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MOBILITY RIGHTS AND THE CHARTER OF RIGHTS AND FREEDOMS

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MOBILITY RIGHTS AND THE CHARTER OF RIGHTS AND FREEDOMS*

ISSUE DEFINITION

Because Canada is a vast country with various economic opportunities distributed throughout its length and breadth, it is important that the right to move, both inside and outside Canada, be reflected in the *Canadian Charter of Rights and Freedoms*. Section 6, giving every citizen the right to enter, remain in, and leave Canada, recognizes this. It also gives both citizens and permanent residents the right to move into any province and pursue an economic livelihood. However, these latter rights can be reduced by certain types of provincial laws and programs

BACKGROUND

Section 1 of the Charter allows legislatures to impose reasonable limits upon rights and freedoms guaranteed by the Charter, including mobility rights. However, the legislative override, provided in section 33 of the Charter, which allows Parliament or a provincial legislative to expressly declare that legislation shall operate "notwithstanding" much of the Charter, does not apply to section 6.

> 6(1) Every citizen of Canada has the right to enter, remain in and leave Canada.
> 6(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right (a) to move to and take up residence in any province; and (b) to pursue the gaining of a livelihood in any province.

A variety of Canadian laws which would tend to limit mobility rights have been examined, including laws regarding extradition, quarantine, bail, probation, parole, imprisonment,

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and custody of children. For the most part, such limits have been upheld as being reasonably justified under section 1 of the Charter. Although unreasonable limits to interprovincial mobility are unlikely to survive Charter scrutiny, the courts have held that section 6 mobility rights do not include the right to establish oneself professionally anywhere in Canada regardless of qualifications. Specifically, it is clear that the right to interprovincial mobility does not create a right to work.

Section 6(2) seems to create *prima facie* rights to receive social services in different provinces, as well as a *prima facie* prohibition against employment restrictions based on province of previous or present residence. These rights are limited both by the provisions of section 6(3) and (4), and section 1 of the Charter.

A. Limitations on Mobility Rights

> 6(3) The rights specified in subsection (2) are subject to
>
> a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
>
> b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.
>
> (4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

These paragraphs create several limits to mobility rights. Laws requiring reasonable residence periods in order to qualify for social service programs, laws that do not discriminate on the basis of province of previous or present residence, and laws designed to improve conditions in areas of Canada with lower than average employment rates, are all exempted from the mobility rights guarantee in section 6. In other words, these types of provisions can infringe mobility rights, without being unconstitutional. Additionally, a law that is not saved by section 6(3) or (4) may be saved by analysis under section 1 of the Charter as being demonstrably justified in a free and democratic society.

Under section 6(4) the courts will be required to look at the object of the law, program or activity, as well as at how the law is specifically tailored to benefit those individuals in the province who are socially or economically disadvantaged. Interestingly, to date no province has

used section 6(4) in a legal action to justify programs that discriminate in favour of disadvantaged residents.

B. Extradition

In *United States of America* v. *Cotroni*, the Supreme Court of Canada held that, while extradition infringes the mobility rights guarantee in section 6, it constitutes a reasonable limit within the meaning of section 1 of the Charter. The objectives sought by the *Extradition Act*, R.S.C. 1985, c. E-23, relate to concerns that are pressing and substantial. Suppression of crime is an important goal which cannot reasonably be confined within national borders. The accused, Canadian citizens, were charged in connection with acts committed in Canada, and even though they might have been tried in Canada, there were sufficient links to the U.S. to warrant that country's conducting the prosecution. It was felt that it is better that a crime be prosecuted where its harmful impact is felt, and where the witnesses and the persons interested in bringing the case to justice reside. The Court also held that it would not be appropriate to consider the propriety of extradition on a case-by-case basis. The administrative discretion of the Attorney General to determine whether or not a Canadian citizen should be deported was found to be of little relevance, because Canada is under an international obligation to surrender a person accused of having committed a crime listed in an extradition treaty if there are no proceedings against the person in Canada.

C. Restrictions on Professional Activity

Restrictions imposed by provincial legislation on the ability to work in a province have been tested in a number of cases.

In *Basile* v. *Attorney General of Nova Scotia*, the Nova Scotia Court of Appeal used the mobility section of the Charter to strike down a provincial regulation under which door-to-door salesmen who were not residents of Nova Scotia would be refused licences to carry on their trade. The Court held that this regulation was a "direct affront" to section 6(2) of the Charter and overruled the lower court decision. Similarly a New Brunswick court struck down provincial legislation prohibiting the Atlantic Lotteries Corporation from licensing gaming devices whose owner resides outside the province.

In the *Skapinker* case, the Ontario Court of Appeal determined that the section of the Ontario *Law Society Act* which requires that members of that Society be Canadian citizens or British subjects is inconsistent with section 6(2)(b) to the extent that it denies permanent residents of Canada the right to practise law in Ontario. The Court also held that this was not a law of general application since, when its effect is examined, it applies only to permanent residents of Canada, and laws are not of general application if they impair the status or capacity of a particular group. The Court also felt that it could not be justified as a limitation under section 1 as citizenship requirements for the practice of law have been abolished in England and Scotland, declared unconstitutional in the United States, and serve no useful purpose.

This decision was appealed to the Supreme Court of Canada, which, on 3 May 1984, rendered a unanimous decision in which it allowed the appeal of the Law Society and found that the mobility section of the Charter had no effect on the Law Society's requirement that its members be Canadian citizens or British subjects. Mr. Justice Estey, who rendered the decision, pointed out that the issue before the court was not whether it is or is not in the interest of this community to require Canadian citizenship as a precondition to membership in the provincial bar.

Because of the nature of the case, the court also had the opportunity to comment on the weight that should be given to the section headings found in the Charter. It was noted that "these headings were systematically and deliberately included as an integral part of the Charter for whatever purpose" and should be taken into consideration when discerning the meaning of the Charter. In this case it was felt that an attempt must be made to reconcile the heading "mobility rights" with the content of the section.

1. Right to Work

This basic issue in the eyes of the court in *Skapinker* was a narrow one. Section 6(2)(a) was termed to be "pure mobility" as it speaks of moving to and residing in a province. If (b), "the gaining of a livelihood," is joined with (a), it is also a mobility provision. However, if (b) is separate from (a), it may give a "right to work" without reference to mobility as a prerequisite. The court concluded that section 6(2)(b) could not be separated from the nature and character of the rights granted in section 6 and therefore the rights relate to movement into another province, either for the taking up of residence, or to work without establishing residence. Several other courts have similarly found that section 6 does not guarantee a "right to work."

In 1985, however, the British Columbia Supreme Court struck down a regulatory scheme that prevented a physician from outside British Columbia from obtaining a billing number to practise at the clinic of her choice in British Columbia. The scheme was designed to control provincial expenditures for medical services, and to ensure that new billing numbers were granted only to doctors who would provide needed services or work in underserviced rural areas. However, it also permitted differential treatment for physicians resident in the province at the time the scheme was implemented, as well as for certain other classes of physicians. Dr. Mia had received her medical degree in British Columbia, and was qualified to practise there, but was residing in Ontario at the time the scheme came into effect.

The decision is somewhat ambiguous because the court dealt with both section 6 mobility rights, and the section 7 right to "life, liberty and security of the person." In declaring that the limitation on billing numbers was not reasonable under section 1, the court referred to the section 7 right of "liberty" to move within the province in order to practise a profession when qualified, and came close to advocating a "right to work." In its analysis of section 6 and interprovincial mobility rights, however, the court relied primarily on the fact that Dr. Mia was subjected to differential treatment because of her province of previous residence. Granting a preference to some physicians on the basis of their residence in British Columbia, or similar criteria such as length of residency in British Columbia or post-doctoral experience in British Columbia, impaired Dr. Mia's mobility rights. The fact that she remained entitled to practise without pay or with direct payment by patients was not relevant, since section 6(b) protects the right to pursue the gaining of a livelihood or to practise on a viable economic basis.

In 1991, the Prince Edward Island Court of Appeal considered a reference on the constitutionality of regulations made under the provincial *Veterinary Assistance Act*. Certain designated clinics received a subsidy for veterinary services to livestock; this created what the court referred to as a "preferred class" of veterinarians. A veterinarian who moved to PEI from Ontario to establish an equine practice was duly licensed and sought to have his clinic designated. Because there was no procedure for designating additional clinics, he was unsuccessful. Citing *Mia*, among other cases, the court found that the right to pursue a livelihood, free of laws that discriminate on the basis of residence, "must not be rendered illusory and ineffective by provincial regulations which erect barriers or create preferences." Although the court found that the regulations violated section 6(2), it did not address the issue of whether they could be justified under section 1, since that was beyond the scope of the reference.

On the other hand, in 1993, the same Court of Appeal held to be valid those provisions in the *Public Accounting and Auditing Act* that restrict the practice of that profession to members of the Institute of Chartered Accountants of Prince Edward Island. The trial judge had struck down the limitations as violating sections 2(b) (freedom of expression), 6(2), and 7 (life, liberty and security of the person) of the Charter. The Appeal Division referred to both *Skapinker* and *Black* in finding that a province may regulate a profession, as long as it does not discriminate on the basis of residence. Their decision was approved by the Supreme Court of Canada in 1995 (*Walker*).

In 1997, the British Columbia Supreme Court returned to the issue of medical billing restrictions. In *Waldman*, the court dealt with a system that restricted the chargeable fees of new physicians unless they were practising in an underserviced area. New practitioners trained in the province were exempt under a "grandfathering" provision. The court held that the proposed system categorized physicians on the basis of province of training, and therefore discriminated on the basis of province of residency. However, the court also held that there was no "liberty" under section 7 protecting the right of a person to practise a profession; any such arguments, it reasoned, had been overruled by the Supreme Court of Canada when it adopted the reasoning of the Prince Edward Island Court of Appeal in *Walker*.

2. Self regulated Professions

In *Black* v. *The Law Society of Alberta*, the Supreme Court of Canada again considered section 6 and provincial law society requirements. Deciding that a purposive approach to the Charter dictated a comprehensive approach to mobility rights, the court held that section 6 was designed to protect the right of a citizen, or a permanent resident, to move about the country, to reside where he or she wishes, and to pursue his or her livelihood without regard to provincial boundaries. The court also held that a person can pursue a livelihood in a province without being there personally.

Mr. Black was the pre-eminent partner in the firm Black & Co., of which all the partners were members of the Law Society of Alberta. Only some of the partners, however, lived in Calgary, while the others were residents of Toronto. In anticipation of such an inter-provincial or national law firm, the Law Society of Alberta had passed two Rules: Rule

154, which prohibited any Alberta resident from entering into any arrangement to practise law with anyone not ordinarily resident in Alberta; and Rule 75B, which stated that no member could be associated with more than one law firm.

The Alberta Court of Appeal had ruled that Rule 154 violated both sections 6(2)(b) and 2(d) of the Charter, and was not saved by section 1. Rule 75B did not violate section 6(2)(b), but did violate section 2(d), freedom of association, and was likewise not saved by section 1 since it interfered more than was essential with the Charter right.

The Supreme Court of Canada agreed that both rules were invalid, but based its decision only on section 6. In so doing, it took a broad approach to mobility rights that included both a historical review of interprovincial mobility and a summary of the existing cases. The court stated that a dominant intention of the drafters of the *British North America Act* (now the *Constitution Act*, 1867) was the creation of a national economy through economic union. Through the creation of a central government, the trade and commerce power, section 121 (prohibiting interprovincial tariff barriers) and the building of a transcontinental railway, internal barriers to mobility were to be pulled down and economic integration achieved.

The provinces, or provincial bodies, are free to regulate professions, but (subject to sections 1, 6(3) and 6(4) of the Charter) cannot do so in terms of provincial boundaries. Additionally, the effect of the legislation must be considered as well as the object. Thus, although the object of Rule 75B might be to prevent conflict-of-interest situations, the effect would be to discourage interprovincial law firms with non-resident lawyers.

Overall, the decision in *Black* strongly upholds a broad interpretation of mobility rights. Although it is limited on the facts to the regulation of professions, the historical review suggests that section 6 might extend to a wide range of interprovincial economic barriers.

Law society requirements have featured in a number of other section 6 cases. In the *Malartic Hygrade Gold Mines* case, a lawyer from outside Quebec wished to receive a permit to allow him to defend a client within the province of Quebec. This would have offended Quebec provincial legislation. The court held that the legislation preventing a lawyer from occasional practice in Quebec was constitutional as being a law of general application which did not discriminate primarily on the basis of province of residence. Rather, any barrier thrown up by the legislation was based on the sound administration of justice; in matters other than federal matters, Quebec has the civil law system and not the common law system in force elsewhere in Canada. It

was not unreasonable to prohibit lawyers who are not members of the Bar of Quebec from occasionally arguing cases before the Quebec courts.

However, in 1992, a Quebec court struck down a requirement that precluded members of any other bar in Canada from sitting the special admission examination set by the Barreau du Québec, unless they had previously practised for at least three consecutive years. The court could find no rational link between the requirement and the objective of protecting the public by assuring professional competence. A year later, a New Brunswick court approved a more liberal scheme whereby lawyers from another jurisdiction who had practised for less than three of the last five years were required to spend six months as a student-at-law and, subject to the approval of council, either successfully complete the Bar Admission Course or pass the Bar Exams.

In 1989, the Saskatchewan Court of Appeal confirmed in *Taylor* that section 6 does not prevent a province from regulating professions, as long as there is no discrimination based on province of residence. An accountant who had been admitted to the Institute of Chartered Accountants of Ontario on the basis of having passed the examinations of the American Institute of Certified Public Accountants also applied for membership in the Institute of Chartered Accountants of Saskatchewan. He was turned down on the grounds that the American examinations did not meet the Saskatchewan criteria for professional qualifications. He was required instead to pass the Uniform Final Examination, a national Canadian examination. The court held that the issue was one of professional qualifications alone, and had nothing to do with either present or past place of residence.

However, the Saskatchewan Court of Queen's Bench invalidated a by-law of the Saskatchewan Land Surveyors Association requiring all surveyors who practised in the province to maintain an office there. The by-law was found to violate section 6(2) of the Charter because it had an unjustifiably discriminatory effect on out-of-province surveyors.

D. Marketing and Trade

With respect to marketing and trade more generally, in early 1996 the Northwest Territories Court of Appeal handed down a decision against the Canadian Egg Marketing Agency, largely based on section 6 of the Charter. The regulatory scheme governing the interprovincial sale and export of eggs did not provide a quota for eggs produced in the Northwest Territories because there had been no egg production there when the scheme was established in 1972. Negotiations for

the admission of the Northwest Territories into the egg marketing scheme date back to 1984, but never reached a satisfactory conclusion. In 1992, the Canadian Egg Marketing Agency (CEMA) sought an injunction preventing two territorial producers from marketing their eggs in interprovincial or export trade.

The court found that both the mobility rights and the freedom of association of the two egg producers were violated by the marketing scheme, although the breach of freedom of association was strongly linked to the fact that economic associations were necessary to implement the producers' right, under section 6, to sell in interprovincial markets.

The court did not question the right of government to regulate the ability of producers to sell eggs interprovincially, but found that the absence of a quota amounted to a prohibition rather than regulation. Thus a person producing eggs in the Northwest Territories is prevented from earning a living in other provinces because he or she can never obtain a quota to sell eggs outside the Northwest Territories. This violates the right to earn a living in any province, and the right for a citizen to be treated equally in his or her capacity as a citizen throughout Canada.

As for whether the breach could be justified under section 1, the court specifically rejected two arguments made by CEMA: that the scheme is designed to ensure fairness, and was indeed fair to all except two producers in the Northwest Territories; and that orderly marketing of eggs in Canada is best achieved through the use of a "historical production" system. In response to the first argument, the court pointed out that the Charter exists to protect those whose rights might be infringed, many of whom belong to minorities. The fact that the size of the group protected by the provision is larger than the size of the groups whose rights are infringed in no way changes this situation. As for the "historical production" argument, the court found it difficult to see how a scheme that was essentially exclusionary in nature could be justified on the grounds that the exclusion was historical.

The remedy chosen by the court was to exempt all egg producers in the Northwest Territories from the interprovincial and export aspects of CEMA's egg marketing scheme. Although CEMA argued that such an exemption would wreak havoc with the present orderly market, the court could not accept this argument, in view of the tiny level of production existing in the Northwest Territories.

E. Miscellaneous

The New Brunswick Court of Appeal ruled in *McDermott* v. *Nackawic* that a bylaw which requires full-time and permanent employees to live within town limits does not violate the mobility rights sections of the Charter, on the basis that the Charter protects only interprovincial mobility rights, and not intraprovincial mobility rights.

The Saskatchewan Unified Family Court, in *Kingsbury*, held that the order of the Minister of Social Services ordering that a child be returned to the home of her guardian in another province did not violate the child's right to move and take up residence in any province. That right, provided by section 6(2)(a), was subject to the reasonable limit of the legal guardian's right, prescribed by law, to determine where the child shall live. In Ontario, the Court of Appeal decided in *Parsons* v. *Styger* that a child who is a citizen of Canada, and who has been wrongfully removed from another country within the meaning of the *Hague Convention on the Civil Aspects of International Child Abduction*, is not granted by section 6 the right to remain in Canada in defiance of the Convention.

Several cases have ruled that residency requirements under the electoral laws of a province or territory do not violate section 6 of the Charter, and that any such cases should be dealt with under section 3 (voting rights) instead.

Cases from Alberta, Ontario and Quebec have upheld civil procedure rules which allow courts to order that non-resident parties give security for costs in civil proceedings.

In early 1994, a decision of the Prince Edward Island Supreme Court ruled that legislation setting a different real property tax for resident and non-resident owners of non-commercial property did not violate section 6(2). Under the legislation, taxpayers who resided in the province for at least six consecutive months were entitled to a rebate. The court held that, although this benefit might constitute an incentive to stay in the province, it did not affect the right of persons to move to, or work in, the province.

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