2013 LSBC 05
Report issued: February 7, 2013

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

Arun Mohan

Applicant

Decision of the Benchers on Review

Review date: November 23, 2012
Quorum: Art Vertlieb, QC, Chair, Kathryn Berge, QC, Thomas Fellhauer, Miriam Kresivo, QC, Jan Lindsay, QC, Bill Maclagan, Claude Richmond

Counsel for the Law Society: Jason Twa
Counsel for the Respondent: Henry Wood, QC

BACKGROUND

[1] These are the reasons for a decision of the Benchers on a review of the decision of a hearing panel on the application of the Applicant for enrolment in the Law Society admission program. The initial hearing was ordered by the Credentials Committee on December 9, 2010 as a result of a number of issues arising from the Applicant's academic history.

[2] The hearing panel issued the reasons for its decision on July 6, 2012. The decision of the majority of the hearing panel was to allow the Applicant's enrolment in the admission program. One member of the hearing panel, the Chair, Mr. Wilson, would have rejected the application.

[3] On August 15, 2012, counsel for the Law Society issued a Notice of Review of the panel decision under Section 47(2) of the *Legal Profession Act* and Rule 5-13(2) of the Law Society Rules.

ISSUES

[4] The issues for the Benchers to decide on this review can be summarized as follows:

I. Did the majority of the hearing panel err in the proper application of the burden of proof as to the Applicant's good character and repute and fitness to be enrolled as an articled student, specifically in reference to the evidence relating to the circumstances surrounding the 2000 Honours Thesis?

II. Was the disposition of the hearing panel correct?

FACTS

[5] The parties filed an Agreed Statement of Facts, which was submitted to the hearing panel and fully summarized in the panel's decision. The following paragraphs summarize salient facts from the Agreed

Statement of Facts and the Applicant's sworn evidence.

[6] While a first year student at the University of British Columbia in 1995, the Applicant was suspended from the University for one year and given a failing grade in Math 100. This resulted from an incident in which he attempted to cheat on an exam in that course by changing his answers on the examination paper after it had been marked and asking to have the mark changed. He denied cheating on the exam repeatedly for a period of over 9 years.

[7] After changing programs, the Applicant submitted a thesis in 2000 as part of the requirements for an honours Bachelor of Arts in Sociology, which he was granted in May of that year.

[8] The Applicant was accepted in UBC Law School in September 2000.

[9] In 2002, the Applicant was suspended from the Faculty of Law at UBC for 18 months as a result of plagiarism discovered in a paper that he submitted in January 2002 for Law 345.

[10] In November 2004, the Applicant applied to the Law Society for temporary articles. As part of the application process, the Applicant made a solemn declaration, which has the same legal effect as if made under oath, in which he disclosed the Law School plagiarism incident and the subsequent suspension. Despite the requirement that all academic discipline be disclosed in the application, the Applicant failed to disclose the suspension resulting from the 1995 Math Exam Incident.

[11] The Credentials Committee ordered a hearing on March 7, 2005 regarding the application for temporary articles.

[12] The Law Society asked the Applicant for a copy of his Sociology honours thesis and other academic papers on June 9, 2005. The Law Society also asked a large number of comprehensive questions of the Applicant.

[13] The Applicant answered the questions in writing on September 14, 2005. He stated he could not find the requested documents because the computer used to write his academic papers had been "disposed of." He also wrote that he could not "find hard-copies of the papers due to logistical difficulties associated with when my family and I moved to our new home in August 2003. We threw out a great deal of documents after we moved into our new home."

[14] The Applicant admitted to the academic suspension in the September 2005 letter but denied that he had cheated on the math exam and blamed the incident on the teaching assistant in the course.

[15] On December 6, 2005, the Law Society obtained a copy of the Applicant's 2000 honours thesis from the University of British Columbia as part of a freedom of information request. It was 78 pages in length.

[16] The hearing before the Benchers was eventually set for March 21, 2006; the Applicant withdrew his application on March 17, 2006.

[17] Following the period of suspension, the Applicant returned to the Law School and completed his Bachelor of Laws Degree in 2006.

[18] The Applicant went on to graduate studies at the Faculty of Law and earned an LLM degree in November 2010.

[19] The Applicant applied for enrolment as an articled student in October 2010. As part of the investigation arising from the current application of the Applicant for enrolment in the admission program, counsel for the Law Society wrote to the Applicant on April 17, 2011 and asked him whether he had submitted any papers containing plagiarized material to the University, aside from those that were already known. The Applicant

responded in the negative. The Law Society also requested copies of all academic papers he submitted as a student.

[20] On April 21, 2011, the Applicant was informed that the Law Society had a copy of his honours thesis.

[21] The Applicant provided the Law Society in June 2011 a copy of what he says is the final version of the honours thesis he submitted for grading to the Sociology Department at UBC. This document was 50 pages in length, 28 pages shorter than the document obtained from the University. It is agreed that this version contained no plagiarized material. The Applicant testified that he found the paper because he had been more diligent in searching boxes and garbage bags in the family home garage during the summer of 2011 than he had been in 2005.

[22] The Law Society examined the thesis it had obtained in the 2005 freedom of information request and determined that it contained substantial incidents of plagiarism from academic articles and other publications.

[23] The Applicant admits that he plagiarized parts of the document that the Law Society obtained from the University. However, the Applicant testified that the document obtained by the Law Society was not the honours thesis that he submitted and was assigned a grade upon in 2000. He says that his professor asked him for a copy of his thesis much later and he must have delivered the wrong draft for archival purposes.

[24] The Applicant testified that, in about November 1999, he prepared a draft thesis containing plagiarized material. He said that he planned to use it if he ran out of time to do original work before the due date at the end of March 2000. However, he testified that he had sufficient time to revise the honours thesis so that it contained no plagiarized material and testified that it was this version he submitted for grading.

[25] Due to the passage of time, the University and the professor are unable to conclusively determine which document was the one submitted in 2000. Neither contained a grade or other marking indicating that the professor had marked it.

STANDARD OF REVIEW

[26] Following a review on the record, the Benchers are authorized by section 47(5) of the *Legal Profession Act* (the "Act") to either confirm the decision of the panel or substitute a decision the panel could have made under the Act.

[27] The parties agree that the standard of review on a review by the Benchers under section 47 is correctness. The standard of correctness on a review of the Benchers is the appropriate approach, except where the panel has determined matters of fact based on viva voce evidence, as observed in *Re: Hordal*, 2004 LSBC 36:

> [8] The test to be applied by the Benchers on a review under Section 47 has been stated to be "correctness". The applicability and parameters of this standard are described in Decisions of the Benchers in the cases of *Dobbin* ([1999] L.S.B.C.27), *McNabb* (June 15, 1999), and *Hops* ([1999] L.S.B.C. 29).
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> [9] In *Hops*, while considering the appropriate scope of review for "findings of proper standards of professional and ethical conduct", the Benchers adopted the language of the Honourable Mr. Justice Branca when he wrote in *Re: Prescott* (1971), 10 DLR (3d) 446, at 452:
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> > The Benchers are the guardians of the proper standards of professional and ethical conduct. The definition in my judgment shows that it is quite immaterial whether the conduct complained of is of

> a professional character, or otherwise, as long as the Benchers conclude that the conduct in question is "contrary to the best interests of the public or of the legal profession". The Benchers are elected by their fellow professionals because of their impeccable standing in the profession and are men [and women] who enjoy the full confidence and trust of the members of the legal professional of this Province."
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> [10] It follows from that observation that the Benchers must determine whether the decision of the Hearing Panel was "correct", and if it finds that it was not, then the Benchers must substitute their own judgment for that of the Hearing Panel as is provided in Section 47 (5) of the *Legal Profession Act*.
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> [11] There is a clear caveat articulated in the authorities to the general application of the correctness test in cases where the Hearing Panel has had the benefit of the viva voce testimony of witnesses and have had the opportunity to assess the credibility of those witnesses by observing their demeanor in the proceedings. In those cases the Benchers ought to accord some deference to the Hearing Panel on matters of fact where determinations have been made by a Hearing Panel on factual matters in dispute.

[28] Where the standard of review is correctness, deference is not to be given to the decision maker or their reasoning process, as stated by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 50: .

> [50] As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law. 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.

BURDEN OF PROOF

[29] The Law Society Rules set out the onus and standard of proof facing an applicant before a hearing of the Credentials Committee:

2-67 (1) At a hearing under this Division, 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.

(2) A panel must reject an application for enrolment if it considers that the applicant's qualifications referred to in Rule 2-27(4) are deficient.

[30] The Law Society has, from a practical standpoint, to put forward evidence that may provide grounds to refuse the application. However, the Applicant always has the onus of proof to show that he is "of good character and repute and is fit to become a barrister and a solicitor of the Supreme Court."

DISCUSSION

[31] The object and duty of the Law Society of British Columbia is set out in section 3 of the Act:

> 3 It is the object and duty of the society to uphold and protect the public interest in the administration of justice by

(a) preserving and protecting the rights and freedoms of all persons,

(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,

(d) regulating the practice of law, and

(e) supporting and assisting lawyers, articled students and lawyers of other jurisdictions who are permitted to practise law in British Columbia in fulfilling their duties in the practice of law.

[32] To facilitate the object and duty of the Law Society of British Columbia, the Benchers are responsible for ensuring that applicants to the Law Society meet the character requirements set out in Section 19 of the Act:

> 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.

[33] The issue on review is whether the applicant is sufficiently rehabilitated from his "admitted history of academic fraud and deception" to now be of good character and repute and fit for admission to the Bar (Panel decision at para. 37).

[34] The Applicant has engaged in significant efforts that speak to his rehabilitation. Written evidence from Professor JW and M Law lawyer JS was before the panel. As well, there was viva voce evidence from M Law lawyer WS. At paragraph 43 of the hearing panel decision, the panel noted:

> [43] In the Panel's opinion, a strong recommendation from a law professor based on that much work over those many years must be taken as compelling evidence of the Applicant's current good character and fitness.

[35] However, any recent dishonesty or deception would speak against the Applicant's rehabilitation. Therefore, it was imperative that the panel determine whether the Applicant had been honest about the events surrounding his sociology honours thesis in his sworn evidence at the hearing.

[36] Circumstantial evidence that demonstrates that the Applicant's evidence fails to meet the balance of probabilities test is:

a. The Applicant claims that he prepared two versions of the thesis: a plagiarized one ("Thesis A") and a non-plagaraized one ("Thesis B"). The Applicant claims that he submitted Thesis B for grading, but accidentally submitted Thesis A for archival purposes;

b. The Applicant was unable to find a copy of his thesis in 2005 due to a family move that he claims resulted in many documents being thrown out, but six years later was able to find a copy of his honours thesis (but no other undergrad paper from the same time period) after searching boxes and garbage bags left over from the 2003 move;

c. The copy of Thesis A, obtained from UBC, has indicia of authenticity:

i. It had a cover page that was dated for the due date;

ii. This copy of the honours thesis on file in Department of Anthropology and Sociology was considered by UBC to be an accurate copy of the submitted paper;

d. The Applicant's locating Thesis B only occurred after discovering that the Law Society had obtained a copy of the honours thesis;

e. Thesis B contained indicia of being inauthentic:

i. It was 28 pages shorter than Thesis A;

ii. It had no cover page;

iii. It had no due date; and

iv. It contains errors not found in Thesis A;

f. The Applicant claims he prepared Thesis B in Fall 1999; Thesis B contains the phrase "sections". In February 2000 he was told by his professor to change "chapters" to "sections". An inference may be made that Thesis B was written after he received instructions from his professor in February 2000.

[37] The panel majority wrote at para. 37 of their decision:

> Despite the majority's serious concerns about the Applicant's evidence on this issue, and on his admitted history of academic fraud and deception, which he says ended in 2002, and despite his admitted deception and lack of forthright disclosure in his declaration in support of his 2004 application for enrolment, there is no evidence before us that is inconsistent with the Applicant's evidence on this thesis issue. There is only suspicion and doubt.

[38] Regrettably, the hearing panel did not make a finding on the credibility of the Applicant. The panel did not state that they believed his evidence or found it credible. In fact, the panel majority refers to "serious concerns about the Applicant's evidence."

[39] The panel also erred in stating that there was no evidence before them inconsistent with the Applicant's evidence. That is not correct. There was important circumstantial evidence before them that needed to be analyzed and considered regarding the credibility of the Applicant's version of events.

[40] Circumstantial evidence may be sufficient grounds for a trier of fact to find that a witness is not credible. In *Statton v. Johnson*, 1999 BCCA 0170 (indexed as *Johnson v. Bugera*) at paras. 33 to 35, Hall, JA for the court held:

> [33] This is a case in which I think the comments of O'Halloran J. in the of [sic] cited case of *Faryna v. Chorny* (1951), 4 WWR (NS) 171 at 174 are apposite:
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> > The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial judge to say "I believe him because I judge him to be telling the truth," is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

> The trial judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial judge with a divine insight into the hearts and minds of the witnesses. And a court of appeal must be satisfied that the trial judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case.
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> Mr. Justice Stephen put it another way: He said (General View of the Criminal Law, 1890, p. 191):
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> > "* * * that the utmost results that can in any case be produced by judicial evidence is a very high degree of probability * * * . The highest probability at which a court of justice can, under ordinary circumstances, arrive is the probability that a witness or a set of witnesses tell the truth when they affirm the existence of a fact."
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> There is high authority to support the foregoing, namely, a case in the House of Lords in 1933 to which Lord Greene, MR referred in *Yuill v. Yuill*, [1945] P 15, 114 LJP 1, and described it as inadequately reported. The case was *Hvalfangerselskapet Polaris v. Unilever Ltd.* (1933), 46 Ll L Rep 29, 39 Com Cas 1. In that case the trial judge had disbelieved material witnesses and found that their evidence was invented on the spur of the moment.
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> In the Court of Appeal Scrutton, L.J. giving the leading judgment said the trial judge had seen the witnesses and heard the conflicting testimony and because of that it was impossible for the Court of Appeal to interfere with the trial judge's finding on credibility. But the House of Lords did interfere. It said that the strictures cast by the trial judge on the two witnesses were unjustified and that the evidence of these two witnesses ought to have been received. The House, Lord Atkin presiding, came to that conclusion because it was satisfied that the evidence of the witnesses disbelieved by the trial judge was entirely consistent with the probabilities and the business conditions proved to be in existence at the time. (Emphasis [Hall, JA's]).

[34] In a case like this where a great deal of the circumstantial evidence is at odds with Johnson's direct evidence, I believe it was incumbent on the trial judge to take his analysis one step further in the manner suggested in the above passages.

[35] It appears to me that if this further analysis had been taken in this case, it may well have been that the learned trial judge would have reached a different conclusion. It seems to me it could be fairly suggested that the evidence of Johnson concerning who was driving at the relevant time was "out of harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable" concerning who was the driver of the car just prior to the fatal accident. As I earlier observed, this was not a case of conflicting evidence given under oath by different parties or interests but rather was a case in which substantially the only viva voce evidence concerning the state of events had to be weighed against a body of circumstantial evidence rather at odds with that testimony. Thus, cases that speak of the unique advantage of the trial judge in viewing witnesses have perhaps less applicability in a situation like the instant one.

[41] Even if it can be said that the panel implicitly made a finding of credibility, they do not state their reasons for such a conclusion in accordance with the preponderance of probabilities in the case (*Statton* supra).

[42] Failure to make such a finding, especially one so central to deciding the Applicant's good character, repute and fitness to become an articled student, is an error in law.

[43] Although the Applicant's evidence regarding the honours thesis was with respect to conduct that took

place in 1999 and 2000, his explanations were given in 2012 under oath before a hearing panel. His sworn statements to the panel regarding his honours thesis directly speak to the issue of good character, repute and fitness.

[44] The panel majority failed to examine the consistency of the Applicant's evidence with the circumstantial evidence. The panel was obliged to weigh all of the relevant evidence and make a finding of fact. It is not entitled to deference where it has failed to do so.

[45] The Applicant's elaborate explanation around Thesis B demonstrates that the Applicant did not discharge the onus of proof that he is now "of good character and repute and is fit to become a barrister and a solicitor of the Supreme Court." It bears noting that, in his minority opinion, Bencher Wilson wrote "his [the Applicant's] evidence on this serious issue defies credulity" (Panel decision at para. 69).

[46] The majority decision of the panel, with the errors as noted, cannot stand. Where a panel decision is incorrect, the review panel may substitute a different decision (s. 47(5) of the Act; see also *Hordal* supra).

DECISION

[47] As a result of the foregoing, the decision of the hearing panel is set aside and the application is hereby rejected.

[48] The Law Society has asked that the review panel address the review panel's decision to recommend conditions on the Applicant's call and admission as a member of the Law Society. Given our decision, there is no need to rule on whether the panel was correct in suggesting that the Credentials Committee impose conditions or whether those conditions are evidence of the panel's apprehension of the Applicant's credibility.

RE-APPLICATION

[49] Under Rule 2-28, an unsuccessful applicant for enrolment may not reapply for enrolment for two years after the date of issuance of the decision denying the previous application unless that time is abridged by the hearing panel. The Applicant may make submissions on this issue within 30 days after the issuance of this decision. The Law Society may reply within 14 days.

COSTS

[50] Similarly, we have heard no submissions as to the costs of the hearing and review. If the parties are not able to agree as to costs, either party may make submissions within 30 days after the issuance of this decision. The other party may reply within 14 days.