IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA)

B E T W E E N :

DAVID MORLEY PEARLMAN,

Appellant,

- and -

THE MANITOBA LAW SOCIETY, JUDICIAL COMMITTEE,

Respondent.

FACTUM OF THE ATTORNEY GENERAL OF MANITOBA
INTERVENER

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I N D E X

PART I

STATEMENT OF FACTS

1. The facts are stated in paragraphs 1 - 20 of the Appellant's Factum and are amplified by the Respondent in Part I of its factum.

2. The Attorney General of Manitoba applied to intervene in this proceeding prior to the order of this Honourable Court of January 29, 1991 setting the constitutional questions. On Wednesday, January 9, 1991, Lamer, C.J.C. granted an order pursuant to Rule 18 permitting the Attorney General of Manitoba to intervene in this appeal.

3. This intervention is limited to addressing the constitutional issues raised by the Appellant, namely the applicability of sections 7 and 11 of the *Canadian Charter of Rights and Freedoms* ("Charter") to the Appellant's case and to the justifiability of any alleged constitutional infringement under section 1 of the Charter.

PART II

POINTS IN ISSUE AND THE POSITION OF THIS INTERVENER WITH RESPECT THERETO

4. This intervener wishes to respond to the following points in issue, all of which relate to the extent to which the relevant legislation and the proceedings in question conform to the guarantees entrenched in the *Canadian Charter of Rights and Freedoms*:

1. Does section 52(4) of *The Law Society Act* of Manitoba, R.S.M. 1987, c. L100, contravene section 7 of the *Canadian Charter of Rights and Freedoms* ("Charter")?

ANSWER: NO. SECTION 7 IS NOT ENGAGED BECAUSE THE IMPUGNED LEGISLATION AND THE PROCEEDINGS RELATED THERETO DO NOT EFFECT A DEPRIVATION OF A "LIBERTY" OR "SECURITY OF THE PERSON" INTEREST. IN ANY EVENT, THERE IS NO BREACH OF ANY PRINCIPLE OF FUNDAMENTAL JUSTICE.

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. 100, justified by section 1 of the Charter?

ANSWER: YES. THE IMPUGNED PROVISION IS JUSTIFIED UNDER SECTION 1.

3. Does section 11 of the Charter apply to the Citation and the disciplinary proceedings brought against the Appellant?

ANSWER: NO. THE RESPONDENT IS NOT SUBJECT TO THE CHARTER BECAUSE IT IS NOT "GOVERNMENT" WITHIN SECTION 32 OF THE CHARTER. MOREOVER, SECTION 11 DOES NOT APPLY TO THE DISCIPLINARY PROCEEDINGS AS THEY ARE NEITHER CRIMINAL IN NATURE NOR DO THEY INVOLVE TRUE PENAL CONSEQUENCES.

PART III

ARGUMENT

I. Does section 52(4) of *The Law Society Act* of Manitoba contravene s. 7 of the Charter?

A. The Impugned Legislation

5. The legislation which the Appellant seeks to impugn for constitutional reasons is subsection 52(4) of *The Law Society Act*, the text of which is set out below:

> **Payment of costs of investigation and inquiry**
>
> 52(4) A barrister, solicitor, or student, who is found guilty of professional misconduct, or of conduct unbecoming a barrister, solicitor, or student, or is found incompetent may be ordered by the governing body to pay, all or any part of, the costs and expenses incurred by the society in and about the investigation into, proceedings upon, and hearing of any subject matter of inquiry or any complaint or charge in respect of which he has been found guilty or incompetent.

6. This intervener submits that, in order to understand the context of the legislation being challenged, the following further legislative provisions are relevant:

a) Benchers. The Law Society of Manitoba is a body corporate (s. 2). Its governing body is called, "The Benchers of The Law Society of Manitoba" (s. 5). The membership of the benchers does not consist solely of elective benchers who are members of the Law Society. Rather, elective benchers are only one of eight categories of benchers (s. 6). Other categories comprise a university bencher and four appointed lay benchers, neither category of which could comprise members of the Law Society.

b) Powers. Appendix "1" sets out section 36 of *The Law Society Act* which specifies the powers that the benchers may exercise on behalf of the Law

Society, including those relating to the discipline of its membership (see Appendix "1", especially s. 36(s), (t), (aa), (dd) and (ee)). Further, this Intervener refers this Court to the powers which may be imposed where a member is found guilty of professional misconduct or conduct unbecoming (s. 52(1)). These powers range from disbarment to a reprimand and specifically include the power to order a fine to be paid (s. 52(1)(e), set out in Appendix "1").

c) Process. The process relating to the discipline of Law Society members involves two discrete stages. The initial stage involves proceedings before the discipline committee. This committee is empowered to investigate a complaint and to determine whether a charge against a member is warranted. (See Appendix "2"; Rule 19) Every charge formulated by the discipline committee is then referred to the judicial committee (Appendix "2"; Rule 19.(13)).

The Rules of the Law Society ensure that there is no institutional overlap between the discipline and the judicial committees, *inter alia*, by expressly stating that a bencher may not sit as a member of the judicial committee on any inquiry in which (s)he sat as a member of the discipline or the standards committee when it was dealing with the matter which is the subject of the inquiry (Appendix "2"; Rule 13(e)).

(d) Costs. The power to impose costs pursuant to subsection 52(4) is vested in the benchers, which in turn have delegated this power to the judicial committee via the general authority to delegate granted to the benchers in s. 36(ee) of the Act and specifically assigned to the judicial committee in Rules 21.(1) and 22.(6). The Annual Reports published by the Law Society indicate that the costs recovered under this power have ranged from a low of $2,047 in 1990, to a high of $6,587 in 1989; from 1987 until 1990, the costs accounted for approximately .04% of the Respondent's revenue**.

**The actual figures are set out in financial statements published in the Respondent's annual reports, the most recent of which are filed in this Intervener's *Book of Authorities*. These published reports indicate that the amounts recovered from 1987 until 1990 and the % of the total annual revenue which these amounts represent are: 1987: $4,775 (.042%); 1988: $4,300 (.037%); 1989: $6,587 (.053%) and 1990: $2,047 (.017%).

B. Section 7: Two Elements

7. In order to prove that the impugned legislation contravenes section 7 of the Charter, the Appellant must establish not only that a "liberty or security of the person" interest is engaged but also that he has been deprived of this interest in a manner which is contrary to the principles of fundamental justice. As La Forest, J. stated in *R. v. Beare*, [1988] 2 S.C.R. 387, at 401:

> The analysis of s. 7 of the *Charter* involves two steps. To trigger its operation there must first be a finding that there has been a deprivation of the right to "life, liberty and security of the person" and, secondly, that that deprivation is contrary to the principles of fundamental justice.

C. No "Liberty or Security of the Person" Interest is Engaged

8. This Intervener submits that the Appellant cannot establish that a "liberty or security of the person" interest is engaged under section 7 of the Charter such that the first step within that constitutional section has been met. The right to pursue an occupation or a profession is simply not a "liberty or security of the person" interest under section 7.

9. Earlier decisions of this Honourable Court assist in resolving the issue as to whether the right to pursue an occupation or a profession falls within the scope of section 7. In *Reference re Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, the Contradictors had argued that the right to work in a lawful occupation, i.e. prostitution, was constitutionally protected under section 7 of the Charter because it was a "liberty" interest. While the majority of the Court (Dickson, C.J.C.; La Forest and Sopinka, JJ., concurring) held that it was unnecessary to address this argument because the offence in question carried the possibility of imprisonment and thereby engaged a "liberty" interest, Lamer, J. (as he then was) carefully reviewed and rejected the Contradictors' submission in his concurring majority reasons.

10. Chief Justice Lamer began his analysis by quoting from a passage of the reasons for judgment of Madam Justice Wilson in *Jones v. The Queen*, [1986]

2 S.C.R. 284 at 318, where Her Ladyship articulated the underlying basis for an expansive interpretation of the constitutional protection afforded to "liberty" under section 7:

> I believe that the framers of the Constitution in guaranteeing "liberty" as a fundamental value in a free and democratic society had in mind the freedom of the individual to develop and realize his potential to the full, to plan his own life to suit his own character, to make his choices for good or ill, to be non-conformist, idiosyncratic and even eccentric - to be, in today's parlance, "his own person" and accountable as such. John Stuart Mill described it as "pursuing our own good in our own way."

11. Lamer C.J.C. then considered in his reasons for judgment (pp. 1168-1170 S.C.R.) the decision of the British Columbia Court of Appeal in ***Wilson v. Med. Service Cmsn. of B.C.***, ([1987] 3 W.W.R. 48; appeal allowed [1989] 2 W.W.R. 1 (B.C.C.A.); leave to appeal refused (S.C.C., Nov. 3/88). His Lordship noted that the British Columbia Court of Appeal drew a distinction in that case, "...between the right to work which it states is a purely economic question, and the right to pursue a livelihood or profession which it characterizes as a matter concerning one's dignity and sense of self-worth" (p.1169). Lamer, C.J.C. was critical of this distinction, stating:

> There is no doubt that the non-economic or non-pecuniary aspects of work cannot be denied and are indeed important to a person's sense of identity, self-worth and emotional well-being. But it 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.
>
> Further, it is my view that work is not the only activity which contributes to a person's self-worth or emotional well-being. 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.
>
> (1170 S.C.R.)

12. His Lordship then analyzed section 7 in the context of its place within the Charter, linked as it is with a set of provisions (ss. 8-14 of the Charter) which mainly concern themselves with criminal and penal proceedings, and which are listed under the title of "Legal Rights". It is also relevant that within section 7 itself there is a contextual relationship that sheds light on the intended meaning of "liberty" - the state can effect such a deprivation provided it is done in accordance with the principles of fundamental justice. Those very principles are thus themselves a key to determining the nature of the interests protected. His Lordship concluded that:

> Section 7, and more specifically ss. 8-14, protect individuals against the state when it invokes the judiciary to restrict a person's physical liberty through the use of punishment or detention, when it restricts security of the person, or when it restricts other liberties <u>by employing the method of sanction and punishment traditionally within the judicial realm.</u> (1173-1174 S.C.R., emphasis added)

13. While His Lordship did state that section 7 <u>can</u> extend beyond purely criminal or penal matters to certain aspects of administrative decision making, it is submitted that he interpreted this extension to the administrative realm in a limited manner:

> What is clear, however, is that the state in certain circumstances has created bodies, such as parole boards and mental health review tribunals, that assume control over decisions affecting an individual's <u>liberty and security of the person</u>. Those are areas, because they involve the restriction to an individual's <u>physical liberty and security of the person</u>, where the judiciary has always had a role to play as guardian of the administration of the justice system. There are also situations in which the state restricts other privileges or, broadly termed, "liberties" *in the*

> *guise of regulation, but uses punitive measures in cases of non-compliance. In such situations, the state is in effect punishing individuals, in the classic sense of the word, for non-compliance with a law or regulation.* In all these cases, in my view, the liberty and security of the person interests protected by s. 7 would be restricted, and one would then have to determine if the restriction was in accordance with the principles of fundamental justice.
>
> (1176-1177 S.C.R.; italics added)

14. In another context relating to the interpretation of section 11 of the Charter, Madam Justice Wilson discussed the nature of proceedings with "a true penal consequence" as opposed to proceedings aimed at "regulating activities". It is submitted that it is this type of distinction that Lamer C.J.C. was referring to in the foregoing passage:

> In my view, if a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter is a kind of matter which falls within s. 11. If falls within the section because of the kind of matter it is. This is to be distinguished from private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity: see, for example, *Re Law Society of Manitoba and Savino, supra,* [(1983), 1 D.L.R. 285] at p. 292 . . . . There is also a fundamental distinction between proceedings undertaken to promote public order and welfare within a public sphere of activity and proceedings undertaken to determine fitness to obtain or maintain a licence. Where disqualifications are imposed as part of a scheme for regulating an activity in order to protect the public, disqualification proceedings are not the sort of "offence" proceedings to which s. 11 is applicable. Proceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute are also not the sort of "offence" proceedings to which s. 11 is applicable....
>
> . . .

> Some of these matters may well fall within s. 11, not because they are the classic kind of matters intended to fall within the section, but because they involve the imposition of true penal consequences. In my opinion, a true penal consequence which would attract the application of s. 11 is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity.
>
> *R. v. Wigglesworth*, [1987] 2 S.C.R. 541 at 560-561, *per* Wilson, J.

15. In *Wigglesworth*, this Honourable Court found that the "true penal consequences" test was met because the *Royal Canadian Mounted Police Act*, R.S.C. 1970, c. R-9, under which the police officer had been disciplined, provided for a penalty of imprisonment. Clearly, there are no similar penal consequences at risk in the disciplinary proceedings which are involved in the case at bar (see paragraph 6(b), *supra*).

16. It is submitted that the thrust of Lamer, C.J.C.'s reasoning on the scope of section 7 is consistent with the majority of Canadian courts which have rejected the notion that the right to pursue a profession or livelihood is afforded constitutional protection under section 7.

> *See, eg., Reference re Criminal Code*, [1987] 6 W.W.R. 289 (Man. C.A.); [1990] 1 S.C.R. 1123, particularly the opinion of Philp, J.A. at 311-312 where he states,
>
> ...I think there has been overwhelming acceptance by the courts in Canada that economic rights are not protected; that "liberty" under s. 7 of the Charter, whether interpreted broadly or restrictively, is concerned with the physical liberty of the person. That is the conclusion I have reached. I have concluded that the right (if there is such a right) to engage in prostitution is not one that is protected by s. 7 of the Charter.
>
> *See also Archambault v. Comité de Discipline du Barreau du Québec*, [1989] R.J.Q. 688 (C.S.) where Brassard, J. rejected a claim that professional disciplinary proceedings were protected by section 7 of the Charter, stating at p. 696,

> Le soussigné juge que le droit d'exercer une profession est un droit de propriété qui n'est pas inclus dans l'article 7 de la Charte canadienne et ce droit, de toute façon, doit nécessairement être limité par des règles de discipline, de dignité et d'honneur de la profession.
>
> *See also Lister v. Ontario (A.G.)* (1990), 72 O.R. (2d) 354 (H.C.); (no right to practise dentistry under s. 7)
>
> *Weyer v. Canada* (1988), 83 N.R. 272 (F.C.A.), at 276 (research scientist's dismissal raises no s. 7 issue)
>
> *Anthony v. Misericordia General Hospital* (1988), 50 Man. R. (2d) 49 (Q.B.) at 57 (loss of doctor's temporary admitting privileges at hospital not engaging s. 7)
>
> For a contrary view, see O'Sullivan J.A., dissenting, in his reasons for judgment in the Court below, *Case on Appeal*, p. 107, at p. 113-114

17. This Court has commented generally about the potential for essentially "economic" rights finding protection in section 7. In *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927, a decision which predated *Reference re Criminal Code (Man.)*, this Court implied that the scope for such protection may be narrowly circumscribed:

> What is immediately striking about this section 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 <u>economic rights as generally encompassed by the term "property" are not within the perimeters of the s. 7 guarantee.</u> This is not to declare, however, that no right with an economic component can fall within "security of the person". ... We do not, at this moment, choose to pronounce upon whether those economic rights <u>fundamental to human</u>

> <u>life or survival</u> are to be treated as though they are of the same ilk as corporate-commercial economic rights. (p. 1003; emphasis added)

18. It is submitted that however important the practice of law may be to the Appellant and others, it can hardly be maintained that it is a matter "...fundamental to human life or survival".

19. Further, it is submitted that the Courts should proceed very cautiously before accepting that a right which has a significant economic component, like the right to practise law, is protected by section 7 of the Charter. In ***Wilson v. Med. Services Cmsn.. of B.C., supra***, the British Columbia Court of Appeal construed very narrowly the doctrine that section 7 does not apply to economic rights by interpreting previous authorities to mean only that the guarantee does not protect pure economic rights. As Mr. David Lepofsky has pointed out, this effectively emasculates the "no economic rights" doctrine:

> According to such reasoning, section 7 could in effect provide massive protection to economic, commercial and property rights, so long as a Charter claimant carefully appends his economic claim to something additional which a court may find compelling. This can easily be done, because there is no principled bright line which divides rights which are purely economic from rights which are both economic and something more.
>
> ...If [the "no economic rights"] doctrine were construed narrowly, allowing a party to make a section 7 economic rights claim by simply adding to it some additional claim which a court may find significant, then litigants could potentially challenge a sweeping variety of business, economic and regulatory legislation under s. 7.
>
> M. David Lepofsky, "Case Comment: ***Wilson v. B.C. Medical Services Commission***" (1989), 68 Can. Bar Rev. 615 at 622
>
> ***Contra***: Hart Schwartz, "Case Comment: In defence of Wilson: ***Wilson v. Medical Services Commission of British Columbia*** (1990), 69 Can. Bar Rev. 162

20. A similar observation was made by McLachlin J.A., as she then was, in another decision of the British Columbia Court of Appeal, ***Whitbread v. Walley***, [1988] 5 W.W.R. 324. In that case, the Court dismissed a section 7 challenge to federal legislation limiting the extent of liability to be attached to a faultless ship owner or operator. In dismissing the constitutional attack, the Court stated that section 7 could not be successfully invoked to strike legislation that directly or even <u>indirectly</u> raised economic interests. Thus, submissions to the effect that economic interests would deprive a person of his/her "life, liberty or security of the person" will not succeed, the Court stated, because this would allow property interests to be protected through the back door, ***viz.***:

> The second argument, that economic interests which may affect a person's life, liberty or security of person fall under s. 7, raises the same difficulty. Arguably, it requires reading into s. 7, after the declaration that a person has the right to "life, liberty and security of person", the additional phrase that he has the right to "any ***benefit*** which may enhance life, liberty or security of person". This argument, however, is undermined by an even more serious problem. It is difficult to conceive of a property or economic interest which does not arguably impact on the life, liberty or security of person. Liberty and security of person are flexible and expansive concepts, and the degree to which they can expand is intimately tied with the amount of money one has at his or her disposal. For example, a person who is barred by legislation from raising a claim for breach of contract or whose corporation is denied a licence, might claim that the resultant financial loss has affected his liberty and security of person because without money he cannot go where he wants to go, pursue the activities he wishes to pursue, or provide adequately for his future. To accept the plaintiff's second argument would be to make s. 7 applicable to virtually all property interests. Given the scheme of the <u>Charter</u> and the absence of any reference to the right to property, I cannot accept that this was the intention of its framers.
>
> ***Supra***, p. 325, ***per*** McLachlin J.A. (as she then was) for a unanimous court.
>
> <u>Note</u>: This Court dismissed the appeal from the decision of the B.C.C.A. in reasons for judgment reported at [1991] 2 W.W.R. 195 which do not touch upon this constitutional issue.

21. This Intervener acknowledges the dictum of Dickson, J. (as he then was) in *R. v. Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295 at 344, that the interpretation of a Charter guarantee should be "generous rather than legalistic." However, the Charter is not to be interpreted so loosely as to incorporate everything within it that members of the judiciary may consider to be "important." The interpretation must be one which is "aimed at fulfilling the purpose of the particular guarantee".

> *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295, at 344, *per* Dickson, J. (as he then was)
>
> *And see: Re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313 at 394 *per* McIntyre, J. where His Lordship stated that "... the Charter should not be regarded as an empty vessel to be filled up with whatever meaning we might wish from time to time."

22. It is submitted that the analysis undertaken by Lamer C.J.C. in *Reference re Criminal Code (Man.)* is carefully reasoned and in accordance with the purposive approach to Charter interpretation. It provides "'objective and manageable standards' for the operation of the section" within the framework of a purposive interpretation. (*Re B.C. Motor Vehicle Act* [1985] 2 S.C.R. 486 at 499) The text of section 7; its deliberate exclusion of "property"; its placement in conjunction with ss. 8-14 and under the heading of "Legal Rights"; and its reference to principles of fundamental justice, all support the conclusion that its scope does not extend to the right to practise law or pursue a profession generally.

D. The Principles of Fundamental Justice

1. Introduction

23. In order to establish a breach of s. 7, the Appellant must satisfy this Court that the impugned statutory provision effects a deprivation of an interest protected by s. 7 in a manner which violates the principles of fundamental justice.

24. The thrust of the Appellant's argument appears to be that the possibility that costs may be awarded upon a finding of misconduct leads to an apprehension of bias or an actual pecuniary interest in finding that the Appellant is guilty of the allegation.

25. It is submitted that the essential issue is whether the maxim *nemo judex in causa sua debet esse* is a principle of fundamental justice and if so whether, in the particular statutory context, this principle and the corresponding rule against bias, is violated by the impugned provision. It is this Intervener's position that the maxim is a principle of fundamental justice, but that the impugned provision does not violate that concept or the policy upon which it is based.

> *See*: Robert M. Sedgewick, Jr., "Disqualification on the Ground of Bias as applied to Administrative Tribunals" (1945), 23 Can. Bar Rev. 453, esp. at 453 and 460-461.

2. The Twin Pillars of Natural Justice or Fairness

26. The *nemo judex* maxim upon which the precept against bias is founded is a part of the notion of natural justice or procedural fairness. The dictum of Fauteux, C.J.C in *Duke v. The Queen*, [1972] S.C.R. 917 at 923 is an apt description of that concept, and one that has been referred to by members of this Court in the context of section 7 of the Charter:

> Under s. 2(e) of the Bill of Rights no law of Canada shall be construed or applied so as to deprive him of "a fair hearing in accordance with the principles of fundamental justice". Without attempting to formulate any final definition of those words, I would take them to mean, generally, that the tribunal which adjudicates upon his rights must act fairly, in good faith, without bias and in a judicial temper, and must give to him the opportunity adequately to state his case.
>
> Referred to in *Singh v. M.E.I.*, [1985] 1 S.C.R. 177 at 212-213, *per* Wilson J.

27. Other courts have expressed similar approaches in describing natural justice:

> First, I think that the person accused should know the nature of the accusation made; secondly, that he should be given an opportunity to state his case; and, thirdly, of course, that the tribunal should act in good faith. I do not think that there is really anything more.
>
> *Byrne v. Kinematograph Renters Society*, [1958] 2 All E.R. 579 at 599 *per* Harman J., approv'd in *University of Ceylon v. Fernando*, [1960] 1 W.L.R. 223 at 232 (P.C.)
>
> *And see*: *Ridge v. Baldwin*, [1964] A.C. 40 (H.L.) at 132, *per* Lord Hodson:
>
> ...three features of natural justice stand out - (1) the right to be heard by an unbiased tribunal; (2) the right to have notice of the charges of misconduct; (3) the right to be heard in answer to those charges.

28. In fact, it is submitted that the three points in each formula can be reduced to two: (1) a hearing by an authority; (2) <u>with a mind reasonably open to relevant material placed before it</u>. These are the "twin pillars" of natural justice and it is the second of these - the requirement of impartiality - that can be considered the principle of fundamental justice deserving scrutiny in these proceedings. The policy underlying both aspects of natural justice is said to be identical: justice must not only be done, but must manifestly and undoubtedly be seen to be done.

> *Kanda v. Government of Malaya*, [1962] A.C. 322 at 337 (P.C.) *per* Lord Denning;
>
> *And see*: J. R. S. Forbes, *Disciplinary Tribunals* (1990) at 56; D.P. Jones and A.S. de Villars, *Principles of Administrative Law* (1985) at 244.

29. It is submitted that procedural fairness demands different things in different contexts, and that it is especially important to heed this in the interpretation and application of section 7 of the Charter.

> Like the principles of natural justice, the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case.
>
> *Knight v. Board of Education of Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at 682 *per* Madam Justice L'Heureux-Dubé; and
>
> Both the rules of natural justice and the duty of fairness are variable standards. Their content will depend on the circumstances of the case, the statutory provision and the nature of the matter to be decided. . . . the court decides the content of these rules by reference to all the circumstances under which the tribunal operates.
>
> *S.E.P.Q.A. v. Canada (C.H.R.C.)*, [1989] 2 S.C.R. 879, *per* Sopinka J. (quoted with approval in *Knight, supra* at 682 and in *Old St. Boniface, infra*, at 168 (*per* Sopinka J.)
>
> *And see: Singh v. M.E.I., supra* at 213, *per* Wilson J.

3. Impartiality

30. Obviously, proof of actual bias will disqualify a decision maker. In addition, the case law on impartiality in the context of the rules of natural justice has developed two sub-categories of bias: presumed bias established through proof of pecuniary interest in the outcome of the proceedings and perceived bias established through facts raising an apprehension of bias. This Intervener submits that the Appellant has not established that either sub-category exists in the case at bar. In any event, for the purposes of section 7, it is neither necessary nor desirable to adopt rigid sub-category formulations of the impartiality principle.

> Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "impartial" ...connotes absence of bias, actual or perceived.
>
> *Valente v. The Queen*, [1985] 2 S.C.R. 673 at 685, *per* Le Dain, J.

(a) Pecuniary Interest

(i) No Direct Pecuniary Interest

31. As noted, many of the texts and cases support the notion that, in administrative law, a clear distinction must be drawn between cases of presumed bias arising from pecuniary interest and cases of perceived bias by reason of relationship or other factors, such as pre-judgment. In effect, it appears that a direct pecuniary interest in the outcome of proceedings, however small, would lead ipso facto to disqualification of a judge from hearing such a case. This is so even if the interest may not create a reasonable apprehension of bias. Moreover, perhaps depending on how the matter is plead, an indirect pecuniary interest that could raise a reasonable apprehension of bias may escape adequate scrutiny under such an approach.

> D. J. Mullan, Title 3 - Administrative Law, C.E.D. (Ont.) 3d, para. 50-54
>
> J.M. Evans, *De Smith's Judicial Review of Administrative Action* (4th ed.) 258-260
>
> *Dimes v. Proprietors of the Grand Junction Canal* (1852), 10 E.R. 301 (H.L.)
>
> *Energy Probe v. Atomic Energy Control Board*, [1985] 1 F.C. 563 (C.A.) Compare the majority judgment of Heald J.A., with the concurring majority judgment of Stone J.A.. While Stone J.A. supports a distinction between pecuniary and other reasons for alleged bias, he is critical of the distinction between "direct" and "indirect" pecuniary interests referred to in the majority judgment; in both situations, His Lordship states that the test should be whether the pecuniary benefit be a "likely enough effect to 'colour' the case in his eyes." (at 581)

32. In the case at bar, it is submitted that the members of the judicial committee do not have a direct pecuniary interest arising from the power to award costs under subsection 52(4) of *The Law Society Act*. The costs do not go into their pockets. The costs belong to the body corporate and not to the individual benchers. The point that increased revenue from costs may result

in reduced practising or non-practising fees for those benchers who are also members of the Society is too remote and uncertain to constitute a direct pecuniary interest. The increased revenue from costs could just as well be allocated to an increased library grant. In any event, it is anomalous to consider costs as gain or profit when the essence of the notion of costs is an indemnification for expenses.

> *Energy probe, supra* at 570-571
>
> *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon*, [1969] 1 Q.B. 577 at 598
>
> *R. v. Burton*, [1897] 2 Q.B. 468 at 471-472, and 474
>
> M. Orkin, *The Law of Costs* (2d ed.) p. 2-5; para. 204
>
> *Re Kanerva and Ontario Association of Architects* (1986), 56 O.R. (2d) 518 (Ont. Div. Ct.) at 521

(ii) The "Direct Pecuniary Interest" Test is Inapplicable in this Case

33. Even assuming that those members of the judicial committee, who are also members of the Society, might expect to be levied with fees that are lower by a few dollars or cents if an award of costs is made, it is submitted that such an expectation does not create an interest that is "personal" and distinct. Rather, it is one that they have in common with all such members. It is submitted that this is not the kind of case to which can be applied the principle of law as to interested judges, in *Dimes, supra*. Moreover, given that the impugned provision has long been part of *The Law Society Act*, members of the Law Society, including the Appellant, must have intended to accept or be deemed to have accepted the disciplinary regime including the impugned provision.

> *See O'Brien v. Boyle* (1893), 13 N.Z.L.R. 69 (S.C), where Denniston, J. of the New Zealand Supreme Court held that the principles in *Dimes v. Proprietors of the Grand Junction Canal, supra,* as to pecuniary interest which exist in ordinary judicial bodies are inapplicable to the stewards of a racing club; that such stewards constitute a

peculiar and special tribunal that exists with the full knowledge of the parties who, by racing under its rules, have accepted such tribunal.

See also The Law Society Act, S.M. 1956, c. 39, s. 44(2), where the precursor to ss. 52(4) was first enacted, empowering the governing society to award costs against a member found guilty of professional misconduct or conduct unbecoming.

Chabot v. Man. Horse Racing Commission (1986), 43 Man. R. (2d) 253, at 258-59 (C.A.); leave to appeal refused (S.C.C., June 25/87)

Re Blustein and Borough of North York, [1967] 1 O.R. 604, (H.C.); aff'd C.A. April 6, 1967, leave to appeal refused (S.C.C., May 1/67), where the High Court, at p. 609 approved the following statement of Meredith C.J. in *Elliot v. The Municipal Corporation of the City of St. Catherines* (1908), 18 O.L.R. 57 at 62:

There is a general rule of law that no member of a governing body shall vote on any question involving ...his pecuniary interest, if that be immediate, particular and distinct from the public interest.

(iii) The Implications of the Pecuniary Interest Argument to Self-Governing Professions

34. It is submitted that, if accepted, the logic of the Appellant's argument would emasculate the whole notion of peer review inherent in professional self-discipline. Surely if the ability to award costs upon a finding of misconduct creates a presumed bias by reason of pecuniary interest, so too does the ability to impose a fine, a remedy commonly provided for in such statutes and found in *The Law Society Act* in s. 52(1)(e). While it is conceivable that disciplinary proceedings could continue without a costs provision (although such an absence may constitute unwise or unfair policy), it is submitted that the denial of the power to fine would severely impair the functioning of peer review. The Appellant's submission essentially seeks a tribunal which is not only open-minded, but one that is institutionally independent as that concept is articulated in *Valente v. The Queen*, *supra*, at 684 *et seq.*. While this is a specific constitutional mandate under s. 11(d) for penal courts, this concept is not mandated for disciplinary tribunals under the more flexible and context-sensitive notion of fundamental justice in section 7 of the Charter.

35. Section 7 is concerned with the "fundamental tenets of our justice system" and is not intended to interfere with policy choices such as the selection of a self-governing regime for a particular segment of the community.

> It has been recognized that wide powers of discipline may be safely accorded in professional associations to senior members of such professions. The controlling bodies of most professions such as those of law, medicine, accountancy, engineering, among others, are given this power. I am unable to say that the close identification of such disciplinary bodies with the profession concerned, taken with the seniority enjoyed by such officers within their professional group, has ever been recognized as a disqualifying factor on grounds of bias or otherwise. Rather it seems that the need for special knowledge and experience in professional matters has been recognized as a reason for the creation of disciplinary tribunals within the separate professions.
>
> ***MacKay v. The Queen*** [1980] 2 S.C.R. 370 at 404 *per* McIntyre J.;
>
> I see nothing in law pathological about the selection by the Provincial Legislature here of an administrative agency drawn from the sector of the community to be regulated. Such a system offers some immediate advantages such as familiarity of the regulator with the field, expertise in the subject of the services in question, low cost to the taxpayer as the administrative agency must, by the statute, recover its own expenses without access to the tax revenues of the Province. On the other hand, to set out something of the other side of the coin, there is the problem of conflict of interest, an orientation favourable to the regulated, and the closed shop atmosphere. In some provinces some lay Benchers are appointed by the provincial governments; . . . . It is for the Legislature to weigh and determine all those matters and I see no constitutional consequences necessarily flowing from the regulatory mode adopted by the province . . . . .
>
> ***A.G. Canada v. Law Society of B.C.***, [1982] 2 S.C.R. 307 at 335 *per* Estey J.

(iv) Pecuniary Interest Test too Rigid for Section 7

36. In any event, it is submitted that it is both unnecessary and undesirable to import into section 7 the notion that one must first classify the nature of the basis for a perceived conflict - pecuniary or otherwise - and then apply a rigid rule of *ipso facto* disqualification should the interest be pecuniary. It is respectfully submitted that the principles of fundamental justice dictate that a decision maker must approach the issue before it with a mind that is reasonably open to relevant material placed before it, and that the decision maker must be objectively perceived as capable of such an approach. There must be no manifest unfairness in the process. This approach is consistent with this Court's jurisprudence that the context is of critical importance in delineating the precise content of the principles of fairness or natural justice. It follows that a "reasonable apprehension of bias analysis" (see *infra*) is sufficient whether the factor giving rise to the allegation of impartiality is direct pecuniary interest, indirect pecuniary interest, or a "relationship" of some sort.

37. It must be kept in mind that, depending on the interpretation of the interests it protects, section 7 may have application to a wide variety of tribunals. The protection against bias constitutionally mandated must allow the courts to take into account the institutional setting and protect against manifest unfairness while respecting the policy choices made by the Legislature in creating the particular tribunal and conferring upon it a particular role.

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

38. The rigidity of the traditional pecuniary interest test may have been called into question in a recent decision of this Court, *Old St. Boniface Residents Association Inc. v. Winnipeg (City)*, [1991] 2 W.W.R. 145. In that case, this Court dealt with an allegation concerning a reasonable apprehension of bias on the part of a municipal councillor. In the course of his majority reasons for judgment, Mr. Justice Sopinka noted that a distinction could be made between a case of partiality by reason of pre-judgment, on the one hand, and by personal interest, on the other. In the case of personal interest

(which was not the fact situation before the Court), His Lordship stated:

> ...both at common law and by statute, a member of council is disqualified if the interest is so related to the exercise of public duty that a reasonably well-informed person would conclude that the interest might influence the exercise of that duty. . . .(171)
>
> Statutory provisions in various provincial Municipal Acts tend to parallel the common law but typically provide a definition of the kind of interest which will give rise to a conflict of interest . . ..(172)
>
> . . .
>
> [The reasonable apprehension of bias] test would have been appropriate if it had been found that the councillor had a personal interest in the development, <u>either pecuniary or by reason of a relationship with the developer</u>. In such circumstances, the test is that which applies to all public officials: Would a reasonably well-informed person consider that the interest might have an influence on the exercise of the official's public duty? If that duty is to hear and decide, the test is expressed in terms of a reasonable apprehension of bias. (173)
>
> *Old St. Boniface Residents Association Inc. v. Winnipeg (City)*, [1991] 2 W.W.R. 145 (S.C.C.), *per* Sopinka J. (Dickson, C.J.C., Wilson and McLachlin JJ., concurring); emphasis added.

(b) <u>No Reasonable Apprehension of Bias</u>

39. It is submitted that the proper approach to be taken to whether a reasonable apprehension of bias exists is that articulated in *Committee for Justice v. Nat. Energy Board*, [1978] 1 S.C.R. 369. Writing the majority judgment, Laskin C.J.C referred to a "reasonable apprehension, which reasonably well-informed persons could properly have, of a biased appraisal and judgment of the issues" and to the "probability or reasoned suspicion of biased appraisal and judgment, unintended though it be". (at 391) His

Lordship noted that the reasonable apprehension test, "is grounded in a firm concern that there be no lack of public confidence in the impartiality of adjudicative agencies."

40. Although Mr. Justice de Grandpré dissented as to the result, it is submitted that the formulation of the "reasonable apprehension" test he articulated is consistent with the approach of the majority, and has since been followed by other Canadian courts:

> ...the 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. In the words of the Court of Appeal, that 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 Mr. Crowe, whether consciously or unconsciously, would not decide fairly."
>
> . . .
>
> . . .The question of bias in a member of a court of justice cannot be examined in the same light as that in a member of an administrative tribunal. . .
>
> > The basic principle is of course the same, namely that natural justice be rendered. But its application must take into account the special circumstances of the tribunal.
>
> *Committee for Justice, supra*, at 394-295
>
> ***See also:*** *Re Evans and Milton* (1979), 46 C.C.C. (2d) 129 (Ont. C.A.) (adopts the test expressed by de Grandpré J.)
>
> *MacBain v. Lederman*, [1985] 1 F.C. 856 (C.A.) at 866 *et seq.* in which that Court appears to accept counsels' position that "the Marshall Crowe test" articulated above by Justice de Grandpré is the proper approach.
>
> ***See also*** *Valente v. The Queen, supra* at 684-685

41. It is submitted that an informed person, considering the impugned provision and the financial arrangements of the Society, viewing the matter

realistically and practically - and having thought the matter through - would conclude that it is more likely than not that the judicial committee would decide the issue before it fairly. Indeed, it stretches credulity to assert that the committee members would allow, either consciously or unconsciously, the possibility of a costs order in the event of a finding of misconduct to predispose them to find against the Appellant. The possibility of exercising the power under the impugned provision is simply unlikely to "colour" the issue in the eyes of the members of the judicial committee. In fact, it has long been recognized that "there rests upon the governing bodies of the professions in their exercise of their statutory disciplinary powers the duty to be scrupulously fair to those of their members whose conduct is under investigation and whose reputations and livelihoods may be at stake." (*Ringrose v. College of Physicians*, [1977] 1 S.C.R. 814 at 818) Equally, the power to award costs has long been a common provision in statutory provisions authorizing professional disciplinary proceedings.

> Orkin, *supra* at p. 1-2, para. 102
>
> *The Law Society Act*, S.M. 1956, c. 39, s. 44(2)
>
> *McAllister v. N.B. Veterinary Medical Assoc.* (1986), 71 N.B.R. (2d) 109 at 117 (Q.B.), *per* Stevenson, J.:
>
> I cannot accept that an apprehension of bias or interest is a corollary to any authority of a governing body to assess costs.

42. It is respectfully submitted that the impugned provision does not raise any reasonable apprehension of bias, nor any breach of the principle of fundamental justice requiring impartiality and open-mindedness on the part of decision makers.

> 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.
>
> *Wilson v. Med. Service Cmsn. of B.C., supra*, (C.A.) at 21, *per curiam*

II. 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 Charter?

43. This Intervener submits that the Appellant has failed to establish either that the impugned provision touches upon an interest protected by section 7 or that there is any contravention of the principles of fundamental justice. If, however, this Court should rule otherwise, this Intervener submits that the impugned provision is justified under section 1 of the Charter.

44. This Intervener submits that subsection 52(4) has three pressing and substantial objectives:

1. to deter professional misconduct, conduct unbecoming, and incompetence among members of the legal profession;

2. to assure the public that any of these proscribed activities will be treated with utmost gravity; and

3. to avoid imposing unnecessary operating costs on the Law Society and, ultimately, on innocent members of the legal profession and the paying public, and instead to allow the member whose conduct has fallen short of professional standards to bear the burden of the costs associated with the proceedings.

45. It is further submitted that subsection 52(4) meets the proportionality test prescribed in *R. v. Oakes*, [1986] 1 S.C.R. 103, and refined in subsequent cases such as *R. v. Schwartz*, [1988] 2 S.C.R. 443, esp. at 487-489 and *R. v. Cotroni*, [1989] 1 S.C.R. 1469, esp. at 1489-1490. The rational connection between the levying of costs against a lawyer and the objectives identified in the previous paragraph is self-evident.

46. As for minimal impairment and effects, the Intervener relies on the fact that a meagre .04% of Law Society revenues derive from costs imposed

under subsection 52(4) (see para. 6(d), *supra*). It is submitted that this percentage is so small that the bias factor cannot possibly outweigh the important objectives served by the discretion to levy costs. Moreover, it is submitted that given the small amounts involved, the alleged bias must be regarded as "technical" only. Furthermore, it is submitted, the discretion to award <u>partial</u> costs minimizes the impairment of the Charter right and assures that subsection 52(4) does not require or authorize a Charter breach of disproportionate effects. Finally, in this regard, it must not be forgotten that the Appellant has a right of appeal to the Court against an adverse finding.

III. Does section 11 of the Charter apply to the Citation and the disciplinary proceedings brought against the Appellant?

47. The Appellant argues that the Citation leading to the disciplinary proceedings violates his rights guaranteed under s. 11(b) of the Charter. That provision states:

> 11. Any person charged with an offence has the right
>
> . . .
>
> (b) to be tried within a reasonable time;

48. It is respectfully submitted that this argument must be rejected. The Appellant has failed to establish that either the Charter as a whole or section 11 in particular is applicable to the Citation and the proceedings.

49. It is submitted that the Law Society of Manitoba does not fall within section 32 of the Charter: it is not "government" and no legislative provision is impugned. Therefore the Respondent's actions in formulating and proceeding with the Citation are not subject to Charter review.

> *Stoffman v. Vancouver General Hospital*, [1991] 1 W.W.R. 577 (S.C.C.) at 613-621

Harrison v. University of B.C., [1991] 1 W.W.R. 681 (S.C.C.) at 700 *per* La Forest J.

McKinney v. University of Guelph, S.C.C., December 6, 1990 (not yet reported)

Douglas/Kwantlen Faculty Assn. v. Douglas College, [1991] 1 W.W.R. 643 (S.C.C.) at 661-662 *per* La Forest J.

50. In any event, it is respectfully submitted that this Court's earlier pronouncements make it quite clear that section 11 does not apply to disciplinary proceedings of the type in the case at bar: such proceedings are neither criminal in nature nor do they involve true penal consequences.

R. v. Wigglesworth, supra at 551-562, esp. at 560-561

Trumbley and Pugh v. Metropolitan Toronto Police, [1987] 2 S.C.R. 577

Trimm v. Durham Regional Police, [1987] 2 S.C.R. 582

R. v. Shubley, [1990] 1 S.C.R. 3 at 17 *et seq.* esp. at 21-23

And see: Re Law Society of Manitoba and Savino (1983), 1 D.L.R. (4th) 285 (Man. C.A.); quoted with approval by Wilson J. in *R. v. Wigglesworth, supra*, at 555, 556, and 560.

PART IV

NATURE OF ORDER SOUGHT

51. The Attorney General of Manitoba asks that the appeal be dismissed and that the constitutional questions be answered as follows:

1. Does subsection 52(4) of *The Law Society Act* of Manitoba, R.S.M. 1987, c. L100, contravene s. 7 of the Charter?

   Answer: NO.

2. If the answer to question 1 is affirmative, is subsection 52(4) of *The Law Society Act* of Manitoba, R.S.M. 1987, c 100, justified by s. 1 of the Charter?

   Answer: YES.

3. Does section 11 of the Charter apply to the Citation and the disciplinary proceedings brought against the Appellant?

   Answer: NO.

52. All of which is respectfully submitted.

Marva J. Smith

MARVA J. SMITH

DONNA J. MILLER

Counsel for the Intervener,
Attorney General of Manitoba

PART V

TABLE OF AUTHORITIES

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