IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

APPELLANT
(RESPONDENT)

AND:

THE ATTORNEY GENERAL OF BRITISH COLUMBIA

APPELLANT
(RESPONDENT)

AND:

MARK DAVID ANDREWS

RESPONDENT
(PETITIONER)

AND:

GOREL ELIZABETH KINERSLY

RESPONDENT

AND:

THE ATTORNEY GENERAL OF ALBERTA,
THE ATTORNEY GENERAL OF SASKATCHEWAN,
THE ATTORNEY GENERAL OF ONTARIO,
PROCUREUR GENERAL DE LA PROVINCE DE QUEBEC,
THE ATTORNEY GENERAL OF NOVA SCOTIA
THE FEDERATION OF LAW SOCIETIES OF CANADA
CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS and
ONTARIO COLLEGES AND UNIVERSITIES FACULTY
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OF THE HANDICAPPED
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PART I
STATEMENT OF FACTS

1. The Respondents, Mark David Andrews and Gorel Elizabeth Kinersly ("the Respondents"), accept the facts set out in the Factum of the Appellant, The Law Society of British Columbia (the "Law Society").

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PART II

POINTS IN ISSUE

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2. The Respondents' position in relation to the issues stated by the Chief Justice is that the Court of Appeal did not err in holding that the absolute prohibition against non-citizens under s. 42 of the Barristers and Solicitors Act (the "Act") R.S.B.C. 1979, Ch. 26 violates s. 15(1) of the Canadian Charter of Rights and Freedoms ("Charter") and cannot be justified under s. 1 of the Charter.

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PART III
ARGUMENT

A. SUMMARY OF ARGUMENT

3. It is respectfully submitted that no error has been demonstrated in the Court of Appeal's assessment of the role of citizenship in relation to lawyers and their role in the government of Canada. One or both of the Appellants have conceded the following important points:

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(1) Citizenship is, generally speaking, a distinction which is discriminatory except as it relates to the definition of political rights and privileges. In most statutory contexts a citizenship requirement would be clearly discriminatory and unconstitutional;

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A.G.B.C. Factum: at para. 35, p. 26-6. The Law Society makes no submission on this point.

(2) The analysis of s. 15 propounded by the Court of Appeal and applied to the present case appears with minor modifications to be acceptable to both Appellants;

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A.G.B.C. Factum: at para. 1, p. 3
Law Society's Factum: at pp's 8-10

4. In light of these concessions, it is only necessary that this Court consider the application of the Court of Appeal's analysis of section 15 to the particular circumstances of a prohibition against non-citizens participating in the practice of law.

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5. The Attorney General of British Columbia ("Attorney General") says that the Court should, in deference to the

1 legislature, direct its attention not to the substantive rationality, reasonableness or fairness of a legislative classification but to "the democratic process to ensure that the process does not dysfunction". (A.G.B.C. Factum, p. 15)

6. In reply, the Respondents submit that the Charter by its express provisions requires judicial review of the substantive correctness, reasonableness and fairness of legislative distinctions. Before the passage of the Charter, the political principle of equality was subject to parliamentary supremacy. The Attorney General's reliance on a theory of judicial review which would seek only to ensure that democracy functions is defective in three principal respects:

(1) It assumes that discrimination is not itself a symptom of dysfunction in the democratic process;

(2) It assumes that judicial review pursuant to the Charter is not a legitimate aspect of democratic government, when in fact judicial review pursuant to the Constitution Act, 1982 is the consequence of a democratic process;

(3) If followed, it would mean that a plainly discriminatory enactment passed by the majority to the express prejudice of a minority would be constitutional as long as it was legislated pursuant to the democratic process.

1 Where a statute, as in the present case, expressly discriminates against a category of individuals without reference to their personal qualities or conduct, and where obvious legislative alternatives existed to cure any prejudice, deference to the legislature is not appropriate.

10 7. The Law Society in turn argues that:

(1) The Court of Appeal wrongly defined discrimination as requiring a strict scrutiny of all legislative distinctions; Law Society factum, p. 27.

(2) Citizenship does not assure allegiance or familiarity with Canadian institutions and customs but is helpful in this respect: Law Society factum, p. 28.

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(3) The legal profession is essential to our governance and in this sense is a part of the governmental process: Law Society factum, p. 30-1.

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8. In reply to these central assertions of the Law Society it is submitted that no statutory purpose is achieved by s. 42 which would justify the exclusion of non-citizens under either s. 15(1) or s. 1 of the Charter. In particular:

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(1) The Court of Appeal expressly refrained from adopting the strict scrutiny approach, and in its reasoning paid deference to the legislature;

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(2) It cannot be fair or reasonable to exclude persons from the practice of law on the basis of a category which even on the Appellants' submissions is no more than helpful in obtaining general suitability;

(3) Lawyers are not officers of the state, and are first and fundamentally independent of the state. That independence is protected by the professional standards and requirements of honour which attach to all lawyers in Canada whether they are Canadian citizens or not. Canadian citizenship as a requirement for admission to the bar is of relatively recent vintage and is not a universal requirement in all of the provinces. The fact that British subjects may still be called to the bar in several provinces indicates that there is no necessary relationship between lawyers and citizenship and that such a nexus has not existed in fact, history or practice.

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(4) The functions of a lawyer in relation to the state do not compel the conclusion that only citizens can discharge a lawyer's functions: C.A. p. 112, ll. 15-23. The professional and ethical obligations of a lawyer are too important to be proven or presumed by the accident of birthplace. The process by which both Respondents have qualified for admission to the bar required them each to prove not only their ability but also their personal and professional integrity.

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B. INTERPRETATION OF SECTION 15(1) OF THE CHARTER

9. The Court of Appeal's interpretation of Section 15(1) and its analysis of the relationship between Section 15(1) and Section 1 would appear to be accepted by the Appellants, with some modifications, and it is broadly accepted by the Respondents. The Respondents say that while this Court may wish to appeal to resolve the questions of interpretation, the result of the appeal does not depend upon which of the possible interpretations is accepted.

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10. Two principal questions of interpretation are raised:

(a) What constitutes "discrimination" under s. 15? The answer to this largely determines the answer to the next question;

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(b) At what stage of the inquiry must recourse be had to Section 1?

11. The first question arises because, in the Respondent's submission, s. 15(1) does not provide a formula for testing all legislation classifications. It is a broad statement of the equality principle. The fundamental concept is that all persons should whenever possible be treated equally by the law, and in particular they ought not to be discriminated against on the basis of such categories as those specifically enumerated. Since equality is

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1 necessarily a relational or comparative concept, the central issue in equality rights cases will therefore be whether individuals who are similar in relevant respects are treated similarly by the law. It is left to the Courts, following a path of experience and precedent, to develop a more specific test for the infringement of this right.

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12. The Respondents submit there are three considerations that the proper interpretation of s. 15 should take into account. First, it should be a purposive interpretation. Section 15 is a particular expression of one of the fundamental values underlying the Charter, the commitment to social justice and equality: R. v. Oakes

20 [1986] 1 S.C.R. 103 at 136. It should recognize that the section was intentionally drawn in broad language to avoid the restrictive interpretation given to the equality provision in the Canadian Bill of Rights:

> Reference re Education Act (1986) 25 D.L.R. (4th) 1 at 41, per Howland C.J.O. and Robins J.A. (dissenting), citing Gold, 4 Supreme Court L.R. 131 (1982);
>
> 30 Hogg, Constitutional Law of Canada, (2d ed) Ch. 35; Tarnopolsky, "The Equality Rights in the Canadian Charter of Rights and Freedoms", (1983) 61 CBR 242

It should further recognize that the section, by incorporating a positive right of equality as well as a prohibition against discrimination, was intended to constitutionalize a

40 broad and substantive egalitarian principle.

13. This approach is well stated by Howland C.J.O. and Robins J.A. in Reference re Education Act, supra, at pp 41-2:

1 "We think it manifest that s. 15(1) must be given a large and liberal interpretation, one aimed at fulfilling the purpose of its broad equality guarantee and constraining governmental action inconsistent with its intent. It must also be interpreted, and particularly so in dealing with religion, so as to give full effect to s. 27 of the Charter which recognizes the multi-cultural mosaic of contemporary Canadian society and requires that:

10 27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multi-cultural heritage of Canadians ....

In our view, s. 15(1) read as a whole constitutes a compendious expression of a positive right to equality in both the substance and the administration of the law. It is an all-encompassing right governing all legislative action. Like the ideals of 'equal justice' and 'equal access to the law', the right to equal protection and equal benefit of the law now enshrined in the Charter rests on the moral and ethical principle fundamental to a truly free and democratic society that all persons should be treated by the law on a footing of equality with equal concern and equal respect."

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14. The second consideration is that the section should be read in its linguistic, philosophical and historical context: <u>R.</u> v. <u>Big M Drug Mart Ltd.</u> [1985] 1 S.C.R. 295 at 344. On linguistic analysis, it would appear that the references to equality and discrimination in s. 15(1) are mutually defining: see Bayefsky, "Defining Equality Rights", in Bayefsky and Eberts, "Equality Rights and the Canadian Charter of Rights and Freedoms". But neither linguistic nor philosophic analysis provide an effective test for "discrimination". The definitions of "discrimination" tend to circularity; for example, the

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1 definition of "pejorative distinction" leaves the central question of what distinctions are prohibited unanswered. From the academic writings cited by the Appellants, there appears no sure philosophical ground.

15. The historical background, however, suggests a meaning for "discrimination". There is a wealth of accumulated experience, Canadian and international, as to what discrimination is and which distinctions should be regarded as invidious. (See C.A. p. 101; Attorney General's Factum, para. 8). Without attempting a formal definition, there is a shared understanding that discrimination encompasses unwarranted stereotyping and stigmatizing of individuals and groups.

16. The third consideration is that any test chosen should allow room for the full developmentand realisation of the equality principle. Too narrow a formulation might prematurely uphold distinctions which should be carefully reviewed.

17. With respect to the first question of what is "discrimination" under s. 15, the Court of Appeal sensibly took a middle course between interpretive extremes, while emphasizing in its application of s. 15 to the present case the necessity for an objective analysis of the legislative distinction. The approach taken by the Court of Appeal has received appellate acceptance in other jurisdictions: Ontario Century 21 Ramos Realty v. The Queen (unreported) Ontario Court of Appeal No. 592/85, February 27, 1987; Headley v. Public Service Commission (1987) 72 N.R. 185, per Pratte, J. (Fed. C.A.).

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18. The heart of the Court of Appeal's test for discrimination is that the Court should determine whether the impugned distinction is unreasonable or unfair, weighing the purposes of the legislation against its effects: C.A. p. 103, 105.

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19. The open framework of this test allows for future constitutional growth through judicial experience. The Respondents accept its application by the Court of Appeal and do not disagree with its formulation, provided three matters are taken into account.

20. First, in applying the test the courts should look to historical-legal experience to identify marks or badges of discrimination. A compilation is given in Spitz, "Litigation Strategy in Equality Rights: The American Experience" in Weiler and Eliot, Litigating the Values of a Nation, at pp 401-402:

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> "(1) The classification (law, regulation or policy) or governmental action in question is based on a characteristic which is specifically enumerated in section 15(1) - race, sex, national origin, etc.
> (2) The classification or governmental action in question is based on a characteristic which is closely analogous to the characteristics enumerated in section 15(1), because the characteristic is immutable or involves a group which is politically powerless or historically discriminated against, such as nationality (alienage or citizenship), birth status (illegitimacy), sexual orientation or marital status, among others.
> (3) The classification or governmental action infringes on a right or freedom which is either specifically enumerated in the Charter (the right to counsel, etc.) or is implicit in the Charter.
> (4) Evidence is shown that the purpose of the classification or action is to harm or stigmatize the plaintiff or his or her group.

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> (5) The classification seriously harms the plaintiff and/or others similarly situated to the plaintiff.
> (6) The classification or governmental action results in a complete exclusion or denial of a right or benefit, as compared to a limitation of that right or benefit.
> (7) The classification or governmental action is irrational, arbitrary or capricious."

21. Second, it is submitted that two different inquiries into "purpose" may be required in discrimination cases, depending on which of two types of discrimination is alleged. In the first type, the court will characterize the 'purpose' of the legislation so that it may determine whether the statutory scheme fails to treat equally all persons who are similarly situated with respect to the purpose of the law: see Tussman and tenBroek, "The Equal Protection of the Laws", 37 Cal. L. Rev. 341 (1948). This has been called "purpose dependent discrimination": Harris, "Equality, Equality Rights and Discrimination under the Charter of Rights and Freedoms", (1987) 21 UBC Law Rev. (forthcoming). In the second type, "purpose independent discrimination", it is alleged that the purpose of the law itself infringes the principle of equality. In that case, the inquiry into the purpose and effect of the legislation is the same as in such Charter decisions as R. v. Big M Drug Mart, supra, at pp. 331 - 333 and R. v. Edwards Books and Art Limited [1986] 2 SCR 713. It is submitted the Court of Appeal's test was directed toward the "purpose dependent" situation.

22. Where purpose dependent discrimination is in issue, there must be an examination of the means adopted by the

1 legislature in relation to the statutory object. The analysis of the means must be made in the light of alternative means available to the legislature.

23. Where it is alleged the actual purpose is discriminatory, it is submitted a proper or correct purpose should not be assumed if other purposes are possible and little evidence establishes which purpose motivated the legislature. Statutes such as that in the present case were drafted and passed in the light of parliamentary supremacy and without constitutional regard to the rights of individuals adversely affected. If there is little or no evidence of the actual legislative purpose then the effect of the legislative provision must be the paramount consideration in a judicial review of its constitutional character.

24. Analysis of purpose is closely connected to the question of deference to the legislature. The Court of Appeal in its test and in its application gave appropriate weight to the right of the legislature to legislate for the good of all. The Appellants seek, in their analysis of s. 15, to give an undue position to the legislative determination. Deference to the legislature should not be allowed, through an *ex post facto* justification of an infirm purpose, to insulate a law from Charter review:

> "Purpose is a function of the intent of those who drafted and enacted the legislation at the time, and not of any shifting variable."
>
> *Re Big M Drug Mart* supra, at page 335 per Dickson C.J.C.

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See also Re B.C. Motor Vehicle Act [1985] 2 S.C.R. 486 at 495 et seq.

25. The third point relates to the second question of interpretation, namely when recourse should be had to s. 1. The Court of Appeal held that a determination must be made under s. 15 that there is discrimination in the sense of invidious treatment, not a mere distinction, before the inquiry turns to s. 1. The Respondents accept this, but say that there should be clarification of what analysis is done under which section. It is submitted that there may be a broad inquiry under s. 15 into whether discrimination is present, including considerations of fairness, the effect on the individual, and the factors listed in paragraph 20 above. However, any inquiry into the public policy merits of the legislation and any weighing of the competing interests should be done under s. 1: R. v. Jones [1986] 2 S.C.R. 284 at 298; Harris, supra. It is in accord with the structure of the Charter to say that s. 15 grants equality rights, while s. 1 articulates the principles on which those rights may be limited. The justification for limiting them must be proven to the standard established by s. 1: R. v. Oakes, supra.

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26. In this regard, it is submitted that the pre-Charter considerations proposed in R. v. McKay [1980] 2 S C R. 370 should now be allocated as between sections 15 and 1 on this basis.

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27. The Attorney General submits there should be different levels of scrutiny depending on the ground of discrimination alleged. The Attorney General concedes that

1 the Court of Appeal test was appropriate to the present case, and no reply is strictly necessary. However, the Respondents wish to make two points. First, it would be inappropriate for the level of scrutiny to depend on the ground alleged, for the following reasons:

(1) It is not supported by the language of s. 15(1);

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(2) There is no logical connection between the ground of discrimination and the level of scrutiny. The focus of the Court's review should rest on the way individual interests are affected. The Court of Appeal's test is already responsive to this;

(3) The US experience with different levels of scrutiny is not encouraging. No coherent approach has emerged and yet the choice of scrutiny level in effect predetermines the result of the challenge: see Gold, "Moral and Political Theories in Equality Rights Adjudication" in Litigating the Values of a Nation; Spitz, supra.

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28. Second, the Attorney General's submission is that the lower level of scrutiny should be limited to a review of the integrity of the democratic process. As submitted in paragraph 6, this is inappropriate under the Charter and internally flawed. It has been tellingly criticized in the American context: see Tribe, "The Puzzling Persistence of Process-based Constitutional Theories", (1980) 89 Yale L.J. 1063; Siegan, "Commentary on Monaghan Paper", (1987) 21 UBC Law Rev. 165.

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29. The Respondent's submissions have been directed to urging an analysis of s. 15 that emphasizes objective

1 characteristics of discrimination and places any deference to the legislature in a proper constitutional perspective. The principle of legislative deference can only be compatible with the rights conferred within s. 15 if it is contained within a narrow ambit. It certainly has little, if any, application to the judicial review of a category
10 such as citizenship that is susceptible to abuse and is primarily a status relating to a specific right, ie. the democratic franchise.

C. DISCRIMINATION ON THE BASIS OF CITIZENSHIP

30. Neither appellant has challenged the holdings below
20 that citizenship can be the basis of a justified challenge under s. 15 of the Charter.

31. It will be submitted that the use of the citizenship category in the Act is discriminatory. This is particularly evident in that the category is not used for any purpose intrinsic to the Act. Unlike the many other
30 requirements of admission, citizenship bears no clear relationship to the individual's personal and professional characteristics. Further, the prohibition against non-citizens is absolute. It directly affects newer immigrants, frustrating in whole or part their ability to enter the legal professions.

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1 (1) Nature of citizenship as a category

32. The appellants' reliance on the historical application of some form of citizenship requirement implies that distinctions which have historical antiquity deserve preservation. However, it is not the case that past forms of discrimination were necessarily regarded by right-thinking members of society as the result of prejudice at the time they were in force. Prejudice has not always had its source in mean-spirited self-interest. It has often arisen out of misguided attempts to benefit a particular group and even more often followed the perception that a categorical definition reflected a reality. Aristotle's exclusion of slaves and women from citizenship in the ideal polity was not based on hatred, but a mistaken and widely shared belief that such individuals were incapable of citizenship: Russell, A History of Western Philosophy, 1945, at p. 186; Politics (Jowett translation) Random House edition 1943, para. 1255 at p. 60. The modern history of the evolution of equality rights shows the necessity of requiring an objective analysis of the use of a categorical distinction in the light of an individual's right to be treated as an individual and not merely as a member of an arbitrary group or class. The Law Society's reference to the general helpfulness of a citizenship requirement is inconsistent with this approach. It is the dignity of the individual which is guaranteed by s. 15 and not the right of the legislature to distinguish between groups within society.

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1 33. The appellants' reference to Aristotle as the founder of the notion of equality may or may not be historically accurate; what is clear is that Aristotle's notion of citizenship is inappropriate to modern democracies with a universal franchise. In respect of the proper moral position relating to the treatment of aliens, the Judeo-

10 Christian tradition affords a more reliable guide:

> "You are to have the same law for the alien and the native-born." Leviticus 24:22 (NIV Translation)

> "Do not mistreat an alien or oppress him, for you were aliens in Egypt." Exodus 22:30 (NIV Translation).

20 34. Citizenship as a ground of distinction is an example of a form of discrimination which is recognized in some contexts to be inapt, but is not often the subject of serious thought or debate. The citizenship requirement with respect to members of the barbers' council was only repealed upon passage of the Charter: <u>Charter Rights Amendment Act</u>, S.B.C. 1985, c. 68, s. 11. Indeed, the <u>Act</u> permitted the

30 benchers to allow British subjects to remain members of the bar: s. 42(c). There are indeed, a multitude of citizenship requirements have been recognized by the Parliamentary Committee into Equality Rights as requiring review for their fairness and reasonableness: Boyer Report, <u>Parliamentary Report on Equality Rights</u>, October, 1985, p. 66 Recommendation 38 at p. 141.

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(a) <u>Citizens and Permanent Residents</u>

35. The reasons of the Court of Appeal make it clear that the use of citizenship as a category generally provides

1 little assurance that a person who falls within the category will have any assured characteristic or quality. This is because in order to become a citizen a person need have no definite personal qualities or attributes. Further, in order to remain a citizen no standard of behaviour or ability is required.

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36. The Law Society seeks to reinstate the trial judge's finding that permanent residents are no more than mere attachments to the country and for that reason a discrimination against them based upon their lack of citizenship is justifiable.

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37. In principle this argument is offensive. Permanent residents in accordance with the history and traditions of this country are welcome additions to Canadian society and are part of the future strength of our country. The ten million immigrants who have come to this country since 1900 have helped Canada become the country it is and Canada's distinctiveness as a nation is due in part to its recognition of the value of differences between peoples.

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This value is now a constitutional principle embodied in s. 27 which states that:

> "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multi-cultural heritage of Canadians."

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38. Judicial recognition of a principle which would deprive permanent residents of the opportunity to practise one ofthe professions would be an interpretation contrary to s. 27. The reasoning of the learned trial judge, reversed by the Court of Appeal, was not that permanent residents

1 lack certain qualities and attributes. Rather, it was that citizens were expected to have certain attributes whereas permanent residents would not be so expected: C.A. at p. 78, l. 18 - p. 79, l. 11. This reasoning was used to support the arbitrary exclusion of individuals who actually proved they possessed all the necessary qualities to be good
10 lawyers. Both citizens and permanent residents are expected to have a deep attachment and regard for the country and allegiance to our system and way of life. To say otherwise is to deny the value of the immigration process and the commitment which it requires of any person choosing to move and take up his life in a new country. The statutory status of permanent resident (now recognized in s. 6 of the
20 Charter) places various requirements on a person before he can become a permanent resident. The only characteristics of a citizen that a permanent citizen resident does not have is a period of residence specifically defined by the Act and the passage of the largely informal citizenship exams. Because it is not only citizens who reside in Canada, a citizenship requirement is not a distinct requirement of:
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(a) Allegiance to the country;

(b) Familiarity with Canadian customs or traditions; or

(c) Connections with the country.

39. A citizenship requirement primarily discriminates
40 against permanent residents, since non-resident aliens or resident aliens without permanent resident status have no right to take up a permanent residence in Canada: Immigration Act S.C. 1976, c. 52, s. 4. As such, the effect of a citizenship requirement is primarily to frustrate or

1 bar the entry of new immigrants into the profession. The use of the citizenship qualification has permitted that barrier to vary in terms of years from five years in 1973 to the current requirement of three years: Citizenship Act, S.C. 1974-75-76, c. 108 s. 5 amending R.S.C. 1970, c. C-18. The practical impact of this length of time varies
10 from individual to individual. Individuals unable by reason of family or other obligations to outwait their period of disqualification would be forced to pursue another occupation.

(b) Citizenship and Allegiance

20 40. The Appellant Law Society asserts that there has been a consistent citizenship requirement in Canadian history in relation to being called to the bar. It will be submitted later that this history is inaccurate. Further, this argument rests on the mistaken premise that the concepts of allegiance (i.e. being a British subject) and Canadian citizenship are identical.
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41. The history of the concept of citizenship in the Commonwealth is dramatically different from its history in the United States or other republican jurisdictions. Concepts of citizenship vary from country to country and from one legal tradition to another. Modern concepts of
40 democratic theory evolved long after the concepts of British subject and allegiance were well rooted in Commonwealth political theory. The concept of allegiance in British legal history was distinct from any notion of citizenship, and the definition of a British nationality is a recent

1 development: See Jones, British Nationality Law, (1956), pp. 1-62; Dummet, Citizenship and Nationality, (1976), pp. 20-39. The development of a Canadian citizenship as distinct from the capacity of a British subject was a complementary evolution from the original ties to the British sovereign. Canadians are still British subjects,
10 and have always been entitled to be called to the bars of England, Scotland and Wales notwithstanding their knowledge or ignorance of British traditions, customs or practices.

42. This emphasis on allegiance must be viewed in the context of the monarchical principle that all residents of a country owe allegiance to Her Majesty. The law of treason
20 has always recognized authority over resident aliens: Joyce v. D.P.P. [1946] A.C. 347. Equally, allegiance is a matter of individual decision rather than a group qualification. As such, aliens have always been entitled at law to take the oath of allegiance and that oath is of no less value than the oath provided by a citizen: In Re Howard [1976] 1
30 N.S.W.L.R. 641 at 646; Re Dickenson and Law Society of Alberta (1978) 84 D.L.R. (3d) 189 at 195; Public Officers Act, R.S.O. 1980 Ch. 415, s. 4; Oaths of Allegiance Act R.S.C. 1970, Ch. 0-1, s. 3; Citizenship Act S.C. 1976, s. 39. This has apparently been the case since Blackstone: Lenoir, supra, at p. 533, n. 25.

40 43. The oaths of citizenship and allegiance have never included a renunciation of other loyalties, such as is found in republican jurisdictions: Oath of Citizenship, Citizenship Act, s. 6 and s. 8; Oath of Allegiance required for

1 admission to the bar (Rules of Law Society).

(c) <u>History and experience of the use of citizenship as a legislative category</u>

44. The general history and experience of the use of
10 citizenship as a legislative classification demonstrates that it has been used for prejudicial and oppressive reasons.

45. In Canada it was noted early that differing requirements for immigrants were intended to exclude new members of the country from carrying on their only means of
20 earning a livelihood with the result that many were forced to take up other means of livelihood. Earl of Durham, <u>A Report On Canada</u> (1st ed.) Methuen, (1902), at p. 121-123, quoted in Lenoir, infra, at 537, n.43.

46. The historical use of citizenship is broader than controls for admission to the bar. As described in detail
30 in Head, "The Stranger In Our Midst: A Sketch Of The Legal Status Of The Alien In Canada" [1964] Can Y.B. Int'l. Law 107, citizenship was used as a means of discriminating against new immigrants. Indeed, Canadian citizens were banned from voting by reason of their immigrant status or race pursuant to several statutes passed by the legislature
40 of British Columbia. Not only has law been an exclusive preserve; so too have pharmacists, beer vendors, loggers and barbers variously excluded immigrants or others by reference to the franchise: Head, <u>supra</u>, at p. 128

47. The history of the use of the citizenship requirement in the United States shows that citizenship requirements were often an arbitrary means of excluding newer immigrants from participation in selected areas of society: Yick Wo v. Hopkins 118 U.S. 356 (1886); Graham v. Richardson 403 U.S. 365 (1971); Sugarman v. Dougall 413 U.S. 634 (1973); Truax and the State of Arizona v. Raich 239 U.S. 33 (1915).

48. There is therefore a history of general abuse of a citizenship requirement. In relation to the practice of law, the historical use of a citizenship or quasi-citizen-ship requirement is inconsistent, and includes references to illegitimate legislative purposes. For example, the statu-tory exclusion of non-British subjects in British Columbia occurred when the Rules of the Law Society also required that candidates be on the voters list. Inclusion on the voters list was a prerequisite for numerous other economic activities and "Asians" were barred from voting: C.A. p. 111, line 17 to 24.

(2) Citizenship as a Requirement for the Legal Professions

49. The Law Society has submitted that there has been a consistent citizenship requirement throughout history for the practice of law. Even the common law did not have a consistent reference to legitimate objectives in relation to bars to the practice of law. At common law aliens and women were prohibited from becoming attorneys: Coke on Littleton, and referred to in In Re Howard, supra; In Re Heyting [1928] N.Z.L.R. 233 (N.Z.S.C.). The early history is complicated

1 by issues of translation and practise. As noted by the Court of Appeal of New South Wales in In Re Howard, supra, at pp. 647 and 649, Coke's law french statement of the rule ("Feme ne poient estre attorneyes...ne nul que n'est a le foy le roy") likely intended only to exclude those who refused to bear allegiance to the King.

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50. There was no common law rule prohibiting aliens from becoming barristers as opposed to attorneys. Neverthe-less, until 1868 barristers were required to take an oath of allegiance which was thought to prevent aliens from becoming barristers: 3 Halsbury's Law of England (3d ed.) at 6. After 1868 aliens were regularly called to the bar as

20 barristers in England: Re Howard, supra; Re Scholer [1955] N.Z.L.R. 1190 (N.Z.S.C.) per McGregor J. at 1190; Robert L. Lenoir, "Citizenship as a Requirement to Practice Law in Ontario", (1981) 13 Ottawa L.R. at 547, note 93; John de P. Wright, "Admission of Women to the Bar: An Historical Note", (1982) 16 L.S.U.C. Gazette 42. The statutory requirement that a solicitor in Britain be a British subject

30 was repealed in 1974: Solicitors (Amendment) Act, 1974, (U.K.).

51. Between 1605 and 1829 Roman Catholics were barred by U.K. statute from being "counsel or attorneys." An Act to Prevent and Avoid Dangers Which May Grow by Popish

40 Recusant, 3 Jac. I. Ch. 5, s. 6 (1605); An Act for the Relief of His Majesty's Roman Catholic Subjects, 10 George IV Ch. 7 (1829) (U.K.).

1 52. At various times in the history of the Canadian Bar women, Roman Catholics, French Canadians, Aboriginal Peoples, Asiatics, and non-British subjects have been barred from the practice of law. Some of these disabilities were imported via the common law of England and some had their genesis in local conditions: Riddel, "The Bar and the Courts of Upper Canada", pp. 3-4; Watts, The History of The Legal Profession in British Columbia 1869 - 1984, at pgs. 47, 133-146.

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53. In Ontario before 1912 the common law appears to have governed the admission of persons to the bar which would have admitted aliens as barristers, but not possibly as attorneys. The first Barristers and Solicitors Act required a person to be a British subject but not a Canadian citizen. Barristers Act, (Ont.) 2 Geo V, (1912) Ch. 27, s. 3, Solicitors Act, (Ont.) 2 Geo. V, (1912) Ch. 120, s. 6. Between 1927 and 1934 in Ontario the requirement that one had to be a British subject was relaxed so that "residents of Ontario who have taken the oath of allegiance and have declared their intention to become British subjects" were permitted to practice as barristers or solicitors in the Province of Ontario: Statute Law Amendments (Ont.) Ch. 28, 17 Geo. V, (1927) s. 12 and 13.

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54. In the early years of the British Columbia bar, the Rules of Court originally permitted Americans to be called to the bar if they were qualified in an American state. The Order of the Court made it difficult for native Canadians to be called since a person had to have previously been qualified for the bar in England or in one of the United

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1 States. Soon thereafter, and until 1972, the only absolute qualification for admission to the bar in B.C. was that of British subject. This pattern of requiring that a person be a British subject has been found commonly in the other common law provinces.

10 55. The history of Canadian law societies appears to indicate that allegiance was required rather than citizenship. This has its direct parallel in the treatment of allegiance as the governing consideration in the history of the bars of United Kingdom. The statutory requirement that a person be a British subject necessarily excluded some persons who bore allegiance to Her Majesty and were capable

20 of taking the oath of allegiance, but it was a short form requirement directed towards allegiance and not citizenship. As there was no constitutional right to equality, persons who were prepared and entitled to swear the oath of allegiance, but were not British subjects, were arbitrarily excluded from the practice of law.

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(3) Purpose and Effect of s.42 of the Act

(a) Respondents' Position

56. The relationship between a legislative category and the presumed legitimate objectives of the statute is a

40 central feature in any equality determination. In the present case, it has been asserted that there are certain legitimate objectives which are attained by the use of the legislative category of citizenship.

1 57. The conclusion of the Court of Appeal was that the provision did not obtain the legislative objectives assumed for it. Further, the Court of Appeal concluded that if such objectives were forwarded by the provision then the use of the category was not proportional to those objectives.

10 58. The Appellant [illegible]w Society seeks to avoid the reasoning of the Court of Appeal by stating that the standard of review applied by the Court of Appeal paralleled the "strict scrutiny" test used in the United States for cases of racial and similar discrimination. The Court of Appeal did not expressly or in fact apply the strict scrutiny test but rather extracted a test which has not been seriously challenged. In Respondent's submission, there is 20 nothing in the standard applied by the Court of Appeal which is objectionable. Further, it is respectfully submitted that the reasoning of the Court of Appeal in respect of the nature of citizenship and its impact in the present circumstances is sound and correct.

30 59. The Respondents' position is that the effect of s. 42 is to erect an arbitrary barrier to the entry of new immigrants to the practice of law. Whether this was the Law Society or the Province's purpose is unclear; no evidence was offered at the trial level of the purpose of the provision, and contemporary commentary is mixed: 29 40 Advocate (1971) "Entre Nous" p. 108-9.

(b) Reply to Appellants' Submissions

1 60. The appellant Law Society submits that the requirement of citizenship achieves the following goals:

(a) Familiarity with Canadian institutions and customs;

(b) Commitment to Canadian society;

(c) Ensuring that lawyers, who play a fundamental role in the Canadian system of government, are citizens.

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(i) Familiarity

61. The Court of Appeal held, with respect to the first goal, that:

> "Citizenship does not ensure familiarity with Canadian institutions and customs. Only citizens who are not natural born Canadians are required to have resided in Canada for a period of time. Natural born Canadians may reside in whatever country they wish and still retain their citizenship. In short, citizenship offers no assurance that a person is conscious of the fundamental traditions and rights of our society. The requirement of citizenship is not an effective means of ensuring that the persons admitted to the bar are familiar with this country's institutions and customs". C.A., p. 107, l. 15-23.

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62. It is also submitted that the practical necessities of familiarity with Canadian institutions and customs are dealt with in the examinations prescribed for admission to the bar. Someone who is wholly unfamiliar and incapable of dealing with the circumstances and customs of Canadian society might not be able to pass the examinations required of him by the Law Society. In respect of a lawyer's abilities, it is noteable that the Law Society requires additional educational requirements of foreign trained

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1 lawyers, whether they are Canadian citizens or not. In the present case, the Respondent Andrews passed all of the examinations required of Canadian trained lawyers as well as the additional examinations required of foreign-trained lawyers. There is no suggestion that either of the Respondents have an inadequate knowledge of Canadian customs
10 and traditions. Such an assertion could well be a basis for excluding citizens or non-citizens after a personal interview by a Bencher as required by the Rules.

63. The Law Society essentially concedes that a citizenship requirement does not ensure familiarity with or commitment to Canada and its laws: but, "there can be no
20 doubt it helps": Law Society factum, p. 28. Naturally any organization in Canada will largely consist of Canadian citizens; and one would hope the majority of citizens are loyal and familiar with Canadian customs and traditions. This is not, however, the issue. As addressed by the Court of Appeal, the issue is whether the use of the citizenship category is fair and just to individual non-citizens. It
30 can only be fair if the excluded group (i.e. permanent residents) lack the desirable qualities of members of the qualified group. The appellants' factums both rely upon the special status of citizenship. The respondents do not gainsay the special status of citizenship, but say that by its nature it is unsuitable and dangerous to permit it to be
40 used to exclude immigrants from joining a vital profession. Indeed, the values of fairness and equality reflected in the Charter are the common heritage of all Canadians, old and new.

1 (ii) Commitment

64. In respect of the implication that non-citizens lack a commitment to Canadian society, the Court of Appeal stated that:

> "Only those citizens who are not natural born Canadians can be said to have made a conscious choice to establish themselves here permanently and to opt for full participation in the Canadian social process, including the right to vote and run for public office. While no doubt most citizens, natural born or otherwise, are committed to Canadian society, citizenship does not ensure that that is the case. Conversely, non-citizens may be deeply committed to our country. Moreover, the requirement of commitment to our country is arguably satisfied by the oath of allegiance which lawyers are required to take. An alien may swear that oath. In any event, an alien may owe allegiance to the Crown if he is resident within this country, even if he does not take the oath of allegiance: Re Dickenson and Law Society of Alberta, supra". C.A., p. 108, l. 1-12.

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65. In addition to these matters, it is respectfully submitted that the requirement of citizenship prohibits any non-citizen from proving himself or herself to the satisfaction of the Benchers. The fundamental issue in all equality cases is whether the law respects the right of an individual to be treated as an individual. The categorical exclusion of individuals who may indeed have a deeper and more significant reason for being committed to Canada offends those individuals' rights to be treated as individuals.

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66. The only formal requirement of commitment which applies to citizens is the oath of allegiance. Unlike the

armed forces, for example, lawyers do not commit themselves to following the orders of superiors or pledging their lives to the service of the country. Their duties are primarily private and are subject to the professional duties and ethics of the profession. The lawyer's continuing obligation is to his profession and to the system of laws of which he plays a part. It is not primarily to the executive or legislative arms of government.

(iii) <u>State or Government Function</u>

67. The Court of Appeal carefully considered the third basis upon which the Law Society and the Attorney-General seek to affirm the citizenship requirement in the present case; it held that:

> "While lawyers clearly play an important role in our society, it cannot be contended that the practice of law involves performing a state or government function. In this respect, the role of lawyers may be distinguished from that of legislators, judges, civil servants and policemen. The practice of law is first and foremost a private profession. Some lawyers work in the courts, some do not. Those who work in the courts may represent the Crown or act against it. It is true that all lawyers are officers of the court. That term, to my mind, implies allegiance and certain responsibilities to the institution of the court. But it does not men that lawyers are part of the process of government."

> "It was urged before us that society accords lawyers special powers and privileges as members of the legal profession which ally them with the governmental process. However, the only privilege lawyers are given is the right to charge fees for representing clients. The power to issue writs, discover documents and subpoena witnesses is shared by every member of our society. No one suggests

1 that a private person who exercises these powers on his own behalf is playing a role in the government of our country, nor that citizenship should be a prerequisite of so doing. The fact that lawyers do these things on behalf of others can offer no justification of the requirement that they be Canadian citizens."

"The fact is that citizenship was not seen as essential to the practice of law in this province prior to 1971. It is still not viewed as such in most jurisdictions; only two other provinces require lawyers to be citizens. In the tradition of the British Commonwealth, citizenship has never been a requirement for the right to practise law. These facts belie the contention that citizenship is vitally and integrally connected with the lawyer's role in society.

"I cannot accept that contention. The Legislature was not defining its political community by imposing a requirement of citizenship on lawyers in s. 42 of the <u>Barristers and Solicitors Act</u>. Nothing is said in that section about the role lawyers play in governmental processes. Nor can we assume that was the premise upon which the citizenship requirement was founded. The argument that the State should be given broad power to define its political community, might well have application in other contexts, such as the question of who may be a citizen. I do not find it helpful in deciding the issue now before us."

68. The Appellants' argument on this point pre-supposes that the requirement of citizenship has nothing to do with the qualifications or abilities of an <u>individual</u> to practise law. It represents a formal requirement related to the relationship of a lawyer to the process of government.

69. On the identical issue, the United States Supreme Court, the Court of Justice of the European Communities, the Ontario Court of Appeal, the British Columbia Court of

1 Appeal and the Alberta Supreme Court have all concluded that a citizenship requirement is not justified:

> Re Griffiths 413 U.S. 717 (1973) (USSC) at 723-24, 727-29;
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> Rafaelli v. Board of Bar Examiners 496 P 2d 1264, (1912) (SC Cal. in Bank) at 1273;
>
> 10 Reyners v. The Belgian State [1974] 2 CMLR (Common Market Law Reports) 305 (Court of Justice of the European Communities) at 329-330;
>
> Re Dickenson and Law Society of Alberta, supra;
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> Re Skapinker and the Law Society of Upper Canada (1983) 145 DLR (3d) 502 (Ont. CA); 40 OR (2d) 481 at 488 per Grange, J.A.;
>
> 20 Re Application of Park, 481 P. 2d 690 (1971) (SC of Alaska) per Dimond, J. at 691-692;

Numerous commentators have concluded that the citizenship requirement is ineffective, unnecessary and unfair:

> 30 Arthurs, "The First Column", Obiter Dicta, p. 4 (1976);
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> Lenoir, "Citizenship as a requirement for the practice of law in Ontario", supra, at 548;
>
> Cliffe, "Aliens: The Unconstitutional Classification for Admission to the Bar", 4 St. Mary's Law Journal, 181;
>
> 40 Ross, "The Solicitors (Amendment) Act (1974), (UK): Its relevance to Australia" (1975) 49 Australian Law Journal 268.

70. Other "Officers of the Court" such as next friends, receivers, trustees in bankruptcy and commissioners for

1 taking affidavits, are not required to be citizens notwithstanding their involvement in the legal process. It is noteworthy that where statutes have made similar stipulations relating to participation in "Officers ... concerning the Government" or "Place of Trust from or under His Majesty" lawyers have not been included: Lenoir, supra,
10 p. 531, n. 16.

71. In addition to these factors there are compelling reasons why lawyers should not be regarded as arms of the state for the purposes of admission to the bar.

72. Firstly, the exclusion of permanent residents
20 denies them participation in a profession which is vital to the appearance of fairness and justice in Canadian institutions. They would be effectively excluded from the profession intended to insure fair and just treatment of their rights.

30 73. Secondly, it is of the essence of our legal profession that it be independent of the processes of government. The Appellant Law Society and Attorney-General argue that a lawyer's powers and duties identify him with the application of law to Canadian residents. As stated by Mr. Justice Estey in Attorney-General of Canada v. Law Society of British Columbia [1982] 2 SCR 307:

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> "Th: independence of the bar from the state in all its pervasive manifestations is one of the hallmarks of a free society ... The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the bar and through those members, legal advice and services generally."

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74. The fundamental submission of the Attorney-General is that the legislature by the passage of the citizenship requirement was in fact "defining its political community." In reply to this, it is to be observed that the citizenship requirements passed by the same legislature in other contexts clearly were intended to do something other than define its political community. Similarly, there is no evidence that the legislature considered lawyers part of its political community and that this was the purpose which motivated the change from the previous system of allowing British subjects to be called to the bar. Finally, and most importantly, there is no evidence that the legislature considered the impact of the provision on permanent residents and addressed the concern that they not be excluded from vocations to which they were otherwise qualified.

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75. In reply to the appellant Law Society's treatment of the American case law considering citizenship, it is submitted that the cases subsequent to Griffiths expressly made it clear that the reasoning in Griffiths was in no way diminished by reason of the upholding of requirements of citizenship for public school teachers (not private school teachers), peace officers and jurors: Cabell v. Chavez-Salido, 102 S. Ct. 735 (1982); Ambach v. Norwick, 441 U.S. 68 (1979). The difficult case in this series of authorities is Ambach which was decided by a five to four margin, and could well be considered to have been poorly decided. However, this does not diminish the weight of the reasoning of the majority in Re Griffiths.

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76. The dissenting judgments in Griffiths, which are relied upon by the appellant Law Society are part of a series of dissenting decisions by Chief Justice Burger and Rehnquist, J. in which it has been unsuccessfully asserted that the equal protection clause in the American constitution is restricted to racial discrimination. These dissenting opinions have not been accepted by any majority of the Court. Since the Charter expressly prohibits not only racial discrimination but all discriminations, and lists many discriminations other than race, the usefulness of the dissents in Re Griffiths must be seriously questioned.

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77. The contemporary use of a citizenship requirement refutes the suggestion that there is an identity between lawyers and citizens. Long after Canadian citizenship was created by statute in 1946, the majority of provinces in Canada admitted non-resident and non-Canadian citizens so long as they were British subjects. Two provinces today admit permanent residents to the practice of law on varying conditions. Since a British subject is defined by the Citizenship Act (Can.) as a citizen of the Commonwealth, these provisions permit citizens of 46 countries to become lawyers in Canada, notwithstanding that their backgrounds are as varied as Australia, Belize, Fiji, India, Kenya, Nauru, and Western Samoa: Interpretation Act R.S.C. 1970, Ch. I-23; Proclamations in 1972, 1974, 1977, 19, 1981 and 1984.

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1 78. The objection to the citizenship requirement is that it excludes individuals who are in all relevant respects capable of being qualified and valuable members of the bar. The fact that there has been a long history in which non-Canadian citizens have been called to the bar and no evidence that this has created any difficulty in the
10 administration of justice, demonstrates that the exclusion of non-citizens is vague, uncertain and ineffective.

79. In conclusion, there is no evidence to support the appellant Attorney General's argument that s. 42 of the Act was intended to define the political community of British Columbia. Further, there are compelling reasons, including
20 the independence of the Bar, to hold that lawyers are not part of the processes of government for the purposes of admission to the practice of law.

D. SECTION 1 OF THE CHARTER

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80. Neither appellant addresses substantial argument to the applicability and reasoning to be followed should the present provision have to qualify under s. 1 of the Charter.

81. This is notwithstanding that in Re Skapinker [1984] 1 S.C.R. 357 at 383 this Honourable Court made it clear that
40 the record in that case would, in all likelihood, not have established a sufficient basis to pass s. 1 scrutiny.

82. It is respectfully submitted that the "political rights" doctrine invoked by both appellants is, in effect, a

1 s. 1 justification rather than a reasonable or fair justification pursuant to s. 15. Accordingly, it is respectfully submitted that the political rights exception sought to to be created by the appellants must, in this case, meet the s. 1 standard of scrutiny and be "demonstrably justified in a free and democratic society."

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83. Given the fact that Canadian citizenship has never been a consistent requirement for the practice of law in Canadian jurisdictions, it cannot be argued that such a requirement meets s. 1 scrutiny.

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PART IV
NATURE OF ORDER SOUGHT

That the appeal be dismissed.

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ALL OF WHICH IS RESPECTFULLY SUBMITTED.

D.G. Cowper, Esq.,

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W.S. Martin, Esq.,

Counsel for the Respondents Mark
David Andrews and
Gorel Elizabeth Kinersly

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Vancouver, B.C.
September 14, 1987

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