Andrews *v.* Law Society of British Columbia, [1989] 1 S.C.R. 143

The Law Society of British Columbia

and

The Attorney General of British Columbia *Appellants*

and

The Attorney General for Ontario,
the Attorney General of Quebec,
the Attorney General of Nova Scotia,
the Attorney General for Saskatchewan,
the Attorney General for Alberta,
the Federation of Law Societies of Canada *Interveners*

v.

Mark David Andrews

and

Gorel Elizabeth Kinersly *Respondents*

and

The Women's Legal Education and Action Fund,
the Coalition of Provincial Organizations of
the Handicapped, the Canadian Association of
University Teachers and the Ontario Confederation
of University Faculty Associations *Interveners*

indexed as: andrews *v.* law society of british columbia

File Nos.: 19955, 19956.

1987: October 5, 6; 1989: February 2.

Present: Dickson C.J. and McIntyre, Lamer, Wilson, Le Dain*, La Forest and L'Heureux-Dubé JJ.

on appeal from the court of appeal of british columbia

Constitutional law -- Charter of Rights -- Equality before and under the law and equal protection and benefit of law -- Citizenship required for call to bar -- Whether or not requirement discriminatory with respect to qualified Canadian residents who are not citizens -- Whether or not requirement justified under s. 1 -- Canadian Charter of Rights and Freedoms, ss. 1, 15(1) --Barristers and Solicitors Act, R.S.B.C. 1979, c. 26, s. 42.

The respondent Andrews, a British subject permanently resident in Canada met all the requirements for admission to the British Columbia bar except that of Canadian citizenship. His action for a declaration that that requirement violated s. 15(1) of the *Canadian Charter of Rights and Freedoms* was dismissed at trial but allowed on appeal. Kinersly, an American citizen who was at the time a permanent resident of Canada articling in the Province of British Columbia, was added as a co-respondent by order of this Court. The constitutional questions before this Court dealt with: (1) whether the Canadian citizenship requirement for admission to the British

* Le Dain J. took no part in the judgment.

Columbia bar infringed or denied the equality rights guaranteed by s. 15(1) of the *Charter*; (2) if so, whether that infringement was justified by s. 1.

Held:

Section 15(1) of the *Charter*

Per Dickson C.J. and McIntyre, Lamer, Wilson and L'Heureux-Dubé JJ.: Section 15(1) of the *Charter* provides for every individual a guarantee of equality before and under the law, as well as the equal protection and equal benefit of the law without discrimination. This is not a general guarantee of equality; its focus is on the application of the law. No problem regarding the scope of the word "law" arose in this case because legislation was under attack.

The "similarly situated should be similarly treated" approach will not necessarily result in equality nor will every distinction or differentiation in treatment necessarily result in inequality. The words "without discrimination" in s. 15 are crucial.

Discrimination is a distinction which, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, has an effect which imposes disadvantages not imposed upon others or which withholds or limits access to advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

Generally, the principles applied under the Human Rights Acts are equally applicable to questions of discrimination under s. 15(1). However, the *Charter* requires a two-step approach

to s. 15(1). The first step is to determine whether or not an infringement of a guaranteed right has occurred. The second step is to determine whether, if there has been an infringement, it can be justified under s. 1. The two steps must be kept analytically distinct because of the different attribution of the burden of proof; the citizen must establish the infringement of his or her *Charter* right and the state must justify the infringement.

The grounds of discrimination enumerated in s. 15(1) are not exhaustive. Grounds analogous to those enumerated are also covered and the section may be even broader than that although it is not necessary to answer that question in this case since the ground advanced in this case falls into the analogous category.

The words "without discrimination" require more than a mere finding of distinction between the treatment of groups or individuals. These words are a form of qualifier built into s. 15 itself and limit those distinctions which are forbidden by the section to those which involve prejudice or disadvantage. The effect of the impugned distinction or classification on the complainant must be considered. Given that not all distinctions and differentiations created by law are discriminatory, a complainant under s. 15(1) must show not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit of the law but must show in addition that the law is discriminatory.

A rule which bars an entire class of persons from certain forms of employment, solely on the grounds of a lack of citizenship status and without consideration of educational and professional qualifications or the other attributes or merits of individuals in the group, infringes s. 15 equality rights. Section 42 of the *Barristers and Solicitors Act* is such a rule.

Per La Forest J.: The views of McIntyre J. as to the meaning of s. 15(1) were substantially agreed with in so far as relevant to the question of whether or not the impugned provision amounted to discrimination based on "irrelevant personal differences" such as those listed in s. 15 and, traditionally, in human rights legislation. The opening words of s. 15 referring more generally to equality, however, may have a significance that extends beyond protection from discrimination through the application of law. Nevertheless, all legislative classifications need not be rationally supportable before the courts; s. 15 was not intended to be a tool for the wholesale subjection of legislation to judicial scrutiny.

The impugned legislation distinguished the respondents from other persons on the basis of a personal characteristic which shares many similarities with those enumerated in s. 15. Citizenship is typically not within the control of the individual and is, at least temporarily, a characteristic of personhood which is not alterable by conscious action and which in some cases is not alterable except on the basis of unacceptable costs. Non-citizens are a group of persons who are relatively powerless politically and whose interests are likely to be compromised by legislative decisions.

Citizenship, while properly required for certain types of legitimate governmental objectives, is generally irrelevant to the legitimate work of government in all but a limited number of areas. Legislating citizenship as a basis for distinguishing between persons, here for conditioning access to the practice of a profession, harbours the potential for undermining the essential or underlying values of a free and democratic society embodied in s. 15. Legislative conditioning on the basis of citizenship may, in certain circumstances, be acceptable in the free and democratic society that is Canada, but that legislation must be justified by the government under s. 1 of the *Charter*.

Section 1 of the *Charter*

Per Dickson C.J. and Wilson and L'Heureux-Dubé JJ.: The legislation at issue was not justified under s. 1.

The objective of the legislation was not sufficiently pressing and substantial to warrant overcoming the rights protected by s. 15. Given that s. 15 is designed to protect those groups who suffer social, political and legal disadvantage in our society, the burden resting on government to justify the type of discrimination against such groups is appropriately an onerous one.

The proportionality test was not met. The requirement of citizenship is not carefully tailored to achieve the objective that lawyers be familiar with Canadian institutions and customs and may not even be rationally connected to it. Most citizens, natural-born or otherwise, are committed to Canadian society but that commitment is not ensured by citizenship. Conversely, non-citizens may be deeply committed to our country. Even if lawyers do perform a governmental function, citizenship does not guarantee that they will honourably and conscientiously carry out their public duties: that is a function of their being good lawyers, not of citizenship.

Per La Forest J.: While in general agreement with McIntyre J. about how the legislation must be approached under s. 1 in balancing the right infringed by the legislation against its objectives, the legislation fails to meet the test of proportionality.

Citizenship neither ensures the objectives of familiarity with Canadian institutions and customs or of commitment to Canadian society. Restriction of access to the profession to citizens is over-inclusive. Less drastic methods for achieving the desired objectives are available.

While certain state activities may, for both symbolic and practical reasons, be confined to those who are full members of our political society, such restriction should not apply to the legal profession as a whole. The practice of law is primarily a private profession. A lawyer working for a private client does not play a role in the administration of justice requiring citizenship. Ordinary lawyers are not privy to government information and there are rules to restrict lawyers from obtaining confidential governmental information. Their situation differs from those involved in government policy-making or administration.

Per McIntyre and Lamer JJ. (dissenting): The citizenship requirement is reasonable and sustainable under s. 1 given the importance of the legal profession in the government of the country. The measure was not disproportionate to the object to be attained. Non-citizens are encouraged to become citizens and the maximum delay imposed upon the non-citizen from the date of acquisition of permanent resident status is three years. It is reasonable to expect that the newcomer who seeks to gain the privileges and status within the land and the right to exercise the great powers that admission to the practice of law will give should accept citizenship and its obligations as well as its advantages and benefits.

Cases Cited

By Wilson J.

Referred to: *United States v. Carolene Products Co.*, 304 U.S. 144 (1938); *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Re Dickenson and Law Society of Alberta* (1978), 84 D.L.R. (3d) 189.

By La Forest J.

Referred to: *Buck v. Bell*, 274 U.S. 200 (1927); *Union Colliery Company of British Columbia v. Bryden*, [1899] A.C. 580; *Kask v. Shimizu*, [1986] 4 W.W.R. 154; *Fontiero v. Richardson*, 411 U.S. 677 (1973); *Re Howard*, [1976] 1 N.S.W.L.R. 641; *In re Griffiths*, 413 U.S. 717 (1973); *Reyners v. The Belgian State*, [1974] 2 Common Market Law R. 305.

By McIntyre J. (dissenting as to the application of s. 1)

Referred to: *Dennis v. United States*, 339 U.S. 162 (1950); *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Reference Re Family Benefits Act* (1986), 75 N.S.R. (2d) 338; *Reference Re Use of French in Criminal Proceedings in Saskatchewan* (1987), 44 D.L.R. (4th) 16; *Smith, Kline & French Laboratories Ltd. v. Canada (Attorney General)*, [1987] 2 F.C. 359; *R. v. Ertel* (1987), 35 C.C.C. (3d) 398; *R. v. Gonzales* (1962), 132 C.C.C. 237; *R. v. Drybones*, [1970] S.C.R. 282; *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183; *Mahe v. Alta. (Gov't)* (1987), 54 Alta. L.R. (2d) 212; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349; *Reference re an Act to Amend the Education Act* (1986), 53 O.R. (2d) 513; *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536; *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Bhinder v. Canadian National Railway Co.*, [1985] 2 S.C.R. 561; *MacKay v. The Queen*, [1980] 2 S.C.R. 370; *Belgian Linguistic Case (No. 2)* (1968), 1 E.H.R.R. 252; *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *United States v. Carolene Products Co.*, 304 U.S. 144 (1938); *Graham v. Richardson*, 403 U.S. 365 (1971).

Statutes and Regulations Cited

Barristers and Solicitors Act, R.S.B.C. 1979, c. 26, s. 42.

Canadian Bill of Rights, R.S.C. 1970, App. III, s. 1(*b*).

Canadian Charter of Rights and Freedoms, ss. 1, 2(*a*), 7, 15(1), (2), 25, 27, 32.

Canadian Citizenship Act, S.C. 1946, c. 15.

Canadian Human Rights Act, S.C. 1976-77, c. 33, s. 10.

Constitution Act, 1982, s. 52.

Constitution of the United States of America, 14th Amendment.

Human Rights Act, S.M. 1974, c. 65, s. 6(7).

Human Rights Code, 1981, S.O. 1981, c. 53, s. 17.

Human Rights Code, R.S.B.C. 1979, c. 186, ss. 1, 22.

Immigration Act, S.C. 1910, c. 27.

Indian Act, R.S.C. 1970, c. I-6, s. 12(1)(*b*).

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Racial Discrimination Act, 1944, S.O. 1944, c. 51.

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APPEAL from a judgment of the British Columbia Court of Appeal (1986), 2 B.C.L.R. 305, 27 D.L.R. (4th) 600, [1986] 4 W.W.R. 474, allowing an appeal from a judgment of Taylor J. (1985), 66 B.C.L.R. 363, 22 D.L.R. (4th) 9, [1986] 1 W.W.R. 252. Appeal dismissed, McIntyre and Lamer JJ. dissenting. The first constitutional question should be answered in the affirmative; the second in the negative.

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Joseph Arvay, for the appellant Attorney General of British Columbia.

Elizabeth C. Goldberg and *David Lepofsky*, for the intervener the Attorney General for Ontario.

Jean-Yves Bernard and *Julie Hudon*, for the intervener the Attorney General of Quebec.

Alison Scott, for the intervener the Attorney General of Nova Scotia.

Robert G. Richards, for the intervener the Attorney General for Saskatchewan.

Richard F. Taylor, for the intervener the Attorney General for Alberta.

P. B. C. Pepper, Q.C., for the intervener the Federation of Law Societies of Canada.

D. G. Cowper and *W. S. Martin*, for the respondents.

Mary Eberts and *Gwen Brodsky*, for the intervener the Women's Legal Education and Action Fund.

J. David Baker, for the intervener the Coalition of Provincial Organizations of the Handicapped.

Steven Barrett, for the interveners the Canadian Association of University Teachers and the Ontario Confederation of University Faculty Associations.

//*Wilson J.*//

The judgment of Dickson C.J. and Wilson and L'Heureux-Dubé JJ. was delivered by

WILSON J. -- I have had the benefit of the reasons of my colleague, Justice McIntyre, and I am in complete agreement with him as to the way in which s. 15(1) of the *Canadian Charter of Rights and Freedoms* should be interpreted and applied. I also agree with my colleague as to the way in which s. 15(1) and s. 1 of the *Charter* interact. I differ from him, however, on the application of s. 1 to this particular case.

As my colleague points out, s. 42 of the *Barristers and Solicitors Act*, R.S.B.C. 1979, c. 26, differentiates between citizens and non-citizens with respect to admission to the practice of law. The distinction denies admission to non-citizens who are in all other respects qualified. While the citizenship requirement applies only to those non-citizens who are permanent residents, it has the effect of requiring those permanent residents to wait for a minimum of three years from the date of establishing their permanent residence before they can be considered for admission to the Bar. It imposes a burden, in the form of some delay in obtaining admission, on permanent residents who have acquired all or some of their legal training abroad.

I agree with my colleague that a rule which bars an entire class of persons from certain forms of employment solely on the ground that they are not Canadian citizens violates the equality rights of that class. I agree with him also that it discriminates against them on the ground of their personal characteristics, i.e., their non-citizen status. I believe, therefore, that they are entitled to the protection of s. 15.

Before turning to s. 1, I would like to add a brief comment to what my colleague has said concerning non-citizens permanently resident in Canada forming the kind of "discrete and insular minority" to which the Supreme Court of the United States referred in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), at pp. 152-53, n. 4.

Relative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated. They are among "those groups in society to whose needs and wishes elected officials have no apparent interest in attending": see J. H. Ely, *Democracy and Distrust* (1980), at p. 151. Non-citizens, to take only the most obvious example, do not have the right to vote. Their vulnerability to becoming a disadvantaged group in our society is captured by John Stuart Mill's observation in

Book III of *Considerations on Representative Government* that "in the absence of its natural defenders, the interests of the excluded is always in danger of being overlooked . . . ." I would conclude therefore that non-citizens fall into an analogous category to those specifically enumerated in s. 15. I emphasize, moreover, that this is a determination which is not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society. While legislatures must inevitably draw distinctions among the governed, such distinctions should not bring about or reinforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others.

I believe also that it is important to note that the range of discrete and insular minorities has changed and will continue to change with changing political and social circumstances. For example, Stone J. writing in 1938, was concerned with religious, national and racial minorities. In enumerating the specific grounds in s. 15, the framers of the *Charter* embraced these concerns in 1982 but also addressed themselves to the difficulties experienced by the disadvantaged on the grounds of ethnic origin, colour, sex, age and physical and mental disability. It can be anticipated that the discrete and insular minorities of tomorrow will include groups not recognized as such today. It is consistent with the constitutional status of s. 15 that it be interpreted with sufficient flexibility to ensure the "unremitting protection" of equality rights in the years to come.

While I have emphasized that non-citizens are, in my view, an analogous group to those specifically enumerated in s. 15 and, as such, are entitled to the protection of the section, I agree with my colleague that it is not necessary in this case to determine what limit, if any, there is on the grounds covered by s. 15 and I do not do so.

Section 1

Having found an infringement of s. 15 of the *Charter*, I turn now to the question whether the citizenship requirement for entry into the legal profession in British Columbia constitutes a reasonable limit which can be "demonstrably justified in a free and democratic society" under s. 1.

As my colleague has pointed out, the onus of justifying the infringement rests upon those seeking to uphold the legislation, in this case the Attorney General of British Columbia and the Law Society of British Columbia, and the analysis to be conducted is that set forth by Chief Justice Dickson in *R. v. Oakes*, [1986] 1 S.C.R. 103.

The first hurdle to be crossed in order to override a right guaranteed in the *Charter* is that the objective sought to be achieved by the impugned law must relate to concerns which are "pressing and substantial" in a free and democratic society. The Chief Justice stated at pp. 138-39:

> To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

This, in my view, remains an appropriate standard when it is recognized that not every distinction between individuals and groups will violate s. 15. If every distinction between individuals and groups gave rise to a violation of s. 15, then this standard might well be too stringent for application in all cases and might deny the community at large the benefits associated with sound

and desirable social and economic legislation. This is not a concern, however, once the position that every distinction drawn by law constitutes discrimination is rejected as indeed it is in the judgment of my colleague, McIntyre J. Given that s. 15 is designed to protect those groups who suffer social, political and legal disadvantage in our society, the burden resting on government to justify the type of discrimination against such groups is appropriately an onerous one.

The second step in a s. 1 inquiry involves the application of a proportionality test which requires the Court to balance a number of factors. The Court must consider the nature of the right, the extent of its infringement, and the degree to which the limitation furthers the attainment of the legitimate goal reflected in the legislation. As the Chief Justice stated in *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 768:

> Second, the means chosen to attain those objectives must be proportional or appropriate to the ends. The proportionality requirement, in turn, normally has three aspects: the limiting measures must be carefully designed, or rationally connected, to the objective; they must impair the right as little as possible; and their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgment of rights.

The appellant Law Society submitted that the Court of Appeal erred in its consideration of the citizenship requirement by failing to accord proper recognition to the role of the legal profession in the governmental process of the country and in failing to consider that Canadian citizenship could reasonably be regarded by the legislature as a requirement for the practice of law. The respondents, on the other hand, argued that the Court of Appeal was right in concluding that there was not a sufficiently rational connection between the required personal characteristic of citizenship and the governmental interest in ensuring that lawyers in British Columbia are familiar with Canadian institutions, are committed to Canadian society, and are capable of

playing a role in our system of democratic government. I am in general agreement with the reasoning of the Court of Appeal on this aspect of the case for the following reasons.

The trial judge in this case concluded that the discrimination against non-citizens in s. 42 of the *Barristers and Solicitors Act* was justified under s. 1 of the *Charter*. He said ((1985), 22 D.L.R. (4th) 9) at p. 21:

> I find citizenship to be a personal characteristic which is relevant to the practice of law on account of the special commitment to the community which citizenship involves and not merely because the practical familiarity with the country necessary for that occupation can generally be expected in the case of citizens.

On appeal McLachlin J.A., as she then was, found that the exclusion of non-citizens was not rationally connected to the governmental interest in ensuring that lawyers had a sufficient knowledge of local affairs and institutions for the competent practice of law. She stated ((1986), 27 D.L.R. (4th) 600) at p. 612:

> 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: see *Re Dickenson and Law Society of Alberta* (1978), 84 D.L.R. (3d) 189 at p. 195, 5 Alta. L.R. (2d) 136, 10 A.R. 120.

I appreciate the desirability of lawyers being familiar with Canadian institutions and customs but I agree with McLachlin J.A. that the requirement of citizenship is not carefully tailored to achieve that objective and may not even be rationally connected to it. McDonald J. pointed out in *Re Dickenson and Law Society of Alberta* (1978), 84 D.L.R. (3d) 189, at p. 195 that such a requirement affords no assurance that citizens who want to become lawyers are sufficiently

familiar with Canadian institutions and "it could be better achieved by an examination of the particular qualifications of the applicant, whether he is a Canadian citizen, a British subject, or something else".

The second justification advanced by the appellants in support of the citizenship requirement is that citizenship evidences a real attachment to Canada. Once again I find myself in agreement with the following observations of McLachlin J.A., at pp. 612-13:

> The second reason for the distinction -- that citizenship implies a commitment to Canadian society -- fares little better upon close examination. 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 commited [*sic*] to our country.

The third ground advanced to justify the requirement relates to the role lawyers are said to play in the governance of our country. McLachlin J.A. disputed the extent to which the practice of law involves the performance of a governmental function. She stated at p. 614:

> 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, in my mind, implies allegiance and certain responsibilities to the institution of the court. But it does not mean that lawyers are part of the process of government.

Although I am in general agreement with her characterization of the role of lawyers *qua* lawyers in our society, my problem with this basis of justification is more fundamental. To my mind, even if lawyers do perform a governmental function, I do not think the requirement that they be

citizens provides any guarantee that they will honourably and conscientiously carry out their public duties. They will carry them out, I believe, because they are good lawyers and not because they are Canadian citizens.

In my view, the reasoning advanced in support of the citizenship requirement simply does not meet the tests in *Oakes* for overriding a constitutional right particularly, as in this case, a right designed to protect "discrete and insular minorities" in our society. I would respectfully concur in the view expressed by McLachlin J.A. at p. 617 that the citizenship requirement does not "appear to relate closely to those ends, much less to have been carefully designed to achieve them with minimum impairment of individual rights".

Disposition

I would dismiss the appeal with costs. I would answer the constitutional questions as follows:

Q. (1) Does the Canadian citizenship requirement to be a lawyer in the Province of British Columbia as set out in s. 42 of the *Barristers and Solicitors Act*, R.S.B.C. 1979, c. 26 infringe or deny the rights guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

A. Yes.

Q. (2) If the Canadian citizenship requirement to be a lawyer in the Province of British Columbia as set out in s. 42 of the *Barristers and Solicitors Act*, R.S.B.C. 1979, c. 26 infringes or denies the rights guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms*, is it justified by s. 1 of the *Canadian Charter of Rights and Freedoms*?

A. No.

//*McIntyre J.*//

The reasons of McIntyre and Lamer JJ. were delivered by

MCINTYRE J. (dissenting in part) -- This appeal raises only one question. Does the citizenship requirement for entry into the legal profession contained in s. 42 of the *Barristers and Solicitors Act*, R.S.B.C. 1979, c. 26, (the "Act") contravene s. 15(1) of the *Canadian Charter of Rights and Freedoms*? Section 42 provides:

> **42.** The benchers may call to the Bar of the Province and admit as a solicitor of the Supreme Court
>
> (*a*) a Canadian citizen with respect to whom they are satisfied that he . . .

and s. 15 of the *Charter* states:

> **15.** (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The respondent, Andrews, was a British subject permanently resident in Canada at the time these proceedings were commenced. He had taken law degrees at Oxford and had fulfilled all the requirements for admission to the practice of law in British Columbia, except that of Canadian citizenship. He commenced proceedings for a declaration that s. 42 of the Act violates the *Charter*. He also sought an order in the nature of mandamus requiring the benchers of the

Law Society of British Columbia to consider his application for call to the Bar and admission as a solicitor. His action was dismissed at trial before Taylor J. in the Supreme Court of British Columbia in a judgment reported at (1985), 22 D.L.R. (4th) 9. An appeal was allowed in the Court of Appeal (Hinkson, Craig and McLachlin JJ.A., at (1986), 27 D.L.R. (4th) 600), and this appeal is taken by the Law Society of British Columbia, by leave granted November 27, 1986. Pursuant to an order of this Court on January 28, 1987, Gorel Elizabeth Kinersly, an American citizen who was at the time a permanent resident of Canada articling in the Province of British Columbia, was added as a co-respondent in this appeal. On January 28, 1987, the Chief Justice stated constitutional questions in the following terms:

(1) Does the Canadian citizenship requirement to be a lawyer in the Province of British Columbia as set out in s. 42 of the *Barristers and Solicitors Act*, R.S.B.C. 1979, c. 26 infringe or deny the rights guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

(2) If the Canadian citizenship requirement to be a lawyer in the Province of British Columbia as set out in s. 42 of the *Barristers and Solicitors Act*, R.S.B.C. 1979, c. 26 infringes or denies the rights guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms*, is it justified by s. 1 of the *Canadian Charter of Rights and Freedoms*?

Following the judgment in his favour, the respondent Andrews was called to the Bar and admitted as a solicitor in the Province of British Columbia and is now a Canadian citizen. The co-respondent, Kinersly, who had expressed an intention to become a Canadian citizen, became eligible to do so on March 15, 1988.

Disposition in the Courts Below

Taylor J., at trial, defined discrimination under s. 15(1) of the *Charter* as the drawing of an irrational distinction between people based on some irrelevant personal characteristic for the

purpose, or having the effect, of imposing upon the victim of the discrimination some penalty, disadvantage or indignity, or denying some advantage. He did not consider that the enumerated heads of discrimination in s. 15(1), race, national or ethnic origin, colour, religion, sex, age or mental or physical disability, were a complete listing of the proscribed bases of discrimination, and said, at p. 16:

> Thus, in order to amount to discrimination under s. 15(1), the personal characteristic on which a distinction is based must either be one which is entirely irrelevant in the context in which the distinction is made or one which is given a significance clearly beyond that which could reasonably be justified in such a context -- the distinction must in this sense be irrational.

He said that the test would be the same whether or not the discrimination was on the basis of a characteristic enumerated in s. 15(1) of the *Charter*. Citizenship, in his view, while not within the term, national origin, is nonetheless a characteristic which could form a basis for discrimination under s. 15(1). He adopted a broad view of the concept of citizenship. He said, at p. 20:

> Citizenship is, I think, a privilege which is understood to carry with it commitments to promote the security and welfare of the country, and to protect the way of life in which Canadians have come to believe, which are not expected of a permanent resident, even a resident sworn to allegiance. A citizen is a part of the country, a resident non-citizen never really more than an attachment to it.

In determining the relevance of citizenship to entry into the legal profession, he referred to the wide powers accorded to lawyers in the administration of justice and the judicial process which give rise to a duty to protect the system from abuse and to respect the laws of the land. He said, at pp. 20-21:

> It cannot in my view be said that there is anything irrational in the view which has been taken by the Legislature that only Canadian citizens ought to exercise such powers in this province and be entrusted with such responsibilities.

He did not consider that any burden imposed on non-citizens by the citizenship requirement was disproportionate to the relevance of citizenship in view of the nature of the duties and responsibilities of members of the legal profession. He concluded that neither s. 15(1) nor s. 7 of the *Charter* were infringed by the Canadian citizenship requirement in s. 42 of the Act.

McLachlin J.A. wrote the judgment for a unanimous Court of Appeal. She expressed the view, at p. 605, that the real meaning of the concept of equal protection and benefit before and under the law is that:

> . . . persons who are "similarly situated be similarly treated" and conversely, that persons who are "differently situated be differently treated".

She referred to two competing approaches which have been adopted in dealing with discrimination under s. 15(1). One view is that any distinction is sufficient to establish discrimination, and when discrimination is found the courts should immediately turn to s. 1 of the *Charter* for a determination of its constitutional validity. The other view is that discrimination under s. 15(1) must be "invidious or pejorative" in nature, in that it must result from an unreasonable classification or unjustifiable differentiation. The second view, then, incorporates principles of justification and reasonableness into s. 15(1) independently of s. 1. She adopted essentially the second view rejecting the proposition that any differentiation would result in a resort to s. 1 of the *Charter*, arguing that it could not have been intended to give a guarantee in s. 15(1) against every legislative classification. To do so, she asserted, would be to trivialize the fundamental rights guaranteed by the *Charter* and deprive the words "without discrimination" in s. 15(1) of any content and, in effect, to replace s. 15(1) with s. 1. This approach, in her opinion, would mean that many important and socially accepted distinctions, such as restrictions on drunken driving and special provisions for the care, protection, and

education of children, would be subject to automatic review under s. 1. To equate the provisions of s. 15(1) with a guarantee against all distinction would, in effect, "elevate s. 15 to the position of subsuming the other rights and freedoms defined by the *Charter*". She said that there must be an initial determination of the reasonableness and fairness of the impugned legislation under s. 15(1). Therefore, she saw two questions emerge: what degree of evaluation of the legislation should be done under s. 15(1), and what role, if any, remained for s. 1 when legislation is attacked under s. 15(1)?

In dealing with the first question, she said that the court should determine whether the impugned distinction is reasonable or fair, having regard to its purposes and aims and to its effect on the person concerned. She said, at pp. 609-10:

> My response to the first question is that the question to be answered under s. 15 should be whether the impugned distinction is reasonable or fair, having regard to the purposes and aims and its effect on persons adversely affected. I include the word "fair" as well as "reasonable" to emphasize that the test is not one of pure rationality but one connoting the treatment of persons in ways which are not unduly prejudicial to them. The test must be objective, and the discrimination must be proved on a balance of probabilities: *R. v. Oakes*, *supra*, (applying this test to s. 1.) The ultimate question is whether a fair-minded person, weighing the purposes of legislation against its effects on the individuals adversely affected, and giving due weight to the right of the Legislature to pass laws for the good of all, would conclude that the legislative means adopted are unreasonable or unfair.

She went on to state that s. 1 would apply to permit discrimination in extraordinary circumstances, such as the internment of enemy aliens in wartime which would create discrimination not to be tolerated in peacetime.

She concluded that the citizenship requirement in the Act discriminated against the respondent. She rejected the Law Society's argument that the importance of the legal profession in the general scheme of the administration of the legal system justified the citizenship requirement. She

reached the conclusion that the distinction deprived the respondent of the equal benefit of the law guaranteed under s. 15, and she concluded on this point by saying, at p. 616:

> In summary, none of the reasons offered for the requirement of citizenship for the practice of law offer a convincing justification for it. On the other hand, the requirement is clearly prejudicial to the appellant and those similarly placed. Having met all the other requirements for the admission to the bar, the appellant is nevertheless unable to gain admission to practise because he is not yet a Canadian citizen. I find that the appellant has discharged the onus upon him of showing that the requirement of citizenship for admission to the practice of law is unreasonable or unfair.

The Concept of Equality

Section 15(1) of the *Charter* provides for every individual a guarantee of equality before and under the law, as well as the equal protection and equal benefit of the law without discrimination. This is not a general guarantee of equality; it does not provide for equality between individuals or groups within society in a general or abstract sense, nor does it impose on individuals or groups an obligation to accord equal treatment to others. It is concerned with the application of the law. No problem regarding the scope of the word "law", as employed in s. 15(1), can arise in this case because it is an Act of the Legislature which is under attack. Whether other governmental or *quasi*-governmental regulations, rules, or requirements may be termed laws under s. 15(1) should be left for cases in which the issue arises.

The concept of equality has long been a feature of Western thought. As embodied in s. 15(1) of the *Charter*, it is an elusive concept and, more than any of the other rights and freedoms guaranteed in the *Charter*, it lacks precise definition. As has been stated by John H. Schaar, "Equality of Opportunity and Beyond", in *Nomos IX: Equality*, ed. J. Roland Pennock and John W. Chapman (1967), at p. 228:

> Equality is a protean word. It is one of those political symbols -- liberty and fraternity are others -- into which men have poured the deepest urgings of their heart. Every strongly held theory or conception of equality is at once a psychology, an ethic, a theory of social relations, and a vision of the good society.

It is a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises. It must be recognized at once, however, that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality. This proposition has found frequent expression in the literature on the subject but, as I have noted on a previous occasion, nowhere more aptly than in the well-known words of Frankfurter J. in *Dennis v. United States*, 339 U.S. 162 (1950), at p. 184:

> It was a wise man who said that there is no greater inequality than the equal treatment of unequals.

The same thought has been expressed in this Court in the context of s. 2(*b*) of the *Charter* in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, where Dickson C.J. said at p. 347:

> The equality necessary to support religious freedom does not require identical treatment of all religions. In fact, the interests of true equality may well require differentiation in treatment.

In simple terms, then, it may be said that a law which treats all identically and which provides equality of treatment between "A" and "B" might well cause inequality for "C", depending on differences in personal characteristics and situations. To approach the ideal of full equality before and under the law -- and in human affairs an approach is all that can be expected -- the main consideration must be the impact of the law on the individual or the group concerned.

Recognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law, there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another. In other words, the admittedly unattainable ideal should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another.

McLachlin J.A. in the Court of Appeal expressed the view, at p. 605, that:

> . . . the essential meaning of the constitutional requirement of equal protection and equal benefit is that persons who are "similarly situated be similarly treated" and conversely, that persons who are "differently situated be differently treated" . . . .

In this, she was adopting and applying as a test a proposition which seems to have been widely accepted with some modifications in both trial and appeal court decisions throughout the country on s. 15(1) of the *Charter*. See, for example, *Reference Re Family Benefits Act* (1986), 75 N.S.R. (2d) 338 (N.S.S.C.A.D.), at p. 351; *Reference Re Use of French in Criminal Proceedings in Saskatchewan* (1987), 44 D.L.R. (4th) 16 (Sask. C.A.), at p. 46; *Smith, Kline & French Laboratories Ltd. v. Canada (Attorney General)*, [1987] 2 F.C. 359, at p. 366; *R. v. Ertel* (1987), 35 C.C.C. (3d) 398, at p. 419. The reliance on this concept appears to have derived, at least in recent times, from J. T. Tussman and J. tenBroek, "The Equal Protection of Laws" (1949), 37 *Calif. L. Rev.* 341. The similarly situated test is a restatement of the Aristotelian principle of formal equality -- that "things that are alike should be treated alike, while things that are unalike should be treated unalike in proportion to their unalikeness" (*Ethica Nichomacea,* trans. W. Ross, Book V3, at p. 1131a-6 (1925)).

The test as stated, however, is seriously deficient in that it excludes any consideration of the nature of the law. If it were to be applied literally, it could be used to justify the Nuremberg laws of Adolf Hitler. Similar treatment was contemplated for all Jews. The similarly situated test would have justified the formalistic separate but equal doctrine of *Plessy v. Ferguson*, 163 U.S. 637 (1896), a doctrine that incidentally was still the law in the United States at the time that Professor Tussman and J. tenBroek wrote their much cited article: see M. David Lepofsky and H. Schwartz "Case Note" (1988), 67 *Can. Bar Rev.* 115, at pp. 119-20. The test, somewhat differently phrased, was applied in the British Columbia Court of Appeal in *R. v. Gonzales* (1962), 132 C.C.C. 237. The Court upheld, under s. 1(*b*) of the *Canadian Bill of Rights*, R.S.C. 1970, App. III, a section of the *Indian Act*, R.S.C. 1970, c. I-6, which made it an offence for an Indian to have intoxicants in his possession off a reserve. In his locality there were no reserves. Tysoe J.A. said that equality before the law could not mean "the same laws for all persons", and defined the right in these words, at p. 243:

> . . . in its context s. 1(*b*) means in a general sense that there has existed and there shall continue to exist in Canada a right in every person *to whom a particular law relates or extends* no matter what may be a person's race, national origin, colour, religion or sex to stand on an equal footing with every other person to whom that particular law relates or extends and a right to the protection of the law.

This approach was rejected in this Court by Ritchie J. in *R. v. Drybones*, [1970] S.C.R. 282, in a similar case involving a provision of the *Indian Act* making it an offence for an Indian to be intoxicated off a reserve. He said, at p. 297:

> . . . I cannot agree with this interpretation pursuant to which it seems to me that the most glaring discriminatory legislation against a racial group would have to be construed as recognizing the right of each of its individual members "to equality before the law", so long as all the other members are being discriminated against in the same way.

Thus, mere equality of application to similarly situated groups or individuals does not afford a realistic test for a violation of equality rights. For, as has been said, a bad law will not be saved merely because it operates equally upon those to whom it has application. Nor will a law necessarily be bad because it makes distinctions.

A similarly situated test focussing on the equal application of the law to those to whom it has application could lead to results akin to those in *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183. In *Bliss*, a pregnant woman was denied unemployment benefits to which she would have been entitled had she not been pregnant. She claimed that the *Unemployment Insurance Act, 1971*, violated the equality guarantees of the *Canadian Bill of Rights* because it discriminated against her on the basis of her sex. Her claim was dismissed by this Court on the grounds that there was no discrimination on the basis of sex, since the class into which she fell under the Act was that of pregnant persons, and within that class, all persons were treated equally. This case, of course, was decided before the advent of the *Charter*.

I would also agree with the following criticism of the similarly situated test made by Kerans J.A. in *Mahe v. Alta. (Gov't)* (1987), 54 Alta. L.R. (2d) 212, at p. 244:

> . . . the test accepts an idea of equality which is almost mechanical, with no scope for considering the reason for the distinction. In consequence, subtleties are found to justify a finding of dissimilarity which reduces the test to a categorization game. Moreover, the test is not helpful. After all, most laws are enacted for the specific purpose of offering a benefit or imposing a burden on some persons and not on others. The test catches every conceivable difference in legal treatment.

For the reasons outlined above, the test cannot be accepted as a fixed rule or formula for the resolution of equality questions arising under the *Charter*. Consideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies, and also upon

those whom it excludes from its application. The issues which will arise from case to case are such that it would be wrong to attempt to confine these considerations within such a fixed and limited formula.

It is not every distinction or differentiation in treatment at law which will transgress the equality guarantees of s. 15 of the *Charter*. It is, of course, obvious that legislatures may -- and to govern effectively -- must treat different individuals and groups in different ways. Indeed, such distinctions are one of the main preoccupations of legislatures. The classifying of individuals and groups, the making of different provisions respecting such groups, the application of different rules, regulations, requirements and qualifications to different persons is necessary for the governance of modern society. As noted above, for the accommodation of differences, which is the essence of true equality, it will frequently be necessary to make distinctions. What kinds of distinctions will be acceptable under s. 15(1) and what kinds will violate its provisions?

In seeking an answer to these questions, the provisions of the *Charter* must have their full effect. In *R. v. Big M Drug Mart Ltd.*, this Court emphasized this point at p. 344, where Dickson C.J. stated:

> This Court has already, in some measure, set out the basic approach to be taken in interpreting the *Charter*. In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the *Charter* was a purposive one. The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.
>
> In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection. At the same time it is important not to

> overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore, as this Court's decision in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical contexts. [Emphasis in original.]

These words are not inconsistent with the view I expressed in *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313.

The principle of equality before the law has long been recognized as a feature of our constitutional tradition and it found statutory recognition in the *Canadian Bill of Rights*. However, unlike the *Canadian Bill of Rights*, which spoke only of equality before the law, s. 15(1) of the *Charter* provides a much broader protection. Section 15 spells out four basic rights: (1) the right to equality before the law; (2) the right to equality under the law; (3) the right to equal protection of the law; and (4) the right to equal benefit of the law. The inclusion of these last three additional rights in s. 15 of the *Charter* was an attempt to remedy some of the shortcomings of the right to equality in the *Canadian Bill of Rights*. It also reflected the expanded concept of discrimination being developed under the various Human Rights Codes since the enactment of the *Canadian Bill of Rights*. The shortcomings of the *Canadian Bill of Rights* as far as the right to equality is concerned are well known. In *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349, for example, this Court upheld s. 12(1)(*b*) of the *Indian Act* which deprived women, but not men, of their membership in Indian Bands if they married non-Indians. The provision was held not to violate equality before the law although it might, the Court said, violate equality under the law if such were protected. In *Bliss*, *supra*, this Court held that the denial of unemployment insurance benefits to women because they were pregnant did not violate the guarantee of equality before the law, because any inequality in the protection and benefit of the law was "not created by legislation but by nature" (p. 190). The case was distinguished from the Court's earlier decision in *Drybones*, *supra*, as not involving (pp. 191-92) the imposition of a penalty on a racial group to which other citizens are not subjected, but as involving rather "a definition of the

qualifications required for entitlement to benefits". It is readily apparent that the language of s. 15 was deliberately chosen in order to remedy some of the perceived defects under the *Canadian Bill of Rights*. The antecedent statute is part of the "linguistic, philosophic and historical context" of s. 15 of the *Charter*.

It is clear that the purpose of s. 15 is to ensure equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration. It has a large remedial component. Howland C.J. and Robins J.A. (dissenting in the result but not with respect to this comment) in *Reference re an Act to Amend the Education Act* (1986), 53 O.R. (2d) 513, attempt to articulate the broad range of values embraced by s. 15. They state at p. 554:

> 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 respect.

It must be recognized, however, as well that the promotion of equality under s. 15 has a much more specific goal than the mere elimination of distinctions. If the *Charter* was intended to eliminate all distinctions, then there would be no place for sections such as 27 (multicultural heritage); 2(*a*) (freedom of conscience and religion); 25 (aboriginal rights and freedoms); and other such provisions designed to safeguard certain distinctions. Moreover, the fact that identical treatment may frequently produce serious inequality is recognized in s. 15(2), which states that the equality rights in s. 15(1) do "not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups . . . ."

Discrimination

The right to equality before and under the law, and the rights to the equal protection and benefit of the law contained in s. 15, are granted with the direction contained in s. 15 itself that they be without discrimination. Discrimination is unacceptable in a democratic society because it epitomizes the worst effects of the denial of equality, and discrimination reinforced by law is particularly repugnant. The worst oppression will result from discriminatory measures having the force of law. It is against this evil that s. 15 provides a guarantee.

Discrimination as referred to in s. 15 of the *Charter* must be understood in the context of pre-*Charter* history. Prior to the enactment of s. 15(1), the Legislatures of the various provinces and the federal Parliament had passed during the previous fifty years what may be generally referred to as Human Rights Acts. With the steady increase in population from the earliest days of European emigration into Canada and with the consequential growth of industry, agriculture and commerce and the vast increase in national wealth which followed, many social problems developed. The contact of the European immigrant with the indigenous population, the steady increase in immigration bringing those of neither French nor British background, and in more recent years the greatly expanded role of women in all forms of industrial, commercial and professional activity led to much inequality and many forms of discrimination. In great part these developments, in the absence of any significant legislative protection for the victims of discrimination, called into being the Human Rights Acts. In 1944, the *Racial Discrimination Act, 1944*, S.O. 1944, c. 51, was passed, to be followed in 1947 by *The Saskatchewan Bill of Rights Act, 1947*, S.S. 1947, c. 35, and in 1960 by the *Canadian Bill of Rights*. Since then every jurisdiction in Canada has enacted broad-ranging Human Rights Acts which have attacked most of the more common forms of discrimination found in society. This development has been recorded and

discussed by Walter Tarnopolsky, now Tarnopolsky J.A., in *Discrimination and the Law* (2nd ed. 1985).

What does discrimination mean? The question has arisen most commonly in a consideration of the Human Rights Acts and the general concept of discrimination under those enactments has been fairly well settled. There is little difficulty, drawing upon the cases in this Court, in isolating an acceptable definition. In *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, at p. 551, discrimination (in that case adverse effect discrimination) was described in these terms: "It arises where an employer . . . adopts a rule or standard . . . which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force". It was held in that case, as well, that no intent was required as an element of discrimination, for it is in essence the impact of the discriminatory act or provision upon the person affected which is decisive in considering any complaint. At page 547, this proposition was expressed in these terms:

> The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory.

In *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, better known as the *Action Travail des Femmes* case, where it was alleged that the Canadian National Railway was guilty of discriminatory hiring and promotion practices contrary to s. 10 of the *Canadian Human Rights Act*, S.C. 1976-77, c. 33, in denying employment to women

in certain unskilled positions, Dickson C.J. in giving the judgment of the Court said, at pp. 1138-39:

> A thorough study of "systemic discrimination" in Canada is to be found in the Abella Report on equality in employment. The terms of reference of the Royal Commission instructed it "to inquire into the most efficient, effective and equitable means of promoting employment opportunities, eliminating systemic discrimination and assisting individuals to compete for employment opportunities on an equal basis." (Order in Council P.C. 1983-1924 of 24 June 1983). Although Judge Abella chose not to offer a precise definition of systemic discrimination, the essentials may be gleaned from the following comments, found at p. 2 of the Abella Report.
>
> > Discrimination . . . means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics . . . .
> >
> > It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory.

There are many other statements which have aimed at a short definition of the term discrimination. In general, they are in accord with the statements referred to above. I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

The Court in the case at bar must address the issue of discrimination as the term is used in s. 15(1) of the *Charter*. In general, it may be said that the principles which have been applied under the Human Rights Acts are equally applicable in considering questions of discrimination under s. 15(1). Certain differences arising from the difference between the *Charter* and the Human Rights Acts must, however, be considered. To begin with, discrimination in s. 15(1) is limited to discrimination caused by the application or operation of law, whereas the Human Rights Acts apply also to private activities. Furthermore, and this is a distinction of more importance, all the Human Rights Acts passed in Canada specifically designate a certain limited number of grounds upon which discrimination is forbidden. Section 15(1) of the *Charter* is not so limited. The enumerated grounds in s. 15(1) are not exclusive and the limits, if any, on grounds for discrimination which may be established in future cases await definition. The enumerated grounds do, however, reflect the most common and probably the most socially destructive and historically practised bases of discrimination and must, in the words of s. 15(1), receive particular attention. Both the enumerated grounds themselves and other possible grounds of discrimination recognized under s. 15(1) must be interpreted in a broad and generous manner, reflecting the fact that they are constitutional provisions not easily repealed or amended but intended to provide a "continuing framework for the legitimate exercise of governmental power" and, at the same time, for "the unremitting protection" of equality rights: see *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 155.

It should be noted as well that when the Human Rights Acts create exemptions or defences, such as a *bona fide* occupational requirement, an exemption for religious and political organizations, or definitional limits on age discrimination, these generally have the effect of completely removing the conduct complained of from the reach of the Act. See, for example, exemptions for special interest organizations contained in the *Human Rights Code*, R.S.B.C. 1979, c. 186, as am., s. 22; *The Human Rights Act*, S.M. 1974, c. 65, as am., s. 6(7); and the *Human*

Rights Code, 1981, S.O. 1981, c. 53, s. 17. "Age" is often restrictively defined in the Human Rights Acts; in British Columbia, it is defined in s. 1 of the Code to mean an age between 45 and 65; in s. 38 of the *Individual's Rights Protection Act*, R.S.A. 1980, c. I-2, it is defined as eighteen and over. For an example of the application of a *bona fide* occupational requirement, see *Bhinder v. Canadian National Railway Co.*, [1985] 2 S.C.R. 561. Where discrimination is forbidden in the Human Rights Acts it is done in absolute terms, and where a defence or exception is allowed it, too, speaks in absolute terms and the discrimination is excused. There is, in this sense, no middle ground. In the *Charter*, however, while s. 15(1), subject always to subs. (2), expresses its prohibition of discrimination in absolute terms, s. 1 makes allowance for a reasonable limit upon the operation of s. 15(1). A different approach under s. 15(1) is therefore required. While discrimination under s. 15(1) will be of the same nature and in descriptive terms will fit the concept of discrimination developed under the Human Rights Acts, a further step will be required in order to decide whether discriminatory laws can be justified under s. 1. The onus will be on the state to establish this. This is a distinct step called for under the *Charter* which is not found in most Human Rights Acts, because in those Acts justification for or defence to discrimination is generally found in specific exceptions to the substantive rights.

Relationship Between s. 15(1) and s. 1 of the *Charter*

In determining the extent of the guarantee of equality in s. 15(1) of the *Charter*, special consideration must be given to the relationship between s. 15(1) and s. 1. It is indeed the presence of s. 1 in the *Charter* and the interaction between these sections which has led to the differing approaches to a definition of the s. 15(1) right, and which has made necessary a judicial approach differing from that employed under the *Canadian Bill of Rights*. Under the *Canadian Bill of Rights*, a test was developed to distinguish between justified and unjustified legislative distinctions within the concept of equality before the law itself in the absence of anything

equivalent to the s. 1 limit: see *MacKay v. The Queen*, [1980] 2 S.C.R. 370, where it was said, at p. 407:

> . . . and whether it is a necessary departure from the general principle of universal application of the law for the attainment of some necessary and desirable social objective. Inequalities created for such purposes may well be acceptable under the *Canadian Bill of Rights*.

It may be noted as well that the 14th Amendment to the American Constitution, which provides that no State shall deny to any person within its jurisdiction the "equal protection of the laws", contains no limiting provisions similar to s. 1 of the *Charter*. As a result, judicial consideration has led to the development of varying standards of scrutiny of alleged violations of the equal protection provision which restrict or limit the equality guarantee within the concept of equal protection itself. Again, article 14 of the *European Convention on Human Rights*, 23 U.N.T.S. 222, which secures the rights guaranteed therein without discrimination, lacks a s. 1 or its equivalent and has also developed a limit within the concept itself. In the *Belgian Linguistic Case (No. 2) (1968), 1 E.H.R.R. 252, at p. 284, the court enunciated the following test:*

> *. . . the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to principles which normally prevail in democratic societies. A difference in treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.*

The distinguishing feature of the Charter, unlike the other enactments, is that consideration of such limiting factors is made under s. 1. This Court has described the analytical approach to the *Charter* in *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, and other cases, the essential feature of which is that the right guaranteeing sections be kept analytically separate from s. 1. In other words, when confronted with a problem under the

Charter, the first question which must be answered will be whether or not an infringement of a guaranteed right has occurred. Any justification of an infringement which is found to have occurred must be made, if at all, under the broad provisions of s. 1. It must be admitted at once that the relationship between these two sections may well be difficult to determine on a wholly satisfactory basis. It is, however, important to keep them analytically distinct if for no other reason than the different attribution of the burden of proof. It is for the citizen to establish that his or her *Charter* right has been infringed and for the state to justify the infringement.

Approaches to s. 15(1)

Three main approaches have been adopted in determining the role of s. 15(1), the meaning of discrimination set out in that section, and the relationship of s. 15(1) and s. 1. The first one, which was advanced by Professor Peter Hogg in *Constitutional Law of Canada* (2nd ed. 1985) would treat every distinction drawn by law as discrimination under s. 15(1). There would then follow a consideration of the distinction under the provisions of s. 1 of the *Charter*. He said, at pp. 800-801:

> I conclude that s. 15 should be interpreted as providing for the universal application of every law. When a law draws a distinction between individuals, on any ground, that distinction is sufficient to constitute a breach of s. 15, and to move the constitutional issue to s. 1. The test of validity is that stipulated by s. 1, namely, whether the law comes within the phrase "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

He reached this conclusion on the basis that, where the *Charter* right is expressed in unqualified terms, s. 1 supplies the standard of justification for any abridgment of the right. He argued that the word "discrimination" in s. 15(1) could be read as introducing a qualification in the section

itself, but he preferred to read the word in a neutral sense because this reading would immediately send the matter to s. 1, which was included in the *Charter* for this purpose.

The second approach put forward by McLachlin J.A. in the Court of Appeal involved a consideration of the reasonableness and fairness of the impugned legislation under s. 15(1). She stated, as has been noted above, at p. 610:

> The ultimate question is whether a fair-minded person, weighing the purposes of legislation against its effects on the individuals adversely affected, and giving due weight to the right of the Legislature to pass laws for the good of all, would conclude that the legislative means adopted are unreasonable or unfair.

She assigned a very minor role to s. 1 which would, it appears, be limited to allowing in times of emergency, war, or other crises the passage of discriminatory legislation which would normally be impermissible.

A third approach, sometimes described as an "enumerated or analogous grounds" approach, adopts the concept that discrimination is generally expressed by the enumerated grounds. Section 15(1) is designed to prevent discrimination based on these and analogous grounds. The approach is similar to that found in human rights and civil rights statutes which have been enacted throughout Canada in recent times. The following excerpts from the judgment of Hugessen J.A. in *Smith, Kline & French Laboratories v. Canada (Attorney General), supra*, at pp. 367-69, illustrate this approach:

> The rights which it [s. 15] guarantees are not based on any concept of strict, numerical equality amongst all human beings. If they were, virtually all legislation, whose function it is, after all, to define, distinguish and make categories, would be in *prima facie* breach of section 15 and would require justification under section 1. This would be to turn the exception into the rule. Since courts would be obliged to look for and find section 1 justification for most legislation,

> the alternative being anarchy, there is a real risk of paradox: the broader the reach given to section 15 the more likely it is that it will be deprived of any real content.
>
> The answer, in my view, is that the text of the section itself contains its own limitations. It only proscribes discrimination amongst the members of categories which are themselves similar. Thus the issue, for each case, will be to know which categories are permissible in determining similarity of situation and which are not. It is only in those cases where the categories themselves are not permissible, where equals are not treated equally, that there will be a breach of equality rights.
>
> . . .
>
> As far as the text of section 15 itself is concerned, one may look to whether or not there is "discrimination", in the pejorative sense of that word, and as to whether the categories are based upon the grounds enumerated or grounds analogous to them. The inquiry, in effect, concentrates upon the personal characteristics of those who claim to have been unequally treated. Questions of stereotyping, of historical disadvantagement, in a word, of prejudice, are the focus and there may even be a recognition that for some people equality has a different meaning than for others.

The analysis of discrimination in this approach must take place within the context of the enumerated grounds and those analogous to them. The words "without discrimination" require more than a mere finding of distinction between the treatment of groups or individuals. Those words are a form of qualifier built into s. 15 itself and limit those distinctions which are forbidden by the section to those which involve prejudice or disadvantage.

I would accept the criticisms of the first approach made by McLachlin J.A. in the Court of Appeal. She noted that the labelling of every legislative distinction as an infringement of s. 15(1) trivializes the fundamental rights guaranteed by the *Charter* and, secondly, that to interpret "without discrimination" as "without distinction" deprives the notion of discrimination of content. She continued, at p. 607:

> Third, it cannot have been the intention of Parliament that the government be put to the requirement of establishing under s. 1 that all laws which draw distinction between people are "demonstrably justified in a free and democratic society". If weighing of the justifiability of unequal treatment is neither required or permitted under s. 15, the result will be that such universally accepted and manifestly desirable legal distinctions as those

> prohibiting children or drunk persons from driving motor vehicles will be viewed as violations of fundamental rights and be required to run the gauntlet of s. 1.
>
> Finally, it may further be contended that to define discrimination under s. 15 as synonymous with unequal treatment on the basis of personal classification will be to elevate s. 15 to the position of subsuming the other rights and freedoms defined by the Charter.

In rejecting the Hogg approach, I would say that it draws a straight line from the finding of a distinction to a determination of its validity under s. 1, but my objection would be that it virtually denies any role for s. 15(1).

I would reject, as well, the approach adopted by McLachlin J.A. She seeks to define discrimination under s. 15(1) as an unjustifiable or unreasonable distinction. In so doing she avoids the mere distinction test but also makes a radical departure from the analytical approach to the *Charter* which has been approved by this Court. In the result, the determination would be made under s. 15(1) and virtually no role would be left for s. 1.

The third or "enumerated and analogous grounds" approach most closely accords with the purposes of s. 15 and the definition of discrimination outlined above and leaves questions of justification to s. 1. However, in assessing whether a complainant's rights have been infringed under s. 15(1), it is not enough to focus only on the alleged ground of discrimination and decide whether or not it is an enumerated or analogous ground. The effect of the impugned distinction or classification on the complainant must be considered. Once it is accepted that not all distinctions and differentiations created by law are discriminatory, then a role must be assigned to s. 15(1) which goes beyond the mere recognition of a legal distinction. A complainant under s. 15(1) must show not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law but, in addition, must show that the legislative impact of the law is discriminatory.

Where discrimination is found a breach of s. 15(1) has occurred and -- where s. 15(2) is not applicable -- any justification, any consideration of the reasonableness of the enactment; indeed, any consideration of factors which could justify the discrimination and support the constitutionality of the impugned enactment would take place under s. 1. This approach would conform with the directions of this Court in earlier decisions concerning the application of s. 1 and at the same time would allow for the screening out of the obviously trivial and vexatious claim. In this, it would provide a workable approach to the problem.

It would seem to me apparent that a legislative distinction has been made by s. 42 of the *Barristers and Solicitors Act* between citizens and non-citizens with respect to the practice of law. The distinction would deny admission to the practice of law to non-citizens who in all other respects are qualified. Have the respondents, because of s. 42 of the Act, been denied equality before and under the law or the equal protection of the law? In practical terms it should be noted that the citizenship requirement affects only those non-citizens who are permanent residents. The permanent resident must wait for a minimum of three years from the date of establishing permanent residence status before citizenship may be acquired. The distinction therefore imposes a burden in the form of some delay on permanent residents who have acquired all or some of their legal training abroad and is, therefore, discriminatory.

The rights guaranteed in s. 15(1) apply to all persons whether citizens or not. A rule which bars an entire class of persons from certain forms of employment, solely on the grounds of a lack of citizenship status and without consideration of educational and professional qualifications or the other attributes or merits of individuals in the group, would, in my view, infringe s. 15 equality rights. Non-citizens, lawfully permanent residents of Canada, are -- in the words of the U.S. Supreme Court in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), at pp.

152-53, n. 4, subsequently affirmed in *Graham v. Richardson*, 403 U.S. 365 (1971), at p. 372 -- a good example of a "discrete and insular minority" who come within the protection of s. 15.

Section 1

Having accepted the proposition that s. 42 has infringed the right to equality guaranteed in s. 15, it remains to consider whether, under the provisions of s. 1 of the *Charter*, the citizenship requirement which is clearly prescribed by law is a reasonable limit which can be "demonstrably justified in a free and democratic society".

The onus of justifying the infringement of a guaranteed *Charter* right must, of course, rest upon the parties seeking to uphold the limitation, in this case, the Attorney General of British Columbia and the Law Society of British Columbia. As is evident from the decisions of this Court, there are two steps involved in the s. 1 inquiry. First, the importance of the objective underlying the impugned law must be assessed. In *Oakes*, it was held that to override a *Charter* guaranteed right the objective must relate to concerns which are "pressing and substantial" in a free and democratic society. However, given the broad ambit of legislation which must be enacted to cover various aspects of the civil law dealing largely with administrative and regulatory matters and the necessity for the Legislature to make many distinctions between individuals and groups for such purposes, the standard of "pressing and substantial" may be too stringent for application in all cases. To hold otherwise would frequently deny the community-at-large the benefits associated with sound social and economic legislation. In my opinion, in approaching a case such as the one before us, the first question the Court should ask must relate to the nature and the purpose of the enactment, with a view to deciding whether the limitation represents a legitimate exercise of the legislative power for the attainment of a desirable social objective which would warrant overriding constitutionally protected rights. The second step in

a s. 1 inquiry involves a proportionality test whereby the Court must attempt to balance a number of factors. The Court must examine the nature of the right, the extent of its infringement, and the degree to which the limitation furthers the attainment of the desirable goal embodied in the legislation. Also involved in the inquiry will be the importance of the right to the individual or group concerned, and the broader social impact of both the impugned law and its alternatives. As the Chief Justice has stated in *R. v. Edwards Books and Art Ltd.*, *supra*, at pp. 768-69:

> Both in articulating the standard of proof and in describing the criteria comprising the proportionality requirement the Court has been careful to avoid rigid and inflexible standards.

I agree with this statement. There is no single test under s. 1; rather, the Court must carefully engage in the balancing of many factors in determining whether an infringement is reasonable and demonstrably justified.

The section 15(1) guarantee is the broadest of all guarantees. It applies to and supports all other rights guaranteed by the *Charter*. However, it must be recognized that Parliament and the Legislatures have a right and a duty to make laws for the whole community: in this process, they must make innumerable legislative distinctions and categorizations in the pursuit of the role of government. When making distinctions between groups and individuals to achieve desirable social goals, it will rarely be possible to say of any legislative distinction that it is clearly the right legislative choice or that it is clearly a wrong one. As stated by the Chief Justice in *R. v. Edwards Books and Art Ltd.*, at pp. 781-82:

> A "reasonable limit" is one which, having regard to the principles enunciated in *Oakes*, it was reasonable for the legislature to impose. The courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line.

In dealing with the many problems that arise legislatures must not be held to the standard of perfection, for in such matters perfection is unattainable. I would repeat the words of my colleague, La Forest J., in *R. v. Edwards Books and Art Ltd.*, at p. 795:

> By the foregoing, I do not mean to suggest that this Court should, as a general rule, defer to legislative judgments when those judgments trench upon rights considered fundamental in a free and democratic society. Quite the contrary, I would have thought the *Charter* established the opposite regime. On the other hand, having accepted the importance of the legislative objective, one must in the present context recognize that if the legislative goal is to be achieved, it will inevitably be achieved to the detriment of some. Moreover, attempts to protect the rights of one group will also inevitably impose burdens on the rights of other groups. There is no perfect scenario in which the rights of all can be equally protected.
>
> In seeking to achieve a goal that is demonstrably justified in a free and democratic society, therefore, a legislature must be given reasonable room to manoeuvre to meet these conflicting pressures.

Disposition

I now turn to the case at bar. The appellant Law Society in oral argument stressed three points. It argued that the Court of Appeal was correct in its analysis of the relationship between s. 15(1) and s. 1 of the *Charter* but that it erred in applying criteria properly to be considered in s. 1, in deciding whether there was a breach of s. 15(1). This argument has been discussed and disposed of above. It was further argued that the Court of Appeal erred in its consideration of the citizenship requirement in s. 42 of the *Barristers and Solicitors Act*, in failing to give proper weight to the importance of the role of the legal profession in the legal and governmental processes of the country and in failing to consider that Canadian citizenship could reasonably be regarded by the Legislature as a requirement for the practice of law. The Law Society argued as well that because of the important duties and powers accorded to lawyers, they do indeed play a vital role in the governmental processes of the country and that, while generally citizenship requirements are discriminatory in nature, the involvement of lawyers in the administration of

justice justified the citizenship requirement. The Attorney General of British Columbia supported these arguments and, as well, argued that for the Court to intervene and strike down the citizenship requirement would exceed the proper limits of judicial review.

The respondents in general supported the judgment of the Court of Appeal. They argued that citizenship bears no clear relationship to an individual's personal and professional characteristics, and questioned the classification of lawyers as significant actors in the State, or governmental process. While conceding that a citizenship requirement for many intimately concerned with the governing processes of the country would be proper and sustainable, it was argued that the relationship of the legal profession to government and the administration of justice was not such that the citizenship requirement could be considered as a reasonable requirement and that any "general helpfulness" of the citizenship requirement, in attaining the objectives of the *Barristers and Solicitors Act,* could not suffice to justify this form of discrimination against an individual. In essence, the difference between the parties centred on the question of the importance of the legal profession in the government of the country.

There is no difficulty in determining that in general terms the *Barristers and Solicitors Act* of British Columbia is a statute enacted for a valid and desirable social purpose, the creation and regulation of the legal profession and the practice of law. The narrower question, however, is whether the requirement that only citizens be admitted to the practice of law in British Columbia serves a desirable social purpose of sufficient importance to warrant overriding the equality guarantee. It is incontestable that the legal profession plays a very significant -- in fact, a fundamentally important -- role in the administration of justice, both in the criminal and the civil law. I would not attempt to answer the question arising from the judgments below as to whether the function of the profession may be termed judicial or *quasi*-judicial, but I would observe that in the absence of an independent legal profession, skilled and qualified to play its part in the

administration of justice and the judicial process, the whole legal system would be in a parlous state. In the performance of what may be called his private function, that is, in advising on legal matters and in representing clients before the courts and other tribunals, the lawyer is accorded great powers not permitted to other professionals. As pointed out by Taylor J. at first instance, by the use of the subpoena which he alone can procure on behalf of another, he can compel attendance upon examinations before trial and at trial upon pain of legal sanction for refusal. He may, as well, require the production of documents and records for examination and use in the proceedings. He may in some cases require the summoning of jurors, the sittings of courts and, in addition, he may make the fullest inquiry into the matters before the court with a full privilege against actions for slander arising out of his conduct in the court. The solicitor is also bound by the solicitor and client privilege against the disclosure of communications with his client concerning legal matters. This is said to be the only absolute privilege known to the law. Not only may the solicitor decline to disclose solicitor and client communications, the courts will not permit him to do so. This is a privilege against all comers, including the Crown, save where the disclosure of a crime would be involved. The responsibilities involved in its maintenance and in its breach where crimes are concerned are such that citizenship with its commitment to the welfare of the whole community is not an unreasonable requirement for the practice of law. While it may be arguable whether the lawyer exercises a judicial, *quasi*-judicial, or governmental role, it is clear that at his own discretion he can invoke the full force and authority of the State in procuring and enforcing judgments or other remedial measures which may be obtained. It is equally true that in defending an action he has the burden of protecting his client from the imposition of such state authority and power. By any standard, these powers and duties are vital to the maintenance of order in our society and the due administration of the law in the interest of the whole community.

The lawyer has, as well, what may be termed a public function. Governments at all levels, federal, provincial and municipal, rely extensively upon lawyers, both in technical and policy matters. In the drafting of legislation, regulations, treaties, agreements and other governmental documents and papers lawyers play a major role. In various aspects of this work they are called upon to advise upon legal and constitutional questions which frequently go to the very heart of the governmental role. To discharge these duties, familiarity is required with Canadian history, constitutional law, regional differences and concerns within the country and, in fact, with the whole Canadian governmental and political process. It is entirely reasonable, then, that legislators consider and adopt measures designed to maintain within the legal profession a body of qualified professionals with a commitment to the country and to the fulfilment of the important tasks which fall to it.

McLachlin J.A. was of the view that the citizenship requirement would not ensure familiarity with Canadian institutions and customs, nor would it ensure a commitment to Canada going beyond one involved in the concept of allegiance, as recognized by the taking of an oath of allegiance. I would agree with her that the desired results would not be insured by the citizenship requirement but I would observe, at the same time, that no law will ever ensure anything. To abolish the requirement of citizenship on the basis that it would fail to insure the attainment of its objectives would, in my view, be akin to abolishing the law against theft, for it has certainly not insured the elimination of that crime. Citizenship, however, which requires the taking on of obligations and commitments to the community, difficult sometimes to describe but felt and understood by most citizens, as well as the rejection of past loyalties may reasonably be said to conduce to the desired result.

I would observe, as well, that the comment of McLachlin J.A. that the citizenship requirement was first adopted in British Columbia in 1971 requires some explanation. I do not think that the

historical argument should be pushed too far: things need not always remain as once they were although, as noted in *R. v. Big M Drug Mart Ltd.* and *Reference re Public Service Employee Relations Act (Alta.), supra*, *Charter* construction should be consistent with the history, traditions and social philosophies of our society. The concept of citizenship has been a requirement for entry into the legal profession in British Columbia from its earliest days. When the Law Society was formed in 1874 the profession was open to British subjects. At that time, the idea of a separate Canadian citizenship, as distinct from the general classification of British subject which included Canadians, was scarcely known -- though as early as 1910, *Immigration Act*, S.C. 1910, c. 27, the term "Canadian citizen" was defined for the purposes of the *Immigration Act* as a "British subject who has Canadian domicile". The concept of citizenship in those early days was embodied in the expression, British Subject, and thus it was recognized as a requirement for entry into the legal profession in British Columbia. As Canada moved away from its colonial past, a separate identity for Canadians emerged and in 1946 with the passage of *The Canadian Citizenship Act*, S.C. 1946, c. 15, the term, Canadian citizen, was formally recognized, giving effect to what had long been felt and accepted by most Canadians. In adopting the term as a qualification for entry into the legal profession in British Columbia, the Legislature was merely continuing its earlier requirement that the concept of citizenship, as then recognized in the term "British subject", be necessary for entry into the profession.

Public policy, of which the citizenship requirement in the *Barristers and Solicitors Act* is an element, is for the Legislature to establish. The role of the *Charter*, as applied by the courts, is to ensure that in applying public policy the Legislature does not adopt measures which are not sustainable under the *Charter*. It is not, however, for the courts to legislate or to substitute their views on public policy for those of the Legislature. I would repeat for ease of reference the words of the Chief Justice in *R. v. Edwards Books and Art Ltd.*, *supra*, at pp. 781-82:

> A "reasonable limit" is one which having regard to the principles enunciated in *Oakes*, it was reasonable for the legislature to impose. The courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line.

The function of the Court is to measure the legislative enactment against the requirements of the *Charter* and where the enactment infringes the *Charter*, in this case the provisions of s. 15(l), and is not sustainable under s. 1, the remedial power of the Court is set out in s. 52 of the *Constitution Act, 1982*: "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect".

The essence of s. 1 is found in the expression "reasonable" and it is for the Court to decide if s. 42 of the *Barristers and Solicitors Act* of British Columbia is a reasonable limit. In reaching the conclusion that it is, I would say that the legislative choice in this regard is not one between an answer that is clearly right and one that is clearly wrong. Either position may well be sustainable and, as noted by the Chief Justice, *supra*, the Court is not called upon to substitute its opinion as to where to draw the line. The Legislature in fixing public policy has chosen the citizenship requirement and, unless the Court can find that choice unreasonable, it has no power under the *Charter* to strike it down or, as has been said, no power to invade the legislative field and substitute its views for that of the Legislature. In my view, the citizenship requirement is reasonable and sustainable under s. 1. It is chosen for the achievement of a desirable social goal: one aspect of the due regulation and qualification of the legal profession. This is an objective of importance and the measure is not disproportionate to the object to be attained. The maximum delay imposed upon the non-citizen from the date of acquisition of permanent resident status is three years. It will frequently be less. No impediment is put in the way of obtaining citizenship. In fact, the policy of the Canadian government is to encourage the newcomer to become a citizen. It is reasonable, in my view, to expect that the newcomer who seeks to gain the privileges and status within the land and the right to exercise the great powers that admission

to the practice of law will give should accept citizenship and its obligations as well as its advantages and benefits. I would therefore allow the appeal and restore the judgment at trial. I would answer the constitutional questions as follows:

Q. (1) Does the Canadian citizenship requirement to be a lawyer in the Province of British Columbia as set out in s. 42 of the *Barristers and Solicitors Act*, R.S.B.C. 1979, c. 26 infringe or deny the rights guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

A. Yes.

Q. (2) If the Canadian citizenship requirement to be a lawyer in the Province of British Columbia as set out in s. 42 of the *Barristers and Solicitors Act*, R.S.B.C. 1979, c. 26 infringes or denies the rights guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms*, is it justified by s. 1 of the *Canadian Charter of Rights and Freedoms*?

A. Yes.

//*La Forest J.*//

The following are the reasons delivered by

LA FOREST J. -- This case concerns the application to aliens of the "equality" provision of the *Canadian Charter of Rights and Freedoms*, s. 15(1), which for convenience of reference I reproduce here:

> **15.** (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

At issue is whether s. 42 of the *Barristers and Solicitors Act*, R.S.B.C. 1979, c. 26, by restricting admission to the Bar of British Columbia to Canadian citizens, violates s. 15(1).

My colleague, Justice McIntyre, has set forth the facts and the judicial history of this appeal and it is unnecessary for me to repeat them. Nor need I enter into an extensive examination of the law regarding the meaning of s. 15(1), because in so far as it is relevant to this appeal I am in substantial agreement with the views of my colleague. I hasten to add that the relevant question as I see it is restricted to whether the impugned provision amounts to discrimination in the sense in which my colleague has defined it, i.e., on the basis of "irrelevant personal differences" such as those listed in s. 15 and, traditionally, in human rights legislation.

I am not prepared to accept at this point that the only significance to be attached to the opening words that refer more generally to equality is that the protection afforded by the section is restricted to discrimination through the application of law. It is possible to read s. 15 in this way and I have no doubt that on any view redress against that kind of discrimination will constitute the bulk of the courts' work under the provision. Moreover, from the manner in which it was drafted, I also have no doubt that it was so intended. However, it can reasonably be argued that the opening words, which take up half the section, seem somewhat excessive to accomplish the modest role attributed to them, particularly having regard to the fact that s. 32 already limits the application of the *Charter* to legislation and governmental activity. It may also be thought to be out of keeping with the broad and generous approach given to other *Charter* rights, not the least of which is s. 7, which like s. 15 is of a generalized character. In the case of s. 7, it will be remembered, the Court has been at pains to give real meaning to each word of the section so as to ensure that the rights to life, liberty and security of the person are separate, if closely related rights.

That having been said, I am convinced that it was never intended in enacting s. 15 that it become a tool for the wholesale subjection to judicial scrutiny of variegated legislative choices in no way infringing on values fundamental to a free and democratic society. Like my colleague, I am not prepared to accept that all legislative classifications must be rationally supportable before the courts. Much economic and social policy-making is simply beyond the institutional competence of the courts: their role is to protect against incursions on fundamental values, not to second guess policy decisions.

I realize that it is no easy task to distinguish between what is fundamental and what is not and that in this context this may demand consideration of abstruse theories of equality. For example, there may well be legislative or governmental differentiation between individuals or groups that is so grossly unfair to an individual or group and so devoid of any rational relationship to a legitimate state purpose as to offend against the principle of equality before and under the law as to merit intervention pursuant to s. 15. For these reasons I would think it better at this stage of *Charter* development to leave the question open. I am aware that in the United States, where Holmes J. has referred to the equal protection clause there as the "last resort of constitutional arguments" (*Buck v. Bell*, 274 U.S. 200 (1927), at p. 208), the courts have been extremely reluctant to interfere with legislative judgment. Still, as I stated, there may be cases where it is indeed the last constitutional resort to protect the individual from fundamental unfairness. Assuming there is room under s. 15 for judicial intervention beyond the traditionally established and analogous policies against discrimination discussed by my colleague, it bears repeating that considerations of institutional functions and resources should make courts extremely wary about questioning legislative and governmental choices in such areas.

As I have indicated, however, this issue does not arise here. For we are concerned in this case with whether or not the legislation amounts to discrimination of a kind similar to those

enumerated in s. 15. It was conceded that the impugned legislation does distinguish the respondents from other persons on the basis of a personal characteristic which shares many similarities with those enumerated in s. 15. The characteristic of citizenship is one typically not within the control of the individual and, in this sense, is immutable. Citizenship is, at least temporarily, a characteristic of personhood not alterable by conscious action and in some cases not alterable except on the basis of unacceptable costs.

Moreover, non-citizens are an example without parallel of a group of persons who are relatively powerless politically, and whose interests are likely to be compromised by legislative decisions. History reveals that Canada did not for many years resist the temptation of enacting legislation the animating rationale of which was to limit the number of persons entering into certain employment. Discrimination on the basis of nationality has from early times been an inseparable companion of discrimination on the basis of race and national or ethnic origin, which are listed in s. 15. Professor Ivan L. Head traces the history of this intolerance in Canada, from early common law restrictions on inheritance and landowning to more modern developments; see "The Stranger in Our Midst: A Sketch of the Legal Status of the Alien in Canada", [1964] *Can. Yearbook of International Law* 107. Especially germane to this issue are the many instances Professor Head recites of provincial legislation aimed at reducing the opportunities available to aliens in the workplace (pp. 127-28). Since some impediment to these strategies existed by reason of the federal legislative power over naturalization and aliens (see *Union Colliery Company of British Columbia v. Bryden*, [1899] A.C. 580), the provinces had recourse to a number of devices to achieve its objectives. Thus, as Head points out at p. 128, "inclusion on the voter's list became a prerequisite for all sorts of economic activity: for admission to professional societies, for obtaining land logger's licences; for obtaining a beer licence." Restrictions regarding professions and trades were not limited to the legal profession; they extended to pharmacists, optometrists, bankers and others.

As Professor Head observes, the nation has gained maturity in this area and legislation aimed at creating "closed-door types of labour legislation" respecting aliens has tended to disappear. Here there was no allegation that the purpose of the legislation was based on discriminatory considerations; the argument centred rather around the adverse effects of the legislation. There is no real dispute that such adverse effects exist. The trial judge, Taylor J., set forth a number of situations, and there are certainly others, where this legislation could detrimentally affect a permanent resident of Canada who has not yet attained citizenship, the group which would normally be affected by the legislation. It can seriously delay them, frequently as they await the period necessary to acquire citizenship, in entering into the profession of their choice, a matter which, of course, may have important long-term implications for their future careers.

There is no question that citizenship may, in some circumstances, be properly used as a defining characteristic for certain types of legitimate governmental objectives. I am sensitive to the fact that citizenship is a very special status that not only incorporates rights and duties but serves a highly important symbolic function as a badge identifying people as members of the Canadian polity. Nonetheless, it is, in general, irrelevant to the legitimate work of government in all but a limited number of areas. By and large, the use in legislation of citizenship as a basis for distinguishing between persons, here for the purpose of conditioning access to the practice of a profession, harbours the potential for undermining the essential or underlying values of a free and democratic society that are embodied in s. 15. Our nation has throughout its history drawn strength from the flow of people to our shores. Decisions unfairly premised on citizenship would be likely to "inhibit the sense of those who are discriminated against that Canadian society is not free or democratic as far as they are concerned and . . . such persons are likely not to have faith in social and political institutions which enhance the participation of individuals and groups in society, or to have confidence that they can freely and without obstruction by the state pursue

their and their families' hopes and expectations of vocational and personal development" (*Kask v. Shimizu*, [1986] 4 W.W.R. 154, at p. 161, per McDonald J. (Alta. Q.B.))

While it cannot be said that citizenship is a characteristic which "bears no relation to the individual's ability to perform or contribute to society" (*Fontiero v. Richardson*, 411 U.S. 677 (1973), at p. 686), it certainly typically bears an attenuated sense of relevance to these. That is not to say that no legislative conditioning of benefits (for example) on the basis of citizenship is acceptable in the free and democratic society that is Canada, merely that legislation purporting to do so ought to be measured against the touchstone of our Constitution. It requires justification.

I turn then to a consideration of the justifiability, fairness or proportionality of the scheme. I agree with McIntyre J. that any such justification must be found under s. 1 of the *Charter*, essentially because, in matters involving infringements of fundamental rights, it is entirely appropriate that government sustain the constitutionality of its conduct. I am in general agreement with what he has to say about the manner in which legislation must be approached under the latter provision, in particular the need for a proportionality test involving a sensitive balancing of many factors in weighing the legislative objective. If I have any qualifications to make, it is that I prefer to think in terms of a single test for s. 1, but one that is to be applied to vastly differing situations with the flexibility and realism inherent in the word "reasonable" mandated by the Constitution.

The degree to which a free and democratic society such as Canada should tolerate differentiation based on personal characteristics cannot be ascertained by an easy calculus. There will rarely, if ever, be a perfect congruence between means and ends, save where legislation has discriminatory purposes. The matter must, as earlier cases have held, involve a test of proportionality. In cases of this kind, the test must be approached in a flexible manner. The

analysis should be functional, focussing on the character of the classification in question, the constitutional and societal importance of the interests adversely affected, the relative importance to the individuals affected of the benefit of which they are deprived, and the importance of the state interest.

With deference, however, I am unable to agree with McIntyre J.'s application of these principles to the present case. I therefore turn to the task of balancing the objectives sought to be accomplished by the legislation against the means sought to achieve that objective. On this issue (though she performed the task under s. 15), I largely share the views expressed by McLachlin J.A. (now C.J.S.C.) in the Court of Appeal. See (1986), 27 D.L.R. (4th) 600.

While there is no evidence on this point, the Attorney General offers three purposes sought to be attained by the legislation. These are:

1. citizenship ensures a familiarity with Canadian institutions and customs;

2. citizenship implies a commitment to Canadian society;

3. lawyers play a fundamental role in the Canadian system of democratic government and as such should be citizens.

With respect to the first touted objective, McLachlin J.A., speaking for the Court of Appeal, had this to say at p. 612:

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

I agree. As Robert L. Lenoir in his article "Citizenship as a Requirement for the Practice of Law in Ontario" (1981), 13 *Ottawa Law Rev*. 527, put it at p. 534: "It should not be supposed that any missing `necessary tradition' will simply be acquired immediately upon receipt of citizenship papers."

One can understand the Law Society's argument that while the citizenship requirement does not ensure familiarity with Canada or its laws, "There can be no doubt `it helps'." But such a familiarity really usually arises from residence in Canada or close contact with relatives. At all events, the simple fact, in my view, is that far less intrusive means exist to ensure such knowledge, if this is indeed the goal. Training in Canadian law and institutions is an obvious answer. As Lenoir, *supra*, at p. 534, states:

> Another reason suggested in support of a nationality requirement is that only citizens from Commonwealth countries come with a tradition and knowledge which will fit into Ontario's system. If an individual does not possess a proper knowledge of law, this should be indicated in law school and bar admission course work.

As counsel for the respondents observes, 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 notable that the Law Society requires additional educational requirements of foreign trained lawyers, whether they are Canadian citizens or not. In the present case, the respondent Andrews passed

all the examinations required of Canadian trained lawyers as well as the additional examinations required of foreign-trained lawyers.

Similar logic applies with respect to the second proffered objective, that of ensuring commitment to Canadian society. On this the Court of Appeal had this to say, at pp. 612-13:

> The second reason for the distinction -- that citizenship implies a commitment to Canadian society -- fares little better upon close examination. 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 commited [*sic*] 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*.

It is to my mind clear that were these the sole objectives, the means chosen, namely, the restriction of access to the profession to citizens, would quite simply be unnecessarily, and so impermissibly, over-inclusive.

As I noted earlier, the people principally affected by this are permanent residents of Canada. Many would have applied for citizenship, and the naturalization process would ensure the necessary familiarity and commitment to Canada. That less drastic methods for achieving these objectives are available is evident from the fact that some provincial law societies simply require a declaration of an intention to become a citizen. And even this could cause serious hardship in some cases where a person could lose his existing citizenship and incur important resulting disadvantages by acquiring Canadian citizenship unless the Bar or the courts have a discretion to exempt a person from such requirement, see *Re Howard,* [1976] 1 N.S.W.L.R. 641. In truth, I think the familiarity and commitment to Canada alleged to be sought could be achieved by

restricting admission to those who are Canadian citizens or who permanently reside in Canada. If we allow people to come to live in Canada, I cannot see why they should be treated differently from anyone else. Section 15 speaks of every individual. There will be exceptions no doubt, but these require the rigorous justification provided by s. 1.

It seems to me that the preceding objectives are, in this case, legitimate, but could easily be accomplished by means that would not impair a person's ability to practice law in the province to as great an extent. It is still an open question whether the right to earn a livelihood is a value constitutionally protected under the *Charter*, perhaps under s. 6. But whether or not such constitutional protection exists, no one would dispute that the "right" to earn a livelihood is an interest of fundamental importance to the individuals affected, and as such should not lightly be overridden.

The third objective advanced by the Attorney General has more substance. It is that certain state activities should for both symbolic and practical reasons be confined to those who are full members of our political society. The Attorney General reduced his arguments regarding this objective to the following syllogism:

(a) persons who are involved in the processes or structure of government, broadly defined, should be citizens;

(b) lawyers are involved in the processes or structure of government;

(c) lawyers, therefore, should be citizens.

I do not quarrel with the first assertion as a general proposition. The Court of Appeal accepted it, noting that this rationale underlies the common requirement that legislators, voters, judges, police and senior public servants be citizens. However, it rejected the second proposition that lawyers play a vital role in the administration of law and justice and are themselves as much a part of the government processes as are judges, legislators and so on. It rejected the notion that the practice of law itself involved performing a state or government function. It stated, at p. 614:

> 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 mean 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 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. [Emphasis added.]

I agree with this statement. It is only in the most unreal sense that it can be said that a lawyer working for a private client plays a role in the administration of justice that would require him or her to be a citizen in order to be allowed to participate therein. Obviously lawyers occupy a position of trust and responsibility in our society, but that is true of all professions, and the members of some of these, like that of chartered accountants, for instance, are privy to matters of the most serious import.

On a more mundane level, the essential purpose behind occupational licensing is to protect the public from unqualified practitioners. But as Lenoir points out (*supra*, at p. 547), "Citizenship

has not been shown to bear any correlation to one's professional or vocational competency or qualification." Like him, I see no sufficient additional dimension to the lawyer's function to insist on citizenship as a qualification for admission to this profession.

It is not without significance that a requirement of citizenship has not been found to be necessary to the practice of law in either the United States (see *In re Griffiths*, 413 U.S. 717 (1973)), or England (see *Solicitors (Amendment) Act 1974* (U.K.), 1974, c. 26, s. 1); see also *Re Howard*, *supra*, at p. 647. The doctrine of privileged communications was pressed into service, but that doctrine exists for the protection of the client. I fail to see what this has to do with the requirement of citizenship.

A requirement of citizenship would be acceptable if limited to Crown Attorneys or lawyers directly employed by government and, therefore, involved in policy-making or administration, so that it could be said that the lawyer was an architect or instrumentality of government policy; see *Reyners v. The Belgian State*, [1974] 2 Common Market Law R. 305. But ordinary lawyers are not privy to government information any more than, say, accountants, and there are rules to restrict lawyers from obtaining confidential governmental information.

I would conclude that although the governmental objectives, as stated, may be defensible, it is simply misplaced *vis-à-vis* the legal profession as a whole. However, even accepting the legitimacy and importance of the legislative objectives, the legislation exacts too high a price on persons wishing to practice law in that it may deprive them, albeit perhaps temporarily, of the "right" to pursue their calling.

I would, therefore, dismiss the appeal with costs. I would answer the first constitutional question in the affirmative and the second in the negative.

Appeal dismissed with costs, MCINTYRE *and* LAMER JJ. *dissenting. The first constitutional question should be answered in the affirmative; the second in the negative.*

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