S.C.C. File No. 23861

SUPREME COURT OF CANADA

(Appeal from the Appeal Division of the
Supreme Court of Prince Edward Island)

BETWEEN:

THOMAS P. WALKER and JOHN M. ROBERTSON

Appellants
(Plaintiffs)

and

THE GOVERNMENT OF PRINCE EDWARD ISLAND

Respondent
(Defendant)

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PART I - STATEMENT OF FACTS

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1. This is an appeal from the Order, dated September 24, 1993, of the Appeal Division which determined that:

(a) Subsection 14(1) of the *Public Accounting and Auditing Act*, R.S.P.E.I. 1988, Cap. P-28 (the "Act") does not infringe the Appellants' rights under subsection 2(b), section 6 or section 7 of the *Canadian Charter of Rights and Freedoms* (the "Charter"); and

(b) If there were an infringement, it would be justified under section 1 of the Charter.

20

2. The Act came into being in 1949. There were two Certified General Accountants working in Prince Edward Island in 1949 who were grandfathered into the Institute as members, while non-CGAs and non-CAs who had practised for two years were eligible for a license and were thus grandfathered.

Reasons for Judgment (Trial), Supplementary Case, Vol. 1, p. 97

3. The trial judge described the rationale for the legislation as follows:

30

> The Institute of Chartered Accountants of Prince Edward Island was established by statute in 1921. Members of the Institute initiated efforts in the 1940's to secure regulatory legislation governing public accountancy. These efforts reflected a desire to establish reciprocal arrangements with Institutes of Chartered Accountants in the other provinces. In addition, it was felt that regulatory legislation would assist in upgrading the quality of accounting services being offered to the general public. Mr. Randolph Manning has been a leading chartered accountant since he opened a branch office of H. R. Doane in Charlottetown in 1944. He described some accounting being performed in Prince Edward Island in earlier times as 'not the best sort of work'.

40

Reasons for Judgment (Trial), Supplementary Case, Vol. 1, pp. 96-97
Manning Evidence, Supplementary Case, Vol. 5, pp. 921-922

4. Subsection 14(1) of the Act reads as follows:

> 14. (1) No person shall practise as or usurp the functions of a public accountant or in any way represent himself or any firm of which he is a partner to be, or act in such manner as to lead to the belief that he or it is, a public accountant or firm of public accountants, unless he is
>
> (a) a member of the Institute; or
> (b) the holder of a license to practise issued by the Institute which is in full force and effect.

Contravention of s. 14 is punishable by a fine of $200.00 and in default of payment, imprisonment.

5. The effect of subsection 14(1) is to prevent persons, including the Appellants, who are not members of the Institute of Chartered Accountants' of Prince Edward Island (the "Institute") from performing:

(a) audits;

(b) review engagements;

(c) non-review engagements, if undertaken for external use.

Reasons for Judgment (Trial), Supplementary Case, Vol. 1, p. 91
Reasons for Judgment (Appeal), Supplementary Case, Vol. 1, p. 173

6. The definitions of "audit", "reviews" and "non-review engagements" accepted by the trial judge were those found in the Canadian Institute of Chartered Accountants Handbook:

> (i) in an audit, the auditor does substantive testing to verify the accuracy and completeness of the data contained in financial statements, after which the auditor's opinion is expressed in the auditor's report; the objective of the auditor's report is to express an opinion as to whether the financial statements present fairly in all material respects the financial position of the entity;

(ii) reviews are distinguishable from audits in that the scope of a review is less than that of an audit and therefore the level of assurance provided is lower - a review engagement includes the rendering of a report to a third party;

(iii) a non-review engagement is generally the compiling of financial data into report format without employing the full analytical or inquiry type functions which take place in the audit and review context - the non-review engagement generates a non-review report which would, in some cases, be prepared for a specific third party.

Reasons for Judgment (Trial), Supplementary Case, Vol. 1, p. 91

7. Some of the witnesses characterized the activities of public accounting and auditing in terms of "attestation". The Appellants' witness, Dan A. Simunic testified:

A. Yes. The term 'attestation', is commonly used to denote a service where an auditor or an accountant provides an assurance to third parties as to the fairness of presentation of a particular set of financial statements, the likelihood that they are free of material errors. And so the two attestation services that are offered in the marketplace are, of course, audits themselves and then what we now call review engagements, and the difference is the level of assurance, this degree of belief that you want to convey to the user, is deemed to be very high in the case of an audit, and to be only moderate in the case of a review engagement.

Simunic Evidence, Supplementary Case, Vol. 5, p. 928

The Respondent's witness, Dr. Jefim Efrim Boritz testified:

A. The attest function is the language which has been used more recently as an umbrella term, to encompass both the audit engagement, as defined, as well as the review engagement for financial statements, as well as other independent expressions of opinion on assertions made by management. Just to give you an example, many, I'll give

> you a specific example. Some trust companies manage assets on behalf of their customers, and, periodically, they would like to provide assurance to their customers that the controls within their organization over the information services provided, over the custodial services and over the management of customers' funds, are reliable, there's [sic] security over systems, the amounts are property recorded and properly managed and so on. They will want, periodically, to produce a report where they make a statement to the public, and they will describe the control procedures in force within those, in those trust companies, and they will want to lend credibility to those kinds of statements or assertions and they would seek out the services of a public accountant to carry out an independent review, to express an opinion on whether, in fact, controls at that trust company are reliable, the security is adequate, and whether the records are accurate, whether funds of the people who entrust funds to these trust companies are properly managed. A number of trust companies, in fact have carried out these types of engagements, have produced these types of reports, that are widely used by them as a way of reassuring customers, existing customers, and perhaps even attempting to attract customers from trust companies, and we know that there are such trust companies in the financial press, we read about the, that may not have as good system control. So when we talk about attest, attest consists of these three types of engagements, the audit, as we know it, and as described in the CICA Handbook, the review engagement, as we know it, review engagements applied to financial statements, but then there are these other types of engagements, where an independent report is called for to lend the credibility to statements made by management to the business community, as a way of either reassuring their customers, or as a way of attracting customers to their services or their products.
>
> Boritz Evidence, Supplementary Case, Vol. 5, p. 889

8. Public accounting involves a number of activities, only one of which, the final report, is expressive. This report, basically a prescribed form, is attached at the end of an audit. A

practising auditor and chartered accountant called by the Respondents described the audit report at trial as follows:

> Q. And when you, when you sign the report and deliver the audit, in your mind, can you tell us what you're doing?
>
> A. I am finishing the audit. I'm communicating the results of the audit to the shareholders. I am, I am showing the end of the process, the end of that particular process. I've satisfied myself that the standards of the profession and of my firm have been met, and all that needs to be done has been done. And I've satisfied myself that what the report says is in conformity with the professional standards.

Trites Evidence, Supplementary Case, Vol. 5, p. 963

9. One of the Appellants gave similar evidence regarding the audit report at trial:

> Q. And you will agree with me, won't you, Mr. Robertson, that just as audits involve two stages, the examination and the reporting, each of which is an integral part of the audit, review engagements involve two stages, compliance with the review standards, and compliance with the reporting standards, each of those stages being an integral part of the complete review engagement procedure. Correct?
>
> A. Yes.
>
> Q. And you'll agree with me, as well, that the report is merely the final step in a procedure that necessarily involves compliance with all the applicable review engagements standards. Correct?
>
> A. The report is developed throughout the course of your engagement. The background to it, and it's attached or compiled when you're completing the file, and the work is done, then you issue the report, in concert with the issuance of the financial statements. There's two scopes here, there's the standard, and there's the reporting standards, reviewing standards, and both of those are an integral part of the engagement.

Q. The report is merely one stage or one step in a procedure that necessarily involves compliance with all of the standards, with all of the review standards and all of the reporting standards. Right?

A. That's right.

Robertson Evidence, Supplementary Case, Vol. 5, pp. 925-926

10. In 1968, the Legislature enacted the bill, *An Act to Incorporate the Certified General Accountants Association of Prince Edward Island*, S.P.E.I. 1968, c. 64, thereby formally establishing CGAAPEI. This legislation did not accord public practice rights to CGAs.

Reasons for Judgment (Trial), Supplementary Case, Vol. 1, p. 97

11. The Appellants, Walker and Robertson, are registered and practising members of the Certified General Accountants Association of Canada and of the provincial associations in New Brunswick and Prince Edward Island.

Reasons for Judgment (Trial), Supplementary Case, Vol. 1, p. 93

12. The Appellant, Walker, resides and conducts his accounting practice in Montague, Prince Edward Island. The Appellant, Robertson, resides and conducts his accounting practice in Fredericton, New Brunswick.

Reasons for Judgment (Trial), Supplementary Case, Vol. 1, pp. 93-94

13. Although the Appellants are permitted, either through regulation or the lack thereof, to practice public accounting in some other Canadian jurisdictions, they are governed by s. 14(1) of the Act in Prince Edward Island, and are required to pass the Uniform Final Exam ("UFE") of the Institute and become members of the Institute before gaining public practice rights in Prince Edward Island.

Reasons for Judgment (Trial), Supplementary Case, Vol. 1, pp. 97-98

14. Achieving a passing grade in the UFE is a requisite to obtaining the designation "Chartered Accountant". The description and purpose of the UFE is contained in the *Report on a Comparison and Evaluation of the CGA and CA Programs* prepared by Dr. J. E. Boritz:

> The UFE consists of a set of four hour exams written on consecutive days. One of the four exams is a comprehensive case which requires undirected problem solving by the student, integrating a variety of subject matters, identifying and ranking problems, applying appropriate analytical techniques, and communicating the findings of the analysis in a coherent fashion. The other three exams consist of both single subject and multi subject questions which require students to possess specific knowledge and to integrate several areas of knowledge as is common in the complex environment in which public accounting is practised...students should identify and solve unstructured problems that require use of multiple information sources. This is precisely the character of the UFE's. Indeed, the UFE's serve two fundamental purposes: (1) to screen prospective public accountants on the basis of their knowledge and problem solving skills as evidenced by their performance on the UFE's and (2) to influence the education of students preparing for the UFE by indicating to students and educators the types of knowledge and problem solving skill required by the accounting profession. In addition, the UFE, by virtue of its high quality, the uniform standard that it represents and the integrity of its administration enables the CA designation to be valid throughout the entire country, regardless of the jurisdiction in which the student completed the pre-UFE requirements.

Boritz Evidence, Supplementary Case, Vol. 5, pp. 891-894
Exhibit D-72, Supplementary Case, Vol 7, pp. 1386-1387

15. The Report of the Professional Organizations Committee to the Attorney General of Ontario, dated April 1980, recommended that the Public Accounting and Licensing Admission Board use the UFE as a common licensing examination: "What we emphatically prefer would be that the common licensing examination be the uniform final examination currently used by the Institute of Chartered Accountants of Ontario."

Trebilcock Evidence, Supplementary Case, Vol. 5, pp. 956-957
Exhibit I-9, Supplementary Case, Vol. 6, p. 1166

16. The trial judge found as fact that the Appellants were unwilling to write the UFE to prove their qualification to practice public accounting. This finding is supported by the evidence of the Appellants.

Reasons for Judgment (Trial), Supplementary Case, Vol. 1, p. 96
Robertson Evidence, Supplementary Case, Vol. 5, p. 924
Walker Evidence, Supplementary Case, Vol. 5, pp. 982-983

17. Both of the Appellants were once enrolled as students in the CA program, but neither completed his course of study.

Reasons for Judgment (Trial), Supplementary Case, Vol. 1, pp. 93-94

18. Of the total Ontario CGA membership in 1992, 563 members had once been Institute students and had failed to complete the CA program.

Wilson Evidence, Supplementary Case, Vol. 5, p. 990
Exhibit D-105, Supplementary Case, Vol. 7, p. 1527

19. There are various regulatory regimes in Canada. They were fully described by the Respondent's witness Michael Trebilcock. The trial judge described the Prince Edward Island legislation as being the most restrictive in Canada, citing the summary provided by Professor Trebilcock:

> ...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.

Reasons for Judgment (Trial), Supplementary Case, Vol. 1, p. 104

20. However, Professor Trebilcock also stated that, in practical terms, the Nova Scotia legislation is "essentially the same as Prince Edward Island and Ontario and Quebec".

Trebilcock Evidence, Supplementary Case, Vol. 5, p. 951

21. The text of Trebilcock's report as it appears in Exhibit J-43, *A Review of Regulatory Options for Public Accountancy*, as it relates to Ontario, is as follows:

> In Ontario, since 1962, only members of the Ontario Institute of Chartered Accountants qualify for public accountancy licenses, which are issued by the Public Accountants Council, which is comprised of twelve members chosen by the governing Council of the Institute of Chartered Accountants of Ontario and three members elected by non-C.A. licensees holding licenses under grandfather provisions in the legislation or under the dispensing power of the Council, which has been very sparingly exercised. The public accountancy functions which are licensed in Ontario, in contrast to British Columbia, are broadly defined and include not only statutory audits but also voluntary audits and non-audit reviews i.e. any attachment of an accountant's name or opinion to a set of financial statements that is viewed as lending credibility to them... [Emphasis added.]

Exhibit J-43, Supplementary Case, Vol. 7, pp. 1367-1368

22. Professor Trebilcock's evidence is consistent with the evidence of Mr. David Wilson, Executive Director of the Ontario Institute of Chartered Accountants. The evidence of Mr. Wilson, on this point was:

> Q. And since 1962, in order to obtain a license to practise public accounting under the Public Accountancy Act, one must be a member of the qualifying body?
>
> A. That's right.
>
> Q. The qualifying body is the Institute of Chartered Accountants?
>
> A. That's right.

Wilson Evidence, Supplementary Case, Vol. 5, p. 987

23. In the late 1970's and through the 1980's, the CGA associations made repeated representations to Government and to the appropriate committee of the legislature. They sought legislative change which would accord CGA members public accounting rights. The Institute defended the UFE as the best means of assuring standards and quality of services in the public interest. ICAPEI has been open to discuss "bridging" proposals for CGA members who meet their stipulated standards. CGA members believe their CGA designations are adequate to protect the public interest.

Reasons for Judgment (Trial), Supplementary Case, Vol. 1, p. 97

24. The trial judge was of the view that the Government of the day and the legislative committees viewed this conflict as a dispute over standards.

Reasons for Judgment (Trial), Supplementary Case, Vol. 1, p. 97

25. The Appellants provided no evidence to show that the CGA standard was equivalent to the CA standard. Dr. Boritz carried out a comprehensive comparison and evaluation of the CGA and CA education programs to determine whether they were similar in terms of quality and further, whether the differences were necessary or superfluous to the objective of providing public accountants with the required education and training. Dr. Boritz came to the following conclusions:

(1) The CA student would have significantly more education than an average CGA student because of the CA requirement for a bachelors degree;

(2) The level of intellectual sophistication of the courses offered in the CA program would be generally higher due to the program's reliance on a university-based education;

(3) The thrust is to enhance the quality and extent of the general education requirement of the CA program by expanding the education requirement beyond the four year bachelor degree;

(4) The CGA program is taught primarily by correspondence, whereas the CA program consists of university courses taught in classroom settings, as well as professional development courses taught in classroom settings and occasionally by correspondence. The quality of instruction within a classroom setting is superior to that possible through most forms of correspondence based education;

(5) The UFE is a four day integrated national examination following the completion of a preparation program as opposed to the CGA program which has individual exams for each course;

(6) The CGA program requires two years of appropriate practical experience while the CA program requires two years of experience in various aspects of public accounting. Public accounting practice is a necessary requirement for qualification as a public accountant.

Exhibit D-72, Supplementary Case, Vol. 7, pp. 1369-1390

26. Dr. Boritz was questioned on whether the differences reflected desirable qualities or were superfluous. He answered:

> In my opinion, the differences that have been identified are not spurious, but represent issues of fundamental importance. I have pointed to the evidence provided in reports published by both academic and professional bodies, independent of the parties involved in this matter, to obtain independent confirmation of the views that I have expressed here. It is clearly the consensus of both the leading academic and practitioner communities that the education requirements for entry into the accounting profession must expand even beyond the requirements that are currently in place. Thus, it is clear that not only are there, are there significant differences between the educational programs of the CA and CGA, but that the CA program is more in keeping with the stated requirements for the practice of public accounting in both Canada and throughout other relevant jurisdictions, such as the U.S. and U.K..

Boritz Evidence, Supplementary Case, Vol. 5, p. 898

27. At paragraph 22 of the Appellants' factum, it is stated that 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." There was no statistical evidence to support the notion that the existing standard restricts entry unduly, nor was there statistical evidence that existing practitioners enjoy an advantageous impact on their incomes.

28. Furthermore, Professor Trebilcock testified that his study did not generate statistics on the costs, if any, to consumers, of restrictions on entry into public accounting.

Trebilcock Evidence, Supplementary Case, Vol. 5, p. 962

29. The Appellants suggest that the impugned legislation confers a monopoly on Chartered Accountants. However, Trebilcock conceded that the use of the term "monopoly" and "restriction" was only accurate insofar as the practice is restricted to those who have the Chartered Accountant designation. He testified that:

(1) there is no limit to the number of people practising in the Province;

(2) there is no limit to the number of firms here;

(3) in fact, public accounting is open to anybody who qualifies with the CA designation;

(4) the designation itself is open to anyone in Canada who has the educational requirements to qualify for the program and who succeeds in passing the exams;

(5) there is no restriction on residency;

(6) there is nothing that purports to discriminate on the basis of province of residence;

(7) with respect to licensing generally, there is no trend towards de-regulation in the case of public accounting.

Trebilcock Evidence, Supplementary Case, Vol. 5, pp. 949-954

30. The Appellants have submitted that the trial judge found as fact that the Appellants were 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.
>
> 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.
>
> Reasons for Judgment (Trial), Supplementary Case, Vol. 1, pp. 110, 117, 130-131

31. These are not findings of fact; rather, they are an expression of opinion of the trial judge which he could not have reached had he considered the issue of superiority of one standard over the other. However, he refused to pass judgment on the standards offered by CAs and CGAs. He said:

> ...I am not unmindful of the great effort counsel exerted in their attempts to persuade me that the CA program is superior or that the CGA program is equivalent. In considering the public interest, it is extremely doubtful that the highest standard will prevail if other standards are shown to be adequate elsewhere. I have carefully appraised the legislation in the other Canadian jurisdictions - not with a view to determining whether CAs have better or higher standards, but to learn whether the standards offered by CGAs have satisfied the needs in other provinces. Clearly CGA standards have been found to be acceptable even if not always on an identical footing with CAs.
>
> In my opinion it is not necessary to resolve the issue as asserted by the defendant, on the basis of whether the CA standard is superior to the standard offered by the CGAs. Most of the constitutional questions at issue in this case can be resolved on the basis that there are reasonable acceptable alternative regimes which are less restrictive of the Charter rights of the plaintiffs.
>
> The plaintiffs have proven that such alternative schemes do exist. That is a sufficient answer.

Reasons for Judgment (Trial), Supplementary Case, Vol. 1, p. 131

32. The evidence discloses that the educational and experience qualifications of the members of the Institute are clearly superior to those of the CGAs.

Boritz Evidence, Supplementary Case, Vol. 5, p. 898
Exhibit D-72, Supplementary Case, Vol. 7, p. 1389
Trainor Evidence, Supplementary Case, Vol. 5, pp 933-948
Exhibit D-42, Supplementary Case, Vol. 7, pp. 1298-1366
Trites Evidence, Supplementary Case, Vol. 5, pp 964-975

33. A high level of auditing skills is, in some instances, more important for an economy comprised of small businesses than one consisting of large businesses.

Boritz Evidence, Supplementary Case, Vol. 5, pp. 900-902

34. The trial judge viewed the importance of a high standard in the accounting profession in this way:

> On the whole of the evidence, it appears incontrovertible that our social and economic environment relies on accurate and available information for its existence. Much of the information which forms the basis for resource development, production of goods, provision of services, enterprise investment and government revenue will be calculated and assessed by a public accountant. Public confidence will increase as the accuracy of information improves.
>
> The role of the public accountant is ever changing in extent and complexity. Reliance upon financial statements is expanding. The public interest requires accuracy and thus reliability in financial reporting. The public interest is therefore served by the maintenance of an accounting profession which is sufficiently educated, prepared and motivated to discharge its duties in a manner worthy of complete reliance, according to law.

Reasons for Judgment (Trial), Supplementary Case, Vol. 1, pp. 99-100

35. A practitioner's view of the difference in qualifications was provided by the witness, Tony Hanson, who was a member of the CGA Association and is a member of the Institute. Mr. Hanson's evidence was that he had resigned from the Association in the previous year. When asked why, he said:

> A. Yes, because of this right here, and that, I guess my basic belief was that C.G.A.'s in P.E.I. were not qualified to practise public accounting, and when it came to the point where they were starting to sue people, I felt that that was not proper. I also believed that it was directed from C.G.A. Canada, and a few locals, but I knew a lot of, and still do and get around with a lot of C.G.A.'s in P.E.I., and I just, I just didn't believe that, ah, that, well, I just believed that this was directed from off Island, and that, in any event, I just, I didn't believe that they should be given public practice rights.

Hanson Evidence, Supplementary Case, Vol. 5, p. 913

36. Philip MacDougall, Deputy Minister of Finance of the Government of Prince Edward Island, testified that there have been no complaints to Government from the purchasers of accounting services or third party users respecting either the manner of regulation or dissatisfaction with the Institute or its members.

MacDougall Evidence, Supplementary Case, Vol. 5, p. 919

37. The Respondent is unwilling to propose amendments to the Act as it remains satisfied that the public interest is best served by continuing to restrict the practice of public accounting to those who have earned the designation of Chartered Accountant.

MacDougall Evidence, Supplementary Case, Vol. 5, p. 916

PART II - ISSUES

38. 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, Cap. P-28 limit the Appellants' rights guaranteed by sections 2(b), 6 or 7 of the Canadian Charter of Rights and Freedoms?

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?

PART III - ARGUMENT

10 **Freedom of Expression**

39. The Respondent submits that the Appeal Division was correct in finding that s. 14(1) of the Act does not infringe the Appellants' rights under s. 2(b) of the Charter.

40. The Appeal Division found that the Appellants are free to express themselves so long as they do not purport to be doing so with the authority of, or in the capacity of, a public accountant. The guarantee of freedom of expression to communicate opinions and ideas does not include "the
20 right to have them recognized as authoritative and to charge the public for them".

Reasons for Judgment (Appeal) , Supplementary Case, Vol. 1, pp.168

41. Following the judgments of this Court in Hunter v. Southam Inc., [1984] 2 S.C.R. 145 and R. v. Big M Drug Mart, [1985] 1 S.C.R. 295, the Appeal Division held that the proper approach to interpreting the Charter is a purposive one, but care must be taken not to overshoot the actual purpose of the right or freedom.

30 Reasons for Judgment (Appeal), Supplementary Case, Vol. 1, pp. 167-168

42. In considering the scope of freedom of expression, the Appeal Division stated:

> A construction which would have s-s. 2(b) include a guaranteed right to carry on a business, practice a profession, to be regarded as authoritative in a field, or to charge a fee for services as a public accountant overshoots its purpose and goes beyond what is necessary to give effect to it.

40 Reasons for Judgment (Appeal), Supplementary Case, Vol. 1, p. 168

43. The Appellants' own witness explained the difference between simple expression and authoritative expression as follows:

> There are two issues here: one is the general issue of expression, that it incorporates the notion of being heard, as well as speaking; and the other is that within this kind of authority structure, some people are authorized speakers, or authorized differentially to speak...
>
> Smith Evidence, Supplementary Case, Vol. 5, p. 932

> ...an auditor's opinion that a company's financial statement has been produced in accordance with generally accepted standards authorizes it as the version that can be treated by others as a stand-in for reality. It can then function as the version that counts for third parties...
>
> Smith Evidence, Supplementary Case, Vol. 5, pp. 930-931

44. In determining whether the activity falls within the scope of s. 2(b), the first question to be asked is whether the activity conveys or attempts to convey meaning.

Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927 at pp. 968-969
Ramsden v. Peterborough (City), [1993] 2 S.C.R. 1084 at pp. 1095-96

45. The provision of an audit report, at the conclusion of the audit, might be regarded as expressive.

46. If it is expressive activity, the second question is whether the practicing of public accounting is protected by s. 2(b).

Ramsden v. Peterborough, supra, at p. 1096
Irwin Toy, supra, at pp. 968-969

47. The determination of this question is assisted by a review of the regulation of professions, in a more general context.

48. The special nature and status of the professions and their regulation was considered by this Court in Rocket v. Royal College of Dental Surgeons of Ontario, [1990] 2 S.C.R. 232 and Pearlman v. Manitoba Law Society Judicial Committee, [1991] 2 S.C.R. 869. In Pearlman, Iacobucci J. referred, with approval, to *The Report of the Professional Organizations Committee*:

> ...the very decision to restrict the right to practise in a professional area implies that such a restriction is necessary to protect affected clients or third parties. The regulation of professional practice through the creation and the operation of licensing system, then, is a matter of public policy: it emanates from the legislature; it involves the creation of valuable rights; and it is directed towards the protection of vulnerable interests.

Pearlman, supra, at p. 887

49. The Appellants' interests in practicing public accounting must be balanced against the state interest in restricting the practice for the protection of vulnerable interests, keeping in mind the general rule that one's rights are always circumscribed by the rights of others.

Committee for the Commonwealth of Canada v. Canada, [1991] 1 S.C.R. 139 at pp. 153, 157
Ramsden v. Peterborough, supra, at p. 1100

50. It is in the context of the limited restrictions contained in the Act, specifically, authoritative speech, that the Appellants' interests must be viewed. The Appellants are not limited, by s. 14(1), in expressing their views on any subject. They are restricted only in terms of the capacity to say certain things relating to the practice of accounting.

51. The circumstances in which the Appellants find themselves are:

(1) The Appellants are free to express themselves on any of the matters referred to in subsection 1(e) of the Act so long as they do not purport to be doing so with the authority of, or in the capacity of, a public accountant.

(2) This restriction does not apply to those opinions provided to management for internal use.

(3) In short, the Appellants cannot issue an audited statement, a review statement or a non-review report for use by the public.

Reasons for Judgment (Appeal), Supplementary Case, Vol. 1, pp. 167, 173

52. If the Appellants wish to practice as public accountants, then all they need do is qualify. The opportunity to qualify is not restricted by the Act.

53. Government's interest, in restricting the practice of public accounting to those who are qualified, is a public protection measure. It has established and maintained a single standard for accounting and auditing since 1949. Similar legislation exists for the governing of other professions such as law and medicine.

54. This balancing of interests leads to the conclusion that public accounting does not fall within the ambit of s. 2(b). Regulatory provisions affecting qualifications are not limitations on the freedom of expression.

55. The subject of professional regulation is discussed extensively in Exhibit J-9, *The Report of the Professional Organization Committee*. This report endorses the concept of professional regulation, with the knowledge that the regulation is by professional bodies, as opposed to government.

Exhibit J-9, Supplementary Case, Vol. 6, p. 1022

56. This form of regulation has been accepted by this Court. In Pearlman, supra, Iacobucci J. said:

> ...where the legislature sees fit to delegate some of its authority in these matters of public policy to professional bodies themselves, it must respect the self-governing status of these bodies. Government ought not to prescribe in detail the structures, processes, and policies of professional bodies. The initiative in such matters must rest with the professions themselves, recognizing their particular expertise and sensitivity to the conditions of practice. In brief, professional self-governing bodies must be ultimately accountable to the legislature; but they must have the authority to make, in the first place, the decisions for which they are to be accountable.

Pearlman, supra, at p. 887

and quoted, with approval, the following passage from the judgment of Estey J. in Attorney General of Canada v. Law Society of British Columbia, [1982] 2 S.C.R. 307:

> I see nothing in law pathological about the selection by the provincial Legislature here of an administrative agency drawn from the sector of the community to be regulated.... It is for the Legislature to weigh and determine all these matters and I see no constitutional consequences necessarily flowing from the regulatory mode adopted by the province...

Pearlman, supra, at p. 888

57. Similar sentiments were expressed by McLachlin, J. in Rocket, supra:

> It is difficult to overstate the importance in our society of the proper regulation of our learned professions. Indeed, it is not disputed that the provinces have a legitimate interest in regulating professional advertising.

Rocket, supra, at p. 249

58. When the limitation contained in s. 14(1) is viewed in the context of:

(a) the Legislature's authority to enact the *Public Accounting and Auditing Act*;

(b) society's need for professional regulation, encompassing qualitative controls;

(c) the superior qualifications of Chartered Accountants to those of Certified General Accountants; and

(d) the fact that the Act does not impair the Appellants' ability or opportunity to qualify as Chartered Accountants,

there can be no finding that s. 14(1) infringes the Appellants' rights under s. 2(b) of the Charter.

Section 6

59. The Respondent submits that the Appeal Division was correct in finding that s. 14(1) of the Act does not contravene s. 6(2)(b) of the Charter.

60. Section 6(2)(b) reads as follows:

> 6. (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
>
> ...
>
> (b) to pursue the gaining of a livelihood in any province.

61. Section 6(2)(b) guarantees all Canadian citizens and permanent residents the right to pursue a livelihood of choice in any province on the same terms and conditions as the residents of that province.

Black v. Law Society of Alberta, [1989] 1 S.C.R. 591 at pp. 617-618

62. The learned trial judge did not make any findings or provide an explanation as to how s. 14(1) affects the s. 6(2)(b) rights of the Appellants. He simply found that their "rights to gaining a livelihood in the practice of public accounting have been substantially restricted by the impugned legislation".

Reasons for Judgment (Trial), Supplementary Case, Vol. 1, p. 138

63. The notion that s. 6(2)(b) embraces a free standing right to work was firmly rejected by this Court in Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357 at pp. 382-383 and in Black, supra:

> The cases have raised a further issue, namely, whether a particular claim is protected by the phrase 'to pursue the gaining of a livelihood'. Arnup J.A., dissenting in the Court of Appeal in *Skapinker, supra*, made passing reference to this at pp. 514-15. 'The permanent resident who goes to another province,' he stated, 'has a right to pursue the gaining of a livelihood there, whether that person is a lawyer or a Class "A" mechanic, but must comply with the local laws concerning the qualifications of all lawyers or all mechanics (except laws discriminating on the basis of past or present province of residence)'. I agree. Section 6(2)(b), in my view, guarantees not simply the right to pursue a livelihood, but more specifically, the right to pursue the livelihood of choice to the extent and subject to the same conditions as residents.

Black, supra, at pp. 617-618

64. In order to find infringement of s. 6(2)(b) of the Charter, the Court must find, on the evidence, that there is an impairment of mobility affecting livelihood.

Skapinker, supra, at pp. 379-380

65. The facts of this case as they apply to s. 6(2)(b) are straightforward and simple. The Appellant Robertson is a resident of New Brunswick while the Appellant Walker is a resident of Prince Edward Island. Neither are members of the Institute of Chartered Accountants. Both of the Appellants can practice public accounting in New Brunswick, but not in Prince Edward Island.

66. There is no issue related to mobility or residence. The very fact that neither Mr. Walker nor Mr. Robertson can practice in Prince Edward Island demonstrates that the legislation applies to residents and non-residents alike. Anyone with the requisite qualifications can become a member.

Trebilcock Evidence, Supplementary Case, Vol. 5, pp. 953-954
Shea Evidence, Supplementary Case, Vol. 5, p. 927
Exhibit I-3, Tab 13, Supplementary Case, Vol. 6, pp. 992-1000

67. The only reason the Appellants cannot practice public accounting is because they do not have the necessary qualifications. Section 14(1) does not impair the s. 6(2)(b) rights of the Respondents.

Taylor v. Inst. of Chartered Accountants of Sask. (1989), 59 D.L.R.(4th) 656 (Sask.C.A.) at p. 659

68. Subsection 6(3) of the Charter reads as follows:

> 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.

69. The Act is a law of general application that does not discriminate among persons primarily on the basis of present or previous residence within the meaning of s. 6(3) of the Charter. In fact, it does not discriminate on the basis of residence at all. Accordingly, s. 6(2)(b) has no application.

70. The Appellants' only complaint can be that they are receiving different treatment in the different provinces. The Charter does not afford any protection just because laws differ as between provinces.

> Once it is determined that there is no duty on the Attorney General of Ontario to implement a program of alternative measures, the non-exercise of discretion cannot be constitutionally attached simply because it creates differences as between provinces. To find otherwise would potentially open to Charter scrutiny every jurisdictionally permissible exercise of power by a province, solely on the basis that it creates a distinction in how individuals are treated in different provinces.

R. v. Sheldon S., [1990] 2 S.C.R. 254 at p. 285
See also: Haig v. Canada, [1993] 2 S.C.R. 995 at pp. 1046-47

Section 7

71. The Appeal Division held that the restriction in s. 14(1) limiting the right to practice public accounting does not engage s. 7 of the Charter. In doing so, the Court followed the reasoning of Lamer J., as he then was, in Reference re Criminal Code, that:

(1) the restrictions on liberty that s. 7 is concerned with are those that occur as a result of individual's interaction with the justice system and its administration;

(2) the rights under s. 7 do not extend to the right to exercise a chosen profession.

Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), [1990] 1 S.C.R. 1123 at p. 1173 and p. 1179
Reasons for Judgment (Appeal), Supplementary Case Vol. 1, p. 175

72. The onus is on the Appellants to prove that:

(1) there has been a deprivation of the right to "life, liberty and security of the person"; and

(2) the deprivation is contrary to the principles of fundamental justice.

Reference re Criminal Code, supra, at pp. 1178-1179
R. v. Beare, [1988] 2 S.C.R. 387 at p. 401

73. If life, liberty or security of the person is not implicated, then the analysis stops there. If no principle of fundamental justice is contravened, s. 7 is not infringed and there is no need to consider whether there has been a deprivation of life, liberty or security of the person.

Pearlman, supra, at p. 881

Fundamental Justice

74. The principles of fundamental justice reflect the fundamental tenets on which our legal system is based. They are the principles upon which there is some consensus that they are vital or fundamental to our societal notion of justice.

Pearlman, supra, at p. 882
Rodriquez v. The Attorney General of Canada and the Attorney General of British Columbia, [1993] 3 S.C.R. 519 at p. 590

75. The regulation of professional practice through the creation and operation of a licensing system is a matter of public policy. Speaking on behalf of this Court, in Pearlman, supra, Iacobucci, J. said:

> It is appropriate at this juncture to mention the legislative rationale behind making a profession self-governing. The Ministry of the Attorney General of Ontario produced a study paper entitled *The Report of the Professional Organizations Committee* (1980) which, I believe, provides a helpful analysis of this rationale. The following extract from p. 25 is apposite:
>
> ...
>
> The regulation of professional practice through the creation and the operation of a licensing system, then, is a matter of

> matter of public policy: it emanates from the legislature; it involves the creation of valuable rights; and it is directed towards the protection of vulnerable interests.

Pearlman, supra, at pp. 886-887

76. Once in the realm of general public policy, the principles of fundamental justice are largely irrelevant. In the words of Lamer J. (as he then was) in Reference Re Criminal Code, supra:

> ...what is at stake in these examples is the kind of liberty and security of the person the state typically empowers judges and courts to restrict. In other words, the confinement of individuals against their will, or the restriction of control over their own minds and bodies, are precisely the kinds of activities that fall within the domain of the judiciary as guardian of the justice system. By contrast, once we move beyond the 'judicial domain', we are into the realm of general public policy, where the principles of fundamental justice as they have been developed, primarily through the common law, are significantly irrelevant. In the area of public policy what is at issue are political interests, pressures and values that no doubt are of social significance but which are not 'essential elements of a system for the administration of justice', and hence are not principles of fundamental justice within the meaning of s. 7. The courts must not, because of the nature of the institution, be involved in the realm of pure public policy; that is the exclusive role of the properly-elected representatives, the legislators. To expand the scope of s. 7 too widely would be to infringe upon that role. [Emphasis added]

Reference re Criminal Code, supra, at pp. 1175-76
Energy Probe v. Canada (1994), 17 O.R.(3d) 717 (Ont.S.C.) at p. 756

77. The Appellants appear to argue that not only do the principles of fundamental justice apply to regulation of occupations, but to satisfy those principles, Government must regularly "turn its mind" to what is necessary to protect the public. The Appellants do not offer any authority for this proposition nor any hint as to what might constitute "turning its mind".

78. The evidence is clear that Government entertained ongoing representations by CGAs and CAs in respect of the Act and was satisfied that there was no need to amend the Act.

79. There being no principle of fundamental justice contravened, there is no need to consider whether there has been a deprivation of life, liberty or security of the person. The analysis stops there.

Life, Liberty and Security of the Person

80. The Appellants assert that "s. 7 protects the rights of an individual to pursue an occupation or profession for which he or she is qualified...". (Emphasis added.) Both had at one time been enrolled in the CA program but withdrew. They have refused to write the UFE.

81. As noted at paragraph 17, supra, the Professional Organizations Committee recommended that the common licensing examination be the UFE.

82. In the context of examining cases pertaining to the regulation of professions, the Court, in Wilson, said:

> Section 7 did not afford relief in any of these cases. In two of them it was held that the regulating provisions did not breach the principles of fundamental justice. In two of the cases *Mia* was distinguished on the basis that it did not deal with regulation but with an actual deprivation of the right to practise. We have no doubt that regulation of such matters as standards of admission, mandatory insurance for the protection of the public, and standards of practise and of behaviour will not constitute an infringement of s. 7.
>
> Wilson v. British Columbia (Medical Services Commission) (1988), 53 D.L.R.(4th) 171 at p. 190

83. Such regulation, by necessity, involves the determination as to who is, and who is not, qualified to engage in an occupation or practice that profession.

84. Quite simply, the Appellants are not qualified to practice public accounting. They have not met the standard required by the Act.

10

85. The Appellants also argue that the liberty guaranteed in s. 7 is "inextricably tied to the concept of human dignity". This Court has held that liberty and security of the person under s. 7 of the Charter are not to be defined in terms of attributes such as dignity, self-worth and emotional well-being. Were that so, liberty under s. 7 would be all-inclusive.

Reference re Criminal Code, supra, at pp. 1170-1171

86. In simple terms, what the Appellants seek is a right to pursue a particular occupation.
20 They are asserting, essentially, an economic "right".

87. With the possible exception of s. 6(2)(b), the Charter does not concern itself with economic rights.

Reference re Criminal Code, supra, at pp. 1170-1171

88. Section 7 does not guarantee a right to a particular livelihood or professional membership.

30

Reference re Criminal Code, supra, at p. 1179
Kopyto v. Law Society of Upper Canada, (1993) 107 D.L.R.(4th) 259 (Ont.Div.Ct.) at p. 269

89. In his review of s. 7 and the question of "economic liberty", Peter Hogg, in Constitutional Law of Canada, 3d ed., vol. 1 (Toronto: Carswell, 1992), writes at p. 44-8:

> The framers of Canada's Charter of Rights deliberately omitted any reference to property in s. 7, and they also omitted any guarantee
40 of the obligation of contracts. These departures from the American model, as well as the replacement of 'due process' with 'fundamental justice' (of which more will be said later), were intended to banish *Lochner* from Canada. The product is a s. 7 in which liberty must be interpreted as not including property, as not including freedom of contract, and, in short, as not including *economic* liberty. [Citing *Re ss. 193 and 195.1 of Crim. Code at 1163-1166.*]

> Another reason for caution in the definition of liberty is the placement of s. 7 within the Charter of Rights. Section 7 leads off a group of sections (ss. 7 to 14) entitled 'Legal Rights'. These provisions are mainly addressed to the rights of individuals in the criminal justice system: search, seizure, detention, arrest, trial, testimony and imprisonment are the concerns of ss. 8 to 14. It seems reasonable to conclude, as Lamer J. has done, that 'the restrictions on liberty and security of the person that s. 7 is concerned with are those that occur as a result of an individual's interaction with the justice system, and its administration'. [Citing *Re ss. 193 and 195.1 of Crim. Code* at p. 1173.] This line of reasoning also excludes economic liberty from s. 7.
>
> ...
>
> The suggested role [that s. 7 includes the economic capacity to satisfy basic human needs] also involves a massive expansion of judicial review, since it would bring under judicial scrutiny all of the elements of the modern welfare state, including the regulation of trades and professions, the adequacy of labour standards and bankruptcy laws and, of course, the level of public expenditures on social programmes. As Oliver Wendell Holmes would have pointed out, these are the issues upon which elections are won and lost; the judges need a clear mandate to enter that arena, and s. 7 does not provide that clear mandate. [Emphasis added.]

Constitutional Law of Canada, supra, at pp. 44-8-44-9

90. The Appellants rely on, *inter alia*, Wilson, Khaliq-Kareemi and Mia.

Appellants' Factum, para. 77

91. The Wilson decision is "out of step with the overwhelming weight of constitutional case law" and ought not to be applied by this Court.

See Lepofsky, M. David, Wilson v. B.C. Medical Services Commission, [1989] 68 C.B.R. 615

92. In the recent decision of the Nova Scotia Supreme Court in Cahill v. Hearing Committee of the Provincial Medical Board (N.S.) et al., Khaliq-Kareemi was not referred to. Instead, the Court adopted the reasoning of Lamer J. in Reference re Criminal Code, supra, as to the purpose of s. 7.

Cahill v. Hearing Committee of the Provincial Medical Board (N.S.) et al. (1994), 131 N.S.R.(2d) 378 (N.S.S.C.)

93. In both Mia and Wilson, the plaintiffs were effectively deprived of earning a livelihood in their profession.

Mia, supra, at pp. 401-402
Wilson, supra, at p. 190
Re Beltz and Law Society, B.C. (1986), 31 D.L.R.(4th) 685 (B.C.S.C.) at p. 694

94. Clearly, here, such is not the case:

> Q. Now, looking back, at this point, over your experience at Pottie and Walker, and Walker and Company, with Mr. Robertson, and Walker, Huestis and Burns, would you say that your, you've experienced success in your practice, so far?
>
> A. I've experienced success, but I'm , I don't feel fulfilled as a professional person, because I feel that there's an element of my practice that I haven't been able to develop to my satisfaction, and to my reward.
>
> Q. And tell me what this lack of fulfilment, like, what, how does it manifest itself to you? How does it make you feel?
>
> A. ...On the personal side, you, you're at risk that your competitor is not, and the risk is that they have access to the bigger market, because of the fact that they have a fuller range of services, particularly in the audit area. And so you're able, you're not able to, perhaps, realize the same income potential from your investment. You may have more clients, and you may be able to expand naturally, but

> because of the fact that you don't have the full range of service, you might not be able to expand specifically, and so your income is reduced, possibly, and, therefore, your personal net worth and your personal self-worth is also diminished by that same restriction.
>
> Walker Evidence, Supplementary Case, Vol. 5, pp. 976-977

95. The Appellants' rights under s. 7 are not infringed by s. 14(1) of the Act.

Interaction of ss. 2(b), 6 and 7 of the Charter

96. What the Appellants assert, essentially, is the right to pursue a particular occupation and to do so without having to meet the standard required by the Act.

97. If the Charter guarantees economic rights, that guarantee would be found in ss. 6(2)(b) and 6(4).

Reference Re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313 at p. 412

98. Therefore, if the Charter guarantees a right to work, leaving aside a right to pursue a particular occupation, that right would have to be found in s. 6. However, s. 6 does not create a free standing right to work. Section 6(2)(b) guarantees only the right to pursue a livelihood to the same extent and subject to the same conditions as residents.

99. For the reasons set out in paragraphs 60-70, supra, the Appellants' arguments under s. 6 must fail.

100. It is not reasonable to conclude that either of ss. 2(b) or 7 provides a free standing right to pursue a particular occupation, given that s. 6, which addresses specifically the gaining of a livelihood, does not confer that protection.

B. (R.) v. Children's Aid Society of Metropolitan Toronto (27 January 1995), No. 23298, (S.C.C.) at paras. 27, 234
International Longshoremen's and Warehousemen's Union - Canada Area Local 500 v. Canada, [1994] 1 S.C.R. 150 at p. 151

Section 1

101. The Appeal Division was correct in finding that even if s. 14(1) violated the Appellants' Charter rights, it is saved by s. 1.

Reasons for Judgment (Appeal), Supplementary Case, Vol. 1, p. 168

102. Before embarking on the s. 1 analysis, it is essential that the regulatory scheme be put in perspective. The importance of this preliminary step was noted by McLachlin J. in Rocket, supra:

> While the Canadian approach does not apply special tests to restrictions on commercial expression, our method of analysis does permit a sensitive, case-oriented approach to the determination of their constitutionality. Placing the conflicting values in their factual and social context when performing the s. 1 analysis permits the courts to have regard to special features of the expression in question. As Wilson J. notes in *Edmonton Journal v. Alberta (A.-G.)* (1989), 64 D.L.R.(4th) 577, [1989] 2 S.C.R. 1326, [1990] 1 W.W.R. 577, not all expression is equally worthy of protection. Nor are all infringements of free expression equally serious.

Rocket, supra, at pp. 246-247

103. The conflicting values are addressed at paragraphs 48-58, supra.

104. The Appeal Division applied to s. 14(1), the criteria established in R. v. Oakes:

> 1. Section 14 must pursue an objective that is sufficiently important to justify limiting a Charter right.
>
> 2. It must be rationally connected to the objective.
>
> 3. It must impair the right no more than necessary to accomplish the objective.
>
> 4. It must not have a disproportionately severe effect on the persons to whom it applies.

R. v. Oakes, [1986] 1 S.C.R. 103 at pp. 138-139

105. The Appellants, the trial judge, and the Appeal Division were satisfied that Government's objective is sufficiently important to justify infringement of the freedom of speech. The trial judge stated:

> The plaintiff acknowledges on the opening question of this analysis that there is a sufficient legislative objective to infringe a Charter right. The Government's objective of protecting the public interest by means of ensuring a reasonable standard of public accounting represents, in my view, a pressing and substantial matter and is sufficiently important to justify infringement of freedom of speech.

Reasons for Judgment (Trial), Supplementary Case, Vol. 1, p. 112
Reasons for Judgment (Appeal), Supplementary Case, Vol. 1, p. 169

106. The next step requires a consideration as to whether the impugned legislation is rationally connected to the objective.

107. This part of the test does not require exhaustive analysis. For example, in Rocket, supra, McLachlin J., in considering a professional misconduct regulation which imposed a ban on advertising other than calling card, professional announcement or yellow page type advertising, said simply at p. 250:

> The objectives of promoting professionalism and avoiding irresponsible and misleading advertising will clearly be furthered by s. 37, para. 39.

Rocket, supra, at p. 250

108. In Reference re Criminal Code, supra, Wilson J., in concluding that s. 195.1 (1)(c) was rationally connected to the prevention of street solicitation, said:

> The logical way to prevent the public display of the sale of sex and any harmful consequences that flow from it is through the two-fold step of prohibiting the prostitute from soliciting prospective customers in places open to public view and prohibiting the customer from propositioning the prostitute likewise in places open to public view. If communication for this purpose or attempts to communicate for this purpose are criminalized it must surely be a powerful deterrent to those engaging in such conduct.

Reference re Criminal Code, supra, at p. 1212

109. The trial judge found that there was no rational connection between the objective and the legislation. He stated:

> I have come to the conclusion that the impugned regulatory regime, while neither unfair nor based on irrational considerations, fails this first step because it is an arbitrary regime.

Reasons for Judgment (Trial), Supplementary Case, Vol 1, p. 115

110. The arbitrariness was explained as follows:

> I believe the defendant has acted arbitrarily when it has isolated CGA's and barred 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 the CGAs on their merits, and that, in my opinion is to act arbitrarily.

Reasons for Judgment (Trial), Supplementary Case, Vol. 1, p. 117

111. It is obvious that what the trial judge viewed as "arbitrary" was government's decision not to change the legislation and thus "preserve the status quo". It was not whether the means chosen in s. 14(1) of the Act were arbitrary or rationally connected to the objective of protecting the public interest.

Reasons for Judgment (Trial), Supplementary Case, Vol. 1, p. 117

112. In the words of the Appeal Division, "it is apparent from his decision that the trial judge did not apply the rational connection text in its correct context".

Reasons for Judgment (Appeal), Supplementary Case, Vol. 1, p. 169

113. If the trial judge had applied this part of the test correctly, he would have come to the conclusion that there was a rational connection between the objective and the means chosen. Given the trial judge's acknowledgement that the "Government's objective of protecting the public interest by means of ensuring a reasonable standard of public accounting...is sufficiently important to justify infringement of freedom of speech", surely a provision which restricts the practice of public accounting to a group which the learned trial judge acknowledges has superior qualifications, is rationally connected to the objective.

Reasons for Judgment (Appeal), Supplementary Case, Vol. 1, p. 169
Reasons for Judgment (Trial), Supplementary Case, Vol. 1, p. 116

114. The third component of the Oakes test is whether the means used impaired the freedom as little as possible.

115. In attempting to apply this test, the trial judge found that there was less restrictive legislation in other provinces. He notes that Manitoba, Saskatchewan, Yukon and the Northwest Territories are unregulated and have no restrictions on the practice of accounting. In British Columbia and New Brunswick, only CAs and CGAs are permitted to do certain statutory audits. Otherwise, the profession is unregulated in those two provinces.

116. Applying the reasoning of the trial judge, any regulation, measured against no regulation, will always fail to satisfy the proportionality test.

Reasons for Judgment (Trial), Supplementary Case, Vol. 1, p. 36

117 However, a limiting measure must not be struck out just because the court can conceive of an alternative that seems less intrusive.

Committee for Commonwealth, supra, at pp. 247-248

118. If the trial judge addressed his mind to the proper question, he would have concluded that, in fact, the Legislature did have a reasonable basis for concluding that it impaired the relevant right as little as possible:

(1) it left open many aspects of the accounting field to non-CAs;

(2) it grandfathered accounting practitioners who, at that time, were not CAs;

(3) it made a clear statement that all those wishing to practise public accounting and auditing in the future would have to achieve the CA standard; and

(4) there was no evidence to indicate that there were any shortages of CA articling positions.

119. On this branch of the Oakes test the Appeal Division found that:

> The trial judge erred in his application of the minimum impairment test because he focused too much on policy considerations and on the fact that other provinces and territories are less restrictive. As Lamer J. said in *Re. ss. 193 and 195.1 of the Criminal Code, supra*, at p. 1138, it is not for the courts to 'second-guess the wisdom of the policy choices made by our legislators'. The fact that other provinces and territories are unregulated or have fewer restrictions does not mean that the Prince Edward Island legislation goes beyond the minimal impairment standard. Peter Hogg points out in *Constitutional Law of Canada*, 3rd ed., vol. 2 at pp. 35-39 that the minimal impairment test must be applied in such a way as to accommodate Canada's Federal system. Therefore, it has to allow for distinctive provincial responses to similar social objectives. The problem with the approach of the trial judge is that

> it does not give due deference to the legislature of this Province. The issue he ought to have addressed is whether s-s. 14(1) represents a reasonably restrained response by the Legislature of this Province to what all parties acknowledge constitutes a pressing and substantial concern. If he had considered s-s. 14(1) from this perspective, the trial judge would have seen that it presents a narrow, well-defined restriction, carefully crafted so as to provide a measure of protection for the public while not interfering too much with the right to practice. The restriction only applies to certain areas of accounting where there is particular vulnerability and even there, it only applies when the services are offered to the public. Considered in that light, any infringement of s-s. 2(b) rights by s-s 14(1) is indeed modest, especially when one considers that the expressive aspects of public accounting and auditing functions are really quite limited in both nature and extent in any event.

Reasons for Judgment (Appeal), Supplementary Case, Vol. 1, pp. 170-172

120. The fourth part of the Oakes test requires that there be proportionality between the effect of the measures which limit the Charter right and the pressing and substantial objective the legislation is intended to address.

121. The Appeal Division applied the test and stated:

> When a law satisfies all the other aspects of the *Oakes* test - in that, it is sufficiently important to justify limiting a Charter right, is rationally connected to the objective, and impairs the right no more than necessary to accomplish the objective - it is difficult to see how its effects can be considered as too severe to justify the limitation. Certainly the limitation imposed by s-s. 14(1) cannot be said to have deleterious effects disproportionate to the value of its objective. It is a narrow restriction based on qualifications affecting only a few services in the accounting field in circumstances where they are being offered to the public. It only restricts the rights of those who are not authorized by the Institute to express themselves authoritatively with respect to audits, review engagements and non-review engagements. Other areas of the accounting profession remain open and unregulated. Furthermore, the restriction does not apply to audits, review engagements or non-review engagements, services which are provided for management use. All in all, any infringement of s-s. 2(b) rights caused by s-s. 14(1) is only incidental and relatively minor and not too high a price to pay for

> the protection it affords the public. I therefore find that s-s. 14(1) meets the fourth criteria in *Oakes* as well as the three others, and accordingly, it is saved by s. 1 of the Charter.

10 Reasons for Judgment (Appeal), Supplementary Case, Vol. 1, pp. 172-173

122. It is submitted that if s. 14(1) infringes any of the Appellants' rights under s. 2(b), 6 or 7 of the Charter, it is saved by s. 1.

PART IV - ORDER SOUGHT

20 123. The Respondent respectfully requests an order dismissing this appeal, with costs throughout to the Respondent.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

30 Roger B. Langille, Q.C.

Charles P. Thompson

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TABLE OF AUTHORITIES