

IN THE SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal of Manitoba)

IN THE MATTER OF: The Law Society Act, C.C.S.M., L100;

AND IN THE MATTER OF: David Morley Pearlman.

BETWEEN:

DAVID MORLEY PEARLMAN,

(Applicant), Appellant,

- and -

THE MANITOBA LAW SOCIETY  
JUDICIAL COMMITTEE,

(Respondent), Respondent.

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REVISED FACTUM OF THE APPELLANT

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REVISED FACTUM OF THE APPELLANT

PART I - STATEMENT OF FACTS

1. The Appellant is a Barrister and Solicitor licenced to practice in the Province of Manitoba by the Manitoba Law Society.
2. In the fall of 1976, David Morley Pearlman was the owner of certain properties in the City of Winnipeg and had grievances against various inspectors employed by the City of Winnipeg, Department of Environmental Planning.

Revised Factum of the Appellant Part I Statement of Facts

3. Mr. Pearlman objected to the manner in which inspectors were dealing with his property and stated his position to the inspectors in writing by letter, dated November 5, 1976.
4. On December 29, 1977, Mr. Pearlman continued to have difficulties with the Department and wrote to Mr. Lloyd Kirkham, stating his position and indicating remedies that he intended to take, including such remedies as are available under the Criminal Code.
5. On June 22, 1978, Mr. Pearlman again wrote Mr. Kirkham complaining about Mr. Kirkham's actions with respect to his property and indicating his intention to take this matter up with the Attorney General with a view to having a charge laid against Mr. Kirkham.
6. In the fall of 1978, Mr. Kirkham committed an assault against Mr. Pearlman, as a result of which Mr. Kirkham was prosecuted by Mr. Pearlman and convicted of assaulting Mr. Pearlman, by Judge Samuel Minuk, on October 27, 1978.
7. Mr. Kirkham's conviction was sustained by Mr. Justice Barkham, then a County Court Judge, on May 18, 1979.

Revised Factum of the Appellant Part I Statement of Facts

8. Mr. Pearlman, being of the opinion that an assault on an officer of the Court justified more harsh treatment than an absolute discharge which was imposed, made application for Leave to Appeal to the Court of Appeal for the Province of Manitoba.
9. On December 20, 1979 the Court of Appeal refused to grant the application for Leave to Appeal and imposed on Mr. Pearlman an obligation to pay Lloyd Kirkham the sum of \$1,500.00.
10. Mr. Pearlman has never paid the sum of \$1,500.00 and has continually resisted the payment of same in several proceedings wherein Mr. Kirkham has sought to have the Court of Appeal Order enforced by the County Court of Winnipeg.
11. Mr. Pearlman continues to take the position that the Court of Appeal Order was made without jurisdiction and cannot be enforced against him.
12. Mr. Kirkham sought to have the Court of Appeal Order enforced in the County Court of Winnipeg but Mr. Justice Jewers quashed a Garnishing Order on the 15th day of September 1983.

Revised Factum of the Appellant Part I Statement of Facts

13. On November 7, 1986 Mr. Justice Jewers quashed a Certificate of Judgment which was registered against lands owned by Mr. Pearlman.
14. On September 23 1986, lawyers for Mr. Kirkham sent Mr. Pearlman a letter in which they threatened to turn the matter over to the Law Society unless \$1,500.00 demanded in a previous letter dated July 7, 1986 was paid.
15. On October 9, 1986 Alex Cudney, on behalf of Mr. Kirkham, reported Mr. Pearlman to the Law Society by letter dated October 9, 1986.
16. Mr. Pearlman responded to the letter from the Law Society on December 24, 1986 indicating his position with respect to the Judgment of the Court of Appeal.
17. On April 7, 1987 Mr. Pearlman was cited by the Law Society alleging conduct unbecoming a Barrister and Solicitor, upon proof whereof he may be liable to be struck off the rolls and disbarred or suspended as a Barrister and Solicitor.

Revised Factum of the Appellant Part I Statement of Facts

18. The Citation is scheduled to be heard by Benchers of the Manitoba Law Society who are constituted as a Judicial Committee.
19. Section 52 (4) of the Law Society Act purports to give the Benchers of the Law Society the power to order Mr. Pearlman to pay all or any part of the costs and expenses incurred by the Law Society in and about the investigation into proceedings upon, and hearing of any subject matter of the inquiry or any complaints or charge in respect of which he has been so found guilty.
20. The Constitutional questions in this Appeal were formulated by His Lordship the Chief Justice Antonio Lamer by Order dated the 29th day of January, 1991 and read as follows:
- "1. Does section 52(4) of the Law Society Act of Manitoba, R.S.M. 1987 c. L100, contravene s. 7 of the Canadian Charter of Rights and Freedoms?
2. If the answer to question 1 is affirmative, is s. 52(4) of the Law Society Act of Manitoba,

Revised Factum of the Appellant Part I Statement of Facts

R.S.M. 1987 c. L100, justified by s. 1 of the  
Canadian Charter of Rights and Freedoms and  
therefore not inconsistent with the Constitution  
Act 1982?"



Revised Factum of the Appellant Part II Points at Issue

PART II - POINTS AT ISSUE

1. The Manitoba Court of Appeal erred in failing to find that the Citation violates the rights of the Applicant as guaranteed by Section 11 of the Canadian Charter of Rights and Freedoms, which provides that any person charged with an offence has the right to be tried within a reasonable time.
  
2. The Manitoba Court of Appeal erred in failing to find, in the alternative, that the Citation deals with conduct alleged to have occurred in 1977, 1978 and 1979, all of which is a matter of public record, and that the Respondedn has been guilty of laches and unreasonable delay in purporting to cite such conduct as being subject to disciplinary measures.
  
3. The Manitoba Court of Appeal erred in failing to find that the Judicial Committee of the Manitoba Law Society declined to exercise it's jurisdiction to give effect to a Motion made on behalf of the Applicant, and declined to determine whether the conduct alleged in the Citation could constitute conduct unbecoming a barrister and solicitor.

Revised Factum of the Appellant Part II Points at Issue

4. The Manitoba Court of Appeal erred in failing to find that the action proposed to be taken by the Respondent is contrary to natural justice and contrary to the Canadian Charter of Rights and Freedoms, in that the Respondent claims the right in the adjudication of this matter to levy costs of the hearing against the Applicant if it finds him guilty, and the adjudicating body therefore has a pecuniary interest in finding the Applicant guilty, and will suffer a pecuniary loss if it finds him innocent.
  
5. Does section 52(4) of the Law Society Act of Manitoba, R.S.M. 1987 c. L100, contravene s. 7 of the Canadian Charter of Rights and Freedoms?
  
6. If the answer to point number 5 is affirmative, is s. 52(4) of the Law Society Act of Manitoba, R.S.M. 1987 c. L100, justified by s. 1 of the Canadian Charter of Rights and Freedoms and therefore not inconsistent with the Constitution Act 1982?

PART III - ARGUMENT

1. The Citation disclosed no unprofessional conduct or misconduct or conduct unbecoming a barrister and solicitor.

Being a barrister in Manitoba does not preclude the citizen from defending his rights and from protecting himself against the unlawful conduct of others.

Mr. Pearlman has the same right as any other citizen to warn a person that he will have access to the law, both criminal and civil, if his rights are infringed upon. It cannot be considered unprofessional misconduct for a citizen to resist payment of a Judgment which he regards to be a nullity.

German v. Law Society of Alberta  
1974, 5 W.W.R., 217

Bateman v. Association of Professional Engineers of Manitoba  
1984, 28 Manitoba Reports (2d), 264

Hoem v. Law Society of British Columbia and Attorney General of British Columbia  
1985, 5 W.W.R., 1

Shumiatcher v. Law Society of Saskatchewan  
1967, 58 W.W.R., 465

2. The Citation violates the rights of the Applicant as guaranteed by Section 11 of the Canadian Charter of Rights and Freedoms which provides that any person charged with an offence has the right to be tried within a reasonable time.

The charge against Mr. Pearlman has penal or quasi-penal consequences. Mr. Pearlman is entitled to rely on the Canadian Charter of Rights and Freedoms which guarantees the right to be tried within a reasonable period of time.

3. In the alternative, the Citation deals with conduct alleged to have occurred in 1977, 1978 and 1979, all of which was a matter of public record and that the Respondent has been guilty of laches and unreasonable delay in purporting to cite such conduct as being subject to disciplinary measures. Laches or unreasonable delay is, in any event a basis for denying the Law Society the right to proceed.

Re MacPhee and Barristers' Society of  
New Brunswick  
1983, 1 D.L.R. (4th edition), 156

Re A Barrister  
1954, 1 D.L.R., 814

4. The Judicial Committee of the Manitoba Law Society declined to exercise its jurisdiction to give effect to a Motion made on behalf of the Applicant and declined to determine whether or not the conduct alleged in the Citation does or does not constitute conduct unbecoming a barrister and solicitor.

5. That an action proposed to be taken by the Respondent is contrary to natural justice and contrary to the Canadian Charter of Rights and Freedoms in that the Respondent claims the right in the adjudication of this matter to levy costs of the hearing against the Applicant if it finds him guilty and the adjudicating body, which is composed of Benchers of the Society, therefore has a pecuniary interest in finding the Applicant guilty and will suffer a pecuniary loss if it finds him innocent.

The activities of the Law Society are governed by its Benchers. As with any other organization the governing body is concerned with the revenue and expenses of the organization.

The revenue of the Law Society comes from various sources including payment of licence fees by its members. The organization would attempt to operate as efficiently as possible so as to minimize its

Revised Factum of the Appellant Part III      Argument

expenses in order to perform it's services with the least possible charge to it's members.

One of the functions of the Law Society is to investigate complaints. The investigation of a complaint can involve greater or lesser expenses depending on the nature of the investigation and the degree to which the Society proceeds in the investigation.

If the Society had unlimited funds it could at least be perceived that it would be liberal in the amount which it utilized for investigation of complaints.

If it's funds were scarce it would nevertheless make a conscientious investigation but would do so having regard to availability of funds.

If the Benchers of the Society had a means of financing the investigation other than through it's normal revenues it would be of financial benefit to the Society, a factor which the Benchers would be perceived as taking into account.

Under the Law Society Act, the Banchers could obtain independent funds for the purpose of paying the expenses of it's proceedings including the investigation of the Society if it found the member guilty of the charges outlined in the Citation.

It could not obtain these funds if it dismissed the allegations in the Citation. Accordingly the Benchers have an apparent and/or perceived pecuniary interest in finding the member guilty and the Society would suffer a pecuniary disadvantage if they found him innocent.

6. In considering the complaint the member is subject to being disbarred or otherwise severely penalized. A person's right to participate in his profession affects his right to life, liberty and the security of the person. By the Canadian Charter of Rights and Freedoms a person cannot be deprived of such rights except in accordance with the principles of fundamental justice.

It is contrary to the principles of fundamental justice that a person should be required to submit himself to a tribunal which has a real and/or apparent and/or perceived financial interest in the proceedings.

It is respectfully submitted that this principle has been established and reiterated by judicial pronouncement over the course of many years.

The Appellant submits that the following authorities are directly to the point of the argument being

Revised Factum of the Appellant Part III Argument

submitted by the Appellant in these proceedings:

Boulton v. The Church Society of the Diocese  
of Toronto  
1868 15 C.R. 450

The King v. McLatchy; Ex Parte Antinori  
Fishing Club  
1916 New Brunswick Reports, Vol 14 402

Rex ex rel Corballis v. Bietel  
(1920) 2 W.W.R. 384

Thos. J. Wallace v. The Hon. William Young  
1868 7 N.S.R. 173

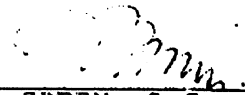


Revised Factum of the Appellant Part IV Order Requested

PART IV - ORDER REQUESTED

It is respectfully requested that this Honourable Court  
allow this appeal.

ALL OF WHICH is respectfully submitted by

  
per SIDNEY GREEN, Q.C.  
Solicitor for the  
(Applicant), Appellant.

February 22, 1991

Revised Factum of the Appellant Part V List of Authorities

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1. <u>German v. Law Society of Alberta</u> 1974, 5 W.W.R., 217 .....	9
2. <u>Bateman v. Association of Professional Engineers of Manitoba</u> 1984, 28 Manitoba Reports (2d), 264	9
3. <u>Hoem v. Law Society of British Columbia and Attorney General of British Columbia</u> 1985, 5 W.W.R., 1 .....	9
4. <u>Shumiatcher v. Law Society of Saskatchewan</u> 1967, 58 W.W.R., 465 .....	9
5. <u>Re MacPhee and Barristers' Society of New Brunswick</u> 1983, 1 D.L.R. (4th), 156 .....	10
6. <u>Re A Barrister</u> 1954, 1 D.L.R., 814 .....	10
7. <u>Boulton v. The Church Society of the Diocese of Toronto</u> 1868, 15 C.R., 450 .....	14
8. <u>The King v. McLatchy; Ex Parte Antinori Fishing Club</u> 1916 New Brunswick Reports, Vol. 14, 402	14
9. <u>Rex ex rel Corballis v. Bietel</u> (1920) 2 W.W.R., 384 .....	14
10. <u>Thos. J. Wallace v. The Hon. William Young</u> 1868 7 N.S.R. 173 .....	14