2011 LSBC 14
Report issued: May 24, 2011

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

**Marius Schuetz OTHERWISE KNOWN AS MARIUS ALEXANDER**

APPLICANT

**Decision of the Hearing Panel
on Application for Reinstatement**

Hearing date: February 21 and 22, 2011
Panel: David Mossop, QC, Chair, Patricia Bond, Stacy Kuiack

Counsel for the Law Society: Henry Wood, QC
Counsel for the Respondent: Ian Aikenhead, QC

# Background

[1] Marius Schuetz, otherwise known as Marius Alexander, (the "Applicant") applies for readmission as a barrister and solicitor. The Applicant seeks readmission subject to a condition that he not operate a trust account or otherwise deal with clients' money. This application triggers section 19(1) of the Legal Profession Act which reads as follows:

> 19(1) 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.

[2] This section is the "gateway" to the practice of law. The section sets out criteria for becoming an articled student, becoming a lawyer for the first time, and for readmission to the practice of law. Although the standard is the same, a hearing panel applies that standard in a different context. For admission as an articled student, a hearing panel may concentrate on events that happened prior to the application for articles. In many cases these events may include criminal activity of a youthful indiscretion or a more serious nature. F or persons becoming lawyers for the first time, the hearing panel may concentrate on what happened during his or her articles as well as previous activities. For lawyers seeking readmission, the hearing panel will look into:

> (a) his or her dealings with the Law Society prior to ceasing to be a member (this would include the conduct record);
>
> (b) the reason he or she ceased to be a member. If it is substance abuse or a mental health problem, the hearing panel must be satisfied these problems are adequately dealt with;
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> (c) what the lawyer has been doing during his or her period away from practice.

[3] The above considerations are not exhaustive, and the hearing panel may look at other factors too.

[4] The contextual analysis described above is to determine whether the applicant is of "good character and repute". This

has a strong public interest component. That public interest component can be divided into two general categories. The first is public protection. The public must be protected from individuals who misuse their position as a lawyer. However, public interest also has a "public inclusive provision". It is in the interest of the public to have lawyers from diverse backgrounds and diverse experiences. As we will see later on, the Applicant does come from a rather unique background. Sometimes, these two aspects of public interest do not conflict. Sometimes, they do conflict and, if there is conflict, public protection prevails and the lawyer is not readmitted. However, in other cases, a hearing panel may add conditions on the readmission to protect the public and, at the same time, give the public a diverse pool of lawyers to serve the public in general.

[5] The Hearing Panel has decided to readmit the Applicant on conditions.

## facts

### Education and Early Career

[6] The Applicant was born in the Netherlands 62 years ago and came to Canada in 1979.

[7] He has a graduate degree in economics from a university in the Netherlands.

[8] In 1977, the Applicant obtained a masters degree in science from the University of Guelph in Ontario, a university well-known for its agricultural courses.

[9] In 1994, he obtained a law degree from Queen's University.

[10] The Applicant articled in Vancouver and in 1995, set up his own law office. His practice has been a rather unique one. He services the agricultural community of British Columbia, including small farms. His practice also has a financial transaction or banking component.

[11] The Applicant has been married twice. He first married in 1993 and separated from his first wife around 2001. She was a lawyer. On June 17, 2005, he married his present wife, who is an acupuncturist. He currently owns an organic farm, which he indicates is quite profitable.

### Substance Abuse

[12] The Applicant is an alcoholic. He has a long drinking history. He began drinking in his days at university. In 1976 he was convicted of impaired driving. His drinking problems were aggravated by a separation from his first wife in 2001. As he stated to the Panel, he would sit on the back porch of his house, look at the stars, feel depressed and drink.

[13] In addition, he stated to the Panel that he was diagnosed with acute depression in 2002. There was no medical evidence presented to the Panel on this issue. However, it is not uncommon for alcoholism and depression to be interwoven.

[14] In the year or two prior to 2006, the Applicant had difficulties keeping on top of his administrative work. He also had other problems in regards to his practice.

[15] A fellow lawyer and friend, seeing his distress, recommended he see the Lawyers Assistance Program ("LAP"). This program, funded in part by the Law Society of British Columbia, helps lawyers with substance abuse problems, including alcoholism.

[16] His first contact with LAP took place in 2006. He also attended meetings of Alcoholics Anonymous, and he continues to attend AA meetings regularly.

[17] The Applicant ceased to be a member of the Law Society in 2006. This was a voluntary decision. His evidence in front of the Hearing Panel was that he wanted to deal with his health issues, including his dependence on alcohol.

[18] A comprehensive independent medical evaluation was filed with the Hearing Panel. It is dated February 17, 2011. In it,

Dr. Paul Farnan, clinical associate professor, UBC Faculty of Medicine, states this in part:

On physical examination today I could find no evidence of active liver disease or any suggestion that Mr. Schuetz was still using alcohol. He presented as a man who understands that when one is diagnosed as having alcohol dependence that long term and indefinite sobriety is required. More than that however, he seems to have accepted at a deep level that he is an alcoholic and he does not fight or resist that diagnosis. He has an appropriate goal of long term recovery with peace of mind, serenity and happiness, while remaining abstinent.

[19] In the same letter Dr. Farnan states that a urine drug screen was done on the Applicant and no alcohol biomarkers were discovered. However, he also indicates in the letter that such markers disappear after a few days. The test provides some reassurance to the Hearing Panel.

[20] However, in the same letter Dr. Farnan states the following:

> There is however, one issue that needs to be mentioned and while one biological test result is not diagnostic of alcohol use, it is important for completeness to include it in this report. As part of Mr. Schuetz's comprehensive assessment specific liver enzyme levels were checked, as well as other haematological testing. An abnormal result of one enzyme, Gamma-GlutamylTransferase (GGT) was reported. Mr. Schuetz's GGT level was 100U/L and the normal range at the testing laboratory is considered to be 10 – 58 U/L. GGT is an enzyme that is found in many tissues, the most notable one being the liver. Elevated serum GGT activity can also be found in diseases of the biliary system, and pancreas. Elevated levels of GGT may also be due to congestive heart failure.
>
> Of all the liver enzymes, GGT is the one that is very sensitive to the effects of ethanol. In addition to alcohol use as a cause, there are several prescribed drugs which can raise GGT levels, including barbiturates and phenytoin. Others include non steroidal anti-inflammatory drugs, St. John's Wort, and aspirin. Abnormal hepatic function tests (or liver enzyme tests) have been reported during therapeutic use of Citalopram, a medication that has been prescribed for Mr. Schuetz, and which he has used intermittently. I would emphasize that elevated levels of this enzyme (GGT) are not diagnostic of alcohol consumption and the result should not be taken out of context. However, an elevated GGT result must be borne in mind, especially in someone with a past history of drinking alcoholically.
>
> On balance, persistently abnormal values of GGT in the absence of continuing alcohol exposure would probably be most suggestive of underlying liver disease. It should be added that Mr. Schuetz recalls that 'some liver enzyme' was found to be elevated almost 15 years ago during an insurance medical examination. He reports that this was a time in his life when he was not drinking particularly heavily. He is unsure as to which enzyme was elevated at the time, and he is not aware that it was ever followed up. I advised Mr. Schuetz that he should consult with his family physician to ensure appropriate follow up of this abnormal liver enzyme result. This isolated result should not prevent him from looking at a return to the practice of law, so long as certain reassurances are put in place.

[21] This evaluation raises concerns to the Hearing Panel that require some conditions to be put on the Applicant's readmission into the practice of law. These conditions are set out later on in these reasons.

[22] If the only evidence before the Hearing Panel was alcoholism and rehabilitation, this Panel would consider the matter straightforward and admit the individual. The Applicant has had an alcohol problem. He has rehabilitated himself.

[23] The Law Society, and society generally, have taken in recent years a rather enlightened approach to alcohol dependency. Alcoholism is a disease and should be treated as such. The Applicant has had an alcohol problem. In 2006, he voluntarily left the practice of law, in part to deal with his problem. It was a wise decision. It was best for him, the Law Society, and society in general.

[24] If that were all the evidence in front of the Hearing Panel, this Panel would feel comfortable in readmitting the Applicant with certain conditions.

[25] The problem is that the Applicant has had a number of conduct issues with the Law Society. There is no specific medical evidence presented to the Panel connecting these conduct issues to alcoholism. Counsel for the Applicant submitted these conduct issues were connected to his alcoholism, which is now under control. That may be true. Some or all of them may be related. It would have been useful for the Panel to have some medical evidence connecting alcoholism and the practice of law. How does alcoholism affect one's ability to practise law? This could have been provided by specific expert medical evidence or, at least, articles written on the subject. However, at the same time, all members of the profession are aware that alcoholism can diminish the capacity to practise law. However, the Panel does have some doubts as to what extent the problems the Applicant had with the practice of law can be related to his alcoholism or perhaps some other problem. For that reason, we will put additional conditions on the Applicant's ability to practise law for the protection of the public interest.

Conduct History

[26] The Applicant has had a number of issues with the Law Society. The slang expression used is that "he is known to the Law Society". These conduct issues include:

(a) failure to make full disclosure to the Court in regards to ex parte applications;

(b) communicating with a person represented by a lawyer without that lawyer's consent; and

(c) mixing the practice of the law with his business dealings with clients.

[27] Some of these conduct issues predate his more serious drinking problems. One must also remember that alcoholism is not something that pops out at one time. It is a gradual process that may take, in many cases, several years to develop.

[28] However, it is of some significance that his problems with the Law Society started within a few years of being called to the Bar. The first matter dates back to the 1990s. It was the subject of a Conduct Review held on April 12, 1998. There were two separate complaints.

[29] The first complaint concerned a matrimonial matter. The Applicant met with his client and the client's spouse. His client had informed the Applicant that the client and his spouse had reached a settlement agreement and that the spouse had fired her lawyer. At the meeting the Applicant discovered that the spouse, although intending to fire her lawyer, had not actually taken that step. At that point he ended the discussions at the meeting and advised the client to seek independent advice.

[30] The Applicant admitted at the Conduct Review that he had acted inappropriately in arranging the meeting with an unrepresented person whose interests were adverse to his client.

[31] The second complaint concerned an ex parte matrimonial application. The Applicant admitted this was the first ex parte application that he had ever attempted. He further recognized that he failed to make full disclosure to the Court, including a high degree of candour, good faith, and fairness, when representing facts to the Court. He promised the Conduct Review Subcommittee that he would not repeat these activities again.

[32] In 2005, the Applicant was involved in another Conduct Review. In this matter he failed to advise his client to obtain independent legal advice concerning a matter in which the Applicant had a financial interest. SB wanted $20,000 from the Complainant (lender). This deal was to go through the corporate mortgage company of the Complainant. The deal had to be closed quickly. The Applicant agreed to act for SB. There were difficulties communicating between the Complainant (lender), SB, and the Applicant.

[33] SB was a personal friend of the Applicant, and the Applicant agreed to loan the necessary money to SB. The Applicant drew up a Form B mortgage wherein SB was the borrower and the Applicant's wife was the lender, even though his wife knew nothing about the loan at this time. His client, SB, did not receive independent legal advice, and she was not advised to do so by the Applicant. In July, 2000, the Applicant advanced further funds and an entirely new loan agreement was secured by a new mortgage in favour of the Applicant and his wife's corporation. The client at this point did receive independent legal advice.

[34] There were two issues on which the Conduct Review centred. The first was the breakdown in communication between the Applicant and the Complainant concerning the original loan proposal. The Applicant should have told the Complainant the loan was no longer necessary. The second issue was the failure of the Applicant to cease acting for the client when he was in financial dealings with the client and advise such client to seek independent legal advice.

Audit 2006

[35] In 2006 an interim audit of the Applicant's trust accounts was conducted. A report was issued on August 14, 2006. The Panel does not intend to review the total content of this report in these reasons.

[36] The Applicant admits his books were in disarray, and there is no useful purpose to going through the various violations of the trust account rules. To the credit of the Applicant, he admits his mistakes and secondly, consents to not operating a lawyer's trust account if he is readmitted. The Applicant blames the various violations of the trust rules on his alcoholism.

[37] Counsel for the Law Society then focused his presentation on two files referred to in the audit. They are RY and KY and JB and NB.

RY and KY

[38] In 2002, the Applicant became the Canadian lawyer for RY and KY and their companies. They were at the time residents of Vancouver. The Applicant's role became that of corporate counsel (not director), and the main project was the establishment of a Canadian school near Shanghai, China. During the Applicant's involvement with them, they became personal acquaintances, stayed at each other's residences, (the Applicant in Shanghai, and RY and KY at the Applicant's farm) and shared social activities.

[39] In 2004, or thereabouts, RY and KY moved back to China.

[40] During the Applicant's tenure with these clients, the Applicant made many trips to China in order to facilitate the arrangements for the school. The school was established and was licensed by the British Columbia Ministry of Education as an "independent" school like all private schools in British Columbia.

[41] RY and KY were not educators but developers, and they relied heavily on the Applicant and a former BC school principal whom they hired as an education consultant. He established the curriculum, hired teachers, and so on. MP was hired to deal with the business aspects of the school.

[42] In order to establish the school, RY and KY needed investors. The Applicant was not an investor, nor was the Applicant involved in any investor relations, but the Applicant did meet two of the investors, one of whom, MP, also became a client and a personal acquaintance.

[43] The Applicant found out about some falsifications during the Applicant's last visit to Shanghai in 2005, where RY had asked the Applicant to come to assist in sorting out differences that had arisen between the above mentioned MP and himself. During the Applicant's private meeting with MP, MP told the Applicant that he thought that the Applicant was a director of RY's company and that the Applicant was a major investor to the tune of $1.5 million (Canadian). MP then proceeded to tell the Applicant how he had relied on the Applicant's participation in making his own investment. The Applicant was very surprised, and told MP that it simply was not true that the Applicant was a director or investor. Sometime later MP made available to the Applicant the documents with RY's falsifications of the Applicant's signature suggesting that the Applicant was a director and investor.

[44] Upon the Applicant's return to Canada, he became very angry. The Applicant's thinking then was that he could charge RY and KY for benefits they obtained using the Applicant's name without permission.

[45] The Applicant contacted them and sent them an account and negotiations started. The bill was based on a number of issues including a fee for 18 months, the period during which the Applicant calculated that they had used the Applicant's name, based on a fee if the Applicant had been a director. The parties settled for $35,000 and other considerations.

[46] The settlement was drafted by RY and KY as they wished it only to deal with the issue of using the Applicant's name as a director and not as an investor. Respecting the allegation that the Applicant was an investor, they were going to report the "mistake" to the authorities and to the other investors as they had listed him on their Chinese licence applications and documents as an investor. Under the agreement, they were going to arrange all necessary rectifications and provide proof to the Applicant. They insisted that this not be spelled out in the settlement and the Applicant accepted that. The Applicant's original draft settlement had those aspects included.

[47] When it became clear that RY was not going to keep his promises respecting rectification, the Applicant launched a lawsuit. The Applicant drafted the original Statement of Claim, affidavit, and pre-judgment garnishment believing that they were legal, as a debt was owed. The suit was settled.

[48] The Applicant's professional behaviour in this matter is highly questionable. He may or may not have a claim for impersonation. However, the original Statement of Claim was for debt. The Applicant, in the Panel's view, did not make full disclosure to the Court. In particular, there was never an agreement that the Applicant be paid $65,095 including applicable taxes. Instead the Applicant became angry that his name had been used without his consent. He made up a bill that he thought was a fair amount. No agreement was made to pay a fee. He used this to negotiate a settlement. When the other parties allegedly breached the settlement, he sued. In his affidavit to the Court he failed to make full disclosure to the Court of all the surrounding circumstances. The Applicant ultimately retained outside counsel to represent him in this matter. That counsel returned the garnisheed money and amended the pleadings to make a claim for damages. The case was ultimately settled. That counsel, it seems to the Hearing Panel, quickly saw the matter as a claim for damages and not debt. Therefore he returned the money and changed the pleadings.

[49] The Applicant's original behaviour may have been influenced by alcoholism. However, the Panel has some concerns about the Applicant using garnishing orders in an inappropriate manner. The Applicant has misused the garnishing before judgment process.

NB and JB

[50] The audit done in 2006 brought to the attention of the Law Society a file called NB and JB. We have reproduced below parts of the audit report that explained the position of the Law Society on NB and JB, doing business as B Company. Please note that it is a redacted and edited part of the report to protect the privacy of individuals.

[51] The Applicant brought a personal action against a farming client, B Company, alleging that a $50,000 debt was unpaid, when in fact the Applicant had been paid $39,230.67. On the basis of this untrue allegation, the Applicant obtained a garnishing order before judgment against a third party whereby $25,190.48 was paid into Court on B Company's behalf and later paid to the Applicant. The Applicant deposited $25,190.48 into his trust account to the credit of B Company and proceeded to pay debts of B Company. B Company was experiencing financial difficulty and the Applicant had earlier guaranteed a $450,000 debt of B Company's. The action against B Company may have been taken to defeat a competing creditor, W Company, or to circumvent the process of law, or both.

[52] The background was as follows:

> B Company owed a Bank in excess of $700,000 and in February 2003 the Bank called the loan. The Applicant assisted B Company in settling the Bank debt and obtaining new funding from FCC. FCC agreed to lend $450,000 to B Company in exchange for a first mortgage on the B Company farm plus they required a loan guarantor. The Applicant agreed to guarantee the FCC loan for a fee of $50,000 from B Company, which was due upon completion of the loan, and a second mortgage on the B Company farm as security for the indemnity. As a loan condition, FCC required the Applicant to become part owner of the B Company farm and he received a 1/1000th interest.

[53] The loan completed on August 27, 2003, and the net FCC loan proceeds of $445,685.32 were deposited to the trust account of the Applicant. From the loan proceeds, $406,454.65 was paid to the Bank to retire the old debt and the remaining

$39,230.67 was paid to the Applicant in accordance with an unsigned statement of adjustments, which was located in the B Company client file. The cheque ($39,230.67) appears to have been deposited to the Applicant's personal bank.

[54] The auditors found an accounting statement in the B Company client file between B Company and the Applicant that made reference to the FCC Mortgage. It showed that, on August 27, 2003, a $39,230.67 payment was applied to the $50,000 "Amount Owing to the Applicant", which presumably was the mortgage guarantee fee. The statement showed there was an unpaid balance of $10,769.33 after the $39,230.67 payment was applied. The statement also included a November 18, 2003 interest charge of $220.40 due on the unpaid balance of $10,769.23. The interest charge of $220.40 was calculated as 9 per cent of $10,769.23 for 83 days (from August 27 to November 18, 2003). There were two more interest charges of $6.15 on November 23, 2003 and $276.62 on February 28, 2004 and one payment of $6,000 on November 18, 2003. The auditors reviewed the calculation of the two additional interest charges and found they were calculated based on the declining unpaid balances. The auditors confirmed that $6,000 was paid from trust on November 18, 2003.

[55] Based on the interest calculations alone, it would appear that, at least until February 28, 2004, the Applicant considered the $39,230.67 payment he received from the FCC loan proceeds was towards the $50,000 loan guarantee fee owed him.

[56] B Company was in financial difficulty for some time and was behind in payment to creditors. B Company sold flower stock through U Company who collected monies on B Company's behalf. There was $25,190.48 in the B Company account at U Company that had been held up for months due to creditors competing for the funds.

[57] For some months prior to October 2003, W Company, a bulb supplier and creditor of B Company, located offshore, attempted to collect $30,000 of the total $177,000 it was owed from B Company. W Company was one of the creditors competing for the B Company funds at the U Company. The Applicant corresponded and negotiated with W Company's Canadian legal counsel until early October 2003, when W Company decided to deal directly with the Applicant, rather than through its Canadian legal counsel.

[58] Then on October 17, 2003 the Applicant received a letter from DG, W Company's legal counsel from off-shore. This letter was in another language and was translated for the Law Society by a certified translator. On page 2 of the letter, DG asks for the outstanding payment of $30,000 and refers to payment from the funds held at U Company.

[59] The Applicant wrote to DG the following day, October 18, 2003, and said B Company did not have any funds to pay W Company.

[60] U Company paid the $25,190.48 into Court pursuant to the garnishing order issued by the Applicant. On November 4, 2003 an Order granted the funds be paid from Court to Alexander-Gu Law Corporation, for the plaintiff, the Applicant. The Order was consented to by the Applicant and JB and NB. The $25,190.48 was paid out of Court and a deposit for $25,190.48 was made to the Applicant's trust account on November 18, 2003, to the credit of B Company, as recorded in the B Company client trust ledger. The client trust ledger recorded Alexander-Gu Law Corporation as the source of the deposit of $25,190.48.

[61] The $25,190.48 was used to pay $6,000 to Alexander-Gu Law Corporation on November 18, 2003, and $3,600 to B Company on November 23, 2003. The balance was paid to B Company's creditors.

[62] In March 2006 the auditor met with the Applicant and asked him to explain why he brought the action against B Company when he had already been paid $39,230.67 of the $50,000 guarantee fee. He responded that it was a strategy he devised to get B Company access to the U Company funds. He said the funds were B Company's and B Company had been unable to get the funds from U Company because of a faulty lien filed by a creditor (W Company). The Applicant said he was unable to recall more details and agreed to provide a fuller explanation, which he did by letter dated April 10, 2006.

[63] In this letter he said at pages 2-3:

> As I recollect that situation now, the simple answer is that the client and I agreed that any monies paid to Alexander-Gu or myself were not on account of the loan guarantee. We both took the position that no monies had been

paid on the guarantee but that any monies paid were paid on account of farm management services I had rendered to JB and NB.

> At the time that seemed to be an acceptable position to take. … the thought of a fraudulent conveyance had entered me [sic] mind but I resolved that such was not the case as no party known to me would be prejudiced by it. As it turned out the other creditors subsequently did not oppose that the money be paid to JB and NB. …
>
> **However, B Company was desperately in need of the money in order to make natural gas and other payments. …**
>
> **Accordingly, I came up with the suggestion to sue JB and NB in order to have the monies held by U Company paid to me and then pass it on to JB and NB for their use in paying outstanding accounts and the gas bill. …**
>
> Quite frankly, in hindsight I am not as comfortable with it as I was at the time. It was done in order to get the client his money without having to take U Company to court. It was an emergency situation caused by a false claim of lien.
>
> [emphasis added]

[64] The auditors asked the Applicant to produce all documentation in support of the statement in his letter that any payment made to Alexander-Gu or himself were for "farm management fees" but he said there was no documentation. He said that he and JB and NB had conversations about it, but there was nothing in writing. The auditors reviewed all the contents of the B Company client files provided and found nothing that confirmed B Company owed him funds for farm management fees amounting to the $39,230.67 he had been paid on August 27, 2003 from the trust account from the FCC loan proceeds.

[65] The auditors asked what work he had performed for the alleged farm management fees, and he referred to some financial documents that were in the B Company client files. The auditors looked at these and noted there were 2003/2004 financial projections, financial statements and a 2002 business appraisal, but they appeared to have been prepared by other consultants. There was also a Farm Debt Mediation summary dated April 1, 2003 that was prepared by a consultant.

[66] The auditors asked the Applicant if he had ever billed B Company for the alleged farm management fees, and he said he never had.

[67] The auditors asked the Applicant for an accounting between him and the Law Corporation and B Company, but he said he had not prepared one.

[68] The auditors reviewed client billings issued to B Company and noted that the Applicant charged B Company a total of $8,840.00 in fees for the period March 2003 to November 2003. The billings were marked for "farm debt mediation", "farm restructuring", "legal services" and for "various". There were payments from B Company on account, but the auditors could not match them to billings and the Applicant did not prepare accounts receivable records.

[69] All of the auditor's observations were based on the available accounting records, client file documentation provided by the Applicant, Court documents, and discussions and correspondence with the Applicant. The auditor did not obtain independent verification from B Company or its creditor W Company.

[70] In a letter to the Law Society, the Applicant explained his view of the circumstances. He stated:

> I did not think I was signing a false affidavit. JB and NB did owe me money on three accounts: on account of a loan guarantee (with ILA) that I had given their bank, legal fees and on account of farm management assistance I had provided. (I have a M.Sc. in agriculture and considerable work experience in that area.) JB and NB have not disputed that they owed me the money on any of these three accounts and over the years they have been able to pay me slowly and reduce their debt to me. They are still as I write this, 6 years later, paying on that debt by way of instalments.

[71] The Applicant in this case has intermingled his business dealings with his practice of law. This is another example of the Applicant using an *ex parte* order and, in particular, a garnishing order before judgement, in questionable circumstances. Also, the

Applicant needs to bring himself up to date on the evolving law on fraudulent conveyances. To his credit, the Applicant recognizes that he may have acted improperly in the circumstances. See the above paragraph [63].

## Analysis

### The Law

[72] The meaning of section 19(1) of the *Legal Profession Act* has been summarized in *Re: Applicant 3*, 2010 LSBC 21 at pp. 12-20:

> [12] The purpose of this hearing is to determine whether the Applicant satisfies the requirement of section 19(1) of the *Legal Profession Act*, which provides that:
>
> > 19(1) 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 fit to become a barrister and a solicitor of the Supreme Court.
>
> [13] Section 22(3) of the *Legal Profession Act* provides that, following a hearing, the panel must grant the application, grant it subject to appropriate conditions or limitations, or reject it.
>
> [14] The Applicant has the burden of proving that he meets the character and fitness test on a balance of probabilities (Rule 2-67). In *Re: McOuat*, June 12, 1992 Panel Decision at p. 11 (affirmed by the Court of Appeal in *McOuat v. Law Society of BC* (1993), 78 BCLR (2d) 106), the panel commented on the central question of what constitutes good character:
>
> > What constitutes good character and repute and fitness to become a barrister and a solicitor of the Supreme Court? In an article entitled, "What is 'Good Character'?" published in *The Advocate*, (1987) v. 35, at 129, Mary Southin, QC (as she then was), considered the meaning of the terms, stating:
> >
> > I think in the context "good character" means those qualities which might reasonably be considered in the eyes of reasonable men and women to be relevant to the practice of law in British Columbia at the time of application.
> >
> > Character within the Act comprises in my opinion at least these qualities:
> >
> > 1. An appreciation of the difference between right and wrong;
> >
> > 2. The moral fibre to do that which is right, no matter how uncomfortable the doing may be and not to do that which is wrong no matter what the consequences may be to oneself;
> >
> > 3. A belief that the law at least so far as it forbids things which are *malum in se* must be upheld and the courage to see that it is upheld.
> >
> > What exactly "good repute" is I am not sure. However, the *Shorter Oxford Dictionary* defines "repute" as "the reputation of a particular person" and defines "reputation" as:
> >
> > 1. The common or general estimate of a person with respect to character or other qualities; the relative estimation or esteem in which a person is held.
> >
> > 2. The condition, quality or fact of being highly regarded or esteemed; also respectability, good repute.
> >
> > In the context of s. 41 I think the question of good repute is to be answered thus: would a right-thinking member of the community consider the applicant to be of good repute? ...
> >
> > If that right-thinking citizen would say, knowing as much about an applicant as the Benchers do, "I don't think much of a fellow like that. I don't think I would want him for my lawyer", then I think the Benchers ought not to call him or her.
>
> [15] Mary Southin's article has been quoted with approval in several other British Columbia Law Society Credentials

decisions, such as Re: Smart (December 19, 1996 Panel Decision at p.3).

[16] The test of good character and repute has both subjective and objective aspects. This was explained by the hearing panel in McOuat, (supra), at p. 12:

> 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:
>
> 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.

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.

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".

[17] In this same case, the panel explained the fitness test at pp. 17-18:

> 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 the personal cost, resolve to place the client's interest first and to never expose the client to risk of avoidable loss and trustworthiness in handling the money of a client.
>
> The cannons [sic] of legal ethics [Professional Conduct Handbook, chapter 1] adopted by the Law Society provide assistance, when they assert:
>
> 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.

[18] There is overlap between the character test and the fitness test. If this applicant fails the character test, he will automatically fail the fitness test (McOuat, supra).

[19] The expectations of both the public and the profession ought to be reflected in assessing fitness, character and reputation. The hearing panel in Re: DM (June 14, 1994 Panel Decision) recognized this, stating at pp.4-5:

> ... fitness in this context depends on good character and reputation and must reflect to some extent the expectations of both the public generally and other lawyers specifically in what both groups desire, need or otherwise seek in a member of this profession. Like it or not, lawyers are held out to represent themselves as a

> community to the larger public community and as a group which, because of its honesty and integrity, enjoys an especial place. Accordingly, the status of barrister and solicitor requires that a special standard of honesty, integrity, and trustworthiness be imposed, met and kept at all times so that public confidence is maintained and properly nurtured. To prove that this standard is met and will be met thus requires more than a reflection on a person's past honest conduct. The burden is high so that same public can see that as a profession having earned and been granted their trust, will continue to work toward doing everything necessary to keep it. To this end a lawyer must not only show that he or she has all the attributes of good character - honesty being one of them - the lawyer must also show that he or she has other attributes from which a forecast of future integrity can be made. In summary, the profession at large and also the general public require lawyers to adhere to impeccable standards of behaviour and it is only through the adherence to such standards that we may achieve and keep the high regard for which we as a profession clamber and which, inter alia, gives to lawyers both status and economic advantage.

> [20] The Applicant must establish that he is of good character at the time of the hearing. However, the standard is not one of perfection. The hearing panel in Re: Lee, 2009 LSBC 22 at para. [79] stated this principle, by quoting Law Society of Upper Canada v. Schuchert, [2001] LSDD No. 63, at para. 18:
>
> > The relevant test is not whether there is too great a risk of future abuse by the applicant of the public trust, but whether the applicant has established his good character at the time of the hearing on a balance of probabilities. The test does not require perfection or certainty.

[73] The application of those principles to this fact pattern presents a challenge to this Hearing Panel.

[74] None of the cases cited dealt with a rehabilitated alcoholic who at the time of his departure from the practice of law had serious defects in his practice.

[75] In the Panel's view, the proper approach is a three-fold test:

(a) Has the Applicant engaged in meaningful rehabilitation?;

(b) Can safeguards be put in place to ensure the Applicant abstains from alcohol?; and

(c) Can other safeguards be put in place to protect the public from the past failings of the Applicant's practice?

Finding

[76] The Panel is satisfied the Applicant has dealt with his alcohol problem subject to the conditions recommended by Dr. Paul Farnan. He suggested conditions that we will include in this decision. However, the basic problem is that the Panel has doubts about the problems the Applicant has had in the past with the Law Society. Are they related to his alcoholism, or do they go deeper? The Hearing Panel believes the Applicant needs to "beef up" his legal education.

[77] In addition, the Panel feels the Applicant could benefit from a "mentoring relationship". He needs someone around off whom to bounce ideas and to give him a second opinion. There is a set of patterns here. These include:

1. mixing his law practice with business and personal dealings; and

2. his issuing of ex parte orders, particularly garnishing orders, without adequate disclosure to the Court or without foundation.

[78] For these reasons the Panel is not prepared to admit the Applicant unconditionally. Instead, we impose the following conditions in addition to the medical conditions:

1. the Applicant must not have a trust account or otherwise deal with clients' money;

2. his practice is restricted to legal consultant and advisor;

3. he must not advise any client on an ex-parte order or garnishing before judgment (there is too much of a pattern here to allow him to practise in this area);

4. he must not mix his business activity with his practice of law, even if the client obtains independent advice;

5. the Applicant must elect, within 30 days of the date of this decision, and so inform the Credential Committee in writing that he will either:

   (a) re-take and pass PLTC within one year of the date of this decision; or

   (b) take double the required number of CPD hours for the next three years. Such CPD hours must be pre-approved by the Practice Standards Committee.

6. The Applicant must enter into a mentoring relationship with another lawyer approved by the Practice Standards Committee on terms and conditions the Committee considers advisable. This mentoring arrangement must be in place within three months of his readmission into the practice of law.

## summary of orders made

[79] The Hearing Panel orders that the Applicant be reinstated as a member of the Law Society subject to the following conditions:

### Medical Conditions

1. To comply with all of the recommendations made by Dr. Paul Farnan in his report of February 17, 2011 (Exhibit "4" at this Hearing), which include a written commitment by the Applicant to abstain from all potentially addictive mood altering drugs, including alcohol and over-the-counter medications, unless prescribed by a physician knowledgeable about the Applicant's history of alcohol dependence.

2. To enrol at his expense in a formal medical monitoring process of at least 12 consecutive months duration that is overseen by a professional independent monitor who is not involved therapeutically with the Applicant. That monitoring process must include:

   (a) the entry into a written monitoring or relapse prevention agreement in a form acceptable to the Practice Standards Committee;

   (b) the determination of any required recovery activities and their oversight; and

   (c) biological testing that involves at least 18 random tests during the 12 month monitoring period, and most, but not necessarily all of these tests should be for urinary Ethyl Glucuronide.

3. To continue to use one designated physician as his primary care physician, who will also be his main prescriber of any medications. That physician shall be provided with a copy of Dr. Farnan's report of February 17, 2011, and a copy of the signed monitoring or relapse prevention agreement.

4. To consult with his personal physician on a regular basis and to ensure that there are follow-up investigations of potentially abnormal liver enzyme levels, as discussed in Dr. Farnan's report. The outcomes of those investigations must be provided to the Applicant's monitor.

5. To attend regularly at mutual support group meetings such as his current AA meetings at a frequency of at least two meetings per week for the duration of the signed monitoring or relapse prevention agreement. One of those meeting groups shall be declared by the Applicant to be his home group, and he shall participate actively with

that group.

6. To select and maintain regular meaningful contact with a same sex sponsor in relation to his AA involvement, both by way of face-to-face meetings and telephone contact.

7. To complete a written series of the 12 steps with his AA sponsor's guidance within six months hereafter. Copies shall then be provided to both his personal physician and his professional independent monitor.

[80] The monitoring or relapse prevention agreement may be extended beyond 12 months upon the recommendation of the monitor and/or at the direction of the Credentials Committee.

[81] The monitor must report promptly to the Law Society any non-compliance with the monitoring or relapse prevention agreement, and submit a report to the Law Society in any event at the 12 month point. A further report from the monitor will also be required at the end of the monitoring period, if it is extended beyond 12 months for any reason.

Other Conditions

[82] The Applicant will not have a trust account or otherwise deal with clients' money.

[83] The Applicant's practice is restricted to legal consultant and advisor.

[84] The Applicant must not advise any client on an ex-parte order or garnishing before judgment.

[85] The Applicant will not mix his business activity with his practice of law even if the client obtains independent advice.

[86] The Applicant must elect, within 30 days of the date of this decision, and so inform in writing the Credential Committee either:

a. he will re-take and pass PLTC within one year of the date of this decision; or

b. take double the CPD hours for the next three years. Such CPD hours must be pre-approved by the Practice Standards Committee.

[87] The Applicant will enter into a mentoring relationship with another lawyer on terms and conditions the Practice Standards Committee consider advisable. This mentoring arrangement must be in place within 3 months of his readmission into the practice of law.

Costs

[88] None of the parties made any submissions on costs. If any of the parties wish to make a submission on costs, they can do so within 30 days of the date of this decision. The other party will have 14 days to make any response.

Post Script

[89] The Applicant has to abide by these conditions. In particular, he should be guided by the spirit of the conditions as well as the letter of the conditions. When in doubt he should err on the side of prohibition and restraint. In addition, if he has doubts about the application of the conditions he should contact the Law Society. This is his responsibility. He should find out right away who he should contact at the Law Society.

[90] The mentor is a very important aspect of this decision. The Hearing Panel feels the Applicant will benefit from an objective second opinion.

[91] The Applicant has made great strides in dealing with his alcoholism and deserves a second chance. However, the Applicant should consider himself on "probation."