2012 LSBC 30
Report issued: December 13, 2012
Hearing decision issued: April 24, 2012

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

MICHAEL GRANT GAYMAN

Applicant

Decision of the Benchers on Review

Review date: October 10, 2012
Benchers: Art Vertlieb, QC, Chair, Kathryn Berge, QC, David Crossin, QC, Leon Getz, QC, Peter Lloyd, Catherine Sas, QC, Tony Wilson

Counsel for the Law Society: Henry Wood, QC
Counsel for the Applicant: Richard Lindsay, QC and Max Hufton

introduction

[1] This was a Review concerning Michael Grant Gayman, which was sought on behalf of the Law Society of British Columbia to review the decision of the hearing panel (referenced as *Law Society of BC v. Gayman*, 2012 LSBC 12) allowing the reinstatement application of the Applicant as a member of the Law Society of British Columbia.

[2] On December 16, 2011, a hearing was held to consider the application for reinstatement to the Law Society of British Columbia by the Applicant, Michael Grant Gayman, as a barrister and solicitor. The Applicant was disbarred by a hearing panel on May 6, 1999. The basis for disbarment was conduct unbecoming a lawyer. Specifically, the Applicant, acting as a trustee, knowingly breached a trust instrument resulting in the loss of approximately $1,000,000 to some 20 investors.

[3] In its decision of April 24, 2012, the hearing panel concluded that, based upon the exceptional circumstances of the case, the Applicant should be reinstated, but only under strict conditions.

[4] Subsequent to the decision of April 24, 2012, the Credentials Committee chose to refer the matter to the Benchers for a review under s. 47(2) of the *Legal Profession Act* and Law Society Rule 5-13(2).

[5] The issues to be considered were framed as follows:

> 1. With respect to an application for reinstatement, does a hearing panel have jurisdiction to consider any criteria other than those of good character, repute and fitness as specified in s. 19(1) of the *Legal Profession Act*?
>
> 2. If the first issue is answered affirmatively, as a matter of principle, can the nature and gravity of the prior misconduct justify a denial of reinstatement despite the applicant having demonstrated significant current good character, repute and fitness?

3. Was the disposition of the hearing panel correct in this case?

Facts

[6] The review of the facts by the hearing panel was exhaustive and was not contested by either party to the Benchers hearing the Review. Of the 122 paragraphs of the hearing panel's decision, 83 paragraphs set out the facts of this case.

SCOPE OF REVIEW BY THE BENCHERS UNDER SECTION 47(2) OF THE LEGAL PROFESSION ACT

[7] Section 47 of the *Legal Profession Act* provides a broad power of review on the part of the Review panel, with the discretion to substitute its own decision for that of the hearing panel. These are the relevant provisions:

> **Review on the record**
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> 47(1) Within 30 days after being notified of the decision of a panel under section 22(3) or 38(5), (6) or (7), the applicant or respondent may apply in writing to the benchers for a review on the record.
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> …
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> (5) After a hearing under this section, the benchers may
>
> (a) confirm the decision of the panel, or
>
> (b) substitute a decision the panel could have made under this Act.

[8] In embarking upon a Review, the Benchers must determine whether the decision of the panel was correct and, if it finds that it was not, then the Benchers must substitute their own judgment for that of the panel.

[9] The approach to a "correctness" analysis is also well entrenched in our jurisprudence. In *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 50, the Supreme Court of Canada held as follows:

> … When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[10] This is the principle and approach clearly provided for in s. 47(5) of the *Legal Profession Act*.

ISSUES

Does s. 19 of the Legal Profession Act allow for consideration of criteria other than "good character and repute" and "fitness"?

[11] It was the position of the Law Society that a determination of what constitutes good character, repute and fitness pursuant to s. 19 of the *Legal Profession Act* must be considered in conjunction with s. 3 of the *Legal Profession Act* which sets out the overriding object and duty of the Society:

> … to uphold and protect the public interest in the administration of justice by …
>
> (b) ensuring the independence, integrity, honour and competence of lawyers,
>
> (c) establishing standards and programs for the education, professional responsibility and competence of lawyers and of applicants for call and admission, …

[12] The Review panel accepts the assertion of the Law Society that a determination concerning an applicant for membership to the Law Society of British Columbia necessarily requires an evaluation of good character and repute and fitness to become a barrister and a solicitor of the Supreme Court of British Columbia and that this assessment must necessarily be considered in conjunction with s. 3 of the Act to uphold and protect the public interest by preserving the independence, integrity, honour and competence of lawyers. It is a well-recognized principle of statutory interpretation that a statute must be considered in its entirety. Accordingly, the Review panel concludes that, in assessing the criteria of good character, repute and fitness as specified in s. 19(1) of the Act, consideration of the overriding objectives and duties of the Law Society to uphold and protect the public interest as set out in s. 3 are necessarily and appropriately included in this consideration.

Can the nature and gravity of the prior misconduct justify denial of reinstatement despite the applicant having demonstrated significant current good character, repute and fitness?

[13] Counsel for the Law Society argued that the case of *Bolton v. Law Society*, [1994] 2 All ER 486, a decision of the English Court of Appeal, should be formally incorporated into the jurisprudence of British Columbia with respect to consideration of the criteria for consideration upon a reinstatement application.

[14] Counsel for the Law Society argued at length that the principle expressed in *Bolton* triggered a two-step process for dealing with any reinstatement application:

> (a) firstly a determination of whether the requisite requirements of good character, repute and fitness are currently demonstrated, and
>
> (b) subject to those criteria being met, an assessment of whether the circumstances of the misconduct render it appropriate to deny readmission in order to "sustain public confidence in the integrity of the profession" (*Bolton* at page 492, line (e)).

[15] Counsel for the Law Society placed heavy emphasis on the observation in paragraph 16 of the reasons of the Master of the Rolls, that while rehabilitation and redemption are important, they do not touch the essential issue, which is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness.

[16] It is important, however, to note several things about *Bolton*: first, helpful and interesting though they may be in some general way, the learned judge's observations are obiter in two quite separate respects: (1) they formed no part of the reasoning towards, and arguably were absolutely irrelevant to, the Court of Appeal's actual decision that the Divisional Court had, in effect, exceeded its jurisdiction; and (2) the question whether "public confidence" trumps "good character" in relation to reinstatement simply did not arise in *Bolton*. It was a case about the appropriate penalty for misconduct, not about reinstatement of a previously disbarred lawyer.

[17] Secondly, there is no evident statutory context within which Bingham, MR made his remarks that bears even a superficial resemblance to the relevant provisions of the *Legal Profession Act* in British Columbia. *Bolton* was not a case about the interpretation of statutes. It is no guide to the meaning and interpretation of any statutory language, let alone that found in sections 3 and 19(1) of the Act. It is, indeed, completely inconsistent with our view of the language of the Act.

[18] Mr. Wood drew our attention to the fact that *Bolton* has frequently been referred to by disciplinary panels in British Columbia and referred us to a number of cases in which this was done. He was careful to point out, however, that none of them involved an application for reinstatement, and none of them, therefore, required the tribunal to decide the issue that is before us. In each of them the observations of the Master of the Rolls were invoked on the quite different question of the appropriate sanction for misconduct.

[19] It follows from our view of *Bolton* that we do not agree with the Law Society's contention that, in the context of a reinstatement application under s. 19(1) of the Act, a hearing panel must engage in two separate enquiries: first, a determination of whether the requisite requirements of good character, repute and fitness are currently demonstrated; and if these criteria are satisfied, second, an assessment of whether the original misconduct renders it appropriate to deny readmission in order to "sustain public confidence in the integrity of the profession."

[20] In our view there is only one question, and that is the question posed by s. 19(1). Answering that question could, in an appropriate case and depending on the facts, require a hearing panel on a reinstatement application to consider whether, in all the circumstances, the nature and quality of the original misconduct is such as to preclude an affirmative answer. But that enquiry is part of the broader evaluation of the applicant's character, repute and fitness; not a post facto enquiry into a different question. It seems to us that the original panel asked the right question, and set about answering it in an appropriate way.

[21] Furthermore, at the Review hearing, counsel for the Applicant argued that the appropriate test for consideration of an application for reinstatement to the Law Society was as considered and adopted by the hearing panel in *Watt v. Law Society of Upper Canada*, [2005] OJ No. 2431 (Div. Ct.).

[22] In their decision, the hearing panel in this case considered two different tests for determining the criteria to be considered on a reinstatement application. Counsel for the Applicant put forward *Law Society of BC v. Schuetz*, 2011 LSBC 14, and counsel for the Law Society put forward *Watt* (supra). The hearing panel weighed the criteria set out in both cases and ultimately adopted the approach in the Watt case. We agree with the hearing panel's conclusion.

[23] Counsel for the Law Society drew our attention to a further decision made subsequent to the decision of the hearing panel: *Apostolopoulos v. Law Society of Upper Canada*, 2012 ONLSHP 0133. *Apostolopoulos* was referred to as recognizing a ten-principle test set out in the case of *Levenson v. Law Society of Upper Canada*, 2009 ONLSHP 98, which was relied on by counsel for the Applicant and included in his Book of Authorities. *Levenson* identifies ten principles for consideration in an assessment of a reinstatement application. Those principles are set out as follows at paragraph 14:

1. The Society regulates the legal profession in the public interest.

2. Public confidence in the legal profession is more important than the fortunes of any one lawyer.

3. The ability to practise law is not a right but a privilege.

4. Once the privilege is lost, it is hard to regain.

5. The privilege may be regained no matter how egregious the conduct that led to its loss provided sufficiently compelling evidence of rehabilitation is presented. This will be hard to do.

6. The privilege may be regained where, as in *Goldman*, the misconduct was committed as a result of a psychiatric or medical disorder that is very unlikely to recur because the disorder has been successfully treated.

7. The privilege may be regained where, as in *Manek*, the misconduct did not have its origins in a

medical or psychiatric disorder, but the applicant has established genuine and enduring rehabilitation.

8. The legal profession of all professions has a special responsibility to recognize cases of true rehabilitation; however, as rehabilitation will be claimed by virtually all applicants, independent corroborating evidence is required to establish that the rehabilitation is genuine and enduring.

9. The burden of proof on [an applicant for a licence following disbarment] is close to, but is not as high as, the criminal law burden of beyond a reasonable doubt. The burden of proof on an applicant seeking readmission is at least as high as the burden on the Society when it seeks to disbar a lawyer.

10. The [licensing following disbarment] must not be detrimental to the integrity and standing of the bar, the judicial system, or the administration of justice, or be contrary to the public interest.

[24] It was further acknowledged, by counsel for the Law Society as well as counsel for the Applicant, that the principles enunciated in *Bolton* have been essentially incorporated into the ten-principle test set out in *Levenson*, such that the areas of concern identified in *Bolton* are able to be addressed by the considerations enunciated in the *Levenson* decision.

[25] Accordingly, we adopt the six tests as identified in *Watt* to be taken in conjunction with the ten principles set out in the *Levenson* decision as guidance in the consideration and determination of an application for reinstatement to the Law Society of British Columbia. We further note that the ten principles set out in *Levenson* are essentially factors for consideration of a reinstatement application, and it will depend upon the circumstances of each case as to the weight given these ten factors in reaching a decision.

Was the disposition of the Hearing Panel correct in this case?

[26] We are of the view that the decision of the hearing panel was correct. The hearing panel engaged in a thorough and detailed review of the facts of this case. They further engaged in a comprehensive analysis of the relevant jurisprudence. They weighed and balanced consideration of the past behaviour of the Applicant, with his efforts and achievements towards rehabilitation, against the public interest. Their analysis of the facts and their reasoning were sound and we adopt them.

[27] Accordingly, we confirm the decision of the hearing panel that Michael Grant Gayman be reinstated to the Law Society of British Columbia as a barrister and solicitor, subject to the conditions stipulated by the hearing panel.

COSTS

[28] If either party wishes to make submissions concerning costs they may do so in writing addressed to the Hearing Administrator within 30 days of the date of this decision.