2013 LSBC 31
Decision issued: November 8, 2013
Decision on application for enrolment issued: January 23, 2013

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

Re: APPLICANT 4

Applicant

Decision of the Benchers on Review

Review date: September 25, 2013
Benchers: Art Vertlieb, QC, Chair, Rita Andreone, QC, Thomas Fellhauer, Leon Getz, QC, William Maclagan, Ben Meisner, Philip Riddell

Counsel for the Law Society: Henry Wood, QC
The Applicant appeared on his own behalf

introduction

[1] This is a review of the decision of the Hearing Panel on the Applicant's application for enrolment as an articled student in the Law Society Admission Program ("LSAP").

[2] On November 21, 2012, a hearing was held to consider the Applicant's application for enrolment in the LSAP. The purpose of the hearing was to determine whether the Applicant met the statutory criteria set out in section 19(1) of the Legal Profession Act (the "Act"), which states:

> 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] In its decision dated January 23, 2013, the Hearing Panel rejected the Applicant's application. The decision is reported at Re: Applicant 4, 2013 LSBC 03.

[4] Subsequent to the decision, the Applicant filed a Notice of Review under section 47(1) of the Act for a review on the record by the Benchers.

FACTS

[5] A summary of the relevant facts was set out by the Hearing Panel at paragraphs 2 to 24 of its decision.

[6] For ease of reference, the following is a short overview:

> (a) The Applicant was educated as a lawyer outside of Canada and practised as a lawyer outside Canada for approximately two years. The Applicant immigrated to Canada in 2002.
>
> (b) On January 2, 2007, the Applicant was involved in a hit and run accident. Later that evening, the Applicant was given a violation ticket for failing to remain at the scene of the accident and was charged with impaired driving and driving with a blood level in excess of .08. The Applicant spent the night in

jail.

(c) The Applicant was not convicted of any of these offences.

(d) On February 28, 2011 the Applicant made an application for enrolment in the LSAP.

(e) During the period of April of 2011 to January of 2012, the Law Society and the Applicant corresponded with respect to the Applicant's application and, in particular, the details of the events on January 2, 2007 and the disposition of the related proceedings.

(f) The Applicant received a Certificate of Qualification issued by the National Committee on Accreditation of the Federation of Law Societies of Canada on November 29, 2011.

(g) The Credentials Committee of the Law Society referred the Applicant's application to a hearing panel on January 26, 2012.

(h) The Applicant has admitted that he initially lied to the police, but the Applicant's position was that he was not impaired and that, in respect of the hit and run accident, the other vehicle hit the Applicant's vehicle and then left the scene.

(i) The circumstances surrounding these events, the Applicant's disclosure of these events to the Law Society and the Applicant's credibility before the Hearing Panel were the focus of the hearing.

(j) As stated above, the Hearing Panel rejected the Applicant's application.

REQUEST TO ADMIT ADDITIONAL EVIDENCE

[7] A review on the record under section 47(1) is a review of the decision of a hearing panel based on the materials and evidence that was before the Hearing Panel (the record). A review under section 47 is not a rehearing, and generally the parties are not able to present additional evidence.

[8] The Applicant applied to the Review Panel to admit 13 letters of reference that were not presented at the hearing. These letters were presented by the Applicant to the Review Panel and collectively marked as Exhibit "A" for identification.

[9] Section 47(4) of the Act and Rule 5-16(2) provide the Review Panel with the jurisdiction to hear evidence that was not part of the record if there are "special circumstances".

[10] The Applicant was unable to provide adequate reasons for the Review Panel to admit Exhibit "A" that would constitute "special circumstances" other than that he did not think they were necessary at the hearing.

[11] Counsel for the Law Society made submissions that the letters of reference should not be admitted.

[12] At the date of hearing the review, we reserved our decision as to whether or not we would admit the letters of reference.

[13] The central issue that was before the Hearing Panel was the issue of the character and repute of the Applicant. The hearing was the proper forum for consideration of character references since the Review Panel has no opportunity to question the writers of the letters of reference or to hear what information the writers were aware of prior to writing their letters.

[14] In the absence of evidence of special circumstances, as required by the Act, the application of the Applicant to have letters of reference admitted is dismissed.

ROLE OF THE BENCHERS ON A REVIEW

[15] The role of a Review Panel of the Benchers is not to have a rehearing of the evidence but rather to review the decision of the Hearing Panel through a review of hearing record.

[16] Under section 47(5) of the Act, after the hearing of the review under section 47, the Benchers may:

> (a) confirm the decision of the panel, or
>
> (b) substitute a decision the panel could have made under this Act.

STANDARD OF REVIEW

[17] The standard of review on a review by the Benchers under section 47 is correctness. The standard of correctness on a review by 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*, [1997] LSBC 27, *McNabb*, [1999] LSBC 2, and *Hops*, [1999] LSBC 29.

[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 (BCCA), at 452:

> 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.

[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*.

[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.

BURDEN OF PROOF

[18] The Law Society Rules set out the onus and burden 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.

[19] This places the onus upon the Applicant to satisfy the Benchers on the balance of probabilities that he

is of “good character and repute”.

OVERRIDING CONSIDERATIONS

[20] 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.”

[21] To carry out 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.

[22] A determination concerning an applicant for membership in 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. This assessment must be considered in conjunction with section 3 of the Act to uphold and protect the public interest by preserving the independence, integrity, honour and competence of lawyers. Accordingly, when assessing the criteria of good character, repute and fitness as specified in s. 19(1) of the Act, we must take into consideration the overriding objectives and duties of the Law Society to uphold and protect the public interest as set out in section 3.

ISSUE

[23] Was the decision of the Hearing Panel correct in this case?

DECISION

[24] We are of the view that the decision of the hearing panel was correct.

REASONS

[25] From the transcript of the hearing, it is evident that the Hearing Panel had considerable opportunity to hear from the Applicant and to ask questions of the Applicant and consider his responses.

[26] At paragraph 31 of its decision, the Hearing Panel identified the issues of concern:

> (a) The Applicant lied to the police when initially asked about being involved in an accident.
>
> (b) The Applicant lied to police when initially asked about drinking before driving.
>
> (c) The Applicant’s belligerent behaviour with the police.

(d) The Applicant's letter to the Law Society made in response to the Law Society's July 14, 2011 request in which he denied lying to the police about being in an accident or consuming alcohol.

(e) The Applicant's evidence before the Hearing Panel that the other driver was at fault and left the scene of the accident.

(f) The Applicant's evidence before the Hearing Panel that his statement made to the police that "every test will be failed" was meant to convey his confidence that he was not impaired.

[27] The Hearing Panel found that it was inexplicable as to why the Applicant would have lied to the police about his involvement in a hit and run accident if the Applicant was indeed the victim of that accident and was not impaired.

[28] The Hearing Panel found that the Applicant's explanation regarding the hit and run accident was inconsistent with the Report to Crown Counsel. According to the Report to Crown Counsel, the other driver called the police about 15 minutes after the accident occurred and provided a description of the Applicant's car and its licence plate number.

[29] The Applicant testified that the other car pulled in front of him, causing the accident, and then left the scene. In such a scenario, the Hearing Panel concluded that the other driver could not have seen his licence plate number.

[30] The Hearing Panel was also concerned about inconsistencies between the Applicant's behaviour and his testimony that he was not impaired. These inconsistencies included:

(a) making the statement "every test will be failed" after providing his first sample at the police station, which was 170 milligrams of alcohol per 100 millilitres of blood.

(b) the Applicant's explanation for saying that "every test will be failed" was that he thought that one beer and one or two ounces of drink could not impair a person, so the Applicant was confident that whatever test the police would use to check his impairment would fail.

(c) the Applicant's actions, comments and general demeanour at the police station were not the actions of a person confident that they had done nothing wrong.

[31] The Hearing Panel was also concerned about inconsistencies between the Applicant's evidence before the Hearing Panel and his response to the July 14, 2011 letter of the Law Society and the Applicant's response to the Hearing Panel with respect to those inconsistencies. The Hearing Panel found that his response to the Law Society constituted only a partial admission.

[32] The Hearing Panel was in the best position to assess the credibility of the Applicant. The Hearing Panel reviewed and considered the relevant jurisprudence. The Hearing Panel weighed and balanced consideration of the past behaviour of the Applicant against his efforts and achievements towards rehabilitation.

[33] We have considered the issues raised by the Applicant in his Notice of Review and his written submission. However, the Applicant has not convinced us that the decision of the Hearing Panel was incorrect.

[34] We reiterate that the standard for good character is a high one. The Hearing Panel quoted from an excerpt from the article by Mary Southin, QC (as she then was) entitled "What is 'Good Character'?" (1977) 35 The Advocate 129. We note in particular the following point from that quote:

Character within the Act comprises in my opinion at least these qualities: …

2. The moral fibre to do that which is right, no matter how uncomfortable the doing may be…

[35] From paragraph 29 of the decision of the Hearing Panel, which quoted from another hearing panel in *Law Society of BC v. McOuat* dated June 12, 1992 (affirmed by the BC Court of Appeal, 78 BCLR (2d) 106), we also provide the following excerpt:

> 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 …

[36] The Hearing Panel stated at paragraph 40:

> …It is clear that his letter responding to the Law Society's letter of July 14, 2011 constituted only a partial admission with a specific denial about lying to the police. At the hearing he made a more complete admission than was made initially. It is to his discredit that he was not willing to admit to the Panel that his letter was not as forthright as it ought to have been.

[37] The Hearing Panel stated at paragraph 41:

> The Applicant's explanations concerning the circumstances of the accident, his confidence that he was not impaired, and his response to the Law Society's letter of July 14, 2011 do not withstand scrutiny. We do not believe that he was being truthful.

[38] The conclusion of the Hearing Panel at paragraph 42 with regard to the effect of this was:

> When considered in light of the good character test, the Applicant's failure to convince the Panel that he was telling the truth is fatal to his application.

[39] We are unable to find that the Hearing Panel was incorrect in either making a finding of fact, or the in the application of the law. Accordingly, we confirm the decision of the Hearing Panel.

COSTS

[40] 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.