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21671

Court No. 21671

SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal for the Province of Manitoba)

B E T W E E N :

DAVID MORLEY PEARLMAN

(APPLICANT), APPELLANT

- and -

THE MANITOBA LAW SOCIETY JUDICIAL COMMITTEE

(RESPONDENT), RESPONDENT

- and -

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THE ATTORNEY GENERAL OF QUEBEC,
THE ATTORNEY GENERAL OF BRITISH COLUMBIA,
THE ATTORNEY GENERAL OF MANITOBA,
THE ATTORNEY GENERAL OF SASKATCHEWAN

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FACTUM OF THE INTERVENOR ATTORNEY GENERAL OF ONTARIO

PART I: STATEMENT OF FACTS

1. The Attorney General of Ontario accepts as correct the facts as set out in the Factum of the Respondent, the Law Society of Manitoba.

PART II: THE CONSTITUTIONAL QUESTION

2. The Constitutional Questions in this appeal are as follows:

a. 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?

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?

3. The Attorney General of Ontario submits that the first question should be answered in the negative and the second question in the affirmative. The Attorney General relies on the submissions of the Attorney General of Manitoba with respect to the determination of s.1 of the Charter of Rights and Freedoms (the Charter).

PART III: THE ARGUMENT

4. Section 7 of the Charter involves a two step analysis. First, it must be determined whether there has been a deprivation of "life, liberty or security of the person." Only when this first step has been answered affirmatively, is it necessary to then consider whether there has been a violation of "the principles of fundamental justice."

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

I. LIBERTY OR SECURITY OF THE PERSON

(1) INTRODUCTION

5. The first issue to be decided in this appeal is whether the phrase "deprivation of...liberty or security of the person" includes a right not to be threatened with the deprivation of certain work. This, in turn, raises the issue of what are the economic limits of liberty or security of the person.

6. Academics and commentators have divided on the issue of whether liberty or security of the person contains an economic component and the extent of the economic component. For example, certain authors argue that so-called welfare rights are encompassed within the meaning of liberty or security of the person. Other authors, however, argue that any form of economic right is currently excluded and it would require a constitutional amendment to provide for economic rights.

I. Johnstone, "Section 7 of the Charter and Constitutionally Protected Welfare" (1988) 46 University of Toronto Faculty Law Review 1 (arguing that security of the person includes the protection of welfare benefits)

M. Jackman, "The Protection of Welfare Rights Under the Charter" (1988) 20 Ottawa Law Rev. 257 (arguing that s.7 creates a right to an adequate standard of social and economic welfare)

P. Augustine, "Protection of the Right to Property under the Canadian Charter of Rights and Freedoms" (1989) 18 Ottawa Law Review 55 (arguing that there is no constitutional right to property but that it is appropriate to provide one)

D. Lepofsky, "A Problematic Judicial Foray Into Legislative Policy-Making: Wilson v. B.C Medical Services Commission" (1989) 68 Can. Bar Rev. 615 (arguing that there is no right to work)

H. Schwartz, " In Defence of Wilson: Wilson v. Medical Services Commission of British Columbia " (1990) 69 Can. Bar Rev. 162 (arguing that there is a right to prevent government from prohibiting or banning the ability to practice a profession)

Parkdale Community Legal Services, " Homelessness and the Right to Shelter," (1988) 4 Journal of Law and Policy 33 (arguing that homelessness falls within security of the person)

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7. Equally, the lower courts have divided on the question of whether life or security of the person includes an economic component and more particularly, whether it includes the right to work.

See Appendix I for lower court decisions and Paragraphs 29-32, infra

8. The Supreme Court of Canada has not yet dealt squarely with the issue of the breadth of economic rights under s. 7 of the Charter. Rather, the Court has left open the question of whether liberty or security of the person includes the right to work, the right
20 to economic benefits fundamental to human life or survival and the right to social security, equal pay for equal work, adequate food, clothing and shelter.

Irwin Toy v. A.G Quebec, [1989] 1 S.C.R 927 at p.1003

Reference Re ss. 193 and 195(1)(c) of the Criminal Code, [1990] 1 S.C.R. 1123 at p.1176-1177 (per Lamer C.J.)

9. The Attorney General will argue that based on a purposive approach to the Charter as explained in the jurisprudence, the placement of s.7 within the Charter framework and the legislative history, liberty or security of the person may protect only a very limited
30 range of interests with an economic component. In particular, it is submitted that the loss

of an ability to engage in particular work does not engage a liberty or security of the person interest.

(2) THE APPROPRIATE APPROACH

10. In considering how to approach liberty or security of the person, regard should be had to the nature of the interest threatened by the State and the position of the individual as a result of the deprivation. In particular, it submitted that it is appropriate to initially consider whether there is an actual or potential loss of physical integrity. In addition, it may be appropriate in certain circumstances to go beyond physical integrity to examine the deprivation of an economic benefit provided by the State where the result of the deprivation is that an individual falls below a minimum standard of living necessary for development within our society.

11. It is submitted that questions pertaining to the ambit of an economic right which is based on a minimum standard of living ought to be left for a case which raises the appropriate factual foundation. In particular, difficult questions relating to:

i. What is the appropriate level necessary to constitute a minimum standard of living. In this regard, a Court may rely on general welfare benefits already provided by Legislatures and the Parliament, international instruments or other indicators of what society views as a minimum standard of living;

ii. Whether the same rights would apply to individuals who are excluded from applying for the minimum economic benefit; and

iii. Whether there is a substantive right to a minimum standard of living in the absence of any State benefits,

should not be dealt with in a vaccuum. In the case on appeal, this Court need only ensure

that the door is not closed with respect to economic rights which are related to a minimum standard of living.

MacKay v. A.G. Manitoba, [1989] 2 S.C.R. 357 at p.366

Danson v. A.G. Ontario, [1990] 7 S.C.R. 1086 at pp.1099-1102

a. **Physical Integrity**

12. When analyzing whether there is a threat to or loss of physical integrity, the Court may consider not only imprisonment but also detention, psychiatric incarceration, deportation, bodily invasion or unconsented to invasions of mental faculties such as brainwashing. In addition, the loss of an economic benefit such as welfare could have physical consequences such as malnutrition. These circumstances are likely to produce severe ramifications on both physical and mental well-being.

Reference re s.193 and 195(1)(c) of the Criminal Code, supra, at pp. 1175-1178 (threat of loss of control over physical integrity)

R. v. Vaillancourt, [1987] 2 S.C.R 636 at p.651-652 (threat of imprisonment)

Singh v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177 at p. 207 (threat of deportation)

R. v. Dyment, [1988] 2 S.C.R. 417 (seizure of blood without consent in the context of s. 8 of the Charter)

13. It is submitted that it would be unduly restrictive to require there to be a criminal charge before there could be a deprivation of physical integrity. In the context of s. 7, there is no textual requirement that criminal, quasi-criminal or administrative proceedings be distinguished. It is, therefore, preferable to adopt a functional approach and analyze the nature of the deprivation resulting from these types of proceedings.

14. Further, it would be inappropriate to include only actual loss of physical integrity since the threat of the loss of physical integrity may result in highly detrimental consequences.

Mills v. R., [1986] 1 S.C.R. 863 at p.919 (per Lamer C.J., dissenting on other grounds)

R. v. Oakes, [1986] 1 S.C.R. 103 at pp.119-120

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15. It is submitted that all the judgments in R. v. Morgentaler are consistent with the application of the broad physical integrity test suggested in this factum. Specifically, a plurality of the Court relies on the actual threat of incarceration associated with the violation of a criminal offence. A minority of the Court refers to a combination of physical integrity, e.g. the inability of women to control their bodies, and mental integrity, e.g. severe psychological stress. This decision does not stand for the proposition that any psychological stress imposed by legislation is sufficient to invoke a liberty or security of the person interest.

20 R. v. Morgentaler, [1988] 1 S.C.R. 30

b. Liberty or Security of the Person With an Economic Component

16. As argued above, the case on appeal should not close the door on all economic rights under s.7. The rationale for this position is that an individual may be able to show in a future case that the deprivation of certain economic benefits necessary to maintain a minimum standard of living places him or her in a similar position of vulnerability and

likely to suffer similar consequences as an individual who is threatened with loss of physical integrity. Thus, the consequences of the loss of an economic benefit may be "akin" to the loss of physical integrity.

J. Mashaw, Due Process and the Administrative State (1985), at p. 214:

> [I]t may be sensible to say that welfare recipients, along with the criminally accused, are in peculiarly precarious positions. Manipulation of the power to withhold basic sustenance, like manipulation of the power to punish, poses special dangers for the maintenance of individual liberty. And, as in the criminal context, this special danger can be combated only by making the government bear large risks of error in the private individual's favour.[Emphasis Added]

I. Johnstone, supra, at pp.8-9 (setting out the effects of poverty on the individual)

17. In determining whether an individual is denied a minimum standard of living necessary to develop his or her potential, the Court may consider the level of income (e.g., welfare), nourishment (e.g., food stamps) and shelter (e.g., public housing). While this list is clearly not exhaustive, it provides indicators of the ambit of economic rights based on a minimum standard of living, and clearly demonstrates that the case on appeal does not raise such a situation.

c. A Purposive Approach

18. Limiting economic rights in the manner described above and in particular, denying a right to work under liberty or security of the person, is consistent with the purposive approach to the Charter taken by this Court. In particular, this Court has held that:

i. The Charter "does not extend to the right to transact business whenever one wishes;"

R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713 at p.785-786

ii. While s.6(2)(b) has an economic component, it does not create "a free-standing right to work," divorced from the mobility provisions in which it is found; and

Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R 357 at p.380

Black v. Law Society of Alberta, [1989] 1 S.C.R 591 at p.614

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iii. Section 7, "as a general matter, does not encompass economic rights" and does not apply to a "corporation's economic rights."

Irwin Toy v. A.G Quebec, [1989] 1 S.C.R. 927 at p. 1003-1004

Dywidag Systems International Canada Ltd. v. Zutphen Brothers Construction Ltd., [1990] 1 S.C.R. 705 at p.709

20 19. Further, excluding the right to work from s.7 of the Charter does not prevent this Court from considering in the same section, the particular situation of vulnerable individuals. A purposive approach may entail limiting the applicability of a Charter section to a clearly defined class of individuals. For example, under s. 15(1), the non-discrimination clause, this Court has affirmed in a trilogy of cases that the purpose of this provision is to "remedy or prevent discrimination against groups suffering social, political or legal disadvantages." Indicia of these groups include "stereotyping, historical disadvantage or vulnerability to political and social prejudice."

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 at pp. 180-181

30

R. v. Turpin, [1989] 1 S.C.R. 1296 at pp. 1331-1333

Reference Re Workers' Compensation Act, 1983 (Nfld.), [1989] 1 S.C.R. 922 at p. 922

20. Equally, in the context of s.1, this Court has affirmed that the Charter is not intended to deprive vulnerable individuals of special protection nor is it intended to be "an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons."

R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R 713 at p.779

Irwin Toy v. A.G. Quebec, supra, at p. 993

R v. Oakes, supra, at p.136

21. It is submitted that to create a constitutional liberty or security of the person interest for members of a self-regulating profession who seek a right to continue working within that profession conflicts with a purposive approach to the Charter. In particular, professionals start from a position of privilege in that:

i. They are economically privileged as members of a professional association or society which can limit the supply of professionals; and

ii. They are politically privileged since the society or association can speak for their interests in the political arena.

B. Shimberg et. al., Occupation Licensing: Practices and Policies (1973) at pp. 12-14

d. The Structure of the Charter

22. It is submitted that the placement of section 7 in the Charter supports the position that section 7 does not protect a right to work. Sections 7-14 are headed "legal rights." Sections 8-14 list protections typically associated with criminal or quasi-criminal proceedings rather than economic matters. Section 7 is, in this regard, unique since it may provide individuals with broader rights than ss.8-14 but at the same time, it should not be so broadly read as to include far-reaching economic rights such as the right to work.

Canadian Charter of Rights and Freedoms, ss. 7-14

23. The structure of section 7 and its relation to other sections, however, does not necessarily exclude consideration of every interest which has an economic component. Moreover, the general structure of the Charter structure supports particular assistance being given for vulnerable individuals in certain circumstances. For example, sections 15(2) and 6(4) of the Charter permit special programs for disadvantaged individuals.

Canadian Charter of Rights and Freedoms, ss. 6(4), 15(2),

R. v. Keegstra, unreported decision of the Supreme Court of Canada, December 13, 1990 at pp. 53-54

e. **The Legislative History**

24. Lastly, the legislative history of the Charter indicates a will to exclude broad-ranging economic rights. Specifically, the legislative history indicates a specific intent on the part of the drafters to exclude property rights from s.7 of the Charter. In addition, in the context of s.36 of the Constitution Act, 1982, a proposed amendment to include the all-encompassing International Covenant on Economic, Social and Cultural Rights was defeated in the Special Joint Committee.

Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada , 32nd Parl. 1st Session, Issue No. 27 at 46:30

Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, 32nd Parl., 1st Session, Issue no. 49, at 49:71

International Covenant on Economic, Social and Cultural Rights, Article 6, See Appendix III.

P. Augustine, "Protection of the Right to Property Under the Canadian Charter of Rights and Freedoms," supra, at pp.67-68

Constitution Act, 1982, s.36

25. Rather than using the language of the International Covenant on Economic, Social and Cultural Rights, the words chosen for s.7 of the Charter correspond to Article 3 of the Universal Declaration of Human Rights, Article 9 of the International Covenant on Civil and Political Rights and Article 5, section 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In each of these instances, the intent was to limit liberty or security of the person to political and civil rights. The full panoply of economic and social rights are included in other articles or international instruments.

R. v. Keegstra, supra, at p. 47 (per Dickson C.J.)

Universal Declaration of Human Rights, Article 3, See Appendix III

International Covenant on Civil and Political Rights, Article 9, See Appendix III

European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 5, section 1, See Appendix III

26. Although Wilson J. in Singh v. Minister of Employment and Immigration cited with approval Article 25 of the Universal Declaration of Human Rights, this provision gives rise to certain economic rights fundamental to human survival, and does not extend to the general right to work.

Universal Declaration of Human Rights, Article 25

Singh v. Minister of Employment and Immigration, supra, at p.207

27. In summary, it is submitted that the deprivation of a license to practice a profession does not engage a liberty or security of the person interest since it is the type of broad economic claim which was intentionally excluded from the Charter. Economic claims based on minimum standards of living, however, were not explicitly excluded and may be consistent with a purposive approach to the Charter. Such claims, therefore, should not be prevented in this case from being brought forward in the future.

(3) THE COMPETING APPROACHES

28. There are at least four alternative approaches to determining whether there has been a deprivation of liberty or security of the person. It is submitted that each of these tests is inappropriate for the reasons discussed below.

a. Any Economic Deprivation

29. To permit arguments to be made based on any economic deprivation does not provide a sufficient constraint on the ambit of liberty or security of the person. In a market economy, where most State activity involves an economic component, the judiciary would be required to review a myriad of activities carried out by the State. For example, such an approach would require the Courts to review minimum wage regulation, zoning bylaws, taxing statutes, marketing schemes and rent review regulation, to determine whether they were procedurally or substantively in accordance with the principles of fundamental justice and s.1 of the Charter.

See Appendix I for the range of possible economic-based claims

b. **The Right to Practice a Profession**

30. No Canadian Court, at any level, has held that there is a free standing right to work. Although the British Columbia Court of Appeal and the Nova Scotia Court of Appeal (relying on the B.C cases) have attempted to create a test for liberty or security of the person based on the specific nature of the activity carried on by the individual, these jurisdictions have not held that there is an unimpeded right to work.

Wilson v. B.C. Medical Services Commission (1988), [1989] 2 W.W.R. 1 (B.C.C.A.) (leave to appeal to S.C.C refused):

> We have no doubt that regulation of such matters as standards of admission, mandatory insurance for the protection of the public, and standards of practice and of behaviour will not constitute an infringement of s. 7. [Emphasis added]

Whitbread v. Walley, [1988] 5. W.W.R. 313 at 323-325 (B.C.C.A.) (reversed on other grounds in the Supreme Court of Canada ,unreported, December 20, 1990)

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

31. Moreover, it is submitted that the distinction between different kinds of work on the basis that some work is purely economic or commercial whereas other work relates to more profound human needs creates a dichotomy where no principled distinction exists.

D. Lepofsky, "A Problematic Judicial Foray into Legislative Policy-Making" (1990) 68 C.B.R. 615 at p.623:

> [There] is no principled explanation as to why a professional's desire to work is more than an economic right, while everyone else's desire to work is a matter of pure economic right.
>
> There is no constitutional magic in the work of professionals, as compared to the work of others. Work is work, no matter

> who does it. A grant of preferred, special status to physicians (or other professionals) under section 7, simply because they are professionals and not skilled, semi-skilled labourers or unskilled labourers, fundamentally conflicts with the Charter's core egalitarian underpinnings.

Reference re ss. 193 and 195(1)(1)(c) of the Criminal Code, [1990] 1 S.C.R. 1123 at p. 1170 (per Lamer C.J.):

> [I]t seems to me that the distinction sought to be drawn by the court between a right to work and a right to pursue a profession is, with respect, not one that aids in an understanding of the scope of 'liberty' under s.7 of the Charter.

32. It is, therefore, submitted that this Court ought to follow the decisions of the Ontario, Alberta, Saskatchewan and Manitoba Courts of Appeal, which have rejected the distinction between professionals and other kinds of workers. These Courts have uniformly held that there is no constitutional right to practice a profession or to any other kind of work under s.7 of the Charter.

Biscotti v. Ontario Securities Commission (1991), 1 O.R.(3d) 409 (Ont.C.A) at p.412, relying on the decision of the lower court at 74 O.R(2d) 119 at p.123

R. v. Miles of Music Ltd. (1991), 74 O.R.(2d) 518 (Ont. C.A.) at pp. 529-530

City of Calgary v. Budge (unreported decision of the Alberta Court of Appeal, dated January 23, 1991) at pp. 8-15

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

c. The Right to Self-Respect, Dignity and Autonomy

33. The general concepts of dignity, self respect and autonomy have been said to underlie all Charter rights. More particularly, it has been suggested that liberty or security of the person refers to the self-respect, dignity or autonomy of individuals within our society.

Andrews v. Law Society of B.C., [1989] 1 S.C.R. 143 at p.171 (per McIntyre J.)

R v. Big M. Drug Mart, [1985] 1 S.C.R 295 at p.336 (per Dickson C.J.)

Reference re B.C. Motor Vehicle Act, [1985] 2 S.C.R 486 at p.503 (per Dickson C.J.)

I. Johnstone, supra, at pp. 2,4-7, 27

34. It is submitted that to tie the meaning of liberty or security of the person to the question of self-respect, dignity or autonomy begs the question of what are the limits of s.7 of the Charter. It is not that the assertion of these values is right or wrong but they are indeterminate, and require clarification or refinement. Without this further step, these words are capable of providing both narrow and broad s.7 rights. For example, these words have been narrowly defined as the right to "equality, privacy and participation in a fair process" and broadly defined as the right to "pursue our own good in our own way."

J. Mashaw, Due Process in the Administrative State (1985) at pp. 172-182

Jones v. R, [1986] 2 S.C.R. 284 at pp.318-319 (per Wilson J.)

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

35. Further, to provide liberty or security of the person with a broad definition tied to self-respect, dignity or autonomy, could effectively usurp the application and purpose of

other provisions of the Charter. For example, the denial of the rights and freedoms contained in s.2 of the Charter could be subsumed under the general rubric of liberty interests.

> Reference Re. ss. 193 and 195(1)(c) of the Criminal Code, supra (per Lamer C.J.):
>
> If liberty or security of the person under s.7 of the Charter were defined in terms of attributes such as dignity, self, worth and emotional well-being, it seems that liberty under s.7 would be all inclusive. In such a state of affairs there would be serious reason to question the independent existence in the Charter of other rights and freedoms such as freedom of religion and conscience or freedom of expression. [Emphasis Added]

d. The American Approach

36. The American approach to economic rights under the Fourteenth Amendment is premised on the principle that "property" is protected. The characterization of property rights by the Supreme Court of the United States, however, has been in a constant state of flux. For example, initially, it protected only traditional property rights (e.g. commercial and land-owner rights) although more recently, it has been held to include the so-called new property rights (e.g welfare recipient rights). Equally, the degree of substantive and procedural due process attached to property rights has changed over time.

Lochner v. New York, 198 U.S 45 (1905)

Goldberg v. Kelly, 397 U.S.254 (1970)

Matthews v. Eldridge, 424 U.S 319 (1976)

L. Tribe, Constitutional Choices (1988) at pp.186-187

37. It is submitted that the American approach to economic rights should not be imported into Canada because of:

i. Textual distinctions in the relevant constitutional provisions. In particular, it is noteworthy that under the American Fourteenth Amendment, "....[No] State shall deprive any person of life, liberty , or property...";

Reference Re ss. 193 and 195(1)(c) of the Criminal Code, supra, at p.1164, 1171

ii. The criticisms levied against the American law;

Reference Re. ss. 193 and 195(1)(c) of the Criminal Code, supra, at p. 1171:

J. Mashaw, Due Process and the Administrative State, supra, at pp. 35-41

iii. The different structure of the Charter including sections 1, 33 and 52 of the Charter which have no counterpart in the American Constitution; and

Reference re B.C Motor Vehicle Act, [1985] 2 S.C.R. 486 at p. 498

R. v. Keegstra, supra, at p. 39

iv. The different historical role of government in the United States and Canada.

McKinney et al. v. Board of Governors of the University of Guelph et al., (unreported decision of the Supreme Court of Canada, December 6, 1990) at pp. 32, 47 (per Wilson J., dissenting on the issue of state action):

> The doctrine of constitutionalism was a driving force behind the creation of the American Constitution. The American Bill of Rights was in large measure the product of a revolution... Canada does not share this history....
>
> [C]anadians have a somewhat different attitude towards government and its role from our U.S neighbours. Canadians recognize that government has traditionally had and continues to have an important role to play in the creation of the preservation of a just Canadian society. The State has been looked to and has responded to demands that Canadians be guaranteed adequate health care, access to education and a minimum level of financial security to name but a few examples. [Emphasis added]

Reference re ss. 193 and 195(a)(c) of the Criminal Code, supra, at p. 1170-1171

Irwin Toy v. A.G. Quebec, supra, at p.1003

38. It is, therefore, submitted that each of the alternative approaches to liberty or security of the person is flawed in that they fail to provide clear, principled and purposive interpretations of the words "liberty or security of the person."

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II. THE PRINCIPLES OF FUNDAMENTAL JUSTICE

39. If this Court should find that there has been a deprivation of liberty or security of the person as a result of the threat of loss of a license to practice a profession, then it must decide whether s.52(4) of the Law Society Act of Manitoba, which enables the disciplinary tribunal to award costs of the investigation, payable to the Law Society against a professional found guilty of misconduct, violates the principles of fundamental justice.

20

(1) THE CONTEXTUAL APPROACH

40. In determining the sources of the principles of fundamental justice, this Court should employ the so-called "contextual" approach, i.e., the nature of the review of the right should be correlated to the context in which the deprivation took place. Specifically, the more severe the deprivation of liberty or security of the person, the more stringent the nature of the principles of fundamental justice.

J. Evans, "The Principles of Fundamental Justice: The Constitution and the Common Law," (1991) 29 Osgoode Hall L.J. 51, at p.71

U.S. v. Cotroni, [1989] 1 S.C.R. 1469 at pp.1489-1490 (per La Forest J.)

Jones v. R., [1986] 2 S.C.R. 284 at p.304-305 (per La Forest J.)

Edmonton Journal v. A.G. Alberta, [1989] 2 S.C.R. 1326 at pp. 1355-1356 (per Wilson J.)

Rocket v. Royal College of Dental Surgeons, [1990] S.C.R. 230 at pp. 246-247 (per McLachlin J.)

Reference Re ss. 193 and 195(1)(c) of the Code, supra, at pp. 1136 (per Dickson C.J.)

R. v. Keegstra, supra, at p. 53-54 (per Dickson C.J.)

41. If this Court finds a deprivation of liberty or security of the person in the case on appeal, then it is submitted that the context is not one which strikes at the core of s.7 rights. Consequently, the substantive and procedural requirements of fundamental justice in the present case ought to be defined differently than, for example, in a criminal proceeding. The principles relating to bias ought to be less onerous in the administrative tribunal context and even less onerous in the self-regulating professional organization context.

Howard v. Stoney Mountain Institution, [1984] 2 F.C. 642 (Fed. C.A) at p.681 (per MacGuigan J.), appeal quashed in the S.C.C. on other grounds at [1987] 2 S.C.R 687:

> There is a sliding standard of adequacy which can be defined only in reference to the particular degree of liberty at stake and the particular procedural safeguard in question.

(2) THE SOURCES OF THE PRINCIPLES OF FUNDAMENTAL JUSTICE

42. The principles of fundamental justice are found in the "basic tenets of our legal system." It is submitted that these tenets may be derived from: (a) the common law; (b) our historical roots; (c) the American jurisprudence; and (d) s. 11(d) of the Charter.

Reference re B.C. Motor Vehicle Act, supra, at pp. 503,512-513

(a) The Common Law

43. It is submitted that the common law principles of governing judicial review of administrative action constitute an appropriate starting point for determining the principles of fundamental justice in the administrative context.

J. Evans, supra, at pp.74, 79:

> It is at least as plausible to maintain that the reference point for defining the content of the principles of fundamental justice - the basic tenets of our legal system - includes a recognition that courts have a limited institutional competence to design procedural detail for the wide variety of administrative agencies that they supervise; that the content... is the result of balancing often competing factors; and that the perspective of the agency can be as valuable to the elaboration of the requirements of fairness in specific contexts as that of a reviewing court. These considerations do not lose their relevance simply because the standard of fairness being applied has its source in the constitution rather than the common law. [Emphasis Added]

44. In particular, the following principles applicable to allegations of bias in administrative law are equally applicable under s.7 of the Charter:

(i) As a general matter, the degree of natural justice required of administrative tribunals varies according to the nature of the tribunal, and is lower than that required of courts;

International Woodworkers of America v. Consolidated Bathurst, [1990] 1 S.C.R. 282 at pp. 323-324

Syndicat des Employes de Production du Quebec et de L'Acadie v. Canadian Human Rights Commission, [1989] 2 S.C.R. 879 at pp.895-896

(ii) Where there is an allegation of bias based on an institutional relationship between the decision-maker and another party, the test is as set out in Committee for Justice and Liberty v. National Energy Board, [1976] 1 S.C.R. 369 at p.394 (per de Grandpre J., dissenting):

> [t]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information....the test is what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly. [Emphasis Added]

Old St. Boniface Residents Association Inc. v. City of Winnipeg (1991), 116 N.R. 48 (S.C.C.) at pp. 59-61 (per Sopinka J.)(as applied to public officials)

Brosseau v. Alberta Securities Commission, [1989] 1 S.C.R. 301 at pp.310, 314-315 (as applied to relationships between component parts of an administrative body)

(iii) Further, the administrative law test of bias does not require the absence of any influence, but asks whether the decision-maker is free to decide according to his or her own conscience and opinions;

International Woodworkers of America v. Consolidated Bathurst, supra, at p. 334

(iv) Where there is an allegation of bias in a self-regulating framework, the standard of review is lower than other tribunals or courts because of the necessary relationship between the disciplinary tribunal, the governing body and the particular member;

Re W. D. Latimer Co. Ltd. and Bray (1974), 6 O.R(2d) 129 (Ont. C.A) (per Dubin J.) at p.138:

> The domestic tribunal that adjudicates on the rights of members is not subject to those disqualifying bias rules applicable to administrative tribunals. The reason for such distinction is stated quite clearly by Maugham, J., in Maclean v. Workers' Union, [1929] 1 Ch. 602 at 626:
>
> > If we consider first the case of a pecuniary interest it is impossible in general to imply from the terms of the rules such a disqualification as regards the members of a domestic forum. For example, when members of a club expel another member under their rules, generally speaking, they all have a pecuniary interest in the matter. Moreover the members of a domestic tribunal have other interests in the decision which may well render them something less than impartial. They have, for example, the interests of their association or body to protect, and may properly regard these interests as a matter of great importance. In many cases the tribunal is necessarily entrusted with the duty of appearing to act as prosecutors as well as that of judges; for there is no one else to prosecute. [Emphasis Added]

(v) With respect to professional disciplinary bodies, the Courts have, in particular, adopted a deferential approach to allegations of bias, recognizing the benefits of peer review and the expertise of the members.

Ringrose v. College of Physicians and Surgeons of Alberta, [1977] 1 S.C.R. 814 at pp. 824-825

Re Law Society of Manitoba and Savino (1983), 1 D.L.R.(4th)285 (Man. C.A.) at p. 292

(b) Historical Roots

45. It is submitted that professional self-regulating bodies and disciplinary tribunals have long been part of the Canadian tradition. The Law Society, in particular, "since its inception in the United Kingdom centuries ago, has been granted monitoring and controlling powers over its membership, primarily for the benefit of the public, which it is

called to serve." In addition, a traditional role of Law Societies is to develop conflict of interest rules to prevent allegations of bias.

Re Law Society of Manitoba and Savino, supra, at p.292 (per Monnin C.J.M.)

46. Further, every province across the country has empowered its law society disciplinary tribunal to award costs against a member found guilty of misconduct.

See Appendix 2 for a comparative review of the equivalent provisions in other provinces to s.52(4) of the Law Society Act of Manitoba

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(c) The American law

47. Although it has been argued at paragraph 37 that the American law in this context should not be incorporated into the Charter, it is submitted that if this Court is inclined to rely on this law, then it should take into account that the American courts have adopted a flexible approach to the requirements of due process and tailored these

20 requirements to the nature of the tribunal.

Matthews v. Eldridge, supra, at pp. 333-336

(d) Section 11(d) of the Charter

48. Section 11(d) of the Charter, the right to a full and fair hearing, also articulates certain principles relevant to the concept of fundamental justice. This provision applies only to individuals who have been charged with an offence. Although these individuals ought to be entitled to a higher standard of procedural and substantive justice than individuals in an

administrative context, it is, nevertheless, appropriate to consider the following test, framed by this Court, for bias in s.11(d):

> Whether a reasonable person, who was informed of the relevant statutory provisions, their historical background, and the traditions surrounding them, after viewing the matter realistically and practically would conclude that a [judge or tribunal member] was a tribunal which could make an independent and impartial adjudication. [Emphasis Added]

Valente v. R, [1985] 1 S.C.R.673, at p.684, citing with approval the test put forward in the Court of Appeal (per Howland C.J.O.)

49. "Impartiality" in Valente v. R, supra, was held to refer to the "state of mind or attitude of the tribunal in relation to the issues or parties in a particular case." This is to be contrasted with "independence," which focuses on the structural relationship between the tribunal and other branches of the regulatory body, government or third party. Independence and impartiality, however, are not completely unrelated since independence may promote the collective impartiality of a tribunal. Once the independence of a tribunal is established, however, any allegation of bias must be assessed on a case-by case basis.

Valente v. R, supra, at p. 685

MacKeigan v. Hickman, [1989] 2 S.C.R. 796 at p.826

Genereux v. Attorney General of Canada, (unreported translation of the Federal Court of Appeal, dated April 9, 1990),(leave to S.C.C. granted), at p.9 (per Barbeau J.)

Attorney General of Quebec v. Lippé (1990), 80 C.R.(3d) 1 at pp. 49-50 (per Tourigny J.) upheld at (1991), 61 C.C.C.(3d) 127 (judgment rendered with reasons forthcoming)

Ian Greene, The Doctrine of Judicial Independence (1988) 26 Osgoode Hall Law Journal 177 at pp.191-192

50. In addition, it has been acknowledged within the context of s.11(d), that the tests for impartiality and independence will be coloured by the nature of the tribunal, and that not all tribunals need have the same level of protection as the courts. In particular, judgment by peers in the context of the court martial system has been upheld under s.11(d) of the Charter.

Genereux v. Attorney General of Canada, supra, at p. 2 (per Pratte J.):

> [T]here is no magic formula for guaranteeing the independence of all tribunals. Tribunals are not all created in the same way; they are often subject to very different rules. Because of this, the threat to their independence does not always take the same form.

(3) THE APPLICATION OF THE PRINCIPLES TO THE FACTS

51. The Appellant alleges that the Law Society Disciplinary Tribunal (the Tribunal) is biased because the members of the Tribunal are alleged to have:

(i) A pecuniary interest in the outcome of the proceedings; and

(ii) An overlapping membership in the Law Society.

Appellant's Factum, paragraphs 5 and 6

52. It is submitted that a reasonable person would not have an apprehension of bias based on the alleged pecuniary interest in the outcome of the disciplinary hearing, since the benefit to the Tribunal members is too remote. The Law Society Act does not authorize Tribunal members to make any cost award payable to themselves personally nor can the Tribunal members direct the Law Society to make any payment to them. Members of the Tribunal are bound by a professional code of ethics which includes rules concerning conflicts of interest. As well, the possibility of an indirect benefit by means of a decrease

in membership dues as a result of cost recoveries is speculative since the Law Society may equally spend the monies received on activities such as public education, the bar admission course or further investigations of alleged misconduct.

53. Further, the mere fact of a relationship or similarity of interests between the members of the disciplinary body and the governing body cannot be sufficient to create an apprehension of bias on the part of a disciplinary tribunal. To hold otherwise is to deny the self-regulating profession the essential power of self-regulation, i.e., the power to discipline its members. The operative standard of bias must, therefore, be lower than the absence of relationship or similarity of interest between the disciplinary tribunal and the governing body.

53. Moreover, the operative standard must recognize the purpose of having members of the Law Society sit as the Tribunal. Peer review is in the public interest since the decision-makers have expertise in the subject matter and are sensitive to the concerns of the profession, and are in an excellent position to uphold the integrity of the profession.

Re Law Society of Manitoba and Savino, supra, at p.292:

> It would be ridiculous and lacking in common sense to call upon another body of men and women to hear and dispose of complaints of professional misconduct....No one is better qualified to say what constitutes professional misconduct than a group of practising barristers who are themselves subject to the rules established by their governing body. [Emphasis Added]

Ministry of the Attorney General of Ontario, The Report of the Professional Organizations Committee (April, 1980) at p.29:

> [T]he legislature...must respect the self-governing status of those [professional] 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. [Emphasis Added]

54. It is submitted that, having regard to the sources of the principles of fundamental justice discussed above, there is no violation of these principles in the case on appeal. In particular, the overlapping functions associated with peer disciplinary review will meet the prerequisites of fundamental justice and not create an apprehension of bias where:

(i) The procedural prerequisites of the common law are met, e.g., the right to notice, an oral hearing, the right to cross examination and an appeal to an independent body;

(ii) There is a long-standing tradition of self-regulation amongst the professions;

(iii) All members of the Law Society, including members of the Tribunal, must comply with conflict of interest rules to prevent allegations of bias;

(iv) The deprivation relates to a license in a self-regulatory context rather than the deprivation of liberty occasioned by incarceration; and

(v) Peer review gives rise to an awareness and concern not only for the protection of the public, but also for the particular situation of the member brought before the Tribunal.

Coffin v. Bolduc,[1988] R.J.Q. 1307 (Que. S.C.) at p.1314

Archambault v. Le Comité de Discipline Du Barreau, [1989] R.J.Q. 688 (Que. S.C.) at p.692

Re Beltz and the Law Society of British Columbia (1986), 7 B.C.L.R. (2d) 353 (B.C.S.C.) at p.363

Genereux v. Attorney General of Canada, supra, at pp.2-3 (per Pratte J.)

PART IV. ORDER SOUGHT

55. It is therefore submitted that the first constitutional question should be answered in the negative. If it is necessary to answer the second constitutional question, it should be answered in the affirmative.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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Dated: April 24, 1991

LORI R. STERLING

Counsel for the Intervenor,
The Attorney General of Ontario

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