IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA)

BETWEEN:

DAVID MORLEY PEARLMAN

APPELLANT

AND:

THE MANITOBA LAW SOCIETY, JUDICIAL COMMITTEE

RESPONDENT

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FACTUM OF THE ATTORNEY GENERAL OF BRITISH COLUMBIA

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I N D E X

PART I

STATEMENT OF FACTS

1. For the purpose of argument on the constitutional questions stated in this appeal the Attorney General of British Columbia adopts the Statement of Facts set out in the Factum of the Appellant and the Factum of the Respondent.

PART II

POINTS IN ISSUE

2. By Order of the Right Honourable Antonio Lamer, P.C., C.J.C., made Tuesday the 29th day of January, 1991, the constitutional questions in this appeal are:

a. Does s. 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?

b. If the answer to question 1 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

A. THE PRACTICE OF A PROFESSION IS NOT A LIBERTY INTEREST PROTECTED BY SECTION 7 OF THE CHARTER

3. The Appellant asserts in his Revised Factum that:

> "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".
>
> Revised Factum of the Appellant, paragraph 6 at p. 13.

4. Support for that proposition may be found in Wilson and other decisions.

> Wilson v. Medical Services Commission (1988) 30 B.C.L.R. (2d) 1 (B.C.C.A.) at p. 26.
>
> Re Maritime Medical Care Inc. and Khaliq-Kareemi (1989) 57 D.L.R. (4th) 505 (N.S.C.A.) at p. 515.
>
> Branigan v. Yukon Medical Council (1986) 1 B.C.L.R. (2d) 350 (Y.T.S.C.) at p. 361.
>
> Howard v. Architectural Institute of British Columbia (1989) 40 B.C.L.R. (2d) 315 (B.C.S.C.) at p. 323.

5. The contrary view has also been expressed by the Courts:

Reference Re Sections 193 and 195.1(1)(c) of the Criminal Code [1990] 1 S.C.R. 1123 per Lamer J. at pp. 1162-1180.

Regina v. Quesnel (1985) 53 O.R. (2d) 338 (Ont. C.A.) at p. 346.

Re Bassett and Government of Canada (1987) 35 D.L.R. (4th) 537 (Sask C.A.) at p. 567.

Forgie v. Public Service Staff Relations Board (1987) 32 C.R.R. 191 (F.C.A.) at p. 192.

Re Allen and Judicial Council of Manitoba (1990) 70 D.L.R. (4th) 164 (Man. Q.B.) at p. 171.

6. It is submitted that the reasoning of Lamer J. on this issue in Reference Re Section 193 and 195.1(1)(c) of the Criminal Code is persuasive and should be adopted by the Court in this case. His conclusion, then, would be determinative of the constitutional questions:

> "Therefore, for the reasons I have stated above, the Appellant's arguments in respect of the right to liberty and security of the person must fail. The rights under s. 7 do not extend to the right to exercise their chosen profession".
>
> Reference Re Section 193 and 195.1(1)(c) of the Criminal Code at p. 1179.

7. Earlier the British Columbia Court of Appeal in Wilson had held that geographic restrictions imposed by government on the right to practice medicine in British Columbia prima facie constitute a violation of the right to liberty protected by s. 7. With respect, it is submitted that the Court in Wilson erred in drawing a distinction between the right to work which is a purely economic question which is not protected under s. 7 of the

Charter and the right to pursue a livelihood or profession which was characterized as a matter concerning one's dignity and sense of self worth which is protected by s. 7 of the Charter. Not only does that distinction lead to a definition of liberty and security of the person under s. 7 of the Charter which becomes all inclusive (Reference Re Section 193 and 195.1(1)(c) of the Criminal Code at p. 1170), but also it creates distinctions in Charter protection which are not capable of principled analysis.

8. For instance, the Court in Wilson draws a distinction between legitimate and reasonable regulation of the practice of a profession and actual deprivation of the right to practice a profession. For the former the Court had no doubt that regulation of such matters as standards of admission, mandatory insurance for the protection of the public, standards of practice and of behaviour will not constitute an infringement of s. 7. (Wilson at p. 21). However, regulation of the practice of a profession (which does not infringe s. 7) inevitably leads to deprivation of the right to practice (which does infringe s. 7) when standards of practice and behaviour are not met.

Howard v. Architectural Institute of B.C. at p. 323.

9. Also, the Court in Wilson focuses on the self employed medical practitioner who intends to bill the Medical Services Plan for services rendered to a patient (Wilson at pp. 9-11). Nothing is said about medical practitioners and other professionals such as lawyers,

engineers, agrologists, nurses, accountants, economists and so on who may be either employed by government or offer their services on contract. If, on the one hand, the constitutionally guaranteed right to practice a profession extends to those employees or contractors they can assert constitutionally guaranteed rights as against the government which other non-professional employees and contractors do not enjoy. If, on the other hand, professional employees and contractors are not viewed as practicing a profession but simply working for the government that work will not enjoy protection under s. 7 of the Charter. There would then be created a constitutionally privileged class of self employed medical practitioners, and perhaps other professionals, who obtain financial support from the government but are not strictly speaking employees or contractors. It is submitted that none of these distinctions (government employee/self employed, government contractor/self employed, professional/non-professional), are meaningful in adopting a purposive approach to the meaning of "liberty and security of the person" in s. 7 of the Charter.

10. There can be little doubt that people derive great personal satisfaction from their work - "A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being" (per Dickson C.J.C. in Reference Re Public Service Employee Relations Act, quoted in Wilson at p. 16). If this satisfaction is the underlying component of liberty as the Court in Wilson implies then, with respect, s. 7 must protect any form of employment, however humble, not just

the practice of a profession. That is, on this rationale s. 7 would have to protect the "right to work".

Wilson v. Medical Services Commission at pp. 16-18.

11. Instead, adopting a purposive approach, it is submitted that the intent of s. 7 of the Charter is to protect legal rights and to restrain governmental restrictions on liberty and security of the person which occur as a result of an individual's interaction with the justice system and its administration (Reference Re Section 193 and 195.1(1)(c) of the Criminal Code at p. 1173).

12. Section 7 was not intended as a mechanism to redistribute benefits or privileges available from the government such as are available to medical practitioners under the Medical Services Plan whereby they may bill the Plan on a fee for service basis for services rendered to their patients. The policy of the government underlying the Medical Services Plan limitations on medical manpower was to make the most efficient use of limited financial resources while at the same time ensuring an adequate level of medical services to the citizens of British Columbia. (Wilson at p. 10).

13. The decision in Wilson distorts those priorities. Inevitably it involves the Court adjudicating the merits of public policy and second guessing the Legislature, a function which this Court has said was inappropriate in applying the Charter.

Reference Re Section 94(2) Motor Vehicle Act [1985] 2 S.C.R. 486 at p. 497-499.

Reference Re Section 193 and 195.1(1)(c) of the Criminal Code at pp. 1176-1177.

14. Thus, for the reasons given by Lamer J. in Reference Re Section 193 and 195.1(1)(c) of the Criminal Code it is submitted that the first constitutional question should be answered in the negative. It would then be unnecessary to answer the second question.

B. SECTION 54(2) OF THE LAW SOCIETY ACT OF MANITOBA DOES NOT VIOLATE THE PRINCIPLES OF FUNDAMENTAL JUSTICE

15. The Appellant asserts:

> "Under the Law Society Act, the Benchers could obtain independent funds for the purpose of paying the expenses of it's (sic) 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".
>
> Revised Factum of the Appellant, pp. 12 and 13.

16. Thus, it is concluded that:

> "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".
>
> Revised Factum of the Appellant, p. 13.

17. With respect, the fundamental problem with this argument is that it assumes the Benchers of the Law Society will act in excess of their jurisdiction by taking into account irrelevant considerations in determining whether a member of the Society has been guilty of professional misconduct or of conduct unbecoming. It is submitted that it would be wrong in principle to find that a statutory provision violates the principles of fundamental justice simply because of the mere possibility

that a decision maker acting pursuant to the authority of that statutory provision might act in excess of jurisdiction.

18. The onus of proof is on the Appellant to show that there is a reasonable apprehension of bias arising from the order of costs mandated by s. 52(4) of the Law Society Act. If he can meet that onus of proof then it is unnecessary to have recourse to the Charter since a finding of reasonable apprehension of bias would in itself as an error of jurisdiction lead to an order of prohibition against the tribunal. Where it is unnecessary to rely on the Charter the Courts should exercise caution.

> Law Society of Upper Canada v. Skapinker [1984] 1 S.C.R. 357.

19. The Appellant has presented no evidence of the significance of any order for costs of investigation in relation to the overall revenues of the Law Society derived from its members. At some point those investigative costs would be so minimal that an allegation of pecuniary benefit levelled at the Benchers would have no foundation at all.

20. In any case, the Court should assume that the Benchers would act honestly and in good faith and in the best interest of the public and not permit irrelevant considerations to influence their decisions.

21. It might just as easily be argued that because of the monopoly enjoyed by most self governing professions the

Benchers would benefit by elimination of a competitor and so their judgment could be influenced. Also, where the governing statute of the profession permits fines to be levied against members of the profession it could be argued that the Benchers might be motivated by improper considerations. These further potential arguments, it is submitted, simply illustrate the undesirability of deciding Charter questions in a factual vacuum.

MacKay v. The Government of Manitoba [1989] 2 S.C.R. 357.

Legal Profession Act, R.S.B.C. 1979, c. 226.5, s. 46.

Law Society Act, R.S.M. 1987, C. L100, s. 52(1)(e).

22. In assessing the type of administrative structure adopted by the Legislative Assembly the Court should not allow the principles of fundamental justice, which in administrative law may be equated to administrative fairness or natural justice, to become a constitutional straitjacket:

> "Some pragmatism is involved in balancing between fairness and efficiency. The provinces must be given room to make choices regarding the type of administrative structure that will suit their needs unless the use of such a structure is in itself so manifestly unfair, having regard to the decisions it is called upon to make, as to violate the principles of fundamental justice".

Jones v. The Queen [1986] 2 S.C.R. 284 at p. 304.

Brosseau v. Alberta Securities Commission [1989] 1 S.C.R. 301 at pp. 313-315.

Reference Re Section 193 and 195.1(1)(c) at pp. 1176-1177.

23. It is quite common under the statutes of British Columbia to empower a professional disciplinary body or a regulatory tribunal such as the Utilities Commission or Securities Commission to be able to assess costs of an investigation or a hearing before the tribunal (see Appendix "A"). In each case a person who comes before the professional disciplinary body or regulatory tribunal has voluntarily engaged in a profession or regulated business. Having gained the benefits of a regulatory statute (i.e. in the case of self governing professionals a monopoly on the practice of the profession or in the case of a public utility a monopoly on the provision of electrical, water etc. services to the public) a person should not be heard to complain that it is fundamentally unjust that they should bear the burden, including the costs of investigation or hearing, for their own failure to meet the standards imposed by that regulatory statute.

PART IV

NATURE OF ORDER SOUGHT

24. That the constitutional questions be answered as follows:

1. Does s. 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?

   Answer: No.

2. If the answer to question #1 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?

   Answer: It is not necessary to answer this question.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

GEORGE H. COPLEY, ESQ.
Counsel for A.G.B.C.

DATED: This 12th day of April, 1991.
Victoria, B.C.

PART V

LIST OF AUTHORITIES

APPENDIX "A"

Accountants (Chartered) Act, R.S.B.C. 1979, c. 2, s. 20(1)(f)

Dentists Act, R.S.B.C. 1979, c. 92, s. 42.1(2)(g)

Engineers Act, R.S.B.C. 1979, c. 109, s. 24.7

Hearing Aid Act, R.S.B.C. 1979, c. 164, s. 8(2)(c)

Land Surveyors Act, R.S.B.C. 1979, c. 217, s. 51(5)

Legal Profession Act, R.S.B.C. 1979, c. 226.5, ss. 46 and 55

Medical Practitioners Act, R.S.B.C. 1979, c. 254, s. 53

Notaries Act, R.S.B.C. 1979, c. 299.1, s. 30

Nurses (Registered) Act, R.S.B.C. 1979, c. 302, s. 30

Optometrists Act, R.S.B.C. 1979, c. 307, s. 14(1.1)(f)

Pharmacists Act, R.S.B.C. 1979, c. 326, s. 45

Psychologists Act, R.S.B.C. 1979, c. 342, s. 11(1)

Securities Act, R.S.B.C. 1979, c. 380.1, s. 134

Utilities Commission Act, R.S.B.C. 1979, c. 421.5, s. 133(1)