2010 LSBC 19
Report issued: August 03, 2010

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

Robert John Douglas McRoberts

Applicant

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

Hearing date: May 20, 2010

Panel: Gavin Hume, QC, Chair, Stacy Kuiack, David Mossop, QC

Counsel for the Law Society: Jason Twa
Appearing on his own behalf: Robert McRoberts

Background

[1] On July 10, 2009, the Credentials Committee ordered a hearing pursuant to Section 19(2) of the *Legal Profession Act* (the " *Act*") and Rule 2-50(3)(c) of the Law Society Rules (the " Rules"). Those provisions in effect provide that, when an application is dealt with by the Credentials Committee, it may take a number of steps including ordering a hearing.

[2] Section 19(1) of the *Act* sets out the standard that an Applicant for Call and Admission must satisfy. It provides as follows:

> No person may be enrolled as an articled student, called and admitted or reinstated as a member unless the benchers are satisfied that the person is of good character and repute and is fit to become a barrister and a solicitor of the Supreme Court.

[3] Rule 2-67(1) provides that:

> ... the onus is on the applicant to satisfy the panel on the balance of probabilities that the applicant has met the requirements of section 19(1) of the Act and this Division.

[4] Section 22(3) of the *Act* provides as follows:

> (3) Following a hearing, the panel must do one of the following:
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> (a) grant the application;
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> (b) grant the application subject to conditions or limitations that the panel considers appropriate;

(c) reject the application.

[5] The Applicant was called to the Bar in Manitoba on June 29, 1978 and had practising status until March 31, 2005. From April 1, 2005 through to October 31, 2007, the Applicant's membership status was inactive. From November 1, 2007 through to March 31, 2009, the Applicant had practising membership status, and as of April 1, 2009 the Applicant's practice status was inactive.

[6] The Applicant was admitted as a lawyer in Saskatchewan on July 15, 1982, though he is currently a disqualified member due to non-payment of his inactive member fee.

[7] On September 8, 1993 the Applicant submitted an application for Call and Admission on Transfer to the Law Society of British Columbia (" LSBC"). On January 26, 1994, the LSBC Credentials Committee resolved to conduct an investigation concerning his application. On November 17, 1994, the Applicant withdrew his Application for Call and Admission on Transfer to the LSBC. This was for a number of reasons. The Applicant's practice was very active, and he was involved in a political campaign in Manitoba. In addition, he had concluded that the practice in BC had not matured sufficiently to support his transfer. On March 11, 2008, the Applicant submitted a second Application for Call and Admission on Transfer to the LSBC, which led to this hearing.

Facts

[8] The LSBC and the Applicant entered into an Agreed Statement of Facts. Without setting out all of the facts agreed to, it can be summarized as follows:

(a) The Applicant has been the subject of 10 claims under the Law Society of Manitoba's Professional Liability Insurance Program. It appears that in six of those claims, no damages were paid by the Manitoba Professional Liability Insurance Program.

i) One of the claims peripherally involved the Applicant, who shared the deductible payment with two others.

ii) Three claims are outstanding. With respect to two of those three outstanding claims, the insurer is dealing with the Applicant's former firm. The third claim is with respect to an allegedly negligently prepared Separation Agreement. The insurer has the preliminary reserve of $7,500 with respect to this claim.

(b) The Applicant has been the subject of three discipline hearings with the Law Society of Manitoba and has been given one caution. Those matters will be discussed in greater detail.

(c) The Applicant has been involved in 21 civil actions between 1989 and 1995, which also will be discussed in greater detail below.

[9] As previously indicated, the Applicant commenced practising in 1978. He became actively involved in mass media marketing and advertising. That appears to have contributed to the rapid growth of his firm, in addition to attracting the attention of the Manitoba Law Society. His firm grew from a two or three person firm in the early 1980s to approximately a 35 to 40 person firm with offices located in a number of locations in shopping malls in Manitoba. In addition, the firm also expanded to 12 locations in BC, Alberta, Saskatchewan and the Toronto area.

[10] Associated with that expanding practice, a number of administrative difficulties, some of which became the subject matter of review by the Law Society and others, became the subject matter of civil litigation, all of which was reviewed during the course of the hearing.

[11] The Applicant described the caution given to him by the Manitoba Law Society in 1992. It arose as a result of the departure of his partner a number of years earlier, at his request, at a point in time when his partner was handling approximately 400 active real estate files that were in various stages. This was early in the growth of his firm. At the same time, the Manitoba Land Titles Office was involved in a real estate boom and, as a result, was behind. The combination of a partner responsible for real estate transactions departing and the real estate boom gave rise to a number of client complaints. The Applicant's practice was not real estate, so he arranged for others to assist. Previous to the caution being issued, the Applicant was cited as a result of some of the issues that arose from the real estate practice, and one other issue. He was acquitted by the Judicial Committee of the Manitoba Law Society, which acquittal was upheld by the Courts. He subsequently agreed to a caution a number of years after the commencement of the investigation and citation by the Law Society in order to close the matters. There was no suggestion of any dishonesty on the part of the Applicant.

[12] The Applicant also gave evidence in chief and was cross- examined with respect to the three other discipline hearings and findings. In the first of the other three discipline hearings, the Applicant was charged with professional misconduct for failing to account to a client and failing to comply with an undertaking to a Provincial Court Judge to account to the client with respect to a sum of $15,000.

[13] The Judicial Committee of the Law Society of Manitoba found that the Applicant was guilty in failing in his duty to his client and failing to comply with his undertaking to a Provincial Court Judge and, as a result, guilty of professional misconduct. With respect to the failure in his duty to a client, he was reprimanded and ordered to pay costs of $1,000. In connection with the undertaking he was fined in the amount of $2,000. These findings were upheld by the Manitoba Court of Appeal.

[14] With respect to these findings, the Applicant gave evidence in chief and was cross-examined. His inability to account to his client was as a result of the fact that his former partner had not deposited the funds in the firm's account. As a result it was not possible to provide the accounting that he had committed to provide. For the same reason, he was unable to comply with the undertaking to the Provincial Court Judge. He admitted freely that he should have returned to the Court in order to amend the undertaking. At the end of the day, the firm paid the sum of $5,000 to the former client, even though no appropriate accounting could take place. There was no suggestion of dishonesty in these findings or in the Applicant's evidence.

[15] In April of 1991, the Applicant was found guilty of a charge of professional misconduct, as a result of which the Law Society of Manitoba's Judicial Committee ordered that the Applicant be reprimanded and pay the costs of the Law Society of Manitoba in the amount of $500. The reprimand and costs came about as a result of an account the Applicant rendered to a taxi company client being reduced by approximately $9,000 by a Master of the Court of Queens' Bench. Again, the Applicant gave evidence in chief and was cross-examined with respect to the finding. He described the client as difficult to deal with, and the matter as a complicated dispute amongst the shareholders of the taxi company. It appears that the Applicant failed to keep proper records with respect to the time spent on behalf of the client. The Master who taxed his account did not find in favour of the Applicant. While we were concerned about the credibility findings of the Master against the Applicant, we again reached the conclusion that he was not deliberately dishonest.

[16] The next discipline hearing of the Judicial Committee of the Law Society of Manitoba with respect to the Applicant involved three matters.

(a) The first matter involved a failure to give notice of a potential claim to the adjuster of the Professional Liability Claim Fund of the Law Society of Manitoba. This was because a Release had been executed that released the Applicant. He was reprimanded for his failure to report. Again there was no suggestion of dishonesty.

(b) The second matter dealt with fees charged to a matrimonial client. When the dispute arose the Applicant voluntarily agreed to arbitrate the fee. There was a significant reduction of the fees. This, in part, at least, appears to be related to the accounting difficulties the firm was facing. At the time the Judicial Committee heard it, the matter had been resolved. Again, a reprimand was issued for charging a fee that was considered by the Judicial Committee not to be fair and reasonable. There was no suggestion of dishonesty.

(c) The third matter dealt with by the Judicial Committee pertained to a breach of an undertaking. An associate in the Applicant's growing firm took on a file and gave an undertaking with respect to payment of the client's former lawyer's fees. The undertaking was to have the client assign part of the settlement funds to pay the fee. The file involved a significant accident. When the Applicant reviewed the file, he concluded that the former lawyer was potentially exposed to a claim of negligence. As a result, he wrote to the former lawyer concerning the possible claim against him. At that point in time, the former lawyer advised the Applicant about the breach of the undertaking. Given the potential negligence claim against the former lawyer, the client would not sign the agreement assigning part of the fee to pay the former lawyer's account. Subsequently, the Applicant negotiated an amendment to the undertaking and trust condition. The Applicant was reprimanded and ordered to pay $500 costs. Again, no suggestion of inappropriate practice or dishonesty arose.

[17] The Panel also reviewed 21 civil cases. The Applicant was cross-examined extensively with respect to each of the 21 cases. These cases arose between the period 1989 and 1995. Not all of the cases could be recalled by the Applicant as they were, in effect, against his firm and as he was the main partner, they at least indirectly involved him. All of the civil claims have been resolved. Some simply involved the issues that arose as a result of a rapidly developing practice and were commercial disputes involving the firm and not the Applicant personally. Some involved claims by former associates for compensation when they were terminated or left the firm. Two involved claims by banks with respect to former partners' capital accounts which were also resolved.

[18] In none of the claims that we reviewed was there any suggestion of dishonesty or inappropriate practice. While the number of claims was significant, we concluded that that alone should not result in the Applicant being precluded from practising.

Analysis

[19] Section 19(1) of the *Act* provides, in part, that this Panel " must be satisfied that the applicant is of good character and repute and is fit to become a barrister and solicitor of the Supreme Court." The onus is on the Applicant to satisfy us that he meets those requirements. Those requirements were discussed in *McOuat* v. *Law Society of BC* (1993), 78 BCLR (2d) 106 (CA). That was an application for reinstatement, but the same principles apply. The Court had this to say:

6 On the wording of that subsection the applicant has the burden of satisfying the committee that he meets two essentially moral standards. The committee was of the view that the first, good character and repute, has both a subjective and an objective aspect. At p.12 of the reasons:

> But we think we are required to consider the regard in which the candidate is held by others as well as the qualities of character Mr. McOuat possesses, that is both the subjective and objective senses of " good character" .

The committee was also of the view that good character is an element of the second standard, namely, fitness to become a barrister and solicitor. The section of the reasons dealing with fitness begins with these introductory paragraphs:

> It is for this panel acting reasonably upon the evidence before it to decide whether Mr. McOuat has discharged the burden of satisfying the panel that he is fit to become a barrister and solicitor. The objective sense of " good character" overlaps with the requirement of fitness.
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> 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.
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> The canons of legal ethics adopted by the Law Society provide assistance, when they assert:
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> > A lawyer is a minister of justice, an officer of the Courts, a client's advocate, and a member of an ancient, honourable and learned profession.
> >
> > In these several capacities it is a lawyer's duty to promote the interests of the State, serve the cause of justice, maintain the authority and dignity of the Courts, be faithful to clients, be candid and courteous in relations with other lawyers and demonstrate personal integrity.
>
> To be fit to practise a lawyer must be ethically equipped to never break the client's trust.

7 I would not disagree with the committee's analysis of the s.36(7)(b) and (c) [now, s. 19(1)] standards.

[20] The original panel in its decision dated June 12, 1992, which was the subject matter of the review by the Court of Appeal in *McOuat* (*supra*) said this:

> **GOOD CHARACTER AND REPUTE**
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> The word " character" in the expression " good character and repute" has been treated in many decided cases, especially the older ones, as importing the character or " characterization" given the applicant by other persons, what may be called a subjective sense. An example is *Leader v. Yell* (1864), 16 CB (NS) 584; 143 ER 1256, where Erle, CJ said:
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> > Good or bad character does not depend on what a man knows of himself; it means his general reputation in the estimation of his neighbours.
>
> In the same case Byles, J. said:

> ... " character" does not mean a man's real conduct and mode of life, but it means his reputation among his neighbours.
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> In more recent cases the words " good character" seem to be applied in the context of " strength of character" or " character defect" . Used in that way the expression " good character" refers to what a man's personality, principles and beliefs actually are as opposed to the way the community regards him, whether or not he has earned the good or bad regard in which he is held. This sense may be considered objective.
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> One tends to naturally consider it more important that a lawyer be a good person and have and act upon correct principles as opposed to being regarded, rightly or wrongly, by others as seeming to be good or bad. But we think we are required to consider the regard in which the candidate is held by others as well as the qualities of character Mr. McOuat possesses, that is both the subjective and objective senses of " good character" .

[21] *McOuat* (*supra*) was cited with approval in *Law Society of BC v. Shaw,* [2003] LSBC 17. The panel in *Shaw* at para. 91 also said this:

> [91] *Black's Law Dictionary* distinguishes " character" as the objective test and " repute" as the subjective test. That is, " character depends on attributes possessed, and reputation on attributes which others believe one to possess. The former signifies reality and the latter merely what is accepted to be reality at present.

[22] In considering this application, the Panel recognized that the onus is on the Applicant to satisfy the Panel that he has met the foregoing tests. In considering the Applicant's application, the Panel concluded that he did meet those tests and that he should be called and admitted, but subject to the conditions set out below.

[23] The Panel reached that conclusion for the following reasons:

> (a) We were provided with a letter of commendation addressed to the LSBC dated November 13, 2007 from the President of the federal Treasury Board, wherein the author indicated that he had known the Applicant for a number of years. In addition, the author described the Applicant as having an entrepreneurial approach to the practice of law. The author, more importantly, asserted he was not concerned about the Applicant's honesty and integrity.
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> (b) In addition, we reviewed a letter dated October 1, 2007, submitted with the Applicant's application, from four Crown attorneys who attested to the Applicant as being well-prepared, competent and reasonable for them to deal with.
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> (c) We also reviewed a letter dated May 14, 2010 from an external accountant for the Applicant's law offices. He described the variety of locations of the Applicant's firm as growing rapidly but associated with administrative and control problems and suffering from administrative systems failures at times. He also commented on the issues that the Applicant faced at the Law Society of Manitoba as a representative of the firm and indicated that those issues were a very small fraction of the firm's total practice.

[24] Our review of the evidence, as described throughout, led us to the conclusion that we did not need to concern ourselves about the Applicant's honesty and integrity. It is clear from the evidence we heard that his

firm grew rapidly, and clearly there were administrative and system problems associated with that, which gave rise to some issues we have discussed above. We also had evidence from Christopher Green who, for a period of time, was associated with the Applicant in the practice of law in British Columbia. Mr. Green is a member of the Law Society of British Columbia and was called to the Bar in 1977. He also attested to the Applicant's honesty and skill.

[25] We considered, in detail, the Applicant's discipline history. With respect to the October 1989 professional misconduct charge, we noted that the Applicant was not in a position to account for the funds for the reasons described above. We also noted that the Applicant acknowledged that he should have returned to the Provincial Court Judge, to whom the undertaking was given, and clarified his responsibilities. We also noted that the Applicant was only reprimanded and ordered to pay costs with respect to his failure to account, presumably as a result of the conclusion of the hearing panel that his difficulty with accounting was for reasons described above. In addition the Applicant was fined in the amount of $2,000 with respect to the conclusion that he had failed to comply with the undertaking to the Provincial Court Judge. We accept the Applicant's explanation of his failure to comply, given the particular circumstances that we have described and which led to the findings of the Judicial Committee of the Law Society of Manitoba.

[26] The April 1991 Law Society of Manitoba Judicial Committee Report was, in effect, a consent decision, as a result of which the Applicant was reprimanded and ordered to pay costs in the amount of $500. The decision itself does not provide any description of the circumstances, though the Applicant did explain, as we set out above, that he did not record appropriately the time he spent on the matter. As a result of this, his bill was reduced substantially. There was no indication of any dishonesty associated with the consent award.

[27] The June 1992 decision dealt with three charges of professional misconduct. Again, no dishonesty was noted in either the report or the explanation that we received in the course of the hearing:

(a) The first charge involved a failure to report a potential claim in an appropriate time frame. The Applicant had received a Release and did not consider himself to be potentially liable to the former client, as a result of which he did not report. He was reprimanded for this.

(b) The second charge involved a fee issue that the Applicant voluntarily submitted to arbitration, which resolved the fee issue. Again, there was a reprimand. The fee issue had been resolved by the time the hearing was held.

(c) In the third charge, the Applicant appeared as a representative of his firm. This arose as a result of computer accounting problems alluded to earlier by his former accountant in his letter of commendation. No funds were lost and all the problems were corrected. The Applicant was fined $1,500 with an award of costs of $5,000.

(d) In its reasons, the Committee acknowledged the co-operation of the Applicant regarding the three charges and the co-operation of his firm with respect to the accounting problems. Again, there was no suggestion of any dishonesty with respect to any of these matters.

(e) We also reviewed the *Discipline Case Digest* dated March 1995 with respect to breach of a trust condition. The Applicant's associate received a file from another firm in the province of Saskatchewan on a trust condition that written instructions be obtained from the transferring client that the previous lawyer be paid his fees in the event of a recovery at trial or settlement. The associate accepted this trust condition, though the condition was not complied with. The Applicant acknowledged his responsibility but noted that, in his view, the former lawyer was negligent in the handling of the file and, as a result, not entitled to payment of the fees. This was resolved between the Applicant and the former

lawyer. Again, no dishonesty was associated with this matter.

Competency

[28] However, there is a question of competency. This is a requirement implicit in the *Legal Profession Act*. When a person applies to transfer from one Law Society to another, the issue of competency comes up. The Law Society of British Columbia must be satisfied that the prospective member is a competent lawyer. In most cases, there is no problem. In addition, just because a lawyer has been subject to a discipline hearing, an insurance claim or a civil action is not, of itself, a reason to refuse the transfer. A much more thorough examination is required.

[29] As set out in paragraph [8](a) above, the Applicant has been the subject of 10 claims under the Law Society of Manitoba's Professional Liability Insurance Program. Those claims were addressed in the Agreed Statement of Facts. The Applicant was cross-examined with respect to those claims. As indicated above, in six of the claims no damages were paid by the Manitoba Professional Liability Insurance Program. While three claims are still outstanding, none of them raised any concern on the part of the Panel. There was no suggestion of any dishonesty with respect to those claims. Only one of the three outstanding claims has a reserve. This is of some significance.

[30] We reviewed, in detail, the 21 civil actions between 1989 and 1995. We concluded that, subsequent to 1995, the Applicant and his firm significantly improved their administrative practices. Mr. Green also testified that, in his experience with the firm, there were no administrative difficulties that gave rise to the discipline issues described above or some of the civil actions also described above. *We also noted that Mr. McRoberts' discipline record of and the civil action ceased after 1995.* In addition, a number of the civil litigation matters were matters that the Applicant was not personally involved in, but instead was named as a result of the role that he played in the firm. Many of the issues were issues that the Applicant had assigned to other members of his firm and were matters that were essentially concluded.

[31] In view of the foregoing, we conclude that the Applicant meets the test of " good character" . We reach that conclusion as there was no suggestion of any dishonesty or other inappropriate motive or activities on the part of the Applicant in the discipline matters and civil actions that we reviewed. That conclusion is reinforced by letters of commendation and the evidence of Mr. Green. In addition, we are satisfied at this point in time that the Applicant is a competent lawyer.

[32] The evidence led us to the conclusion that the Applicant is fit to become a barrister and a solicitor of the Supreme Court of British Columbia. However, we did become concerned that the Applicant has not been as careful, with respect to the manner in which he practised, as he should have been. As a result, we conclude that the Applicant should be called and admitted. However, we also concluded that certain conditions should be applied to the manner in which the Applicant is permitted to practise.

[33] We therefore order that the Applicant be called and admitted, subject to the following conditions:

The Applicant must

(a) take the Small Firm Practice Course;

(b) take a minimum of two hours of continuing legal education on practice management for each of the next two calendar years unless otherwise ordered by the Practice Standards Committee;

(c) practise only in the following arrangements for a minimum of two years:

(i) as an employee or as a member of an existing firm approved by the Practice Standards Committee, if at all possible;

(ii) failing a position with an existing firm approved by the Practice Standards Committee, under supervision on terms and conditions agreeable to the Practice Standards Committee.