full citizen: s. 12(1)(a)(iii), s. 109, s. 110 of the Indian Act), which is exactly what can occur in respect of members of the group of non-citizens. It is submitted that the group must only be fixed and clearly identifiable at any particular moment - which is the case for the group of persons who are not citizens or British subjects, or the group of persons who are "permanent residents" (which is defined in the Immigration Act, 1976-77 (Can.), c. 52, s. 2(1)).

Indian Act, R.S.C. 1970, c. I-6, s. 2(1) - "Indian", ss. 7, 10, 11, 12, 109, 110.

36. With respect to the submission of the Appellant in paragraph 28 of its Factum, it is submitted that it is irrelevant that by the Statutes Revision Act, S.O. 1979, c. 109, s. 2, all Statutes appearing in the Revised Statutes of Ontario are referred to as "the public general statutes of Ontario", or that by s. 3 the commissioners "may omit any enactment that is not of general application." It is submitted that these terms are used primarily to distinguish "Public Acts" (which are set out in Part I of The Statutes of Ontario) from "Private Acts" (which are set out in Part II) The inclusion of a public statute in the Revised Statutes of Ontario is of no assistance to determine whether a provision in that statute is a "law of general application" within the meaning of subsection 6(3) of the Charter. This determination must be made by examining the substance of the law in question. Furthermore, if all Statutes in the Revised Statutes of Ontario were held to be "laws of general application" simply by virtue of being included in the Revised Statutes, the guarantees provided in subsection 6(2) of the Charter would be effectively destroyed.

Statutes Revision Act, S.O. 1979, c. 109, sections 2, 3.

In Re Ontario Medical Act (1907), 13 D.L.R 501 at 505

Section 1 of the Charter

37. Both Grange J.A. for the majority of the Ontario Court of Appeal and Arnup J.A. in dissent agreed that, if section 28(c) of the Law Society Act is inconsistent with s. 6 of the Charter, then s. 1 of the Charter does not save s. 28(c) from being inoperative. It is submitted that this unanimous finding of the Court was correct, and that the denial in section 28(c) of the Law Society Act to persons who are not citizens or British subjects of the right to practise law in Ontario is not such a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society.

Reasons for Judgment of Grange J.A., Case on Appeal, pp. 52-55.

Reasons for Judgment of Arnup J.A., Case on Appeal, p. 74

Charter of Rights, section 1

38. It is submitted that the onus under section 1 of the Charter is on the party seeking to uphold the limit in question. It is up to that party to show that the infringement on the right or freedom set out in the Charter is reasonable and demonstrably justified in a free and democratic society.

Charter of Rights, section 1

Reasons for Judgment of Grange J.A., Case on Appeal, p. 53

Re Federal Republic of Germany and Rauca (1983), 41 O.R. (2d) 255 (C.A.)

Re Southam Inc. and The Queen (No. 1)(1983), 41 O.R. (2d) 113 (C.A.)

39. It is submitted that section 1 of the Charter requires the court to assess whether there are competing individual rights

or social objectives which justify restricting a right otherwise guaranteed by the Charter, and a significant burden lies on the proponent of the limit to demonstrate its justification. It is submitted that a proper test is to determine whether any such competing rights or social objectives exist which should prevail over the right otherwise guaranteed by the Charter, and then to limit the right otherwise guaranteed by the Charter only to the extent strictly necessary to give proper effect to such competing right or social objective.

Re Southam Inc. and The Queen (No. 1)(1983), 41 O.R. (2d) 113 (C.A.)

Re Federal Republic of Germany and Rauca (1983), 41 O.R. (2d) 255 (C.A.)

R v. Carson (1983), 20 M.V.R. 84 (Ont. C.A.)

Re Ontario Film and Video Appreciation Society and The Ontario Board of Censors (1983), 147 D.L.R. (3d) 58 (Ont. Div. Ct).

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

c.f. MacKay v. The Queen [1980] 2 S.C.R. 370 at p. 408 per McIntyre J: (with respect to the Bill of Rights, 1960):

> "... Departures [from the principle of equality] should be countenanced only where necessary for the attainment of desirable social objectives, and then only to the extent necessary in the circumstances to make possible the attainment of such objectives."

40. It is submitted that the Appellant has not discharged the onus on it in the material placed before the court. It is further submitted that there are no competing individual rights or social objectives which might justify the requirement of citizenship or British subject status for the practice of law in

Ontario. There is a social objective in requiring high standards of qualification, including proficiency in the law and good moral character, but this objective is protected by standards in testing which have a rational connection with the individual person's fitness or capacity to practise law. It is not protected by a blanket denial based on the absence of citizenship or British subject status.

Robert L. Lenoir, Citizenship as a Requirement for the Practice of Law in Ontario, Ottawa L.R., 1981, vol. 13, p. 527 at p. 537-538

Raffaelli v. Committee of Bar Examiners (1972) 7 Cal. 3d 287

41. It is submitted that in determining whether a limit is justifiable, assistance may be derived from the legislative approaches taken in other acknowledged free and democratic societies. A person is not required to be a citizen (or British subject) in order to practise law in the United Kingdom or the United States of America. The legal position in the United Kingdom was not merely connected with its entry into the European Common Market, since not only citizens of Common Market countries but also citizens of any country are permitted to practice law in the United Kingdom.

Re Southam Inc. and The Queen (No. 1) (1983), 41 O.R. (2d) 113 (C.A.)

The Solicitors' Act, 1974 (U.K.) c. 47, section 29

Solicitors (Scotland) Act 1980, sections 4,5

In Re Griffiths, 413 U.S. 717 (1973)

42. It is submitted that having the status of a citizen or British subject is not relevant to a lawyer's position as an

officer of the Court or his duty to protect faithfully the interests of his clients. Next friends, receivers and trustees in bankruptcy have all been considered officers of the court with duties to the court, but no prohibition exists against persons lacking citizenship or British subject status from assuming these positions. Court reporters and Special Examiners are designated as officers of the court in The Judicature Act, but are not required to be citizens or British subjects (citizenship is required of officers of the court who also fit within the scope of The Public Officers Act). Until 1968 Commissioners of Oaths in Ontario were designated as officers of the court, but were not required to be citizens or British subjects. Lawyers in Ontario have long been designated as officers of the court by common law and were specifically recognized as such by statute in 1881, but were not required to be British subjects until 1912.

In Re Griffiths, 413 U.S. 717 [1973] at pp. 723-724.

Re Dickenson and The Law Society of Alberta (1978), 84 D.L.R. (3d) 189 at p. 195

Robert L. Lenoir, Citizenship as a Requirement for the Practice of Law in Ontario, Ottawa L.R., 1981, vol. 13, at pp. 529-532.

Raffaelli v. Committee of Bar Examiners (1972) 7 Cal. 3d 287 at pp. 301-302

Morgan v. Thorne, (1841) 7 M. W. 400 at 408, 151 E.R. 821 at p. 825

Boehm v. Goodall, [1911] 1 Ch. 155 at p. 160

Parsons v. Sovereign Bank of Canada, [1913] A.C. 160 at p. 167

Ex parte James (1874), 30 L.T. 773; 9 Ch. App. 609 at 614, [1874-80] All E.R. Rep. 388 at 390

The Judicature Act, R.S.O. 1980, c. 223, sections 83, 84, 89, 103 and 104

The Public Officers Act, R.S.O. 1980, c. 415, sections 1 and 4

The Commissioners for Taking Affidavits Act, R.S.O. 1960, c. 59, sections 4, 6, and S.O. 1968-69, c. 12, section 1

The Judicature Act, 1881, 44 Vic. c. 5, section 74(3)

The Barristers Act, 1912, 2 Geo. V, c. 27, section 3

The Solicitors Act, 1912, 2 Geo. V., c. 28, section 6

43. It is submitted that a person's status as a citizen or British subject is not relevant to his taking the oaths which are necessary to practise law. Citizenship or British subject status is not a prerequisite to taking an oath of allegiance. Furthermore, it is submitted that there is no rational ground for believing that all permanent residents who are not also citizens or British subjects, and who must take the required oaths before being admitted to practise law, are by virtue of not being citizens or British subjects, lacking in loyalty or commitment to abide by the laws of the province.

Rules made pursuant to section 14 of The Law Society Act, R.S.O. 1980, c. 233, Rule 51

The Public Officers Act, R.S.O. 1980, c. 415, section 4

Oaths of Allegiance Act, R.S.C. 1970, c.O-1, section 3

Re Dickenson and The Law Society of Alberta (1978), 84 D.L.R. (3d) 189 at p. 195

Robert L. Lenoir, Citizenship as a Requirement for the Practice of Law in Ontario, Ottawa L.R., 198[illegible], vol. 13, at pp. 532-534

In re Griffiths, 413 U.S. 717 (1973) at pp. 725-727

Raffaelli v. Committee of Bar Examiners (1972) 7 Cal. 3d 287 at pp. 297-299

44. It is submitted that the distinction between Canadian citizens and British subjects on the one hand, and all other persons on the other, is arbitrary and has no relevance to whether a person is likely to appreciate the history and laws of Canada and therefore is likely to be conscious of the rights of persons before the courts or the traditions of the courts. If this is a social objective to be furthered with respect to the qualifications of lawyers, it could better be achieved by an examination of the particular qualifications of the applicant.

Re Dickenson and The Law Society of Alberta (1978), 84 D.L.R. (3d) 189 at p. 195

Robert L. Lenoir, Citizenship as a Requirement for the Practice of Law in Ontario, Ottawa L.R., 1981, vol. 13, at pp. 534-535

Raffaelli v. Committee of Bar Examiners (1972) 7 Cal. 3d 287 at pp. 296-297

45. It is submitted that the practice of law does not place a person so close to the core of the political process as to make him a formulator of government policy, nor does it make him an official of the government. It is therefore submitted that lawyers should not be required to have the same qualifications as those required of members of the provincial legislature.

In re Griffiths, 413 U.S. 717 (1973) at p. 729

Robert L. Lenoir, Citizenship as a Requirement for the Practice of Law in Ontario, Ottawa L.R., 1981, vol. 13, at p. 528-529

The Public Officers' Act, R.S.O. 1980, c. 415, sections 1 and 4.

PART IV: ORDER REQUESTED

42. The Respondent respectfully requests that this appeal be dismissed (with costs in any event pursuant to the Order granting leave).

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Brian Morgan

Of the Counsel for the Respondent

TABLE OF AUTHORITIES

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

2. The Constitution Act, 1982 (sections 1-32, Canadian Charter of Rights and Freedoms)

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

4. Driedger, The Construction of Statutes, 1974, pp. 1-13; 109-11-12; 116-117; 123-131; 112-116

5. Maxwell on The Interpretation of Statutes (12th ed.) pp. 28-47

6. Malartic Hygrade Mines Ltd. v. The Queen (1982), 142 D.L.R. (3d) 512 (Que.Sup.Cr.)

7. D.P.P. v. Schildkamp, [1971] A.C. 1

8. Lloyds Bank Ltd. v. Secretary of State for Employment, [1979] 2 All E.R. 573

9. Union Steamship v. Melbourne (1884), 9 App. Cas. 365

10. Craies on Statute Law, 7th ed., pp. 207-210

11. Ontario Interpretation Act, R.S.O. 1980, c. 219, s.9

12. Canada Interpretation Act, R.S.C. 1970, c. I-23

13. Attorney-General of Canada v. Jackson, [1946] S.C.R. 489

14. Brotherhood of Railway Trainmen v. Baltimore & O.R. Co. (1947), 67 S. Ct. 1387 (U.S.S.C.)

15. United States v. Roemer, 514 F. 2d 1377 (1975) 2d Cir.

16. United States v. Carillo-Colmenero, 523 F. 2d 1279 (1975) (U.S. C.A., 5th Cir.)

17. Habib v. Raytheon Co., 616 F. 2d 1204 (1980) (U.S.C.A., D.C. Cir.)

18. Re Allman and Commissioner of the Northwest Territories (1980), 144 D.L.R. (3d) 467 (N.W.T.S.C.)

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

20. R. v. Puzzella, April 7, 1983, Ont. C.A. (not yet reported; digested (1983), 2 C.R.D. 400 40-01)

21. Storey v. Zazelenchuk, Nov. 29, 1982, Sask. Q.B. (not yet reported; digested (1983), 2 C.R.D. 325 20-01)

22. Kingsbury v. Minister of Social Services, Nov. 30, 1982, Sask. Fam. Ct. (not yet reported; digested (1983), 2 C.R.D. 685-02)

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

24. Reference Re Residential Tenancies Act (1981), 123 D.L.R. (3d) 554

25. The Attorney-General of Canada v. The Reader's Digest (Canada) Ltd., Selection du Reader's Digest (Canada) Ltee, [1961] S.C.R. 755

26. Reference re Anti-Inflation Act, [1976] 2 S.C.R. 373

27. Kruger and Manuel v. The Queen (1977), 75 D.L.R. (3d) 434 (S.C.C.)

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

29. John Deere Plow Company Limited v. Theodore F. Wharton, (1915) A.C. 330

30. Great West Saddlery Company Limited v. The King, (1921) 2 A.C. 91

31. British Columbia Power Corporation Ltd. v. Attorney-General of British Columbia et al. (1963), 47 D.L.R. (2d) 633

32. Regina v. Strongquill [1953], 8 W.W.R. (NS) 247 (Sask. C.A.)

33. Natural Parents v. Superintendent of Child Welfare et al. (1976), 60 D.L.R. (3d) 148 (S.C.C.)

34. Re Bell and Bell (1977), 16 O.R. (2d) 197

35. R. v. Haines (1980), 52 C.C.C. (2d) 588 (appeal dismissed without discussion of this issue: 63 C.C.C. (2d) 348)

36. Indian Act, R.S.C. 1970, c. I-6, s. 2(1) - "Indian", ss. 7, 10, 11, 12, 109, 110

37. Statutes Revision Act, S.O. 1979, c. 109, sections 2, 3

38. In Re Ontario Medical Act (1907), 13 D.L.R. 501

39. Re Federal Republic of Germany and Rauca (1983), 41 O.R. (2d) 255 (C.A.)

40. Re Southam Inc. and The Queen (No. 1) (1983), 41 O.R. (2d) 113 (C.A.)

41. R. v. Carson (1983), 20 M.V.R. 84 (Ont. C.A.)

42. Re Ontario Film and Video Appreciation Society and The Ontario Board of Censors (1983), 147 D.L.R. (3d) 58 (Ont. Div. Ct.)

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

44. MacKay v. The Queen, [1980] 2 S.C.R. 370

45. Robert L. Lenoir, Citizenship as a Requirement for the Practice of Law in Ontario, Ottawa L.R., 1981, vol. 13, p. 527 at p. 537-538; 529-532-534-535; 528-529

46. Raffaelli v. Committee of Bar Examiners (1972) 7 Cal. 3d 287

47. The Solicitors' Act, 1974 (U.K.) c. 47, section 29

48. Solicitors (Scotland) Act 1980, sections 4, 5

49. In Re Griffiths, 413 U.S. 717 (1973)

50. Re Dickenson and The Law Society of Alberta (1978), 84 D.L.R. (3d) 189

51. Morgan v. Thorne, (1841) 7 M.W. 400; 151 E.R. 821

52. Boehm v. Goodall, [1911] 1 Ch. 155

53. Parsons v. Sovereign Bank of Canada, [1913] A.C. 160

54. Ex parte James (1874), 30 L.T. 773; 9 Ch. App. 609; [1874-80] All E.R. Rep. 388

55. The Judicature Act, R.S.O. 1980, c. 223, sections 83, 84, 89, 103 and 104

56. The Public Officers Act, R.S.O. 1980, c. 415, sections 1 and 4

57. The Commissioners for Taking Affidavits Act, R.S.O. 1960, c. 59, sections 4, 6 and S.O. 1968-69, c. 12, section 1

58. The Judicature Act, 1881, 44 Vic. c. 5, section 74(3)

59. The Barristers Act, 1912, 2 Geo. V, c. 27, section 3

60. The Solicitors Act, 1912, 2 Geo. V, c. 28, section 6

61. Rules made pursuant to section 14 of The Law Society Act, R.S.O. 1980, c. 233, Rule 51

62. Oaths of Allegiance Act, R.S.C. 1970, c. O-1, section 3