

IN THE SUPREME COURT OF CANADA

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

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

AND IN THE MATTER OF: David Morley Pearlman

BETWEEN:

DAVID MORLEY PEARLMAN,

Appellant (Applicant),

- and -

**THE MANITOBA LAW SOCIETY
JUDICIAL COMMITTEE,**

Respondent (Respondent).

FACTUM OF THE RESPONDENT

Mr. Sidney Green, Q.C.
147 Westgate
Winnipeg, Manitoba
R3C 2E2
(204) 783-0746
Solicitor for the Appellant

The Law Society of Manitoba
201 - 219 Kennedy Street
Winnipeg, Manitoba
R3C 1S8
(204) 942-5571
Jannine LeMere
Solicitor for the Respondent

Burke-Robertson
70 Gloucester Street
Ottawa, Ontario
K2P OA2
(613) 236-9665
Ottawa Agent for the Appellant

Gowling Strathy & Henderson
2600 - 160 Elgin Street
Ottawa, Ontario
K1N 8S3
(613) 232-1781
Henry S. Brown
Ottawa Agent for the
Respondent

TABLE OF CONTENTS

	<u>Pages</u>
PART I STATEMENT OF FACTS	1 - 2
PART II POINTS IN ISSUE	3 - 4
PART III ARGUMENT	5 - 17
PART IV NATURE OF THE ORDER REQUESTED	18
PART V TABLE OF AUTHORITIES	19
APPENDIX	

PART I

STATEMENT OF FACTS

1. The Respondent accepts the facts as set out in the Reasons for Judgment of the Court of Queen's Bench and the Court of Appeal and in pages 1 through 4 of the Appellant's Factum but would add the following thereto:

10

i) The Discipline Committee of the Law Society of Manitoba directed that the Appellant be charged with conduct unbecoming a barrister and solicitor on March 30, 1987; and on April 6, 1987 the Deputy Chief Executive Officer formulated the citation,
Case on Appeal, pp. 30, 80, 93

20

ii) On July 16, 1987 the Judicial Committee of the Law Society of Manitoba heard submissions on behalf of the Appellant on a motion that the citation disclosed no basis for the charges; and on a motion that the committee could not enter into the inquiry because to do so would violate the protection extended to the Appellant under section 11 of the Charter,
Case on Appeal, p. 20

30

iii) In August of 1987 the Judicial Committee gave written reasons concluding it had jurisdiction to enter upon an inquiry involving the subject citation;
Case on Appeal, p. 35

iv) On September 21, 1987 an Originating Notice of Motion appealing the Judicial Committee's decision was filed in the Court of Queen's Bench;
Case on Appeal, p. 5

v) The motion was argued before His Lordship, Mr. Justice Jewers on January 27, 1988 and dismissed in reasons given February 24, 1988;

Case on Appeal, p. 105

vi) An appeal from Mr. Justice Jewers' decision to the Manitoba Court of Appeal was heard on April 5, 1989. The Attorney-General for Manitoba intervened on a constitutional question;

10

Case on Appeal, p. 116

vii) On September 8, 1989 the Manitoba Court of Appeal in a majority decision, dismissed the Appellant's appeal with costs.

Case on Appeal, p. 116

PART II

POINTS IN ISSUE

- i) The majority of the Manitoba Court of Appeal did not err in upholding the decision of the Judicial Committee of the Law Society of Manitoba and the Court of Queen's Bench.

10 The Appellant has raised the following issues:

- ii) The Manitoba Court of Appeal erred in failing to find that the Citation violates the rights of the Applicant as guaranteed by Section 11 of the Canadian Charter of Rights and Freedoms, which provides that any person charged with an offence has the right to be tried within a reasonable time.

- 20 iii) The Manitoba Court of Appeal erred in failing to find, in the alternative, that the Citation deals with conduct alleged to have occurred in 1977, 1978 and 1979, all of which is a matter of public record, and that the Respondent has been guilty of laches and unreasonable delay in purporting to cite such conduct as being subject to disciplinary measures.

- 30 iv) The Manitoba Court of Appeal erred in failing to find that the Judicial Committee of the Manitoba Law Society declined to exercise its jurisdiction to give effect to a Motion made on behalf of the Applicant, and declined to determine whether the conduct alleged in the Citation could constitute conduct unbecoming a barrister and solicitor.

- v) The Manitoba Court of Appeal erred in failing to find that the action proposed to be taken by the Respondent

is contrary to natural justice and contrary to the Canadian Charter of Rights and Freedoms, in that the Respondent claims the right in the adjudication of this matter to levy costs of the hearing against the Applicant if it finds him guilty, and the adjudicating body therefore has a pecuniary interest in finding the Applicant guilty, and will suffer a pecuniary loss if it finds him innocent.

10 vi) By order of the Right Honourable Chief Justice of Canada dated January 29, 1991 the following constitutional questions were stated, which are also in issue:

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?

20 2. If the answer to Question 1 is affirmative, is section 52(4) of the Law Society Act of Manitoba, R.S.M. 1987 c. L100, justified by section 1 of the Canadian Charter of Rights and Freedoms and therefore not inconsistent with the Constitution Act 1982?

PART III

ARGUMENT OF THE RESPONDENT

i) The majority of the Manitoba Court of Appeal did not err in upholding the decision of the Judicial Committee of the Law Society of Manitoba and the Court of Queen's Bench.

- 10 1. Mr. Justice Philp, in speaking for the majority of the court, carefully reviewed the record in the case at bar. No evidence had been called therefore the court did not need to examine findings of fact, credibility or weight.
2. The Respondent submits the majority of the Court of Appeal properly applied the appropriate law to the undisputed record in a logical and concise way and reached a correct decision.
- 20 3. It is respectfully submitted O'Sullivan, J.A., in his dissenting reasons erred when he cited section 36(o)(xi) of The Law Society Act as the provision which ought to have applied in the Appellant's case. The section cited specifically excludes from the reasons to refuse to issue a practising certificate "a judgment for the payment of costs". The \$1,500.00 order to pay issued against the Appellant in 1979 by Freedman, C.J.M. was solely an order for the payment of costs.
- 30 Therefore the Law Society of Manitoba had no authority to refuse to issue the Appellant a practising certificate on the basis of the section quoted by the learned justice of appeal.
4. Additionally, disciplinary procedures and the refusal to issue practising certificates are not mutually

exclusive. The Respondent submits the Appellant's cited behaviour may still be determined to be conduct unbecoming a barrister and solicitor notwithstanding section 36(o)(xi) of The Law Society Act.

10 5. Additionally, O'Sullivan, J.A. failed to consider the provisions of the Canadian Bar Association's Code of Professional Conduct in measuring whether the Appellant's alleged behaviour could constitute conduct unbecoming a barrister and solicitor. These provisions were amply reviewed in the court below by Jewers, J.A. Case on Appeal, pp.97-102

20 6. It is submitted that the majority of the Manitoba Court of Appeal properly applied the principles to be used in reviewing a decision of the Queen's Bench Judge and the Judicial Committee of the Law Society of Manitoba and did not make any determination contrary to those principles.

20 ii) The Manitoba Court of Appeal erred in failing to find that the Citation violates the rights of the Appellant as guaranteed by Section 11 of the Canadian Charter of Rights and Freedoms, which provides that any person charged with an offence has the right to be tried within a reasonable time.

30 7. With respect to the constitutional issue raised by the Appellant, the Respondent respectfully adopts the argument of the Intervener, the Attorney General of Manitoba.

8. However, the Appellant in this point also argues that the Citation discloses no unprofessional conduct or misconduct or conduct unbecoming a barrister and solicitor.

9. In response to the Appellant's argument that the Citation discloses no offence, the Respondent submits the Appellant was charged with conduct unbecoming a barrister and solicitor. Conduct unbecoming is generally considered to be conduct on the part of a member which is dishonourable and tends to bring the profession into disrepute, but which does not arise out of the member's professional undertaking or out of any particular solicitor/client relationship.

10

Re Cwinn and Law Society of Upper Canada (1980),
28 O.R. (2d) 61 (H.Ct.) at p.67

10. The Benchers of the Law Society are charged with the responsibility of exercising disciplinary jurisdiction over barristers, solicitors and students.

20

The Law Society Act, R.S.M. 1987 c. L100, sec.
36(t)
See Appendix, p.(iv)

11. The Governing Body or a committee thereof must also provide for inquiries or investigations and hearings of any charge or complaint of professional misconduct or conduct unbecoming a barrister, solicitor or student.

30

The Law Society Act, R.S.M. 1987 c. L100, sec.
36(aa), sec. 49(1)
See Appendix, p.(v) and (vii)

12. The question of whether conduct does or does not constitute professional misconduct or conduct unbecoming a barrister and solicitor is one to be determined by the Bencher members of the Judicial Committee.

Rules of the Law Society of Manitoba, sec.22(4)(b)
See Appendix, p.(xi)

13. In this connection, the Manitoba Court of Appeal has held:

No one is better qualified to say what constitutes professional misconduct or conduct unbecoming a barrister and solicitor than a group of practising barristers who are themselves subject to the rules established by their governing body.

10

Law Society of Manitoba v. Savino (1983), 23 Man. R. (2d) 293 (C.A.) at pp.298-9

14. It is submitted that Jewers, J. correctly formulated the question in the proceedings before him, and applied the proper test when he stated:

20

On the application before me I can only determine whether the Benchers have jurisdiction to consider the charges and not whether the facts alleged in them would, if proved, constitute professional misconduct. If the facts set out in the charges can reasonably be regarded as disgraceful or dishonourable, then it is open to the Benchers to decide whether the conduct alleged, if proved, does - or does not - constitute professional misconduct. The decision is not one for this court to make at this stage of the proceedings but it is eminently a judgment to be made by the Benchers who are the proper arbiters of professional standards. The only question for me is whether the allegations, if proved, are reasonably open to the interpretation of professional misconduct. If so, then in my opinion, the Benchers have jurisdiction to proceed.

30

Reasons for Judgment of Jewers, J., Case on Appeal, p.97

40

15. All of the members of the Court of Appeal approved of the test as set out by Jewers, J..

Reasons for Judgment of O'Sullivan, J.A., Case on Appeal, p.109

Reasons for Judgment of Philp, J.A., Case on Appeal, p.129

16. The majority of the Court of Appeal also agreed with the conclusion of the learned Queen's Bench judge when this test was applied to the allegations made against the Appellant.

Reasons for Judgment of Philp, J.A.: Case on Appeal, p.129

- 10 17. In addition, the Respondent submits the cases of German v. Law Society of Alberta, [1974] 5 W.W.R. 217 (Alta. C.A.) and Shumiatcher v. Law Society of Saskatchewan (1966), 58 W.W.R. 465 (Sask.C.A.) are distinguishable from the facts of the case at bar. In both the German and Shumiatcher matters an appeal of the Benchers' finding of conduct unbecoming a barrister and solicitor occurred after a full hearing on the merits. The Respondent submits the Appellant's challenge is premature as it has been brought before any evidence had been received.
- 20

18. Notwithstanding the court in German overturned the member's conviction, the court upheld the role of the Benchers in determining and adjudicating "conduct unbecoming".

German v. Law Soc. of Alta., supra, at p.229

19. The Alberta Court of Appeal has since overruled the German decision with respect to the definition of "conduct unbecoming". In Trace v. The Institute of Chartered Accountants Council and Institute of Chartered Accountants (1988), 63 Alta. L.R. (2d) 53 (C.A.) the court held conduct unbecoming is to be defined more broadly than simply disgraceful or dishonourable behavior and can encompass degrees of transgression which may be small or large. Therefore, Jewers, J. and the majority of the Manitoba Court of
- 30

Appeal used a more stringent test than was necessary to conclude the allegations against the Appellant were capable of constituting "conduct unbecoming".

Trace v. The Institute of Chartered Accountants Council and Institute of Chartered Accountants, supra, at p. 57

- 10 20. The Appellant also cites the case of Bateman v. Association of Professional Engineers of Manitoba (1984), 28 Man.R. (2d) 264 (Q.B.) as authority for the proposition that a complaint of unprofessional conduct against a professional must allege the conduct complained of and in what way it was unprofessional.
- 20 21. The Respondent submits that if the test as set out in the case of Bateman were applied to the case at bar the Citation issued against the Appellant (Case on Appeal, p.27) would qualify. In Bateman, Wright, J. suggests at p. 267:
- Similarly an allegation of unprofessional conduct should indicate in what way the conduct is in breach of professional standards as they may exist - perhaps by following the wording of one or more of the many rules of conduct listed in the professional engineers' code of ethics (authorized by bylaw passed pursuant to the Act).
- 30 22. Jewers, J. carefully compared the allegations in the Citation to the relevant provisions of the Canadian Bar Association's Code of Professional Conduct and found ample support for the breaches alleged in the three counts of the Citation.
- Reasons for Judgment of Jewers, J., Case on Appeal, pp. 97-102
- 40 23. The Respondent submits the case of Hoem v. Law Society of British Columbia and Attorney-General of B.C., [1985] 5 W.W.R. 1 (B.C.C.A.) cited in the Appellant's

factum is a case which deals with the exclusive principle of prosecutorial discretion. The principles enunciated in the Hoem case must be restricted to their particular fact situation. The Respondent submits the Hoem case is not of general applicability and is not relevant to the case at bar.

10 24. The Respondent submits that the presence of civil court proceedings or remedies is not a bar to disciplinary proceedings. The potential for parallel procedures such as disciplinary proceedings and civil or criminal proceedings has always existed. To preclude a professional body from disciplining one of its members because civil or criminal courts have taken some action would be to deny a self-governing body its mandate.

25. As Wright, J. found in Bateman at p.266:

20 The disciplinary procedures permitted by the Act can run parallel with or in addition to any other investigative authority contained in the legislature's own procedures or arising pursuant to public inquiries, unless specifically restricted. No restrictions are indicated. This is not a question of duplication of proceedings. Nor is the question of competence of the respondent the issue. If the respondent has jurisdiction to proceed with the inquiry then it has the right and presumed ability to measure whether or not the kind of misconduct alleged has been committed by the Applicant.

30

See also: Wigglesworth v. R., [1987] 2 S.C.R. 541

40 iii) The Manitoba Court of Appeal erred in failing to find, in the alternative, that the Citation deals with conduct alleged to have occurred in 1977, 1978 and 1979, all of which is a matter of public record, and that the Respondent has been guilty of laches and unreasonable delay in purporting to cite such conduct as being subject to disciplinary measures.

26. The Respondent accepts that the factual underpinnings which gave rise to the charges of conduct unbecoming against the Appellant arose in the late 1970's. The Respondent's first awareness of the matter occurred in October of 1986 when it was brought to the Law Society's attention. The chronology from that point on is as set out in the Reasons for Decision, Jewers, J.:

Case on Appeal, p.93

10

Society proceeded as follows:

October 23rd, 1986 - requested explanation from Mr. Pearlman;

October 28th, 1986 - received response from Mr. Pearlman;

20

November 14th, 1986 - correspondence considered by the Discipline Committee, who instructed their counsel to obtain further information regarding the enforcement proceedings in the County Court;

December 12th, 1986 - Discipline Committee considered again, and instructed counsel to request from Mr. Pearlman confirmation that the costs assessed by the Court of Appeal had been paid;

30

December 30th, 1986 - response from Mr. Pearlman;

January 9th, 1987 - Discipline Committee directed that alleged "second set of reasons" referred to by Mr. Pearlman in his latest correspondence be reviewed;

March 30th, 1987 - the Discipline Committee directed that Mr. Pearlman be charged;

40

April 14th, 1987 - hearing of case set down for June 24th, 1987;

At request of counsel for Mr. Pearlman, matter adjourned to July 16th, 1987.

The case went before the Judicial Committee of the Law Society on the preliminary point of the jurisdiction of the Society to proceed with the charges. In August, 1987, the Judicial Committee

issued reasons in which they held that they did have jurisdiction to hear the charges. Following that, the applicant filed this motion on September 21st, 1987.

27. The Respondent submits, and it was found as a fact in the courts below, that from the point of awareness of the matter the Respondent acted with reasonable dispatch and did not unreasonably delay the prosecution.

10

Reasons for Decision of Jewers, J., Case on Appeal, pp.93-94

Reasons for Decision of Philp, J.A., Case on Appeal, p.123

28. The reasonableness of time can only logically begin from the date the Respondent receives the complaint for it is only then that the Society can prosecute the charge. The Respondent's authority over a member is independent of any civil remedies the complainant may exercise. Just as a complainant cannot halt disciplinary proceedings nor should a complainant's delay in reporting a matter affect the Respondent's lawful authority to discipline its members for conduct unbecoming. The delay in the case at bar existed before the Respondent was seized of the matter and, it is submitted, not relevant to disciplinary proceedings, although it may otherwise be relevant in civil proceedings between the Appellant and the complainant.

20

30

29. The courts below found no evidence that the Respondent was aware of the facts of this case until October, 1986.

Reasons for Decision of Jewers, J., Case on Appeal, p.94

Reasons for Decision of Philp, J.A., Case on Appeal, p.123

40

30. The doctrine of laches is an equitable remedy. To be invoked it must be demonstrated that the delay has been unreasonable and serious prejudice has occurred to the seeking party. It must be demonstrated in light of all the circumstances to grant the specific relief sought would be unjust.

10 I.C.F. Spry, The Principles of Equitable Remedies, 3rd ed., (Toronto: Carswell, 1984), pp.415-422

31. Examples of prejudice are a lapse in memory of witnesses, the unavailability of witnesses or a destruction of evidence. There is no evidence of that nature in the case at bar. Rather there is simply an order for costs and a lack of compliance with that order. The record exists and speaks for itself. Not only has the Appellant not satisfied the criteria to invoke the doctrine of laches, the Court has found the Respondent acted with reasonable dispatch.

20

Reasons for Judgment of Jewers, J., Case on Appeal, pp.93-94

32. In Re MacPhee & Barristers' Society of New Brunswick (1983), 1 D.L.R. (4th) 156 (N.B.Q.B.) a discipline matter involving a four year delay between the information coming to the attention of the Barristers' Society and the charges being formulated caused proven prejudice in that the witnesses' memories were less reliable, the tapes of previous court proceedings were no longer available and documents were lost. The delay could not be reasonably explained in Re MacPhee. By contrast, in the case at bar the Law Society acted promptly (within eight days) when it became aware of the complaint.

30

33. The Respondent submits that it cannot be held responsible for the pre-charge delay in the case at bar because to do so would be to impose upon the Law Society the duty to monitor the ongoing activities of every lawyer on a day-to-day basis.

Wasylyshen v. Law Society of Sask. (1985), 39 Sask. R. 187 (C.A.) at p.192

10 34. Furthermore, in the case at bar, the Respondent submits the assessment of costs against a lawyer in itself is not conduct unbecoming, it is only the subsequent and continuing refusal to pay the order that founds a charge of improper conduct. This factor must be taken into consideration in calculating any pre-charge delay.

20 35. Additionally, the Respondent submits that the Appellant has taken no lawful steps to dispute the order of costs issued against him by the Manitoba Court of Appeal. He has simply ignored it.

iv) The Manitoba Court of Appeal erred in failing to find that the Judicial Committee of the Manitoba Law Society declined to exercise its jurisdiction to give effect to a Motion made on behalf of the Appellant, and declined to determine whether the conduct alleged in the Citation could constitute conduct unbecoming a barrister and solicitor.

30 36. The Judicial Committee, in its Reasons noted the issue raised by counsel for the member cited:

40 Mr. Green, counsel for Mr. Pearlman, challenges the committee's jurisdiction to enter into the inquiry on the grounds that the Citation discloses no basis for the charge. He also argues that the committee cannot enter into the inquiry because to do so would be contrary to the protection extended to the member under Section 11 of the Charter of Rights and Freedoms...

Case on Appeal, p.32

37. The matter was not before the committee to be tried on the merits, and, as the committee points out:

10

On the submission that the Citation does not disclose any charge to which the member must answer, the committee is of the opinion that the argument presented, and the material filed in support would be better presented to the committee actually entering into the inquiry as to whether or not the member's conduct does or does not constitute conduct unbecoming to a barrister and solicitor.

Case on Appeal, p.33

38. Jewers, J. also addressed the limited nature of the proceedings in his Reasons by noting:

20

The case went before the Judicial Committee of the Law Society on the preliminary point of the jurisdiction of the Society to proceed with the charges (emphasis added).

Case on Appeal, p.93

39. The Respondent respectfully submits that to ignore rather than challenge a court order by lawful means is exactly the type of conduct which could expose the Appellant to disciplinary proceedings.

30

Code of Professional Conduct, Chapters VIII and XVII Appendix, pp. (xvii) - (xxviii).

Reasons for Decision of Jewers, J., Case on Appeal, p.98

v) The Manitoba Court of Appeal erred in failing to find that the action proposed to be taken by the Respondent is contrary to natural justice and contrary to the Canadian Charter of Rights and Freedoms, in that the Respondent claims the right in the adjudication of this matter to levy costs of the hearing against the Appellant if it finds him

40

guilty, and the adjudicating body therefore has a pecuniary interest in finding the Appellant guilty, and will suffer a pecuniary loss if it finds him innocent.

(vi) By order of the Right Honourable Chief Justice of Canada dated January 29, 1991 the following constitutional questions were stated, which a also in issue:

- 10 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?
2. If the answer to Question 1 is affirmative, is section 52(4) of the Law Society Act of Manitoba, R.S.M. 1987 c. L100, justified by section 1 of the Canadian Charter of Rights and Freedoms and therefore not inconsistent with the Constitution Act 1982?
- 20 40. The Respondent adopts the argument of the Intervener, the Attorney-General of Manitoba.

PART IV

NATURE OF THE ORDER REQUESTED

1. The Respondent respectfully submits that the Appellant's appeal be dismissed with costs.

10 2. The Respondent respectfully submits that the Constitutional questions be answered as follows:

1. No.
2. Not applicable.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

20 THE LAW SOCIETY OF MANITOBA JUDICIAL COMMITTEE

Per: _____
Jannine LeMere, Counsel

PART V

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Bateman v. Association of Professional Engineers of Manitoba</u> (1984), 28 Man.R. (2d) 264 (Q.B.)	10, 11
<u>Re Cwinn and The Law Society of Upper Canada</u> (1980), 108 D.L.R. (3d) 381 (Div.Ct.)	7
<u>German v. Law Society of Alberta</u> , [1974] 5 W.W.R. 217 (Alta.C.A.)	9
<u>Hoem v. Law Society of British Columbia & Attorney-General of British Columbia</u> , [1985] 5 W.W.R. 1 (B.C.C.A.)	10, 11
<u>I.C.F. Spry, The Principles of Equitable Remedies</u> , 3rd ed., (Toronto: Carswell, 1984), pp.415-422	14
<u>Law Society of Manitoba v. Savino</u> (1983), 23 Man.R. (2d) 293 (C.A.)	8
<u>Re MacPhee & Barristers' Society of New Brunswick</u> (1983), 1 D.L.R. (4th) 156 (N.B.Q.B.)	14
<u>Shumiatcher v. Law Society of Saskatchewan</u> (1966), 58 W.W.R. 465 (Sask.C.A.)	9
<u>Trace v. The Institute of Chartered Accountants Council and Institute of Chartered Accountants</u> (1988), 63 Alta.L.R. (2d) 53 (C.A.)	9, 10
<u>Wasylyshen v. Law Society of Saskatchewan</u> (1985), 39 Sask.R. 187 (C.A.)	15
<u>Wigglesworth v. R.</u> , [1987] 2 S.C.R. 541	11