

27th May, 1993

MINUTES OF SPECIAL CONVOCATION

Thursday, 27th May, 1993
2:00 p.m.

PRESENT:

The Treasurer (Allan M. Rock), Bragagnolo, Campbell, Copeland, Cullity, Feinstein, Finkelstein, Goudge, Kiteley, Lamont, McKinnon, Manes, Mohideen, O'Brien, Palmer, Pepper, Ruby, Somerville, Thom, Topp and Wardlaw.

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IN PUBLIC

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ADMISSIONS COMMITTEE

Re: APPLICATION FOR ADMISSION OF ANN K. LAMBERT

Discussion took place on the preliminary matter of whether the Admissions Committee panel could participate in the proceedings before Convocation.

Convocation was of the view that the panel could participate.

Mr. Ruby placed the Report of the Admissions Committee before Convocation.

Mr. Thomas Lockwood appeared for the Society and Ms. Elizabeth Shilton appeared for the applicant. Ms. Janet Minor appeared on behalf of the Attorney General's office.

The Report of the Admissions Committee was filed as Exhibit 1, Mr. O'Brien's letter and memo were filed as Exhibit 2 and Mr. Kenneth Golish's letter filed as Exhibit 3.

THE LAW SOCIETY OF UPPER CANADA

REPORT OF THE COMMITTEE OF)
BENCHERS APPOINTED PURSUANT)
TO SECTION 27(4) OF THE LAW)
SOCIETY ACT, R.S.O. 1990)
c. L. 8 IN RESPECT OF THE)

APPLICATION OF)
ANN KNOWLTON LAMBERT FOR)
ADMISSION TO THE LAW)
SOCIETY OF UPPER CANADA)

AS A BARRISTER AND SOLICITOR)

THOMAS J. LOCKWOOD

For the Society

ANN K. LAMBERT

Representing herself

HEARD: MAY 11, 1990

BEFORE A QUORUM OF THE ADMISSIONS COMMITTEE COMPOSED OF:

PATRICIA J. PETERS, Q.C. (CHAIR)
DONALD H.L. LAMONT, Q.C.
EARL J. LEVY, Q.C.

THE NATURE OF THE APPLICATION

This application is made by ANN KNOWLTON LAMBERT for admission to the Law Society of Upper Canada ("Society") pursuant to section 27 of the Law Society Act, R.S.O. 1990, c. L.8, ("Act") which provides as follows:

- 27.- (1) Every application for admission to the Society shall be on the prescribed form and be accompanied by the prescribed fees.
- (2) An applicant for admission to the Society shall be of good character.
- (3) No applicant for admission to the Society who has met all admission requirements shall be refused admission.
- (4) No application for admission to the Society shall be refused until the applicant has been given an opportunity to appear in person before a committee of benchers.
- (5) Where an applicant for admission to the Society is refused admission, the applicant is entitled to a statement of the reasons for refusal.
- (6) Where an application for admission to the Society has been refused, another application based on new evidence may be made at any time.

Because Ms. Lambert did not appear to meet the requirements of section 28(c) of the Act, her application was referred to a committee of benchers under section 27(4) of the Act.

Section 28 of the Act reads, in part, as follows:

"28. - Subject to sections 30, 31, 32, 34, 35, 36 and 38,

- (c) the persons, being Canadian citizens or permanent residents of Canada,
- (i) who are members on the 31st day of December, 1990,
- (ii) who after that day successfully complete the Bar Admission Course and are called to the bar and admitted and enrolled as solicitors, or
- (iii) who after that day transfer from a jurisdiction outside Ontario and are called to the bar and admitted and enrolled as solicitors,

are members and entitled to practise law in Ontario as barristers and solicitors;"

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ISSUE

The question before the committee was whether Ms. Lambert should be refused admission to the Society because of the requirement that members be either Canadian citizens or permanent residents of Canada.

THE FACTS OF THE CASE

a) Applicant's Background:

Ann Knowlton Lambert is a citizen of the United States of America. She earned her J.D. from Harvard Law School in 1974 and practised law in Boston, Massachusetts for 14 years. A detailed account of her academic qualifications and professional experience is excerpted from her Affidavit which was filed with her application and is attached hereto and marked as Exhibit "A" to this report.

b) Background to Application for Membership:

Due to Ms. Lambert's interest in coming to Ontario, in December 1986 she submitted an application for evaluation of her credentials to the Joint Committee on Accreditation. She was informed in January of 1987 that she would be granted a Certificate of Qualification upon successfully writing examinations in constitutional law, taxation, corporate law, evidence and either civil or criminal procedure. She immediately commenced to prepare herself to take such examinations. In addition, she applied to various London firms for an articling position for the 1988/1989 year and, in October, 1987 was interviewed by Earl Cherniak and Mary Anne Sanderson of Lerner & Associates in London. She was offered and accepted an articling position at that firm.

Ms. Lambert wrote the required examinations of the Joint Committee on Accreditation in June, 1988 and received a Certificate of Qualification from the Committee dated July 20, 1988.

At that time, Ms. Lambert sought and eventually obtained approval from Canadian Immigration officials to be employed in Canada for one year. She put her Boston home on the market, changed her practising status before the Supreme Judicial Court of Massachusetts' Board of Bar Overseers to "inactive" and entered Canada on August 7, 1988. On August 8, 1988 she moved into 23 Abbey Rise, London, Ontario and on August 9, 1988 began to article with Lerner & Associates.

In the Spring of 1989, Ms. Lambert petitioned the Law Society for abridgement of her articling year and the teaching term of the Bar Admission Course on the grounds that it was warranted by her prior experience. Her articles were abridged to nine months and she completed same on June 30, 1989.

Ms. Lambert obtained a Student Visa for the teaching term of the Bar Admission course and employment authorization allowing her to teach one course in the Faculty of Law at the University of Western Ontario.

In December, 1989 Ms. Lambert completed and submitted a preliminary application for permanent residency status to the Canadian Consulate General in Detroit. With that form she also submitted to the Consulate a letter from Lerner & Associates, signed by John W. T. Judson indicating that the firm had made an offer of employment to her for a position as an associate lawyer with the firm.

Ms. Lambert enrolled in the teaching term of the Bar Admission Course in London from September 1989 to January 1990 and completed all of its requirements.

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At the time that Ms. Lambert filed her Articles of Clerkship and Bar Admission Course Application, in August of 1988, Section 28 of the Act required that all candidates for Call to the Bar be Canadian Citizens or British Subjects. However, applicants for Bar Admission were advised by a notice in the application form of an amendment to the Act, to become effective the 1st of July, 1989, that members of the Society must be Canadian Citizens and that those members not Canadian Citizens would cease to be members of the Society and, consequently, lose their right to practise law on the 1st of July, 1989.

At that time (August, 1988) Ms. Lambert was aware that the case of Andrews V. Law Society of British Columbia was pending before the Supreme Court of Canada and she was of the view that the Court would rule that the Citizenship requirement for admission to the Bar violated section 15 of the Charter of Rights and Freedoms, was not justified under section 1 and would not, therefore, be an impediment to her being called to the Bar of Ontario.

On February 2, 1989, the Supreme Court of Canada issued its decision in the Andrews case striking down the Citizenship requirement for admission to the Bar as violative of the equality rights protected by section 15(1) of the Charter and, further, held such violation not to be a reasonable limit within section 1.

Ms. Lambert states that she did not learn of the amendment to the Act, effective July, 1989, requiring that applicants for admission to the Society be Citizens or permanent residents of Canada, until January 8, 1990.

On the same day, January 8, 1990, she received word from the Canadian Consulate General in Detroit that her application for permanent residence could not be accepted, apparently because Lerner & Associates' offer of employment could not satisfy the requirement that the position be one that could not be filled by an existing Canadian citizen or landed immigrant.

Ms. Lambert then requested leave of the Admissions Committee to make a late filing of a substituted Petition for Call to the Bar and Certificate of Fitness as a de facto permanent resident of Canada on the basis that she resided at 23 Abbey Rise, London, Ontario, and had no other residence, that she intended to remain in Canada, that she had an Ontario Driver's License, a Social Insurance Number, an OHIP number and an account at a Canadian Bank. She further indicated that she filed a Canadian tax return and for the past three years had been a member of the Canadian Bar Association. She was also a member of the Neighbourhood Legal Services (London and Middlesex), the Criminal Lawyer's Association (Canada), the Canadian Civil Liberties Association and the Women's Law Association of Middlesex County.

c) Applicant's Arguments:

At the hearing held on May 11, 1990 before a quorum of the Admissions Committee, Ms. Lambert advanced the following arguments:

1. That the requirement in s.28(c) of the Law Society Act that a member be a Canadian citizen or a permanent resident of Canada is unconstitutional because it infringes the equality guarantees of s. 15(1) of the Charter of Rights and Freedoms.
2. That the benchers have authority to determine whether the requirement of Canadian citizenship or permanent residency in s.28(c) of the Law Society Act is constitutional. Further, if the benchers determine the requirement to be unconstitutional, that they have power to act accordingly and to approve Ms. Lambert's application for admission despite the words of s. 28(c).

3. That assuming, without conceding, that the requirement of Canadian citizenship or permanent residency is constitutional, Ms. Lambert nonetheless meets the requirement because she is in the ordinary lay meaning of the term, a permanent resident. Ms. Lambert argues that it is incorrect to interpret the term "permanent resident" as having the meaning ascribed to it in s. 2(1) of the Immigration Act, R.S.C. 1985, c.1-2.
 4. That the statutory amendments should not have a retroactive effect on her individual case because, since the Andrews case had held the requirement of citizenship to be ultra vires and of no force and effect, it was, therefore, not a requirement at the time she commenced the Bar Admission Course. The amending legislation, effective July, 1989 was, in effect, retroactive application of a requirement which did not exist at the time she was accepted into the Bar Admission Course and was, therefore, the imposition of an ex post facto law and unfair.
 5. That it would be violative of fundamental fairness principles to invoke remedial legislation to cut off the rights of a non-citizen who has assiduously undertaken and completed all of the requirements of the Bar Admission Course in good faith in an effort to gain admission to practise law in the Province of Ontario.
- d) Change in Circumstances:

Since the hearing date, Ms. Lambert was required to leave Canada as her Student Visa expired on June 30, 1990. It is the Committee's understanding that she returned to Boston, Massachusetts and established a law practice there and is currently practising law in that state.

Upon being apprised of her return to the United States and the fact that there was no contact by Ms. Lambert with the Law Society for a lengthy period of time, the Committee assumed that Ms. Lambert had withdrawn her application for membership. However, in the spring of 1992, Ms. Lambert formally requested that the Committee make a decision with respect to her application for Call to the Bar, notwithstanding the fact that she is no longer residing in Canada and has no present intention to return to Canada.

CONCLUSION

After lengthy consideration, the Committee has concluded that the applicant, Ann Knowlton Lambert, should be admitted as a member of the Society.

The majority of the Committee is of the view that it has jurisdiction and should determine the constitutional validity of the legislative restrictions on membership.

Further, the majority of the Committee is of the view that the requirement of citizenship or permanent residency as a qualification for admission to and continued membership in the Law Society infringes the equality rights guaranteed by Subsection 15(1) of the Charter and cannot be justified under Section 1 of the Charter.

In coming to these conclusions, the majority of the Committee accepts and adopted the reasoning set out in the opinion letter to the Society dated October 1, 1992 from Marilyn L. Pilkington, Professor of Law, Osgoode Hall Law School ("the Pilkington opinion"), such letter being attached hereto and marked as Exhibit "B" to this report.

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It is noted that this decision does not constitute a declaration of invalidity of the legislation in question and has no formal authority as precedent but is limited to this proceeding (Cuddy Chicks Ltd. v. Ontario Labour Relations Board [1991] 2 S.C.R. 5 at p. 17).

It is further noted that this matter was heard without the applicant having given notice of the constitutional issue to the Attorney General of Ontario and that no objection was raised by counsel for the Society.

If we are wrong in our view of the law on the constitutional validity of our legislation or of our jurisdiction to consider same, then we conclude that Ms. Lambert should be admitted as a member of the Society on the basis that it would be fundamentally unfair to do otherwise, given what she calls the "acute catch 22" situation in which she finds herself.

In good faith, Ms. Lambert has completed all of the requirements for admission to membership in the Society, except that she is neither a citizen nor a permanent resident of Canada, requirements over which she has no control. She cannot obtain permanent residency status unless she has a job offer in Canada which cannot be filled by a Canadian citizen or permanent resident; she cannot obtain a job offer as a lawyer in Ontario unless she is admitted to membership in the Society; and she cannot be admitted as a member of the Society unless she is a citizen or permanent resident of Canada. It is a conundrum and, in our view, would be fundamentally unfair to Ms. Lambert to deny her admission in her particular circumstances.

As pointed out in the Pilkington opinion, there are no residency requirements for members of the Society who are Canadian citizens. They may leave Ontario to reside abroad and still maintain their membership in the Society so long as they continue to pay their fees. This is not the case for members who are permanent residents of Canada, who lose their status when they cease to reside in Canada. Thus, Section 32 of the Law Society Act discriminates between Canadian citizens and permanent residents of Canada.

As further pointed out in the Pilkington opinion, even if Ms. Lambert remains in the United States, to deny her membership in the Society would deprive her of the benefit of being able to practise Ontario law in the U.S. as a foreign legal consultant.

In view of these conclusions, it is unnecessary to deal with the balance of the applicant's arguments.

ALL OF WHICH THE COMMITTEE BEGS LEAVE TO REPORT TO CONVOCATION

DATED this 26th day of February, 1993

"Patricia J. Peters"
Patricia J. Peters, Q.C. (Chair)

"Earl Levy"
Earl J. Levy, Q.C.

(see Exhibits A and B in Convocation file)

MINORITY REPORT

Donald H. L. Lamont, Q.C.

After lengthy considerations, the Committee has now concluded that the applicant Ann K. Lambert should be admitted as a member of the Law Society.

This member agrees with the recommendation to permit Ms. Lambert to be admitted as a member of the Law Society of Upper Canada, but for different reasons.

The four issues in this application and submissions of Ms. Lambert were:

1. That the requirement in s. 28(c) of the Law Society Act that a member be a Canadian citizen or a permanent resident of Canada is unconstitutional because it infringes the equality guarantees of s. 15(1) of the Charter of Rights and Freedoms.
2. That the benchers have authority to determine whether the requirement of Canadian citizenship or permanent residency in s. 28(c) of the Law Society Act is constitutional. Further, if the benchers determine the requirement to be unconstitutional, that they have power to act accordingly and to approve Ms. Lambert's application for admission despite the words of s. 28(c).
3. That assuming, without conceding, that the requirement of Canadian citizenship or permanent residency is constitutional, Ms. Lambert nonetheless meets the requirement because she is "in the ordinary lay meaning" of the term of a "permanent resident". Ms. Lambert argues that it is incorrect to interpret the term "permanent resident" as having the meaning ascribed to it in s. 2(1) of the Immigration Act, R.S.C. 1985, c. 1-2.
4. That the statutory amendments should not have a retroactive effect on her individual case because, since the Andrews case had held the requirement of Citizenship to be ultra vires and of no force and effect, it was therefore, not a requirement at the time she commenced the Bar Admission course. The amending legislation, effective July, 1989 was, in effect, retroactive application of a requirement which did not exist at the time she was accepted into the Bar Admission Course and was, therefore, the imposition of an ex post facto law and unfair. She further argued that "it would be particularly inept and violative of fundamental fairness principles to invoke remedial legislation to cut off the rights of a non-citizen who has assiduously undertaken and completed all of the requirements of the Bar Admission Course in good faith in an effort to gain admission to practice law in the Province of Ontario."

I find that submission #4 is persuasive for a recommendation in her favour for admission.

She has an outstanding academic and practice record as an attorney in the State of Massachusetts.

She was approved by the Joint Committee for admission as a student in the Bar Admission Course which she completed with pass standing.

Her articling experience was also completed satisfactorily with Lerner & Lerner in their London office.

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It can be noted that during the Bar Admission Course she was also temporarily on the Faculty of the Law School of the University of Western Ontario.

It can be noted from the transcript that I was favourable and urged that Ms. Lambert with the help of Lerner & Lerner make further efforts with Immigration. This was apparently not done.

As to a constitutional ruling on s. 28(c) of the Law Society Act, it seems inappropriate for a sub-committee of the Admissions Committee to consider and decide on the constitutionality of s. 28(c) or as it is sometimes said to rule on the legality of the enabling statute, the Law Society Act.

Frequently, or almost always, recommendations of approval or disapproval flow from the Admissions Committee to Convocation,, pursuant to Rule 26 and s. 36 of the Act.

This member is quite aware of and concerned about the problem with which Ms. Lambert was faced when the Law Society Act was amended; which amendment to s. 28(c) includes "Canadian citizens or permanent residents of Canada" was presented to the Ontario Legislature by Ian Scott the then Attorney General and supported.

The applicant states in her own words the "acute catch 22 situation" she was in when she applied for membership.

Ms. Lambert as above stated enrolled in the Bar Admission Course at the time when s. 28(c) only permitted Canadian citizens to become members, and she anticipated as it turned out that the Supreme Court of Canada would and did turn down that requirement.

At that point in time Ms. Lambert could have qualified.

However prior to our hearing her application but during her proceeding through the Bar Admission Course and prior to her successfully completing the Bar Admission Course, s. 28 was amended by including the specific "permanent resident" status.

In effect Ms. Lambert is caught by the retrospective effect of the amendment.

Ms. Lambert seems to have now re-established herself in the practice of law as an attorney in Boston.

We have no information of her intending to return to Ontario.

Nor is there any evidence that she might wish to be a consultant in Boston on Canadian law, as the majority of the Committee have put forward.

Ms. Lambert's main objective is to be called to the bar in Ontario.

I agree that she should be admitted.

There is no need to deal with the constitutional issue, particularly on the facts of this application, by acceding to her wish apparently to challenge and change the law.

One valid reason, namely #4 of her submissions, for her to attain her objective is sufficient. Therefore I disassociate myself from the reasons of the majority so far as they pertain to the submissions 1 and 2 of the applicant.

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For the above reasons I accept the unfairness of applying the retrospective effect of the amendment, and accordingly this member is prepared to recommend to Convocation that Ms. Lambert be called to the bar and admitted as a member of the Law Society of Upper Canada.

If that recommendation is accepted by Convocation I wish Ms. Lambert well.

ALL OF WHICH IS respectfully submitted

DATED this 26th day of February, 1993

Donald H.L. Lamont, Q.C.

There were opening remarks by Mr. Lockwood as to the procedure to be followed and that counsel would with Convocation's permission deal with the minority position first.

Counsel, the applicant, the reporter and the public withdrew.

Convocation considered the procedure and decided to proceed with the minority report arguments and following that would decide, if necessary, on how to deal with the constitutional issue.

Counsel, the applicant, the reporter and the public were recalled and informed of Convocation's decision.

There were submissions by Ms. Shilton on behalf of the Applicant.

A book of Exhibits from the Admissions Committee hearing were before Convocation and filed as Exhibit 4.

Questions were taken from the Bench.

There were submissions by Mr. Lockwood and a reply by Ms. Shilton.

Counsel, the applicant, the reporter and the public withdrew.

It was moved by Mr. Topp, seconded by Mr. Ruby that the minority report be adopted for the reasons expressed therein.

Carried

It was moved by Mr. Wardlaw, but failed for want of a seconder that in considering all the circumstances and the requirement that Convocation do justice, that Convocation exercise its inherent jurisdiction and admit the applicant without giving reasons.

It was moved by Ms. Kiteley, seconded by Mr. Copeland that the matter be remitted to the Committee with adequate notice to the Attorney General with the Law Society paying the applicant's costs today and further appearances before the Committee and Convocation.

The motion was ruled out of order because of the procedure agreed to by Convocation, that is to deal with the minority report which did not raise constitutional issues, first.

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It was moved by Mr. Thom, but failed for want of a seconder that Ms. Lambert's application be dismissed as moot.

It was moved by Mr. Manes, seconded by Mr. Campbell that Ms. Lambert be admitted to the Bar on condition that she give an undertaking to continue to try to obtain permanent residence in Ontario.

Mr. Manes' motion was ruled out of order by the Treasurer because it involved the constitutional issue and Convocation was proceeding on the basis of the minority report.

Counsel, the applicant, the reporter and the public were recalled and informed of the decision of Convocation.

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CONVOCATION ROSE AT 4:00 P.M.

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Confirmed in Convocation this day of , 1993.

Treasurer