S.C.C. File No. 23861

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

B E TW E E N:

THOMAS P. WALKER and JOHN M. ROBERTSON

Appellants
(Plaintiffs)

- and -

THE GOVERNMENT OF PRINCE EDWARD ISLAND

Respondent
(Defendant)

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PART I - STATEMENT OF FACTS

1. The Appellants appeal to this Court from the order of the Supreme Court of Prince Edward Island, Appeal Division, dated September 24, 1993, granting the appeal of the Respondent from the decision of the Supreme Court of Prince Edward Island, Trial Division, dated October 29, 1992, declaring unconstitutional section 14(1) of the *Public Accounting and Auditing Act*, R.S.P.E.I. 1988, c. P-28. The Honourable Mr. Justice A.S. Campbell of the Supreme Court of Prince Edward Island, Trial Division, had held that section 14(1) of the Act is unconstitutional and is of no force and effect in that it violates the Appellants' rights under sections 2(b), 6 and 7 of the *Canadian Charter of Rights and Freedoms*, and is not justified by section 1 thereof.

2. Section 14(1) restricts the practice of public accounting to members of the Institute of Chartered Accountants (the "Institute"). Contravention of this section is punishable by fine or imprisonment. All non-members of the Institute of Chartered Accountants, including the Appellants, are thus precluded from the practice of public accounting even when otherwise qualified to do so by, for example, the holding of another accounting designation.

3. The accounting services reserved by the Act to members of the Institute include audits, review engagements and non-review engagements if undertaken for external use. These are services where an independent report is called for to add credibility to statements made by management to the business community, as a way of either reassuring their lenders or customers, or as a way of attracting customers to their services or products. These services are the fundamental purpose of an accounting practice. Without an audit report, for example, there is no audit.

Trial Decision, Supplementary Case on Appeal ("Supplementary Case"), Vol. 1, pp. 89-91; *Robertson Evidence*, Supplementary Case, Vol. 2, pp. 277-278, 280; *Walker Evidence*, Supplementary Case, Vol. 2, pp. 401-403, 415-416, 418-419, 422, 424; *Boritz Evidence*, Supplementary Case, Vol. 2, p. 179

4. The Appellants have chosen public accounting as their career and, as found by the trial judge, are good at what they do. The Appellant Thomas Walker, who is from PEI, worked to support himself through university. Although he began his accounting studies through the Institute, he had to leave that program because of family illness and the resulting financial burden. Mr. Walker then pursued a career in public accounting by enrolling in the Certified General Accountants (CGA) program which permitted him to take courses by distance education while working full time. The Appellant John Robertson, who is from New Brunswick, also began his accounting career by enrolling with the Institute, then withdrew by choice and enrolled as student in the CGA program. After successful completion of the CGA course of studies, including national uniform examinations and appropriate practical experience requirements, both Mr. Walker and Mr. Robertson received their CGA designation.

Trial Decision, Supplementary Case, Vol. 1, pp. 93-94, 150

5. The cornerstone of the CGA program is its commitment to the principle of open access. The CGA program enables people who would not otherwise be able to prepare themselves for the accounting profession, because they have to work full time, to have access to an accounting education. The CGA program has a strongly committed academic basis through its relationship with the University of British Columbia and students study part time through distance education and continue to work. Both Mr.

Walker and Mr. Robertson benefited from the flexibility and open access of the CGA program, which permitted them to complete their accounting education.

Trial Decision, Supplementary Case, Vol. 1, pp. 93-94, 126, 129, 150; *Harrison Evidence*, Supplementary Case, Vol. 2, pp. 203-205, 213-214, Exhibit J-4A, Tab 1, Supplementary Case, Vol. 3, p. 439

6. The CGA program of studies is continually evolving to respond to changing requirements in the education of accounting professionals. For example, in the early 1980s, the entire scope and sequence of the CGA curriculum was validated against standard university curricula, using the American Accounting Association ("AAA") study by Flaherty, "The Core of the Curriculum for Accounting Majors" (1981). The Flaherty study was initiated by the AAA with the specific objectives of identifying a body of common accounting knowledge, identifying cores of accounting knowledge for various areas of specialization, and determining the degree of emphasis which ought to be placed upon conceptual knowledge and technical ability for various accounting topics.

Harrison Evidence, Supplementary Case, Vol. 2, pp. 199-202, Exhibit J-4A, Tab 1, Supplementary Case, Vol. 3; p. 439 (at p. 452); Exhibit P-31A, Supplementary Case, Vol. 3, p. 632

7. In addition to completing courses, each CGA student is required to obtain acceptable practical experience in the accounting field. This requirement provides the opportunity to apply first hand the concepts and skills being learned, and to consolidate knowledge and understanding. As students progress to higher levels in the program of studies, they must be employed in positions of progressively higher levels of responsibility. The provincial associations monitor and approve the student's practical experience as the student progresses through the program. CGA Canada requires a minimum period of practical experience of two years. However, CGA students typically have upwards of seven years' experience behind them as they gain their CGA designation.

Harrison Evidence, Supplementary Case, Vol. 2, pp. 211-212, 217-218; *Exhibit J-4A*, Tab 1, Supplementary Case, Vol. 3, p. 439

8. In addition to education and experience, post certification monitoring requirements for CGAs in public practice include continuing education, a code of ethics, a professional

discipline and enforcement regime, a compulsory peer review and practice inspection program and compulsory liability insurance.

Exhibit P-63, Supplementary Case, Vol. 4, p. 854

9. Mr. Robertson was instrumental in passage of the *Certified General Accountants Act of New Brunswick* in 1986, whereby CGAs in New Brunswick were accorded public accounting and auditing rights equal to those previously enjoyed exclusively by CAs. Mr. Robertson was able to acquire extensive personal experience in the field of public accounting, both in New Brunswick and in the course of the formation of a national accounting partnership, Evancic Perrault Robertson (EPR), the members of which enjoy full practice rights in a number of Canadian jurisdictions. Mr. Walker was also able to acquire significant experience in public accounting (including auditing) working for clients of Mr. Robertson's firm in New Brunswick and with EPR.

Trial Decision, Supplementary Case, Vol. 1, pp. 94-95

10. In 1989, both Mr. Walker and Mr. Robertson applied to the Institute in PEI for a licence to practise public accounting, providing the Institute with information regarding their educational and professional qualifications. In response, the Institute advised that it was no longer empowered to issue licences and advised that anyone who wished to qualify to practise public accounting must become a member of the Institute. A person becomes a member by qualifying through the Institute's chartered accountancy education program. Mr. Walker and Mr. Robertson did not become members of the Institute.

Trial Decision, Supplementary Case, Vol. 1, pp. 95-96, 128-130, 146-147;
Walker Evidence, Supplementary Case, Vol. 2, pp. 408-409, *Exhibit* J-1, Tabs 15 and 16, Supplementary Case, Vol. 3, pp. 429-430, 431 respectively

11. Accordingly Mr. Walker and Mr. Robertson are prohibited from practising public accounting in PEI. Both testified at length about the effect of these restrictions. The Appellants find their exclusion from practice to be humiliating and degrading and it deprives them of a sense of fulfilment and of the opportunity to engage their talents and professional training in a challenging accounting career in PEI.

Trial Decision, Supplementary Case, Vol. 1, pp. 146-147; *Walker Evidence*, Supplementary Case, Vol. 2, pp. 404-407, 410-413; *Robertson Evidence*, Supplementary Case, Vol. 2, pp. 281-286

12. Speaking of the restriction on his occupational aspirations imposed by the Act, Mr. Walker testified:

> ... So educationally, professional, personally, commercially, to think that all I am today under the law of Prince Edward Island, under section 14.1 of the [Act], is that I am entitled to be a bookkeeper, no, that does not measure up to, to anything I represent or want to represent or that I feel or that, in fact, exists in my commercial practice.
>
> *Walker Evidence*, Supplementary Case, Vol. 2, pp. 411-412

13. With regard to why he insists upon maintaining his residence in Prince Edward Island and engaging in a public practice in Prince Edward Island, Mr. Walker testified:

> ... When I graduated from high school, I knew, at that point, that I wanted to be in the accounting profession, and, specifically, public accounting, and all that entails, so I focused my life and my education and my investment toward that. I think, as you look at my transcripts and my employment history, ... I was always oriented toward commercial public practice type accounting. ... I attended university here, rather than an off-island university, so that I could get practical experience in my home province, because I intended to make my life here, even then. In addition to that, I have had, over the years, employment and business opportunities to locate outside of the province; I chose not to, for the reason that I wanted to stay here and make my living here. Historically, my ancestors are from here. I feel at home here. This, I believe, has a quality and, as part of a full and rewarding life, is that you settle yourself where you're happy, and you settle yourself where you want to make investment, both of your own time and your skill and your vocational choice, and, for those personal reasons, I wanted to be in Prince Edward Island. ...
>
> *Walker Evidence*, Supplementary Case, Vol. 2, pp. 412-413

14. With regard to the Government's suggestion that he can, after all, do anything a bookkeeper can do in Prince Edward Island, Mr. Robertson testified that he was:

> Offended, I suppose, as a Canadian. But as a professional, as well. I think that the Government is telling me they clearly do not understand, first of all, maybe, what a bookkeeper is, and, secondly, what professional accountant is. ... The reality of the day is that I am denied, in this province, from practising a professional publicly, that I am well able and have demonstrated

> and have been educated for, simply because the law grants, in my opinion, a monopoly to the Institute. ... how do I feel? ... Frustrated, I guess, in that one can't get through to the Institute and say, this isn't right.
>
> *Robertson Evidence*, Supplementary Case, Vol. 2, pp. 284-285

Regulation of the Accounting Profession

15. The accounting profession is not comparable to other established professions such as medicine and law. The history of the accountancy profession is characterized by rivalry between and among various accounting organizations. The Institute is seen by some as representing the accounting elite, maintaining its privileged position by means of organizational co-opting, whether through grandfathering or mergers with other accounting associations. However, other accounting associations have emerged both to complement and compete with the Institute. While some of the earlier associations have disappeared, in Canada today there are three national accounting associations: CAs, CGAs and Certified Management Accountants (CMAs). Each association is identified with a particular accounting designation, for which it provides the educational program, professional development and continuing quality assurance.

> *Trebilcock Evidence*, Supplementary Case, Vol. 2, p. 373; *Exhibit J-28*, Supplementary Case, Vol. 3, p. 604

16. The CAs, CGAs and CMAs have all achieved legislative recognition in Canada, and participate in the provision of public accounting services, but the extent of the recognition and participation varies. The regulation of accounting in Canada was described at trial by Professor Michael Trebilcock, who gave extensive expert evidence on professional regulation. Professor Trebilcock's evidence was not challenged or contradicted by other evidence at trial. His overview of accounting regimes, as set out below, was accepted by the trial judge:

(a) **The most permissive regulatory regime** for public accounting in Canada exists in Saskatchewan, Manitoba, the Yukon and Northwest Territories where legislation sets up certification regimes under which the three major accounting associations may certify members to practise public accounting without restricting the ability of non-members to practise.

(b) **Slightly less permissive regimes** are evidenced in British Columbia, Alberta and New Brunswick where some limits are placed on the ability to practise public accounting.

i) In British Columbia the statutory audit function requires a license and only CAs and CGAs automatically qualify; for non-statutory audits, however, no restrictions exist; a regime similar to this exists in the European Community.

ii) In Alberta, a license is required to perform both audits and non-audit reviews, but members of the three major accounting organizations automatically qualify for licensure.

iii) In New Brunswick, both the CAs and CGAs are licensed to perform the full range of public accounting functions, including statutory audits; outside of statutory audits, public accountancy in New Brunswick is generally unregulated.

(c) **An even more restrictive model** of regulation adopts a licensure regime restricted to CAs:

i) In Ontario only CAs qualify for a licence to practise public accountancy (comprising not only statutory audits but also voluntary audits and non-audit reviews); however, dispensing power is vested with the Public Accountants Council to make exceptions;

ii) in Quebec there is no independent licensing body but public accountancy (broadly defined) is confined to CAs with some significant exceptions in the case of audits;

iii) in Nova Scotia and Newfoundland licences to practise public accountancy, again broadly defined, are issued by a licensing board heavily dominated by CAs; licences are issued automatically to CAs, but, there is a discretion to license non-CAs;

(d) **the most restrictive category of public accountancy regulation in Canada is evident in PEI** where only members of the Institute are permitted to engage in public accountancy; there is no independent licensing body and no discretion to license non-CA accountants.

Trial Decision, Supplementary Case, Vol. 1, pp. 102-4, *Exhibits P-43, P-44 and P-45*, Supplementary Case, Vol. 4, pp. 642, 739, 741 respectively

17. Thus, regulation of accounting in Canada reflects a wide diversity of regulatory options, the most intrusive being licensing in the manner in place in Prince Edward Island.

18. At trial Professor Trebilcock identified three classes of parties who are potentially affected by professional regulation. The "first parties" are the professionals themselves. The "second parties" are consumers of professional services. "Third parties" are those

other than direct consumers who will be relying upon the professional's work. Within this framework, Professor Trebilcock described the purposes of professional regulation. Through regulation, second parties become aware of the qualifications of those offering services, and can make informed choices. Regulations can also provide a set of minimum standards that will protect both second and third parties by ensuring that only those who are competent to do so will be permitted to offer services to the public.

19. The regulatory approaches used in Canada, described above, include regulation which can be characterized as input regulation, or as output regulation. A regulation that focuses directly upon the quality or characteristics of a particular professional service, and not upon the qualifications of individuals providing the services, is called output regulation. In contrast, input regulation of professional service markets focuses not on the characteristics or quality of the service, but rather on the characteristics or qualities of service providers..

Trebilcock Evidence, Supplementary Case, Vol. 2, p. 373-374

20. Input regulation is therefore concerned with the training of service providers, on the assumption that whoever acquires professional credentials will deliver service of an appropriate quality. Two forms of input regulation are certification and licensure regimes. A certification regime operates on the basis that a professional body will certify service providers as having satisfied a particular training protocol. A certification regime does not, however, prevent people without these training credentials from practising in the same area. Certification regimes are therefore principally responsive to the first regulatory rationale of aiding consumers of a professional services ("second parties") in determining the qualifications of service providers.

Trebilcock Evidence, Supplementary Case, Vol. 2, p. 373-375

21. A licensure regime is similar to a certification regime, in that a licence is only issued to a professional after successful completion of a proscribed training protocol. A licensure regime goes further, however, in *prohibiting* persons who do not hold a licence from providing professional services. It therefore seeks to provide a "quality floor" for professional services that will protect both second and third parties.

Trebilcock Evidence, Supplementary Case, Vol. 2, p. 375

22. The primary shortcoming of a licensure regime lies in the risk that, because the licensees often control the licensing process, standards will be set unnecessarily high in order to restrict entry unduly and drive up the incomes of existing practitioners. Additionally, once a licensing regime is put in place, with the attendant advantageous impact upon practitioners' incomes, it is very difficult to revoke the scheme without inducing substantial opposition by those benefiting from the restricted markets. Given these disadvantages, use of licensing regimes should be reserved for those instances where information costs to consumers or affected third parties are particularly high or substantial third party damage caused by incompetent service cannot be adequately addressed through monetary damages.

Trebilcock Evidence, Supplementary Case, Vol. 2, p. 376, line 25, p. 377, line 5; *Exhibit P-43*, Supplementary Case, Vol. 4, p. 642

23. Even in Ontario, a focal point of the financial markets, research and study has failed to justify such a licensure regime. The Professional Organizations Committee (POC) was appointed by the Attorney General of Ontario to review the regulation of the professions of law, accountancy, architecture and engineering, and issued its final report in 1980. The POC, its Research Directorate and its research team all agreed that the Ontario regulatory scheme - a licensure regime which for all practical purposes, restricted public accountancy, to CAs - was too restrictive. Indeed, the POC went so far as to state in its report:

> For us to propose that the struggle over who should license public accounting should be finally resolved in favour of the ICAO, we would have to be convinced that the resulting monopoly position is beyond reasonable doubt in the interests of the public. In conscience, we cannot declare ourselves to be so convinced.

Trebilcock Evidence, Supplementary Case, Vol. 2, pp. 380, 383, line 40ff, *Exhibit J-9*, Supplementary Case, Vol. 3, p. 548

24. Provincial governments and others have continued to consider these issues and two recent reports illustrate the controversy surrounding the question of exclusive licensure regimes. The Report of the Select Committee on the Practice of Public

Accountancy in Newfoundland, in June of 1994, concluded that public accounting should no longer be restricted to CAs in Newfoundland, and CGAs and CMAs should be permitted to apply for licensure. In another report on the regulation of public accounting in Ontario, released in September of 1994, the author, Roger N. Wolff, also recommended a less restrictive regulatory system though with the continued use of a licensing board and uniform qualifying examinations.

25. Acceptance in Canada of the CGA qualifications is further shown within federal legislation. Numerous federal statutes, such as the *Bank Act*, the *Investment Companies Act* and the *Trust and Loans Companies Act*, require that entities regulated by those statutes appoint an auditor who is a member in good standing of an institute or association of accountants incorporated by or under the authority of a provincial legislature, which include members of both the Institute and the CGA Association. Additionally, these statutes provide that the auditor must have practised the profession of accountant for a designated number of years. None of the statutes include among the required qualifications for an auditor a provision favouring one particular accounting institution or association over another.

Appendix, pp. 89, 167, 175 respectively

26. Both the Alberta and Saskatchewan Securities Commissions have also recently promulgated guidelines identifying acceptable auditors for audits, financial statements and other financial information filed under the relevant securities legislation. In both cases, these policies provide that appropriate auditors or accountants include any qualified CA, CGA or CMA.

Appendix, pp. 239, 242 respectively

27. The *Canada Business Corporations Act* does not require that the audit of federally incorporated companies be performed by members of a particular accounting institute or association. Its regulations provide that financial statements and auditors' reports must be prepared in accordance with the standards set out in the CICA handbook. CGAs, like CAs, subscribe to these standards.

Trial Decision, Supplementary Case, Vol. 1, pp. 104-106, 115; Appendix p. 109

PEI Legislation

28. The PEI Institute of Chartered Accountants (which had been established by statute in 1921) initiated efforts to secure regulatory legislation in PEI in the 1940s. These efforts were part of the CAs' national campaign to establish reciprocal arrangements between Institutes in various provinces (so as to enhance their professional mobility) and to "upgrade" the quality of accounting services being offered to the public. The impugned legislation was first enacted in 1949, as a private member's bill. It was fashioned after a bill passed in Quebec in 1947, and contains no exceptions to the CA-only rule, such as later appeared in the Quebec legislation. Testimony at trial from a chartered accountant who was a major sponsor of the initial bill indicates that the concerns about the quality of accounting work being done in the province focused on public practitioners who had no formal training or designation. Two CGAs, employed in government service in PEI at the time, were both grandfathered into the Institute as members (which would have allowed them to engage in public practise had they chosen to do so). Other non-CAs received licences to practise, a transitional feature no longer included in the Act.

Trial Decision, Supplementary Case, Vol. 1, pp. 96-97; *Manning Evidence*, Supplementary Case, Vol. 2, pp. 268-269; *Exhibit J-3*, Tabs 19 and 20, Supplementary Case, Vol. 3, pp. 432, 436 respectively

29. The Certified General Accountants Association of PEI (CGAAPEI) was established by statute in 1968. In the 1970s and 1980s, CGAAPEI made representations to the Respondent as well as to the appropriate Committee of the Legislature, seeking legislative change which would accord CGAs public accounting rights. The Institute strongly resisted these representations.

Trial Decision, Supplementary Case, Vol. 1, pp. 97-98

30. Instead of dealing with the CGA demand for public practice rights, the Respondent referred the matter back to the Institute and CGAAPEI for further study and consideration and establishment of a standard acceptable to both parties and in the best interests of the public. In 1988 the Premier of PEI advised of his hope that CGAAPEI and the Institute

could work out some middle ground rather than asking the government to take one side over the other. The Institute had the benefit of the inequality of bargaining power between the CAs and the CGAs in PEI, placing the CAs in the stronger position. The Institute remained firm and unyielding in defence of its exclusive control over public accounting.

Trial Decision, Supplementary Case, Vol. 1, pp.97-99; *Shea Evidence*, Supplementary Case, Vol. 2, p. 298-9

31. The Institute, although not named as a party at trial, was found by the trial judge to have defended this action with the explicit endorsement and support of the Respondent. Further, as found by the trial judge:

> The [Respondent's] insistence that standards is the key to this issue is, in my opinion, somewhat misdirected and exaggerated. This is a conflict over turf. CAs do not wish to share the governance of public accounting with CGAs in Prince Edward Island. ... One would be most naive to conclude that standards is the exclusive issue in this case.

Trial Decision, Supplementary Case, Vol. 1, pp. 101, 129-130

32. As found by the trial judge, the Respondent has not itself conducted any research or studies as a background to its legislation:

i) Mr. Philip MacDougall, CA, Past President of the Institute and Deputy Minister of Finance, with responsibility for the Act, confirmed that no studies were initiated by the Legislature or the government relative to the request of the CGAs for public practice rights.

ii) Mr. MacDougall also acknowledged that he was not familiar with the details of the regulatory regimes in British Columbia, Alberta, and New Brunswick.

iii) As to the gravity of the debate in 1982 as well as in 1987-88, Mr. MacDougall confirmed that neither government nor the Legislature had the benefit of studies and research other than what may have been given by the parties.

Trial Decision, Supplementary Case, Vol. 1, p. 126

33. The trial judge also concluded that the Respondent's approach to the regulation of public accounting has been a "hands-off" approach:

i) there is no formal mechanism for the Institute to report upon its activities to the Respondent;

ii) no review of Institute activities has been undertaken by the Respondent, nor has the Respondent ever conducted a review of the standards for admission, nor of the Uniform Final Examination, nor of any other Institute requirements;

iii) there are no lay members or representatives of the Respondent or of accounting bodies other than the Institute in the Institute; and

iv) in the words of Mr. MacDougall, "the legislation provides for self-regulation through the Institute of Chartered Accountants".

As the learned trial judge concluded:

> In short, the government has placed the Institute in exclusive charge of public accounting in PEI and exercises no formal powers of review over its activities.

Trial Decision, Supplementary Case, Vol. 1, pp. 101-102, 124-125; *Shea Evidence*, Supplementary Case, Vol. 2, pp. 293-295; *MacDougall Evidence*, Supplementary Case, Vol. 2, pp. 236-238, 239, 253-255

34. After defending the action on behalf of the government at trial, the Institute further sought and was granted intervenor status in respect of the appeal.

Trial Decision, Supplementary Case, Vol. 1, p. 102, *Order of Appeal Division* dated June 2, 1993, Supplementary Case, Vol. 1, p. 37; *Shea Evidence*, Supplementary Case, Vol. 2, pp.301-311

35. The trial judge found the Appellants to be among large numbers of Canadians who, although duly qualified by their designations as CGAs to practise public accounting in other Canadian jurisdictions, are denied that privilege in PEI. He also found that:

i) as a small business community, with only two companies traded in the stock exchange, and business and financial institutions that do not, for the most part,

"require auditors trained to meet the sophisticated needs of the corporate elite in Canada", there is "no evident need in this province for the most rigid regulatory accounting regime in Canada";

ii) the standards offered by CGAs have satisfied and been found acceptable to the needs in other provinces;

iii) the public interest will be better served by admission of CGAs into the governance and practice of public accounting in PEI;

iv) the means chosen in the Act are anathema to the egalitarian and pluralistic society which the *Charter* promotes;

v) the Respondent Government has acted arbitrarily by isolating the CGAs and barring them from public practice when more accommodating approaches were open to the government to choose; to decide to preserve the status quo is to refuse to deal with CGAs on their merits, and that, in the opinion of the trial judge, is to act arbitrarily.

Trial Decision, Supplementary Case, Vol. 1, pp. 110, 117, 126, 130-131

Mobility

36. CAs enjoy substantial advantages as a result of their long standing mobility throughout Canada. Although within each of the three major accounting associations there is almost complete interprovincial mobility within their own designation, only CAs from outside the province have that advantage with regard to public practice in PEI. Thus, with public practice rights, the benefits of mobility vary greatly from one association to another.

Trebilcock Evidence, Supplementary Case, Vol. 2, pp. 391, 394; *Shea Evidence*, Supplementary Case, Vol. 2, pp. 287-289; *Wilson Evidence*, Supplementary Case Vol. 2, pp. 426; *Manning Evidence*, Supplementary Case, Vol. 2, pp. 272-273; *Trainor Evidence*, Supplementary Case, Vol. 2, p. 350

37. Restrictions impeding the mobility of professionals in Canada represent a significant problem. The Council of Maritime Premiers in its Report urged self-governing professional bodies, in partnership with Maritime governments, to eliminate limitations to free mobility of professionals within the Maritime provinces. Present impediments to inter-jurisdictional mobility of accountants significantly impair the effective organization of the accounting profession and are at significant variance with trends toward economic integration observable elsewhere in the world. While efforts to address this impediment by means of intergovernmental agreements in Canada are promising, this has not, as yet, been achieved.

Wilson Evidence, Supplementary Case Vol. 2, p. 425; *Manning Evidence*, Supplementary Case, Vol. 2, pp. 274-275; *Exhibit P-46*, Supplementary Case, Vol. 4, p. 747; *Draft Agreement on Internal Trade*

38. In both bilateral and multilateral trading relations, for example under the Free Trade Agreement between Canada and the United States, the General Agreement on Tariffs and Trade and arrangements implemented in the European Community, there is evident a strong movement towards economic integration, not only in goods markets, but additionally in markets for services. In some professions, it may be difficult to harmonize licensing requirements over many jurisdictions because jurisdiction-specific expertise is required, or cultural and linguistic particularities make harmonization difficult. Relative to other professions, however, the accounting profession is not jurisdiction-bound, a conclusion supported by the fact that the "Big Five" accounting firms operate not only nationally, but internationally. Numbers are multilingual, multicultural and multi-jurisdictional, and the audit or review of a set of financial statements does not involve a significantly different set of skills from one province to another.

Trebilcock Evidence, Supplementary Case, Vol. 2, pp. 387-390, *Exhibit P-43*, Supplementary Case, Vol. 4, p. 642

39. Moreover, the client base to which the audit function most often relates (i.e. larger publicly-held corporations) tends to be increasingly national and international in its scope. To offer effective audit services therefore typically requires an accounting firm to be able to operate in a number of jurisdictions, and indeed, countries. This proposition is borne

out by the structure of the public accountancy profession, for accounting firms that dominate the market for audit services are typically national and international in their structure.

Trebilcock Evidence, Supplementary Case, Vol. 2, p. 390, line 10, *Exhibit P-43*, Supplementary Case, Vol. 4, p. 642

40. CGAs, like CAs, are also actively involved in the international accounting organizations including the International Federation of Accountants, the International Accounting Standards Committee and regional organizations such as the European Federation of Accountants and the Inter-American Accounting Association.

MacDonald Evidence, Supplementary Case, Vol. 2, pp. 221-222

41. The International Federation of Accountants, IFAC, was founded in 1977. It represents the approximately 110 national accountancy bodies from some 75 countries throughout the world, particularly in the industrial world, with a total membership of approximately one million accountants in these countries. IFAC has as its broad objective to develop and enhance a coordinated worldwide accountancy profession with harmonized standards.

Exhibit J-4B, Tab 13, Supplementary Case, Vol. 3, p. 523 (at p. 524)

42. IFAC has established standing committees for the purpose of working towards its objectives, including committees on education, ethics, financial and management accounting and international auditing practices. For example, the International Auditing Practices Committee prepares auditing practices guidelines or standards. Each member body, as a condition of membership, is obliged to comply as much as possible with these guidelines and standards.

MacDonald Evidence, Supplementary Case, Vol. 2, pp. 224-234, *Exhibit J-4B*, Tab 13, Supplementary Case, Vol. 3; p. 523

43. In conclusion, seven of the twelve provinces and territories in Canada have rejected the most restrictive regulatory option now in effect in PEI. Moreover, there is little empirical evidence to suggest that, absent extensive regulation, the market for accounting

services exhibits serious problems in terms either of consumers being duped or cheated in one way or another or of third party users of accounting information being prejudiced. The two provinces that have reviewed and revised their accountancy legislation most recently -- New Brunswick and Alberta -- have rejected granting a licensing monopoly to the CAs in favour of placing all public accountancy functions within the powers of parallel qualifying bodies of the CAs, CGAs and CMAs. Moreover, CGAs have recently been recognized on an equal footing by securities regulators in Alberta and Saskatchewan, who are specifically charged with protection of the investing public, and by federal legislation. Lastly, CGAs are substantial participants internationally, where the harmonization of accounting standards and increased mobility are also well underway.

> *Trebilcock Evidence*, Supplementary Case, Vol. 2, p. 372, line 25, p. 385, line 10, p. 395, line 25

Freedom of Expression

44. Contemporary society, and particularly the business community, is greatly dependant upon the communication of written information and often demands that written information be "objectified" - presented in an objective and neutral manner - to invest that information with authority so that readers can rely with confidence upon the information as complete and accurate. In a society in which documents containing objective knowledge are indispensable, the person whose formally expressed and public statement of an opinion transforms an enterprise's financial statements into an authoritative statement of financial status is vested with authority to do so, typically by the state.

> *Smith Evidence*, Supplementary Case, Vol. 2, pp. 333, 336-337; *Boritz Evidence*, Supplementary Case, Vol. 2, p. 196-197

45. Experts tendered at trial by both the Appellants and the government testified that the expression of an opinion is fundamental to audits, review and non-review engagements. While those who have no authorization to practise may perform some of the background work to prepare the opinion, it is only the authorized practitioner who may sign and issue it. Similarly, it is the authorized practitioner who takes the responsibility of deciding when not to give an opinion or report. The provision (or refusal) of opinions and reports attesting to financial status *is* public accounting. Considerable evidence was

introduced at trial with regard to the duty to report and generally the expressive nature of the auditing and review process which traces back to the very origin of auditing in medieval times.

Boritz Evidence, Supplementary Case, Vol. 2, pp. 196-197; *Trites Evidence*, Supplementary Case, Vol. 2, p. 399-400; *Smith Evidence*, Supplementary Case, Vol. 2, pp. 338-344; *supra*, para. 3

46. As stated in the CICA Handbook, "the objective of an audit of financial statements is *to express an opinion...*".

Exhibit J-12, Supplementary Case, Vol. 3, p. 581, Volume II, section 5000.01 (at p. 583)

47. As stated by the Respondent's witness, Mr. Trites:

> The report is the culmination of the audit process ...
>
> *[I]t's a communication to the shareholders or whoever is receiving the report.*
>
> [O]nce you take on an audit engagement, there is a *duty to report*. What would happen in practise is that we would report. There would not be a situation where we would not report. That, that's sort of a fundamental fact.

Trites Evidence, Supplementary Case, Vol. 2, pp. 397-400

48. In the words of the Respondent's expert, Dr. Boritz:

> [T]he auditor must either express an opinion or deny, formally deny an opinion, which is to, to attach a report that says that, for whatever reasons, explaining the reasons, the auditor could not form a professional judgment or opinion about the subject matter, or if the, if the opinion is adverse, in the sense that the auditor does not believe that the financial statements present fairly, to express that sort of opinion,... in a normal course, ...the fact that an audit has been carried out is evidenced by a communication which describes the conclusion that the auditor reached, on the basis of the work done.

Boritz Evidence, Supplementary Case, Vol. 2, pp. 196-197

49. In essence, what the Act denies these Appellants and others in their position is the right to speak as public accountants about the right to speak as public accountants about the financial status of entities about which they have been trained to render an opinion.

Alternatively, it totally denies them the right to engage in the only kind of speech or expression that is encompassed within public accounting, and forms its very essence.

50. The expressive activities denied to the Appellants are activities which promote the achievement of each of the social and human values which underlie freedom of expression. The trial judge found the evidence of the Appellants "most cogent and convincing" in this regard.

Trial Decision, Supplementary Case, Vol. 1, pp. 110-112

Trial Decision

51. In summary, the trial Court held:

i) that public accounting has expressive content and is protected by section 2(b) of the *Charter*, and that the effect of the impugned legislation is to impinge upon the Appellants' expressive rights; in this regard, the Court noted that the section aims at prohibiting expression by denial of access to the message sought to be conveyed;

ii) that the Appellants' liberty as guaranteed by section 7 of the *Charter* had been trenched upon by section 14(1) of the Act noting that, in a free and democratic society, the opportunity to strive for and to reach one's potential in a chosen occupation must surely be a right of citizenship offering human dignity and fulfilment equal to the other freedoms guaranteed by the *Charter*;

iii) that the Appellants' liberty interests were denied without the protection of fundamental justice given the arbitrary actions of the Respondent, its abdication of its responsibilities to the Institute, and its failure to take into account the relevant matters;

iv) that section 14(1) infringes the Appellants' right to pursue the gaining of a livelihood in any province, as guaranteed in section 6(2) of the *Charter* and that the impugned legislation is not a law of general application because it applies to a select class of citizens, namely CAs, who alone are permitted to pursue a livelihood in public accounting to the exclusion of all others; and

v) the trial Court further found that the Respondent failed to meet its onus to demonstrate that the means chosen by it were reasonable and demonstrably justified in a free and democratic society as required by section 1 of the *Charter*.

Appeal Decision

52. The Appeal Division, in overturning the decision of the trial court, had no regard to the numerous material findings of fact made by the trial judge, and drew certain conclusions, set out below, which are inconsistent with the findings made by the trial judge. In summary, the Appeal Division found as follows:

i) that the reporting functions of public accounting and auditing do meet the definition of expression; however, the Act only restricts the capacity in which individuals can express themselves and as such does not contravene section 2(b) of the *Charter*.

ii) that the impugned legislation is a narrow well-defined restriction carefully crafted to provide a measure of protection for the public while not interfering too much with the right to practise, suggesting that considerable scope for accounting practice remained open to the Appellants presumably in part because the Act prohibits only the offering of services to the public for reward;

iii) that the expressive aspects of public accounting and auditing were really quite limited in both nature and extent, which is completely contrary to both the overwhelming evidence at trial and the findings of the trial judge;

iv) that section 7 is concerned only with restrictions on liberty which result from an individual's interaction with the justice system and its administration and as such does not extend any rights to the Appellants in these circumstances;

v) that section 6(2) to the *Charter* is not infringed as it does not guarantee a right to work and subjects all the non-members of the Institute to the same restrictions and conditions; and

vi) that in regard to section 1, the Court should determine the rational connection test on the basis of the statutory language itself and not extrinsic evidence; that in

determining minimal impairment the Court should take into account local distinctions and demonstrate "due deference" to local legislatures; and that the Appellants had not suffered disproportionate infringement of rights because they could still express opinions about accounting in a non-professional and non-commercial context and do in-house accounting work for management.

PART II - ISSUES

53. It is submitted that the issues for consideration by this Court are as follows:

i) with both the Trial Court and the Court below accepting that public accounting has expressive content, whether section 2(b) of the *Charter* will support judicial scrutiny of government action restricting "authoritative" speech to only one of a number of qualified groups of professional accountants;

ii) whether the guarantee of liberty provided for in section 7 of the *Charter* protects the right to practise a profession;

iii) whether the effect of the Act is to restrict mobility contrary to section 6 of the *Charter*; and

iv) whether the standard of government accountability under section 1 of the *Charter* can be met by the respondents in this case.

54. This Court has framed the constitutional questions in this case as follows:

1. Does section 14(1) of the *Public Accounting and Auditing Act*, R.S.P.E.I. 1988, c. P-28 limit the Appellant's rights guaranteed by sections 2(b), 6 or 7 of the Canadian Charter of Rights and Freedoms?	1. Le paragraphe 14(1) de al *Public Accounting and Auditing Act*, R.S.P.E.I. 1988, ch. P-28, restreint-il les droit que l'al.2b), l'art. 6 our l'art. 7 de al Charte canadienne des droits et liberté garantit a l'appelant?
2. If the answer to question 1 is in the affirmative, is section 14(1) nevertheless justified by section 1 of the *Canadian Charter of Rights and Freedoms*?	2. Si la réponse à la première question est affirmative, le par 14(1) est-il justifié en vertu de l'article premier de al *Charte canadienne des droits et libertés*?

PART III - ARGUMENT

Section 2(b) - Freedom of Expression

55. The *Canadian Charter of Rights and Freedoms* guarantees in paragraph 2(b) that everyone has freedom of thought, belief, opinion and expression, including freedom of the press and other media of communications.

56. The freedom to express oneself openly and fully is of critical importance in a free and democratic society. The reasons underlying that freedom are that:

i) seeking and attaining the truth is an inherently good activity;

ii) participation in social and political decision-making is to be fostered and encouraged; and

iii) the diversity in forms of individual self-fulfilment and human fruition ought to be cultivated in an essentially tolerant, indeed welcoming environment not only for the sake of those why convey a meaning, but also for the sake of those to whom it is conveyed.

Ford v. Quebec (A.G.), [1988] 2 S.C.R. 713, 765

Irwin Toy Ltd. v. Quebec (A.G.), [1989] 1 S.C.R. 927, 976

Royal College of Dental Surgeons v. Rocket, [1990] 2 S.C.R. 232, 241, 247

57. This Honourable Court has recognized that the guarantee of freedom of expression in section 2(b) includes freedom of commercial expression. Protecting commercial expression is necessary to recognise the intrinsic value of all expression, to afford protection both to the recipients of expression and the communicators, and to foster informed economic choices which promote individual fulfilment and autonomy.

Ford v. Quebec (A.G.), supra, 766-767

Irwin Toy Ltd. v. Quebec (A.G.), supra, 971

Royal College of Dental Surgeons v. Rocket, supra, 241, 247

58. The inquiry under section 2(b) has two stages. First, the Court must determine whether the activity in question is "expressive activity" in that it conveys or attempts to

convey a meaning. Objection to the form of the expressive activity can be taken only if the form is violent or is a threat of violence.

Irwin Toy Ltd. v. Quebec (A.G.), supra, 974, 978-9

59. Once expressive activity has been found to exist, the Court inquires whether the purpose or effect of government action is to restrict expression. A restrictive purpose may be found where the legislation singles out particular meanings not to be conveyed, restricts access by some to the meaning being conveyed, or controls the ability of the one conveying the meaning to do so. Where the effect of the legislation is to curb expression, the party alleging infringement of section 2(b) must show that the expressive activity supports the principles and values upon which freedom of expression is based, as the trial judge found that the Appellants had done in this case.

Irwin Toy Ltd. v. Quebec (A.G.), supra

60. Legislation which controls participation in a particular expressive activity has as its *purpose* the restriction of freedom of expression.

Epilepsy Canada v. Alberta (A.G.) (1994), 115 D.L.R. 501, 504 (Alta. C.A.)

61. The Act prohibits persons who are not public accountants from performing audits, review and non-review engagements. These activities are expressive and the prohibition directly impairs the Appellants' freedom to engage in that expression. It is submitted that the law therefore has as its purpose the restriction of expression.

62. From the evidence adduced at trial by experts and accounting practitioners (including CAs), it is clear that the rendering to third parties of opinions and reports about the financial status of an entity is activity which conveys a meaning. Moreover, this expression *is* the practice of public accounting. Without the expression of views to third parties (or the explicit refusal to express such views which itself conveys a meaning), there would not be public accounting. Public accounting is, by nature and by definition, an expressive activity. Moreover, this type of expression is unique. There is no substitute; no alternative. The expression of opinions on financial statements by someone who is not a public accountant, is not public accounting, even if those expressions are in the same

"form" as is used by a public accountant, namely, that prescribed by the CICA Handbook. Such expression does not convey meaning in the way that a public accountant's utterance would convey meaning.

63. Moreover, it is clear from the evidence at trial that the expression cannot be separated from the capacity of the speaker. An audit is an evaluation of and report on the financial state of an entity *performed by a public accountant.* A review and report by a person who is not a public accountant is not an audit; it may be expression but it is expression that is different in substance from an audit. It does not convey the meaning that an audit would convey.

64. The difference between the conveying of meaning (expression) by a public accountant and the expression of views by someone who is not a public accountant can thus be seen not as a difference in form, but as an essential difference, a difference in kind. For this reason, the Appellants submit that the cases which rely on distinctions in form of expression are of little assistance.

65. It is further submitted that it is erroneous to suggest, as the Appeal Division did, that because the Appellants may express their views on accounting matters in a non-commercial, non-professional context, there is no restriction on their freedom of expression. This reasoning is based on the erroneous assumption that these other types of expression readily substitute for the conveying of meaning in public accounting. This is not the case. There are no suitable alternatives to the conveying of meaning as and by a public accountant.

66. Even if there were alternatives to the expression of views *qua* public accountant, the availability of options to the prohibited speech does not necessarily mean that there has been no violation of *Charter* rights. In *Ramsden v. Peterborough (City)*, the impugned government action prohibited postering on public property. Postering on public property is a form of expression not linked to any particular meaning and although it is a unique form of expression, one would expect that the same messages could be easily conveyed through many other expressive activities. Nevertheless, prohibiting postering on public property was found to have the clear effect of limiting expression.

Ramsden v. Peterborough (City), [1993] 2 S.C.R. 1084, 1104

67. It is submitted that the result in *Ramsden* is to be preferred to the holding of the Appeal Division in this matter. Carried to its logical limit, the holding of the Appeal Division would mean that the state would not be seen to be wrongfully prohibiting speech unless it prohibited it in all its possible or potential forms. The availability of a perceived or theoretical option to the banned speech would immunize government action from review. Such a holding potentially deprives all would-be speakers of an important element of speech, namely choice. Although there is no positive right to have the government *create* a particular form of expression, any restriction on the content or form of expression, or on access to expression, is a *prima facie* violation of the right to expression. Thus:

> [T]he freedom of expression in s. 2(b) prohibits gags, but does not compel the distribution of megaphones.
>
> *Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995, 1035
>
> *R. v. Native Women's Association of Canada et al.* (October 27, 1994) unreported (S.C.C.), 23 (L'Heureux-Dubé J.)

68. Here, the ban on the Appellants' conveyance of meaning effected by the impugned legislation is total. They cannot convey meaning at all. They cannot give authoritative opinions on the financial status of businesses or other entities. As the trial judge found, they are rendered bookkeepers by this legislation.

69. This ban on expression which affects the Appellants has been accomplished by the state conferring a monopoly over the expressive activity in question on a single group. The monopoly enhances the commercial value of the favoured speech. It limits the array of opinions available to third parties by limiting the classes of speakers. It totally forecloses that conveying of meaning by those who do not enjoy the monopoly. State authorization or preferment of certain expression is thus a type of positive state action which trenches deeply on the purposes for which the freedom of expression guarantee is extended.

70. It is further submitted that even if the Act is found only to restrict the Appellants' access to a particular form of expression, the restriction remains a limit on the Appellants'

freedom of expression, contrary to section 2(b). That there may be other available forms of expression is irrelevant to the analysis under section 2(b).

71. It is further clear from the evidence at trial that even if the Act does not have as its purpose the restriction of freedom of expression, it has that effect. The legislation operates to restrict participation in an expressive activity – performing audit, review and non-review engagements. This expressive activity supports the principles and values upon which freedom of expression is grounded. It fosters the attainment of truth in the business world, extending and facilitating participation in economic decision-making and providing the means by which professional accountants can obtain individual self-fulfilment and human fruition.

72. It is therefore respectfully submitted that the Court below erred in law in failing to find that the Act violates the Appellants' freedom of expression guaranteed in section 2(b).

Section 7 - Liberty

73. It is respectfully submitted that the Court below erred in adopting an extremely restrictive interpretation of section 7, limiting its protection to only those restrictions which occur as a result of an individual's interaction with the justice system and its administration.

Appeal Division Reasons, Supplementary Case, Vol. 1, p. 175

74. The *Charter* and the right to individual liberty guaranteed in section 7 are inextricably tied to the concept of human dignity. Liberty is a condition of human self-respect and of that contentment which resides in the ability to pursue one's own conception of a full and rewarding life.

R. v. Morgentaler [1988], 1 S.C.R. 30, 164-166 (per Wilson J.)

75. Section 7 is thus fundamentally important in a society where state regulation of occupations, including professions, is widespread. The pursuit of an occupation, while having an economic element, is fundamental to human dignity and self-worth. Work is one of the most integral aspects of a person's life, providing not only a means of financial

support but, equally important, a contributory role in society. A person's employment is thus an essential component of his or her sense of identity, self-esteem and emotional well-being.

Reference re Public Service Employee Relations Act, Alta., [1987] 1 S.C.R. 313, 368

Re Mia and Medical Services Committee of British Columbia (1985), 17 D.L.R. (4th) 385 (B.C.S.C.)

Wilson v. Medical Services Committee of British Columbia (1988), 53 D.L.R. (4th) 171, 184-186 (B.C.C.A.), leave to appeal refused, [1988] 2 S.C.R. viii

Peel v. A. & P. (1990), 71 D.L.R. (4th) 293, 313-314 (Ont. H.C.) aff'd (1991), 78 D.L.R. (4th) 333, 389-390 (Ont. C.A.)

76. It has been recoginized in at least two provinces, Ontario and Quebec, that a principled approach to regulation of professions is essential to the promotion of human dignity and equality.

Access: Task Force on Access to Professions and Trades in Ontario, Ontario Ministry of Citizenship, 1989, xi-xiv, 62-67, 70

The Professions and Society, Report of the Commission of Inquiry on Science and Social Welfare, Government of Quebec, 1970, 16-17, 23-24, 31-33

77. Therefore, it is submitted that the concept of liberty in section 7 protects the rights of an individual to pursue an occupation or profession for which he or she is qualified, and to move freely throughout the country for that purpose.

Re Mia and Medical Services Committee of British Columbia, supra, 414-16

Wilson v. Medical Services Committee of British Columbia, supra, 186-93

Re Khaliz Kareemi (1989), 57 D.L.R. (4th) 505, 512-515 (N.S.S.C.A.D.)

Law Society of Manitoba v. Lawrie (1989), 61 D.L.R. (4th) 259, 268 (Man. Q.B.)

Re Branigan and Yukon Medical Council (1986), 26 D.L.R. (4th) 268, 277, 278 (Y.T.S.C.)

78. A section 7 liberty can only be denied an individual in accordance with the principles of fundamental justice. Fundamental justice is not confined to procedural fairness or natural justice, but extends to the substance of the law or practice under review and to the conduct of the state activity in question.

Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486

R. v. Morgentaler, supra, 52-53

Re Mia and Medical Services Commission of British Columbia, supra, 416

Wilson v. Medical Services Commission of British Columbia, supra, 195

79. Denial to an individual of the liberty to pursue a calling or profession for which he or she is qualified, if imposed arbitrarily and not in the manner required to ensure the protection of the public, is not in accordance with the principles of fundamental justice and is an infringement of section 7 of the *Charter*.

Reference re: Mia and Medical Services Committee, supra

Wilson v. Medical Services Committee, supra, 197-198

80. The challenged legislation denies the Appellants' rights to liberty under section 7 by preventing them from practising a profession for which they are qualified. This is, therefore, not a case where the Act is merely reasonable regulation of standards of admission and of practice. Messrs. Walker and Robertson are both qualified CGAs and members of the CGA Associations of Prince Edward Island and New Brunswick and of the CGA Association of Canada. Both are fully able to practise in New Brunswick and do so. The evidence has established that CGAs have the requisite qualifications to practise public accountancy by virtue of a sophisticated and high-quality educational program which is uniform across the country, and a suitable post-certification regime. Indeed, CGAs are permitted full public practice rights in seven of the twelve jurisdictions in Canada, including New Brunswick and all provinces west of Ontario.

R. v. Baig (1992), 78 C.C.C. (3d) 260, 273 (B.C.C.A.)

81. The Act further leaves substantial scope for arbitrary conduct on the part of the Institute, sanctioned by the Respondent, again in contravention of the Appellants' rights to liberty under section 7.

R. v. Baig, supra

82. Further, the denial of the Appellants' right to liberty under section 7 of the *Charter* has not been in accordance with the principles of fundamental justice. The Government has never turned its mind to what is necessary to protect the public; it passed the original legislation at the instigation of the Institute, and has since then, in effect, left it up to the Institute to decide whether practice rights should be extended to CGAs, as revealed by the experience of the CGAs in 1980 and 1986 when they sought to change the legislation. The legislation confers on members of the Institute a monopoly on public practice and allows the Institute to self regulate without any input from the public or any requirement to account or report to the public. It is respectfully submitted that the arbitrary nature of the Government's conduct is not in accordance with the principles of fundamental justice.

Trial Decision, Supplementary Case, Vol. 1, p. 115-118

83. This is not a case where the government has provided for comprehensive regulation of an entire profession, as was in the case in *Pearlman v. Law Society of Manitoba*, including public representation, scrutiny and reporting. In fact, the total abdication of responsibility to the Institute, without obligations of public input, reporting, or accountability is the very antithesis of the responsible regime of self-regulation praised by this Court in *Pearlman*. That wholesale delegation of the public interest in professional regulation compounds the harm which is challenged here, namely total exclusion from practice of a segment of the profession, and deprives the impugned legislation of its constitutional legitimacy.

Pearlman v. Law Society of Manitoba, [1991] 2 S.C.R. 869, 886-889

84. It is therefore submitted that the challenged legislation arbitrarily and in a manner not required to ensure the protection of the public excludes qualified individuals such as the Appellants from practising public accountancy, and consequently infringes section 7 of the *Charter*.

Section 6 - Mobility

85. Citizenship and nationhood are correlatives. Inherent in citizenship is the right to reside wherever one wishes in the country and to pursue the gaining of a livelihood without regard for provincial boundaries.

Black v. Law Society of Alberta, [1989] 1 S.C.R. 591, 612 (per La Forest J.)

86. The framers of Confederation sought to create a national economy. The attainment of economic integration occupied a place of central importance within the concept of Canada as a single country comprising what one would now call a common market. Before the enactment of the *Charter*, however, there was no specific constitutional provision guaranteeing personal mobility, even though it is fundamental to nationhood. During the constitutional exercise culminating in the enactment of the *Charter*, there was a wave of concern regarding the construction of barriers to interprovincial economic activity and a strong feeling that the integration of the Canadian economy, which had been only partially successful under the *British North America Act*, should be completed.

Black v. Law Society of Alberta, supra, 608-612

87. These economic concerns undoubtedly played a part in the constitutional entrenchment of interprovincial mobility rights under section 6(2) of the *Charter*.

Black v. Law Society of Alberta, supra

88. Like other individual rights guaranteed by the Charter, section 6 must be interpreted generously to achieve its purpose to secure to all Canadians the rights that flow from membership in a united country.

Black v. Law Society of Alberta, supra, 612

89. Frequent inter-provincial movement by an individual is not required in order to invoke the protection of section 6 of the *Charter*, for an expansive interpretation of the mobility rights guarantee dictates that the mobility element of the right to pursue the gaining of a livelihood in any province need not be a regular or prominent component of section 6(2)(b). Indeed, regardless of actual physical presence, the protection of section

6(2)(b) applies if a non-resident is pursuing or wishes to pursue a living in the province whose legislation is being challenged.

Black v. Law Society of Alberta, supra, 617, 621-622

90. Legislation also need not have the effect of totally denying an individual the right to gain a livelihood in a province in order to infringe section 6(2)(b). It is sufficient if a person is merely disadvantaged in the pursuit of his or her livelihood.

Black v. Law Society of Alberta, supra, 618-619

91. The Appellants submit that barriers to mobility in the occupations are of two types. The first are direct barriers, barring persons originating in one province from working in another. The second are barriers which arise because of the effect of particular requirements. As in other areas of discrimination or *Charter* jurisprudence, so it is with respect to section 6 that the effect and not just the intention of particular laws must be considered.

Black v. Law Society of Alberta, supra, 625

92. Accordingly, it is submitted that the effect on interprovincial mobility of a provincial requirement must be considered, even if that requirement appears on its face to be simply a neutral requirement relating to professional qualifications. In performing such an "effects" analysis with respect to the mobility of public accountants, it is significant that there is more than one professional designation which signifies acquisition of sufficient training and capacity to protect the public interest in receiving services from a competent practitioner. Thus, the potential indirect barriers to the mobility of public accountants include not just the effects of state requirements relating to holders of one designation, but also the effects of permitting or barring holders of one or other of the designations from public practice in the jurisdiction.

93. A person able to practise public accountancy in one of the seven jurisdictions permitting such practise to holders of the CGA designation is, effectively, denied the chance to relocate, as a public accountant, to a province which refuses to recognize such designation. That person has a more restrictive right to interprovincial mobility, say, than

the holder of another of the designations, even though both designations may serve the needs of public protection. Thus, a province's action in foreclosing public practice by holders of a particular designation overrides any decision on the part of the professional bodies in the various provinces to extend reciprocal recognition to like designations obtained in other provinces.

94. Such barriers are particularly troublesome since the practice of public accounting, unlike some other professions (such as law), does not require local knowledge which may vary from one province or territory to another. Standards are set nationally, through the CICA Handbook, and followed by CAs and CGAs alike.

Richards v. Barreau du Quebec, [1992] R.J.Q. 2847, 2849-50 (C.S.)

95. Section 14 of the Act has the effect of restricting mobility and, thus, thwarting the goal underlying section 6 of the *Charter* of achieving economic integration. This goal has been specifically endorsed by the Council of Maritime Premiers as a goal for the maritime provinces. This strong movement toward economic integration is also evident nationally with endeavours such as the Agreement on Internal Trade underway between the provinces and territories, and internationally with the paths opened by the Free Trade Agreement, GATT, and other international initiatives. Yet, only CAs can enjoy real mobility within Canada, including public practice in Prince Edward Island. Accordingly, although accounting is not, of necessity, jurisdiction bound, section 14 of the Act, in effect, forecloses all but CAs from pursuing the gaining of a livelihood without regard to provincial boundaries.

96. Thus, Mr. Robertson is prohibited from practising as a public accountant in PEI though fully qualified and coming from a province where he lawfully works as a public accountant. Mr. Walker must leave PEI in order to practise public accountancy. The Appellants' ability to practise in PEI on a viable economic basis has been seriously impaired by the monopoly over public accountancy given to the CAs in PEI.

97. Again, this is not a case where the Appellants wish to engage in work for which they are not qualified.

O'Neill v. Law Society of New Brunswick (1993), 141 N.B.R. (2d) 1, 8 (T.D.)

Richards v. Barreau du Quebec, supra

98. It is respectfully submitted that the Court below erred in failing to consider the effect of the Act particularly in the context of provincial legislation which denies to an entire segment of a profession access to a significant area of endeavour which its members may pursue, within the law, in other provinces and territories in Canada, and under federal legislation.

99. Further, the impugned law is also unable to fulfil the qualification in section 6(3)(a) because it is a law that discriminates among persons primarily on the basis of residence. Although it contains no express residence-based provision, the substance and effect of the law is to prevent a large group of professional accountants, who are able to practise public accounting in seven of the twelve Canadian jurisdictions, from practising in PEI. A law which, by its *effect*, impairs the status or capacity of a particular group by establishing a "closed shop", will not be seen as one of general application.

Kruger v. The Queen, [1978] 1 S.C.R. 104, 110

Island Equine Clinic Ltd. v. Prince Edward Island (1991), 82 D.L.R. (4th) 350, 352 (P.E.I.C.A.)

Re Mia and Medical Services Commission of British Columbia, supra, 408-10

100. Section 14 of the Act denies to an entire segment of the accounting profession access to a significant area of endeavour which its members may pursue, within the law, in other provinces and territories and under federal legislation. It is therefore respectfully submitted that its effect is to restrict mobility contrary to section 6 of the *Charter*.

Section 1
Rational Connection

101. In *R. v. Oakes*, this Honourable Court formulated this description of the "rational connection" test:

> . . . the measures must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective.

R. v. Oakes, [1986] 1 S.C.R. 103, 139 (per Dickson C.J.C.)

102. The Court in *Oakes* began its rational connection analysis with the question of whether the impugned provision is "internally rational", in the sense that there is a rational connection between the basic fact of possession and the presumed fact of possession for the purpose of trafficking. The Court held that there was no such internal rationality, and did not proceed further with the section 1 analysis.

R. v. Oakes, supra, 141-142

103. In the event that internal rationality had been found, it is submitted that there would have remained further queries on the issue of rational connection, as described above at paragraph 101. The internal rationality query, by itself, does not exhaust the field of inquiry.

104. Accordingly, it is submitted that the Appeal Division erred in holding that the internal rationality revealed by its textual analysis of section 14(1) satisfied this branch of the section 1 test. This is particularly so where the record at trial (which was before the Court) and the findings of the trial judge reveal a complete absence of any legislative effort to craft in an informed way a specific legislative solution to either the initial problem of substandard, untrained practitioners, or the later development of another accounting association contending for public practice rights.

Minimal Impairment

105. The Appeal Division held that the proper inquiry to make in applying the minimal impairment test is "whether the impugned law constitutes a reasonably restrained legislative approach to dealing with a pressing and substantial concern."

Appeal Division Reasons, Supplementary Case, Vol. 1, p. 170

106. The Appellants submit that the test propounded above, ostensibly on the basis of the jurisprudence of this Honourable Court cited in the reasons of the Appeal Division, should be considered an inference from or paraphrase of the authorities reviewed.

107. A review of the cases relied upon by the Appeal Division suggests that it may have been invoking the oft-articulated principle of this Court that the legislature need not choose the least intrusive means available in order to satisfy the minimal impairment test.

R. v. Swain, [1991] 1 S.C.R. 933, 983 (per Lamer C.J.C.)

Irwin Toy Ltd. v. Quebec (A.G.), supra, 993, 999-1000 (per Dickson C.J.C. et al.)

Reference re: ss. 193 and 195.1 (i)(c) of the Criminal Code (Man.), [1990] S.C.R. 1123, 1138 (per Dickson C.J.C.) and 1196-1199 (per Lamer J.)

McKinney v. University of Guelph, [1990] 3 S.C.R. 229, 286 (per LaForest J.)

108. The Appellants submit that the tolerance for legislative line-drawing exhibited in these cases is predicated on the essential requirement that the legislatures should have actually been reviewing available policy choices, weighing evidence and interests and making decisions aimed at balancing the competing claims on legislative attention and public resources. For example, in *Irwin Toy*, it was stated:

> When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as the courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function.
>
> *Irwin Toy Ltd. v. Quebec (A.G.), supra*, 993

109. After a lengthy review of the social science evidence considered by the legislature in *Irwin Toy*, the Chief Justice concludes that "... the evidence sustains the reasonableness of the legislature's conclusion." In *McKinney*, Mr. Justice LaForest characterizes the question in *Irwin Toy* as whether the government had a reasonable basis, *on the evidence tendered*, for concluding that its legislation impaired the relevant right as little as possible.

Irwin Toy Ltd. v. Quebec (A.G.), supra, 999 (per Dickson C.J.C.)

Reference re: ss. 193 and 195. 1(i)(c) of the Criminal Code (Man.), supra, 1196 (per Lamer J.)

McKinney v. University of Guelph, supra, 286 (per LaForest J.)

110. As stated by Madam Justice Wilson in *McKinney v. University of Guelph*:

> [The] standard which presumptively applies is that of *Oakes*. It is only in exceptional circumstances that the full rigours of *Oakes* should be ameliorated.

McKinney v. University of Guelph, supra, 404-405

111. It is, accordingly, submitted that the Government of Prince Edward Island cannot successfully lay claim to a zone of tolerance or margin of appreciation in the section 1 analysis for the exercise of legislative judgment because it did not, in fact, exercise any such judgment. It did not inform itself about the policy options open to it, or engage in any of its own balancing and weighing of competing interests.

112. The Appeal Division also held that the trial judge had erred because he had not given "due deference" to the legislature of Prince Edward Island, citing the need for the courts to "allow for distinctive provincial response to similar social objectives." Leaving aside the question of whether such an approach is required in principle, the Appellants submit that the Government, on the evidence, cannot rely on any such approach in this case. The evidence does not support it. The Government and legislature of Prince Edward Island did consider one local condition when originally passing the impugned legislation in 1949. That was the danger posed by untrained and unregulated person offering accounting services to the public. However, the evidence of Mr. Manning shows that the CGAs then practising in Prince Edward Island had not prompted this concern and were not encompassed within the statutory ban. In considering the Government's approach to the reform initiatives of the CGAs in 1980-1982 and 1986-1987, it is evident that neither the Government nor the legislature considered local economic circumstances or attempted to tailor a solution specifically designed for Prince Edward Island capital markets or accounting needs. Rather, they simply left it to the CAs, with an entrenched monopoly, to work out a solution with the CGAs, who sought to remove that monopoly. Moreover the trial judge held that the business and economic circumstances of Prince Edward Island do <u>not</u> justify the most restrictive public accounting regime in Canada.

Appeal Division Reasons, Supplementary Case, Vol. 1, pp. 108-109

Balancing Effects and Objective

113. The Appeal Division holds that section 14(1) effects a narrow well-defined restriction, only applicable to "a few services in the accounting field in circumstances where they are offered to the public", namely audits, review engagements and non-review engagements. It is submitted that this restriction effects the total exclusion of CGAs from the field of public accounting, the very subject matter of the Act. Further, the option framed by the Appeal Division, namely of doing "audits, review engagements and non review engagements, services which are provided for management use", is not really an option at all, since these services are, by definition, provided to third parties and not management. It is suggested that the Appeal Division may have been illustrating the availability of careers in management accounting, preparing financial statements for in-house use, but such alternatives are also totally outside the Appellants' chosen field of public accounting.

Appeal Division Reasons, Supplementary Case, Vol. 1, pp. 109-111

114. The Appeal Division also states that the Appellants are free to express themselves on any of the matters referred to in the impugned section, as long as they do not purport to be doing so with the authority of, or in the capacity of, a public accountant. In other remarks, the Court seems to suggest that audits and similar services performed on a non-commercial basis (without charging a fee) might be open to the Appellants. It is submitted that these alternatives do nothing to soften the effect of the infringement of the Appellants' rights. The second, permitting them to offer services, albeit without a fee, runs directly counter to the objective of protecting the public from those the Government considers "unqualified", and thus casts doubt on the entire rationale offered by the Government to support the CA monopoly over public accounting.

Appeal Division Reasons, Supplementary Case, Vol. 1, pp. 105-106

115. For the reasons already given, the effect of the impugned legislation on the *Charter* rights and freedoms of the Appellants is unjustifiably severe, totally denying the Appellants the ability to practise as public accountants in the province. As a result, the legislation's

impact is disproportionate to any legitimate governmental objective and is not a reasonable limit under section 1.

116. Moreover, the way in which the challenged provisions restrict *Charter* rights and freedoms is especially inimical to the values underlying a free and democratic society. By favouring one group of professional accountants over another, regardless of qualifications, the legislation is in direct conflict with the values of social justice and equality. This conflict is accentuated when one considers that the CGA program attracts people from diverse backgrounds who may otherwise be unable to attend university due to family obligations or a lack of financial resources. The CA program historically has excluded such individuals, and the evidence shows that, among professional accountants, CAs are disproportionately represented among the elite in Canada.

Richardson Evidence, Supplementary Case, Vol. 3, pp. 621-628

117. Granting a monopoly over public accounting to CAs also undermines faith in public accounting as a social institution which enhances the participation of individuals and groups in society. As social institutions, professions are seen as an important medium for social mobility, providing career paths which allow individuals to achieve their fullest potential in society. Restricting the practice of public accounting to CAs regardless of merit prevents members of society from engaging in an activity for which they may be fully qualified, leading to the perception that the accounting profession, at least with respect to public accounting, neither fosters nor permits open, merit-based participation of individuals and groups in society.

Richardson Evidence, Supplementary Case, Vol. 3, pp. 621-628

118. The challenged regulatory scheme is also substantially in conflict with the values and principles underlying a free and democratic society because, far from advancing legitimate government objectives, the legislation's effect is to *harm* the public interest in several ways: first, by denying consumers the ability to choose among all individuals qualified to practise public accounting; second, by reducing the potential for innovation in developing improved standards and methods in public accounting, education and practice; and third, by creating a monopoly for CAs, an especially undesirable effect in a small

business economy such as Prince Edward Island. These adverse effects on the public interest further demonstrate that the legislation's impact is disproportionate to any legitimate government objective that it might promote.

119. While substantial government objectives do exist for the regulation of public accounting, the impugned legislation is rationally related to none, operating primarily to create a CA monopoly over public accounting in Prince Edward Island. Granting to professions monopoly and other privileges not required for public protection has been identified by responsible studies as outmoded and too restrictive an approach to regulation. Moreover, the extreme and unnecessarily broad scope of its provisions, extending to prevent a large number of qualified individuals from practising as public accountants, means that *Charter* rights and freedoms are not impaired as little as possible. Finally, the legislation has a severe and disproportionate impact upon *Charter* rights and freedoms, in a manner especially inimical to the values inherent in a free and democratic society.

Exhibit J-9, Supplementary Case, Vol. 3, p. 548
The Professions and Society, supra, p. 31

120. Therefore, the challenged legislation cannot be seen as a reasonable limit demonstrably justified in a free and democratic society, and consequently cannot be saved by section 1 of the *Charter*.

PART IV - ORDER REQUESTED

121. The Appellants respectfully request an order granting this appeal and restoring the decision of the trial judge, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Mary Eberts

Wendy Matheson

Wendy M. Matheson
of Counsel for the Appellants

PART V - TABLE OF AUTHORITIES

The Professions and Society, Report of the Commission of Inquiry on Science and Social Welfare, Government of Quebec, 1970 (p. 27)

Wilson v. Medical Services Committee of British Columbia (1988), 53 D.L.R. (4th) 171 (B.C.C.A.) leave to appeal refused, [1988] 2 S.C.R. viii (pp. 27, 28)

NOTICE TO THE RESPONDENT: Pursuant to subsection 44(1) of the *Rules of the Supreme Court of Canada*, this appeal will be inscribed by the Registrar for hearing after the Respondent's factum has been filed or on the expiration of the time period set out in paragraph 38(3)(b) of the said Rules, as the case may be.