

S.C.C. 23861

IN THE SUPREME COURT OF CANADA
(Appeal from the Appeal Division of the Supreme Court of Prince Edward Island)

BETWEEN:

THOMAS P. WALKER and JOHN M. ROBERTSON

APPELLANTS
(PLAINTIFFS)

AND:

THE GOVERNMENT OF PRINCE EDWARD ISLAND

RESPONDENT
(DEFENDANT)

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PART 1

STATEMENT OF FACTS

1. On September 15, 1994 the Attorney General of British Columbia (the "Attorney General") received Notice of the Constitutional Questions in this appeal as stated by the Chief Justice Lamer in his September 8, 1994 order: Supplementary Case on Appeal, Volume 1 @ 54, 58.
2. On October 4, 1994 the Attorney General filed his Notice of Intention to Intervene: Supplementary Case on Appeal, Volume 1, @ 68.

PART 2

POINTS IN ISSUE

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3. The Attorney General intervenes to address the issue of whether s. 14(1) of the *Public Accounting and Auditing Act*, R.S.P.E.I. 1988, c. P-28 attracts s. 7 of the *Canadian Charter of Rights and Freedoms*, 1982 ("the Charter").

4. The Attorney General's position is that s. 14 does not engage s. 7 of the *Charter* because: (1) "liberty" for s. 7 *Charter* purposes, does not include the right to work or engage in the practice of a profession; and (2) the type of restriction at issue does not occur as a result of an individual's interaction with the justice system and its administration.

5. The Attorney General takes no position in respect of any of the other constitutional issues raised in this appeal.

PART 3

ARGUMENT

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4 6. The appellants do not like the policy underlying s. 14(1) of the *Public*
5 *Accounting and Auditing Act*. They argue that they are as capable or "qualified" as
6 Chartered Accountants to practice public accountancy and that legislation which
7 prevents them from doing so simply because they are not, and choose not to be,
8 members of the Institute of Chartered Accountants and licenced by the Institute,
9 violates s. 7 of the *Charter*. In particular, the appellants say that "liberty" for s. 7
10 *Charter* purposes "protects the rights of an individual to pursue an occupation or
11 profession for which he or she is qualified, and to move freely throughout the
12 country for that purpose": appellant's factum, @ p. 27, para. 76. It is said that this is
13 so because the pursuit of an occupation, while having an economic element, is
14 fundamental to human dignity and self-worth; a person's employment is an essential
15 component of his or her sense of identity, self-esteem and emotional well-being:
16 appellants' factum, @ 26, 27, para. 75.

17
18 7. The essential issue for this Court is whether s. 7 of the *Charter* can be relied
19 on to assert an individual right to pursue an occupation or profession unconstrained
20 by regulatory requirements which have been legislatively imposed in the public
21 interest. Accordingly, the fact the appellants may be "qualified" (in the sense of
22 being capable) of carrying out public accountancy functions is irrelevant. Similarly,
23 the fact that the Prince Edward Island legislature has decided to enact an
24 accounting regulatory scheme which is different from the scheme adopted in some
25 other provincial jurisdictions is also irrelevant. The *Charter* does not impose
26 provincial legislative uniformity in respect of self-governing professions.

27
28

1 **The section 7 "liberty" interest**

2
3 8. The meaning of a *Charter* right is to be ascertained having regard to the
4 interests it was meant to protect, to its historical origins and, where applicable, to
5 the meaning and purpose of other rights and freedoms with which it is associated.
6 While the interpretation should be a generous rather than legalistic one, it should
7 not overshoot the actual purpose of the right in question: *R. v. Big M Drug Mart*
8 *Ltd.*, [1985] 1 S.C.R. 295 @ 344.

9
10 9. The appellants' urge upon this Court an expansive definition of liberty. They
11 rely on the reasoning of Wilson, J. in *R. v. Morgentaler*, [1988] 1 S.C.R. 30 @ 166 to
12 say that the notion of liberty is inextricably linked to the concept of human dignity.
13 *A fortiori*, because the pursuit of an occupation is inextricably linked to human
14 dignity and a sense of self-worth, a s. 7 liberty interest is necessarily engaged:
15 appellant's factum, @ 26, para. 74. Some support for such an expansive definition is
16 found in the judgment of Mr. Justice LaForest (Gonthier, McLachlin, and
17 L'Heureux-Dube concurring) in *R. B. v. Children's Aid Society of Metropolitan*
18 *Toronto*, [1994] S.C.J. No. 24 @ paras. 80, 81. LaForest, J. there agrees with Madam
19 Justice Wilson's formulation of liberty as one which is rooted in fundamental
20 concepts of human dignity, personal autonomy, privacy and choice in decisions going
21 to the individual's fundamental being. Accordingly, he concludes that the right to
22 nurture a child, to care for its development, and to make decisions for it in matters
23 such as medical care, are part of the liberty interest of a parent.

24
25 10. While the scope of liberty in s. 7 of the *Charter* is expansive, it is clearly not
26 synonymous with unconstrained freedom: *Edwards Books & Art Ltd. v. The Queen*,
27 [1986] 2 S.C.R. 713. Dickson, C.J.C. there held (@ 785) that "[w]hatever the precise
28 contours of "liberty" in s. 7, I cannot accept that it extends to an unconstrained right
29 to transact business wherever one wishes". Accordingly, not all individual activity
30 immediately qualifies as an exercise of liberty, providing *prima facie Charter*
31 protection: *Children's Aid Society, infra*, @ para. 212 (per Iacobucci and Major, J.J.);
32 *Prostitution Reference, infra*, @ 1166-1167 (per Lamer, J.).

1
2 11. The largely economic component of a right to work or pursue an occupation
3 is not disputed. This Court has held that the exclusion of the term "property" in s. 7
4 of the *Charter* leads to the general inference that economic rights as generally
5 encompassed by the term "property" are not within the perimeters of the s. 7
6 guarantee: *Irwin Toy Ltd. v. A.G. Quebec*, [1989] 1 S.C.R. 927 @ 1003. The
7 question of whether those economic rights fundamental to human life or survival are
8 to be treated in the same way as corporate-commercial economic rights was left
9 open in that case. (See also *Reference re Public Service Employee Relations Act*
10 [1987] 1 S.C.R. 313 @ 412: "... the *Charter*, with the possible exception of s. 6(2)(b)
11 .. and (6)(4), does not concern itself with economic rights"; and @ 413 "the
12 overwhelming preoccupation of the *Charter* is with individual, political, and
13 democratic rights with conspicuous inattention to economic and property rights".)

14
15
16 **The economic aspect of work**

17
18 12. The Ontario courts have consistently held that s. 7 of the *Charter* does not
19 embrace economic rights to work, earn a livelihood, or pursue a profession. The
20 Ontario courts interpret liberty in this context as relating only to a person's physical
21 and mental integrity and one's control over that integrity: *R. v. Videoflicks Ltd.*
22 (1984), 14 D.L.R. (4th) 10 (Ont. C.A.) @ 48, affm'd sub nom *Edwards Books, supra*
23 ("[t]he concept of life, liberty and security of the person would appear to relate to
24 one's physical or mental integrity and one's control over these, rather than some
25 right to work whenever one wishes"); *R. v. Miles of Music Ltd.* (1989), 48 C.C.C. (3d)
26 96 (Ont. C.A.) @ 109; *Arlington Crane Service v Ont. (Min. of Labour)* (1988), 67
27 O.R. (2d) 225 (H.C.) [which dealt with the issue of whether a closed shop provision
28 in a collective agreement violated s. 7] @ 296 ("... a person has no guaranteed
29 constitutional right to a particular job or to enter a particular profession or
30 occupation or to choose not to be bound by a particular collective agreement");
31 *Haddock v. Ontario (Attorney-General)* (1990), 70 D.L.R. (4th) 644 (Ont.Div.Ct.) @
32 660-661; *Biscotti v. Ontario (Securities Commission)* (1990), 72 D.L.R. (4th) 385

(Ont.H.C.) @ 389 affm'd on this point, (1991), 76 D.L.R. (4th) 762 (Ont. C.A.), leave to appeal denied 83 D.L.R. (4th) vii; *Cosyns v. Canada (Attorney-General)* (1992), 88 D.L.R. (4th) 507 (Ont.Div.Ct.) @ 518; *Kopyto v. Law Society of Upper Canada* (1993), 107 D.L.R. (4th) 259 (Ont.Div.Ct.) @ 269.

See also *Re Bassett and Government of Canada* (1987) 35 D.L.R. (4th) 537 (Sask. C.A.) @ 567; *Forgie v. Public Service Staff Relations Board* (1987), 32 C.R.R. 191 (F.C.A.) @ 192; and *Re Allen and Judicial Council of Manitoba* (1990), 70 D.L.R. (4th) 164 (Man. Q.B.) @ 171-172.

13. The definition of liberty for s. 7 *Charter* purposes applied by the Ontario courts most closely accords with that expressed by Lamer, J. (as he then was) in *Prostitution Reference, infra*, @ 1170-71, 1179; *Children's Aid Society, supra*, @ para. 22 (per Lamer, C.J.). And see *Children's Aid Society*, @ para. 33, where Chief Justice Lamer, in discussing the linkage between the three distinct rights provided for in s. 7 says this:

In my opinion, the connection is found in the person himself or herself, as a corporeal entity, as opposed to the person's spirit, aspirations, conscience, beliefs, personality or, more generally, the expression or realization of what makes up the person's non-corporeal identity. The right to liberty in this context, must therefore be set up against imprisonment, detention or any form of control or of constraint on freedom of movement.

The non-economic aspects of work

14. The appellants here rely on the non-economic aspects of work to trigger the application of s. 7 of the *Charter*. While they recognize the right asserted has a significant economic component, they say it is not "purely" economic and thus, is distinguishable, for example, from the right to conduct a business.

1 15. The importance of the non-economic or non-pecuniary aspects of
2 employment to a person's sense of identity, self-worth and emotional well-being has
3 been acknowledged by this Court: *Reference re ss. 193 and 192.(1)(c) of the Criminal*
4 *Code (Man.)* [1990] 1 S.C.R. 1123 (the "*Prostitution Reference*") @ 1170. Indeed,
5 many aspects of employment (including hiring, firing, terms and conditions of
6 employment) are subject to both federal and provincial regulatory "protective"
7 legislation (*ie.*, legislation governing labour relations, minimum employment
8 standards, and human rights). Legislatures have also seen fit, in the public interest,
9 to legislatively grant self-governing status to many professional and occupational
10 groups, and the importance of this type of regulatory legislation has also been
11 recognized by this Court: *Rocket v. Royal College of Dental Surgeons*, [1990] 2 S.C.R.
12 232 @ 249; *Pearlman v. Manitoba Law Society*, [1991] 2 S.C.R. 869 @ 387; *R. v.*
13 *Wholesale Travel*, *infra*, @ 219, 234. [See also *Howard*, *infra*, @ 320: "Indeed it is
14 the essence of a self-governing profession that no member of it is free to practice it
15 as he sees fit".]

16
17 16. Some courts have concluded that, despite its economic aspect, the right to
18 practice a profession is so fundamental it must be protected as a liberty interest
19 under the *Charter*: *Wilson v. Medical Services Com'n* (1988), 53 D.L.R. (4th) 171
20 (B.C.C.A.) leave to appeal denied, [1988] 2 S.C.R. vii @ 185, 186-187 ("[s. 7] may
21 embrace individual freedom of movement, including the right to choose one's
22 occupation and where to pursue it"); *Re Mia and Medical Services Com'n of B.C.*
23 (1985), 17 D.L.R. (4th) 385 (B.C.S.C.). The *Wilson* case was followed in *Howard v.*
24 *Architectural Institute of B.C.* (1989), 40 B.C.L.R. (2d) 315 (S.C.) @ 319-323 (where
25 it was held that "[t]he power to impose a penalty of termination of the right to
26 practice through disciplinary proceedings transforms the action from one of
27 regulation to one of potential deprivation"); and *Khaliq-Kareemi (Re)* (1989), 57
28 D.L.R. (4th) 505 (N.S.C.A.) @ 515, leave refused (1989), 93 N.S.R. (2d) 269n.

29
30 17. The *Wilson* case, relied on by the appellants, purports to distinguish between
31 a right to work (which the court finds is purely economic right not worthy of *Charter*
32 protection) and a right to pursue a livelihood or profession (which concerns one's

1 dignity and sense of self-worth, and is worthy of *Charter* protection): *Wilson, supra*,
2 @ 187. Not surprisingly, this distinction has been criticized as an unprincipled and
3 unwarranted one: *Prostitution Reference, supra*, @ 1169-1171; *A Problematic Judicial*
4 *Foray into Legislative Policy-Making, infra*, @ 623.

5
6 18. Work is of course not the only activity which contributes to a person's sense
7 of identity, self-worth or emotional well-being. The point has been made that if
8 liberty or security of the person under s. 7 of the *Charter* were defined in terms of
9 such attributes, "liberty" for s. 7 *Charter* purposes would be all inclusive: *Prostitution*
10 *Reference, supra*, @ 1170 (per Lamer, J.); *R. v. Baig* (1992), 78 C.C.C. (3d) 260
11 (B.C.C.A.) @ 273-274; see also. M.D. Lepofsky, *Constitutional Law - Charter of*
12 *Rights and Freedoms, s. 7 - A Problematic Judicial Foray into Legislative Policy-*
13 *Making: Wilson v. B.C. Medical Services Commission* (1988), 68 C.B.R. 615 @ 622
14 ("... [by] allowing a party to make a section 7 economic rights claim by simply adding
15 to it some additional claim which a court may find significant, ... litigants could
16 potentially challenge a sweeping variety of business, economic and regulatory
17 legislation under s. 7").

18
19 19. Even if one accepts the appellants' all-encompassing definition of liberty, a
20 *Charter* liberty interest should not be engaged where the interest at stake, as here, is
21 primarily economic, as opposed to incidentally so (as in *Morgentaler, supra*, @ 171,
22 172). While Mr. Justice LaForest has interpreted liberty broadly (in *Children's Aid*
23 *Society, supra*) he differentiates between the interest there at stake, and forms of
24 economic liberty. Referring to the reasons of Lamer, J. in the *Prostitution Reference*
25 (@ para. 76), he observes that, "[i]n that case, Lamer, J. was concerned with the
26 narrower issue of economic liberty and the right to choose one's profession. The
27 case did not address an issue similar to that raised in the appeal, where the interest
28 claimed by the appellants is of a different nature altogether, and where the state
29 does use the justice system to restrict it".

30

1 **Implications of *Charter* protected right to work or pursue occupation**

2
3 20. An interpretation of liberty which would encompass a right to work or pursue
4 the occupation of one's choice immediately engages the Court in analysis of
5 whether any infringement or deprivation of that interest is in accordance with
6 principles of fundamental justice. As this case well-illustrates, this aspect of the s. 7
7 analysis is particularly ill-suited to what is essentially an evaluation of the validity or
8 reasonableness of the legislature's policy choices which underlie the legislation. It
9 is, to paraphrase Chief Justice Lamer in *Children's Aid Society, supra*, @ para. 31
10 "difficult to draw any connection whatever with the principles of fundamental justice
11 in order to determine whether the infringement [is] lawful".

12
13 21. If one accepts the appellants' position, s. 7 of the *Charter* can be *prima facie*
14 engaged to challenge the appropriateness of policy choices underlying all legislation
15 dealing with various aspects of employment. For example, legislative provisions
16 which permit restrictions on job competitions in the public sector, employment
17 standards provisions which deal with the termination of employment or labour
18 legislation which authorizes union closed-shop provisions could be subjected to
19 constitutional scrutiny under s. 7. As Chief Justice Lamer observes, in *Children's Aid*
20 *Society, supra*, @ para. 35:

21 ... since most laws have the effect of limiting a freedom, the same
22 approach could mean, depending on the facts, that a large
23 proportion of the legislative provisions in force could be
24 challenged on the ground that they infringe the liberty guaranteed
25 by s. 7 of the *Charter*. It would then be for the courts, in each case,
26 to decide whether or not the freedom invoked was a fundamental
27 freedom in our free and democratic society, whether the limit
28 complied with the principles of fundamental justice which, as I
29 noted, often do not apply, or whether the limit was reasonable and
30 could be justified in a free and democratic society. We must keep
31 in mind, first, that what may be important and fundamental to one
32 person may very well not be to another, including the judge who
33 hears the case, and second, that by adopting this approach the
34 judiciary would inevitably be legislating, when this is not its
35 function. With respect, I believe that this situation does not reflect
36

1 the purpose of the *Charter* or of s. 7, or the intention of
2 Parliament.

3
4 **Administrative regulatory proceedings do not attract s. 7 *Charter* scrutiny**

5
6 22. An interpretation of liberty which excludes the liberty to pursue an
7 occupation or profession is entirely consistent with the kind of contextual analysis
8 mandated by this Court: *Prostitution Reference, supra*, @ 1172, 1173; *R. v. Wholesale*
9 *Travel Group Inc.* [1991], 3 S.C.R. 154 @ 209, 224-226. Such analysis requires an
10 assessment of the content of the s. 7 "liberty" interest in the particular context of the
11 matter before this Court.

12
13 23. It is well-established that ss. 8 to 14 of the *Charter* are illustrative both of
14 some of the parameters of s. 7 interests, and of specific deprivations of such interests
15 in breach of the principles of fundamental justice: *Reference re s. 94(2) of the Motor*
16 *Vehicle Act (B.C.)*, [1985] 2 S.C.R. 486 (the "*Motor Vehicle Act Reference*"), @ 502,
17 503, 512, 513. The common thread that runs throughout ss. 7-14 of the *Charter* is the
18 involvement of the justice system. Section 7 is intended to protect legal rights and to
19 restrain governmental restrictions on liberty and security of the person which occur
20 as a result of an individual's interaction with the justice system and its
21 administration: *Prostitution Reference, supra*, @ 1173-1178; *Children's Aid Society,*
22 *supra* (per Lamer, C.J. @ para. 23). See also *R. v. Morgentaler, supra*, @ 55-56 (per
23 Dickson, C.J.).

24
25 24. Sections 8 to 14 of the *Charter* are mainly concerned with criminal or penal
26 proceedings (including quasi-criminal proceedings, and proceedings for "regulatory"
27 offences with truly punitive consequences), and they confer rights related to
28 investigation, detention, adjudication and sanction in relation to "offences":
29 *Prostitution Reference, supra*, @ 1171, 1175; *R. v. Wigglesworth*, [1987] 2 S.C.R. 541,
30 @ 554-555, 558-560.

31
32 25. This Court has repeatedly acknowledged what Mr. Justice LaForest referred
33 to as "the broad divide between true criminal law and regulatory offences":

1 *Wholesale Travel, supra*, @ 208, 189, 216 *et seq.* Accordingly, even where a
2 regulatory "offence" is penal in nature, distinctions are made between the content of
3 fundamental justice for s. 7 purposes as it relates to true criminal offences and those
4 which are "regulatory" but enforced as penal laws. That is because the latter "are in
5 substance of a civil nature and might well be regarded as a branch of administrative
6 law to which traditional principles of criminal law have but limited application": *R.*
7 *v. Wholesale Travel, supra*, @ 217, 218. Of regulatory legislation Mr. Justice Cory
8 says this (@ 219):

9
10 The objective of regulatory legislation is to protect the public or
11 broad segments of the public (such as employees, consumers and
12 motorists, to name but a few) from the potentially adverse effects
13 of otherwise lawful activity. Regulatory legislation involves a shift
14 of emphasis from the protection of individual interests and the
15 deterrence and punishment of acts involving moral fault to the
16 protection of public and societal interests. While criminal
17 offences are usually designed to condemn and punish past,
18 inherently wrongful conduct, regulatory measures are generally
19 directed to the prevention of future harm through the enforcement
20 of minimum standards of conduct and care.

21
22 26. While s. 7 generally and the right to liberty particularly are not exclusively
23 limited to purely criminal or penal matters, applying a contextual analysis, those
24 rights and protections would logically only extend in a regulatory context to those
25 circumstances in which the deprivation of liberty by government action is analogous
26 to the criminal or penal law model. Examples cited in the *Prostitution Reference*,
27 *supra*, @ 1175, are instructive: "[f]or example, the civil process for restraining a
28 mentally disordered person or isolating a contagious person should be subject to
29 review under s. 7 ... [s]imilarly, if a person, as a condition of a probation order were
30 ordered to refrain from associating with certain persons, where failure to comply
31 would bring him within s. 666 of the *Code*, then s. 7 may be engaged". Mr. Justice
32 Lamer (as he then was) went on to say:

33
34 What is at stake in these examples is the kind of liberty and security
35 of the person the state typically empowers judges and courts to
36 restrict. In other words, the confinement of individuals against

1 their will, or the restrictions of control over their own minds and
2 bodies, are precisely the kinds of activities that fall within the
3 domain of the judiciary as guardian of the justice system.

4
5 See also *Motor Vehicle Reference*, *supra*, @ 524 (per Wilson, J.):
6 "Indeed, all regulatory offences impose some restrictions on liberty
7 broadly construed. But I would think it would trivialize the *Charter*
8 to sweep all those offences into s. 7 as violations of the right to life,
9 liberty and security of the person...".

10
11 See also *Nisbett v. Manitoba (Human Rights Commission)*, [1993] 4
12 W.W.R. 420 (Man. C.A.) leave to appeal denied (1993), 14 Admin.
13 L.R. (2d) 231n (S.C.C.) (s. 7 has no application to proceedings of a
14 non-penal nature under the *Human Rights Act*); *Bennett v. British*
15 *Columbia (Securities Commission)* (1991), 82 D.L.R. (4th) 129
16 (B.C.S.C.) @ 172-183, *affm'd* (1991), 94 D.L.R. (4th) 339
17 (B.C.C.A.); *Belhumeur v. Comite de Discipline du Barreau de*
18 *Quebec* (1988), 54 D.L.R. (4th) 105 (Ont. C.A.) @ 116; *Kopyto v.*
19 *Law Society of Upper Canada* (1993), 107 D.L.R. (4th) 259
20 (Div.Ct.), @ 269; *Cahill v. Hearing Committee of the Prov. Med.*
21 *Bdg* (1994), 131 N.S.R. (2d) & 371 A.P.R. 378 (N.S.S.C.), @ 381-
22 386.

23
24 27. For all of the reasons given, the Attorney General says that the asserted right
25 to pursue the occupation of one's choice, unconstrained by regulatory requirements,
26 is not a liberty right protected by s. 7 of the *Charter*.

PART 4

NATURE OF ORDER SOUGHT

28. That the first constitutional issue stated by the order of the Chief Justice of this Court, insofar as it refers to s. 7 of the *Charter*, be answered "No".

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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COUNSEL FOR THE INTERVENER
THE ATTORNEY GENERAL
OF BRITISH COLUMBIA

DATED AT THE CITY OF VICTORIA, IN THE PROVINCE OF BRITISH COLUMBIA THIS 21 DAY OF MARCH, 1995

PART 5

LIST OF AUTHORITIES

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