

IN THE SUPREME COURT OF CANADA

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

BETWEEN:

DAVID MORLEY PEARLMAN

APPELLANT

- and -

THE MANITOBA LAW SOCIETY JUDICIAL COMMITTEE

RESPONDENT

**FACTUM OF THE ATTORNEY GENERAL OF SASKATCHEWAN
INTERVENER**

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PART I
STATEMENT OF FACTS

1. The Attorney General for Saskatchewan adopts the Statement of Facts set out in the Factum of the Appellant as amplified in the Factum of the Respondent.

2. The Attorney General for Saskatchewan participates in this appeal pursuant to a Notice of Intention of Intervention filed on March 6, 1991.

PART II

POINTS IN ISSUE

3. The Constitutional Questions stated in this appeal 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, 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?

Order of the Chief Justice of Canada, January 29, 1991.

POSITION OF THE ATTORNEY GENERAL FOR SASKATCHEWAN

4. The Intervener, the Attorney General for Saskatchewan, submits that the Constitutional Questions should be answered as follows:

- (1) Section 52(4) of The Law Society Act, R.S.M. 1987, c. L100 (the "Act") does not contravene section 7 of the Canadian Charter of Rights and Freedoms (the "Charter").
- (2) If section 52(4) of the Act is found to contravene section 7 of the Charter it is nevertheless a reasonable limitation for the purposes of section 1.

PART III
ARGUMENT

A. THE FIRST CONSTITUTIONAL QUESTION

Introduction

5. The first constitutional question propounded by the Chief Justice raises the question of whether the right of an individual to pursue an occupation or profession is subsumed in the right to life, liberty and security of the person guaranteed by section 7 of the Charter. In three recent cases the Saskatchewan Court of Appeal has held that it is not. The Attorney General for Saskatchewan intervenes in this appeal to argue that these rulings are sound and, accordingly, should be confirmed - albeit indirectly - by this Honourable Court in the instant appeal.

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

Ginther v. Saskatchewan Government Insurance, [1988] 4 W.W.R. 738 (Sask. C.A.).

Taylor v. Institute of Chartered Accountants of Saskatchewan (1989), 59 D.L.R. (4th) 656 (Sask. C.A.).

The Right to Life, Liberty and Security of the Person

6. Bassett, supra, is the leading authority in Saskatchewan with respect to the issue. There Vancise J.A. (Brownridge J.A. concurring) rejected an argument that a medical doctor's privilege to practice medicine received constitutional protection by virtue of section 7 of the Charter. The pertinent paragraph of Vancise J.'s reasons for judgment is found at p. 567 as follows:

The applicant contends that the respondent, by curtailing his right to prescribe controlled drugs, has violated his right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. There is no evidence in this case that the applicant has been so deprived. He submits that security of the person ought to encompass the right to pursue one's occupation or profession and not to be deprived thereof except in accordance with principles of fundamental justice. In order to give s. 7 that interpretation, security of the person must be interpreted to mean the economic capacity to satisfy basic human needs, that is, to earn a living. Nowhere in s. 7 is there reference to property rights and that omission is, in my opinion, significant: see Re Gershman Produce Co. Ltd. and Motor Transport Board (1985), 14 D.L.R. (4th) 722, [1985] 2 W.W.R. 63, 32 Man. R. (2d) 308 (Man. Q.B.); affirmed 22 D.L.R. (4th) 520, [1986] 1 W.W.R. 303, 36 Man. R. (2d) 81 (Man. C.A.).

See also: Ginther, supra, at p. 741.

7. At first it seemed this ruling in Bassett, supra, was consistent with statements of principle found in two judgments of this Honourable Court.

R. v. Edwards Books and Art Limited, [1986] 2 S.C.R. 713.

Reference re Public Service Employees Relations Act, [1987] 1 S.C.R. 313.

8. Edwards Books, supra, is the more pertinent of these authorities. There, Dickson C.J. for the Court on this point, rejected arguments that the Retail Business Holidays Act (Ont.) offended the Appellant's section 7 interests. He opined that "[w]hatever the precise contours of 'liberty' in section 7, I cannot accept . . . it extends to an unrestrained right to transact business whenever one wishes."

9. To similar effect McIntyre J. speaking for himself in Reference re Public Service Employees Relations Act, supra, observed that save for sections 6(2)(b) and 6(4) "the Charter . . . does not concern itself with economic rights."

Reference re Public Service Employees Relations Act, supra,
at p. 412.

10. However, what appeared to be an emerging consensus that the economic right to earn a livelihood was not subsumed in section 7, was then thrown into doubt by obiter comments found in two subsequent authorities.

Irwin Toy Ltd. et al. v. Attorney General of Quebec, [1989] 1
S.C.R. 923.

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R.
143.

11. In Irwin Toy Ltd., supra, this Court refused to address the Appellant's argument that sections 248 and 249 of the Consumer Protection Act (Quebec) offended section 7

of the Charter. Nevertheless the following relevant passage appears in the opinion ascribed to Dickson C.J., Lamer J. (as he then was) and Wilson J.:

What is immediately striking about [section 7] is the inclusion of "security of the person" as opposed to "property". This stands in contrast to the classic liberal formulation, adopted, for example in the Fifth and Fourteenth Amendments in the American Bill of Rights, which provide that no person shall be deprived "of life, liberty or property, without due process of law". The intentional exclusion of property from s. 7, and the substitution therefor of "security of the person" has, in our estimation, a dual effect. First, it leads to a general inference that economic rights as generally encompassed by the term "property" are not within the perimeters of the s. 7 guarantee. This is not to declare, however, that no right with an economic component can fall within "security of the person". Lower courts have found that the rubric of "economic rights" embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property - contract rights. To exclude all of these at this early moment in the history of Charter interpretation seems to us to be precipitous. We do not, at this moment, choose to pronounce upon whether those economic rights fundamental to human life or survival are to be treated as through they are of the same ilk as corporate-commercial economic rights.

Irwin Toy Ltd., *supra*, at pp. 1003-4.

12. More recently, La Forest J., who did not participate in Irwin Toy Ltd., *supra*, expressly left open the question of "whether the right to earn a livelihood is a value constitutionally protected under the Charter, perhaps under s. 7".

Andrews v. Law Society of British Columbia (1989), 56 D.L.R. (4th) 1 (S.C.C.) at p. 43.

13. It is significant to note that although the foregoing reference to section 7 appeared in the original version of Justice La Forest's reasons for judgment, it was replaced in the official Supreme Court Reports by a reference to section 6. However, that amendment is incongruous for this Court had already determined that section 6 does not protect a free-standing right to work.

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 at p. 201.

Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357 at p. 382.

MacKay, Pothier, "Developments in Constitutional Law: The 1988-89 Term" (1990), 1 S.C.L.R. (2d) 81 at p. 114, n. 132.

14. To date the most extensive consideration of this issue by a member of this Honourable Court is found in the concurring opinion of Lamer J. (as he then was) in Reference re Sections 193 and 195.1(1)(c) of the Criminal Code (Man.), [1990] 1 S.C.R. 1123. There he concluded that the right of an individual to exercise his or her chosen profession is not subsumed in section 7.

Reference re Criminal Code (Man.), *supra*, at p. 1179.

15. Lamer J. arrived at this conclusion for essentially two reasons, one textual, the other contextual. With respect to the text of section 7 he observed that the framers of the Charter deliberately refrained from protecting property interests in that provision. This significant omission renders American jurisprudence which interpreted the scope of

the liberty interest enshrined in the Fourteenth Amendment to the Constitution of the United States, of no assistance. Furthermore, this omission makes it extremely difficult, if not impossible, to imbue the rights guaranteed by section 7 with an economic component.

Reference re Criminal Code (Man.), supra, at pp. 1162-71.

See also: Bassett, supra, at p. 567.

Ginther, supra, at p. 741.

Smith, Kline & French Laboratories Ltd. v. Attorney General of Canada, [1986] 1 F.C. 274, at p. 314.

Lepofsky, Case Comment: Wilson v. B.C. Medical Services Commission (1989), 68 C.B.R. 615 at pp. 619-20.

16. Lamer J. also concluded that section 7's context militated against an extremely broad and wide ranging interpretation of the provision. Section 7 is one of a number of "Legal Rights" which directly engage the justice system and more particularly the judicial branch of government. It is triggered only when an individual's physical or mental integrity is threatened or coerced by the justice system. Lamer J. summarized his contextual analysis of section 7 as follows:

Put shortly, I am of the view that s. 7 is implicated when the state, by resorting to the justice system, restricts an individual's physical liberty in any circumstances. Section 7 is also implicated when the state restricts individuals' security of the person by interfering with, or removing from them, control over their physical or mental integrity. Finally, s. 7 is implicated when the state, either directly or through its agents, restricts certain privileges or liberties by using the threat of punishment in cases of non-compliance.

Reference re Criminal Code (Man.), supra, at pp. 1177-8.

17. The interpretation given to section 7 by Lamer J. categorically rejects the argument that the right to liberty and security of the person guaranteed by this provision constitutionalizes for all Canadians a right to work and thereby individual dignity and self-worth is enhanced. That argument achieved its zenith in Wilson v. British Columbia Medical Services Committee, [1989] 2 W.W.R. 1 (B.C. C.A.) leave to appeal refused, [1988] 2 S.C.R. viii.

18. It is submitted that such an interpretation ought to be rejected because it is extravagant. It attempts to incorporate far too much into the opening language of section 7 and thereby "overshoot[s] the actual purpose of the right . . . in question." Simply put, the meaning given to section 7 by the British Columbia Court of Appeal in Wilson, supra, and now urged upon this Honourable Court by counsel for the Appellant, offends this very fundamental principle of Charter interpretation.

R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 at p. 344.

19. By contrast it is submitted that Lamer J.'s analysis of section 7 in Reference re Criminal Code (Man.), supra, accords with the basic principles of Charter interpretation. It gives effect to the purpose section 7 seeks to achieve in keeping with its linguistic, philosophical and historical antecedents. For this reason, the present Chief Justice's interpretation of section 7 should now be endorsed by this Honourable Court.

20. It is significant to observe that the structure of certain international human rights documents which expressly guarantee the right to work lends credence to Lamer J.'s approach. The Universal Declaration of Human Rights is a good example. Article 3 of that document stipulates that "[e]veryone has the right to life, liberty and security of person." Further on a subsequent article enshrines "the right to work, free choice of employment . . . and . . . protection against unemployment" while yet another article guarantees to "[e]veryone . . . the right to a standard of living adequate for the health and well-being of himself and of his family." It is submitted that the separate recognition of a right to work and the right to an adequate standard of living indicates that these very important and legitimate concerns, nevertheless, are not encompassed within the right to "life, liberty and security of person".

Universal Declaration of Human Rights, Articles 3, 23(1) and 25(1).

Humphrey, "The Canadian Charter of Rights and Freedoms and International Law" (1985-86) 50 Sask. Law Rev. 13 at p. 18.

21. The Attorney General for Saskatchewan submits that it is not possible to differentiate on a principled basis between claims by a lawyer or doctor seeking to pursue his or her profession and a labourer attempting to maintain an adequate standard of living in these recessionary times. At bottom, these claims amount to the same thing: the right of an individual to work and thereby earn his or her livelihood.

22. If this Honourable Court accepts the Appellant's submissions on the first constitutional question it will constitutionalize a free-standing right to work. Such a result means that, in circumstances where the Charter applies, wrongful dismissal actions will possess a constitutional dimension, lay-offs will engage constitutional considerations and unemployed workers will have potential grounds for a Charter claim. This, it is submitted, is not what section 7 is intended to do. As Toy J. (as he then was) observed in Milk Board v. Clearview Dairy Farm Inc. (1986), 69 B.C.L.R. 230 (S.C.) at pp. 243-4:

When one considers the pioneering nature of those who preceded us in this country, when one considers the years of depression that preceded the Second World War and the current economic situation with unemployment figures that exceed 10 per cent of the national population, I have great difficulty in conjuring up an all Canadian concept of an enshrined right to work at the calling of one's choice.

23. In the alternative, should this Honourable Court be reluctant to endorse completely Lamer J.'s section 7 analysis in Reference re Criminal Code (Man.), *supra*, there is a narrower basis upon which to hold that section 54(2) of the Act does not infringe the Appellant's right to life, liberty and security of the person. Unlike laws which effectively prohibit the carrying on of a business or profession, laws which simply purport to regulate that business or profession have been found not to violate the first arm of section 7. Even the British Columbia Court of Appeal in Wilson, *supra*, conceded that such laws do not offend section 7:

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 behaviour will not constitute an infringement of section 7.

Wilson, supra, at p. 21.

See also: Beltz v. Law Society of British Columbia, [1987] 1 W.W.R. 427 (B.C. S.C.) at p. 437.

Isabey v. Manitoba Health Services, [1986] 4 W.W.R. 310 (Man. C.A.) at pp. 320-1.

Application of Principles

24. The Attorney General for Saskatchewan submits that either one of the two approaches to section 7 set out above compel this Honourable Court to answer the first constitutional question in the negative.

25. First, it must be noted that section 52(4) of the Act does not fulfill an unconstitutional purpose. It simply accords to the Benchers of the Manitoba Law Society the discretion to order a member of the Society found incompetent or guilty of professional misconduct to pay the costs incurred by the Society in the matter. The levy upon an individual member for such costs does not, in and of itself, offend section 7 of the Charter.

26. Rather, the Appellant objects to the impugned section's effect. More particularly, he alleges that the condition precedent to the operation of section 52(4), namely a finding by either the Benchers or the Judicial Committee that a member is guilty of

incompetence, professional misconduct or conduct unbecoming violates his right to life, liberty and security of the person. Only when the Appellant's objections are viewed this way does his constitutional attack become clearly focussed.

The Act, sections 52(1), (2) and (4).

27. It is submitted that the Appellant's allegations are extravagant. In effect he alleges that any restriction upon his right to practice law which may be imposed as a result of his own incompetence or professional misconduct contravenes section 7 of the Charter. This is simply wrong. To accept this argument would be to rule that the absolute right of every individual to engage in the occupation of his or her own choosing is rooted in section 7. For the reasons outlined above and especially Lamer J.'s reasoning in Reference re Criminal Code (Man.), *supra*, this position must be rejected.

28. Accordingly, this Honourable Court should affirm the ruling in the Court below that: "Counsel for Pearlman has not demonstrated the connection between a potential liability to pay costs in a disciplinary proceeding, and a deprivation of 'life, liberty and security of the person'."

Case on Appeal, pp. 126-7.

Principles of Fundamental Justice

29. If, contrary to the foregoing submissions, this Honourable Court is of the view that section 52(4) of the Act infringes the Appellant's right to life, liberty and security of the person, it is submitted that such deprivation is consistent with the principles of fundamental justice.

30. The Attorney General for Saskatchewan adopts the submissions of the Attorney General of Manitoba at paragraphs 23 to 452 of his Factum.

The Second Constitutional Question

31. The Attorney General for Saskatchewan further adopts the submissions of the Attorney General for Manitoba with respect to the second constitutional question.

PART IV

NATURE OF ORDER SOUGHT

32. The Attorney General for Saskatchewan respectfully submits that the Constitutional Questions stated by the Chief Justice of Canada should be answered in the manner set out in paragraph 4.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Regina, Saskatchewan, this 1st day of May, 1991.

Graeme Mitchell

Graeme G. Mitchell

Counsel for the Attorney General for
Saskatchewan

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| 14. | <u>Smith Kline & French Laboratories Ltd. v. Attorney General of Canada</u> , [1986] 1 F.C. 274 (T.D.). | 9 |
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| 17. | Humphrey, "The Canadian Charter of Rights and Freedoms and International Law" (1985-86), 50 Sask. Law Rev. 13. | 11 |
| 18. | Lepofsky, Case Comment (1989), 68 C.B.R. 615. | 9 |
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