2005 LSBC 31
Report issued: July 26, 2005

The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and a hearing concerning

Re: Applicant 1

Applicant

Decision of the Hearing Panel
on Application for Call and Admission on Transfer

Hearing dates: November 2, 3, 4, 23, 2004 and
June 28, 2005

Panel: Anne K. Wallace, Q.C., Chair, Terence La Liberte, Q.C., Art Vertlieb, Q.C.

Counsel for the Law Society: Herman Van Ommen
Appearing on his own behalf: The Applicant

Background

[1] On December 22, 2003, the Applicant made an application for call and admission on transfer to the Law Society of British Columbia from the [provincial law society]. On March 4, 2004 the matter was referred by the Law Society of B.C. Credentials Committee for a hearing. This hearing commenced on November 2, 2004 and continued on November 3, November 4 and November 23, 2004. The initial four days of hearing raised many issues and the Panel decided it needed more information. On December 15, 2004 the Panel sent a memorandum to Counsel requesting that information. The Panel received a reply in early January, 2005, which the Panel found did not supply the specific information requested. A further memorandum was sent to Counsel on or about February 4, 2005 and a reply was received by the Panel on or about February 10, 2005. Before completing its deliberations, Counsel for the Law Society applied to reopen its case, which application was granted. The hearing was subsequently reconvened on June 28, 2005.

Applicant's history

[2] The Applicant was originally called to the [provincial law society] on [date]. The Applicant practiced in [Province] for 20 years, during which time he had a good conduct record.

[3] In 2002 the Applicant was cited for professional misconduct by the [provincial law society] and was found guilty. The finding was with respect to a family law client who had retained him in order to regain custody of her children, who had been apprehended as a result of her problems with illegal drug use. The Panel found that the Applicant assisted the client to obtain cocaine, shared the cocaine with her and then

had sexual relations with her.

[4] The Applicant denied these facts and appealed the Panel's findings. He was unsuccessful in the [Province] Court of Appeal. On [date] the Applicant was suspended from practice for 18 months and reinstatement after that period was conditional upon three requirements:

1. Submitting a drug dependency assessment which showed he had been evaluated and determined not be using or dependent upon any non-medically prescribed drug.

2. Obtaining a mental health report that showed he was not suffering from any mental health disorder.

3. Reimbursement to the [provincial law society] for costs.

[5] The Applicant moved to B.C. in January, 2001, before the penalty phase of his hearing was held. In March, 2002, the Applicant declared bankruptcy. He was discharged from bankruptcy on [date] and on [date], he was re-instated in the [provincial law society].

The Application for Admittance in B.C.

[6] The Applicant applied for call and admission to the Law Society of B.C. under the National Mobility Agreement of the Federation of Law Societies. This agreement, negotiated by the Federation of Law Societies and subscribed to by all the Law Societies in Canada, provides for the practice of law between jurisdictions and also for transfer of practice between provinces. The situation for this applicant is governed by Sections 10 and 13 of the Agreement which provides that a lawyer who has a disciplinary record in his or her home jurisdiction must obtain a permit to practice in a host jurisdiction (i.e. the Law Society where the application is being made).

[7] In addition, Section 13 provides that the granting of membership by a host governing body is in the complete discretion of that body, limited only by exercising its discretion consistent with the public interest. The Applicant conceded that nothing in the Mobility Agreement affects British Columbia's obligation under the *Legal Profession Act* to ensure that the Applicant meets the standard for admission as set in British Columbia. Neither party to this hearing could find any decisions which set out any specific principles to be applied or the weight to be given, vis-à -vis this hearing, to [Province] disciplinary action and reinstatement. While no case law was presented as to what affect the decision of a sister regulatory Law Society should have on this Law Society, it is this Panel's decision that respect should be given to the [provincial law society] decision to re-admit the Applicant.

[8] However, this Panel must also examine this application in light of the events in B.C. since the penalty decision was rendered by the [provincial law society] and also with due regard to the Law Society of B.C.'s test for admission. The standard for admission to the Bar in British Columbia is set out in the *Legal Profession Act* at section 19(1):

> *No one may be called to the BC Bar unless they are a person of good character and repute and fit to become a barrister and solicitor.*

[9] Counsel for the Law Society submitted that the procedure applied by the [provincial law society] for the Applicant's " reinstatement" was only procedural and did not include the same examination of character and repute as required in British Columbia and therefore has no effect on this application.

Fitness

[10] The objective elements regarding fitness for this Applicant are the physical and mental elements of fitness, namely the drug and mental health issues that were raised during his disciplinary hearing in [Province]. The [provincial law society] ruled that a condition of reinstatement for the Applicant was to supply evidence, to their satisfaction, that he no longer had those problems. Dr. Paul Janke, a respected psychiatrist whose Curriculum Vitae was filed herein as Exhibit 5, provided a mental health assessment to [provincial law society] in November, 2003 which led to the Applicant's reinstatement in [Province]. Dr. Janke's assessment stated that the Applicant " has developed and acquired significant control over his use of substances, indicating that he would be suitable to engage in the appropriate practice of law." (see Exhibit 1, Tab 6, page 8). Dr. Janke also testified at these proceedings with respect to the Applicant's current physical and mental health issues and advised that he felt the Applicant fit to practice in that regard. The Panel accepts Dr. Janke's professional opinion that the Applicant has dealt with the medical and mental health issues that caused him to be suspended in [Province] and that they are no longer an issue for him. The Applicant is to be commended for these efforts with respect to his addictions, which were no doubt very difficult to resolve.

Good Character and Repute

[11] In addition to the objective elements of mental and physical fitness, the Panel must also consider the subjective requirements of good character and repute. The qualities of character demanded of a lawyer in British Columbia are set out in *McOuat v LSBC* 78 BCLR (2d) 106; BCCA 1993. In that case, the appellate court quoted with approval the Law Society hearing panel as follows:

> " The demands placed upon a lawyer by the calling of Barrister and Solicitor are numerous and weighty and fitness implies possession of those qualities of character to deal with the demands properly. The qualities cannot be exhaustively listed but among them must be found a commitment to speak the truth no matter what the personal cost, resolve to place the client's interest first and never expose the client to risk of avoidable loss and trustworthiness in handling the money of a client."

[12] There is no doubt that the Applicant's behaviour in his practice in [Province] fell far short of the standards required by the Legal Profession Act of British Columbia. The Applicant clearly put his own interests ahead of the interests of his client in a most egregious way. However, that matter is at an end. What this Panel must now consider are the issues that have arisen in British Columbia since the Applicant's move to this province.

Applicant's Conduct since his Suspension in [Province]

[13] Extensive character evidence was called by the Applicant. The witnesses who testified in this regard were:

- P.G., a chartered accountant with [company] and a certified and experienced mediator
- P.J., a social worker with 31 years in the federal corrections service who is currently operating a private social work practice
- D.S., previously a paralegal for 23 years and currently a certified mediator and teacher in adult education
- J.C., a certified mediator, a certified management consultant and a funding officer and ombudsperson

for the Federal Government
- J.B., Q.C., a long-standing and respected member of the Law Society of BC

[14] On the limited facts about which they testified, all of these witnesses spoke favourably of the Applicant and told the Panel that they thought the Applicant was honest, genuine and extremely well-intentioned and that he should be admitted to the Law Society of British Columbia. If this were the only evidence before the Panel, the decision for this Panel would have been much easier. However, these witnesses were not privy to the totality of the evidence before this Panel and the evidence of the various witnesses was not consistent between them as to what the Applicant told each of them about his actions in [Province]. Therefore while their evidence is of assistance to the Panel, it is not determinative.

[15] Counsel for the Law Society led evidence with respect to what can generally be categorized into three headings of concern about the Applicant's behaviour in British Columbia. They are:

(a) His dealings with various mediation organizations;

(b) His dealings with Mr. S., a witness in these proceedings; and

(c) His dealings with V.R., a witness in these proceedings.

1. The Applicant's Dealings with Various Mediation Organizations

[16] The Applicant testified about his efforts, after he had settled in B.C., to establish the [Society]. He spearheaded the formation of this Society and personally recruited a group of individuals, highly respected in the mediation community, to form a Board of Directors. The character witnesses who the Applicant called in support of this application were all members of this Board. These witnesses described the Applicant's efforts to inform them of the details of his past. The Panel finds that the Applicant was selective in the information he provided to these people so that they were not aware when they became involved in this project that the Applicant was a suspended lawyer in [Province]. He did not advise them of the details of his past when recruiting the Board members even though, as he admitted on cross-examination, his past history jeopardized the reputation of these individuals.

[17] His efforts to disclose the situation were only made once " the cat was out of the bag" and the Panel finds that the Applicant was only candid with these people when he had no other option. Clearly, no one is required to disclose the details of his or her past to everyone he or she meets and the Panel recognizes that the Applicant was not branded for life with his behaviours of the past. He did not need to make his past a matter of public record on every occasion that presented itself. This Panel recognizes that the Applicant paid the price for past actions in terms of fulfilling the penalty imposed in [Province].

[18] The Panel recognizes that the Applicant was under no legal obligation to disclose to others his history with the [provincial law society]. The people directly affected still came to give favourable evidence on behalf of the Applicant. The Panel does not commend the Applicant's approach to disclosure of his previous history with the [provincial law society]. However, we are not prepared to say that these events should be considered in deciding whether or not the Applicant has met the test for admission to practice in British Columbia.

2. Dealings with Mr. S.

[19] The Law Society called Mr. S. as a witness, who testified that in November, 2002 he needed help with an application to have his arrears of maintenance reduced. He responded to an advertisement in a local newspaper in the " Legal Notices" column, a copy of which was marked as Exhibit 8 in these proceedings, and arranged to meet with the Applicant. Mr. S. testified that when they met, he asked the Applicant if he was a lawyer. The Applicant told him that he was a lawyer in [Province] and had moved to B.C. but was not a lawyer here. When asked why he was not a lawyer in B.C., the Applicant explained that there were too many lawyers in British Columbia and no room for any more. The Applicant told Mr. S. that because he was not a lawyer in B.C., it only meant he could not give Mr. S. legal advice.

[20] Counsel for the Law Society produced an agreement, a copy of which is located at Tab D of Exhibit 17, which Mr. S. had signed. In his own words, Mr. S. stated that the agreement " pre-exonerated" the Applicant (see Transcript Volume III, page 381 at line 3). The Panel finds that that is exactly what the Applicant was attempting to do by having Mr. S. sign this agreement - that is to put in writing that he was not giving legal advice as a means of proving that he wasn't doing so. However, what was written is not determinative of what occurred. This Panel must assess the actions of the Applicant to make the determination.

[21] The Applicant testified that while he drew upon his legal experience to start a mediation practice, he did not practice law in British Columbia. He was adamant that the services he provided to Mr. S. were not legal services but fell within his mediation practice. Mr. S. testified that the Applicant never mentioned mediation to him. When the Applicant was asked to clarify what mediation service he was providing to Mr. S., he gave a long and convoluted explanation about how he thought Mr. S.'s situation could lead to mediation (see Volume III, pages 341 - 346). The Panel finds that the Applicant went to great lengths to try to convince the Panel that he was not engaged in the unauthorized practice of law. The Panel found Mr. S. to be a truthful and sincere witness and accepts the evidence of Mr. S. where it conflicts with the evidence of the Applicant.

[22] Two aspects of the Applicant's dealings with Mr. S. particularly disturb the Panel. Firstly, he was dishonest about the reason he was not a lawyer in B.C. In doing so he was not candid to hide his past and mislead Mr. S., but he also was not candid about the manner in which the Law Society of B.C. operates. There is no quota system here and the Applicant should not have misled Mr. S. into thinking that there is. This brings the administration of the Law Society into disrepute.

[23] Secondly, he was not honest with Mr. S. or with the Panel about the fact that he was practicing law instead of providing mediation services. He was well aware of what amounted to practicing law and that he was not entitled to do so. He attempted in his letter to Mr. S. to protect himself from a finding of unauthorized practice. Clearly he was practicing law while not entitled to do so.

3. Dealings with V.R.

[24] The evidence of V.R. was given on the last day of hearing, June 28th, 2005. V.R. testified that in November, 2004 she had a number of outstanding claims with ICBC. She did not feel confident to act on her own behalf and as a result of unfortunate dealings she had had with lawyers in the past, she did not want to hire a lawyer to act for her. Consequently, she looked under " Mediators" in the yellow pages and as a result called the Applicant on November 25, 2004. As an aside, this was only two days after the Applicant's credentials hearing had apparently concluded.

[25] The Applicant represented to V.R. that he was a mediator with a legal background. On further questioning by V.R., the Applicant indicated that he expected to be licensed to practice law in British Columbia early in 2005 and was waiting " with baited breath" to be licensed, but admitted to her that he was

not licensed to practice law at that time. She testified that he told her that this essentially meant he could not go to court.

[26] From V.R.'s evidence in both direct examination and in chief, it is clear that she found the prospect of an impending meeting with an ICBC adjuster very stressful. In their initial conversation, the Applicant offered to go with V.R. to that meeting as " support" , without any charge to V.R. V.R. accepted that offer, which was an admirable offer on the Applicant's part.

[27] However at that meeting, the Applicant did not act merely as " a support" . V.R. testified that when she and the Applicant met with the adjustor, the Applicant told the adjustor he was there as an advocate. In his evidence, the Applicant denies this and testified he told the adjustor that he was an agent. When questioned, V.R. says she doesn't know the difference. Regardless of which term was used, assessing the Applicant's actions from that meeting and onwards, the Panel finds that the Applicant was clearly acting as a legal advocate. For example, in Exhibit 19, on page 3 of the e-mail from the Applicant to V.R. he advises V.R. that he was " reviewing relevant case law" and " drafting a demand letter" to ICBC. These are functions that a lawyer undertakes, not a mediator. Where the evidence of V.R. and the Applicant conflict, the Panel accepts the evidence of V.R.

[28] The Panel also heard evidence about the negotiations that the Applicant undertook with respect to V.R.'s claims, some of which V.R. testified were not at her instruction. She testified that the Applicant then pressured her to quickly accept the settlement that he had negotiated, even though she advised him that she had a specialist's appointment scheduled for the following week. She testified that she sought advice from friends who were lawyers and was considering what to do when she looked up the Applicant's name on the internet. She testified that when she became aware of the details of his past, she was afraid and therefore decided to accept the offer right away. The Applicant then had the settlement cheque made out to himself. He in turn issued his own cheque to V.R. which was not honoured due to insufficient funds.

[29] The Panel heard evidence about the issue of fees. V.R. testified that fees were discussed right at the outset of their meetings. As well, the Applicant's own notes indicated that fees and a retainer were discussed in December, 2004. The Applicant testified that he only decided to charge V.R. for his services in April, when he became impatient for a decision with respect to his admission in B.C. and was experiencing personal financial pressures. In his own words, at that time he decided to " damn the torpedoes" and charge V.R. on the previously agreed upon contingency basis. He settled all the outstanding ICBC claims for $25,000, inclusive of costs, and charged his fee of 25% of this total, reduced to $6,000.00.

[30] There are numerous aspects of the Applicant's dealings with V.R. that are of serious concern to this Panel. V.R. is a fragile person, both physically and emotionally. Her trust of the legal profession generally had been badly breached in the past, much to the distress of the members of this Panel, and as a result she did not want to hire a lawyer. The Applicant's evidence before this Panel was that V.R. came to him as a person who needed help and didn't want a lawyer so he was trying to assist. V.R.'s case involved four motor vehicle accidents as a result of which she had suffered numerous injuries, including neurological harm. Her case was complicated by the fact of prior motor vehicle accident matters and resulting pre-accident health issues. The effect on V.R. was significant, persistent and ongoing. V.R. needed a qualified and competent lawyer in B.C. practice who could properly and openly represent her as a lawyer. The Applicant was not such a person.

[31] The Panel finds that the Applicant chose to yield to the pressures of his own needs to V.R.'s detriment, in both the settlement of her claims and her further lack of trust of individuals with legal training who are called to the Bar or otherwise. As noted earlier, the Applicant began this *only two days* after his hearing into his fitness to be called to the British Columbia Bar had been adjourned for decision.

Decision of this Panel

[32] As stated at the outset, the Applicant is required to convince this Panel that he is fit by B.C. standards to practice as a lawyer here. Pursuant to Rule 2-67 of the Law Society Rules, the onus is on the Applicant to establish that he meets this standard. The B.C. Court of Appeal stated that test as follows:

> " They (applicants) must demonstrate that they can safely be relied upon to meet the concomitant conditions when put to the test. A valid test of whether this is likely to be the case, although by no means an exclusive one, is an examination of the way the Applicant has performed in the past under conditions similar to those with which members are confronted in the course of serving the public. . . A member of our profession ought to know the difference between right and wrong and must be prepared to sacrifice his or her own interests when they come into conflict with those of a client"
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> *Mason v LSBC CA013204 BCCA September 24, 1991*

[33] The question for this Panel is " Is this the type of person who the Law Society can have confidence that when faced with the " numerous and weighty" demands of practice as a lawyer, possesses " those qualities of character to deal with the demands properly based on his past performance?" and " does he know the difference between right and wrong (and would he) be prepared to sacrifice his own interests when they come into conflict with those of a client?"

[34] The question this Panel must answer is " Is this the type of person who the Law Society can have confidence that when faced with the " numerous and weighty" demands of practice as a lawyer, he possesses " those qualities of character to deal with the demands properly based on his past performance?" . The Panel finds that the Applicant was not candid with this Panel, nor with Mr. S and V.R.. As well, he has practiced law on two separate and unrelated matters when he was not entitled to do so.

[35] In the result, the Applicant has not discharged the burden upon him as set out in Section 19(1) of the *Legal Profession Act* of British Columbia. This application is denied.