2014 LSBC 07
Report issued: February 18, 2014
Oral Reasons: December 9, 2014

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

Marc Andre Eckardt

Applicant

Decision of the Hearing Panel on Application for Enrolment

Hearing date: December 9, 2013
Panel: Phil Riddell, Chair, Ralston Alexander, QC, Lawyer, Laura Nashman, Public representative

Counsel for the Law Society: Henry Wood, QC
Counsel for the Respondent: Michael D. Shirreff

OVERVIEW

[1] Marc Andre Eckardt (the "Applicant"), 50 years of age, earned a law degree in California in 1996 and practised there until 1999. He relocated to Washington State and worked as in-house counsel for an insurance company until 2009 when he was laid off due to the recession and its impact on development projects. He was unemployed for 16 months and then joined ICBC in a non-legal capacity until May 2012 when he resigned to enrol in the Professional Legal Training Course (PLTC) program.

[2] His enrolment in PLTC was interrupted by an order of the Credentials Committee of the Law Society, directing the hearing that is the subject of this proceeding. The hearing was conducted on December 9, 2013 and, after hearing evidence and submissions from the Law Society and the Applicant, the Panel provided an oral decision to approve the Applicant's request to enrol in the PLTC program with written reasons to follow. These are the reasons for the oral decision of the Panel delivered on December 9, 2013.

[3] The hearing was ordered by the Credentials Committee because, in his application for enrolment, the Applicant advised that he had been charged with an offence in Washington State. He provided particulars that verified that he had entered a guilty plea to two misdemeanor assault charges. Subsequent inquiries from Law Society staff revealed issues with possible substance abuse allegations that had not been acknowledged in the initial application.

ISSUE

[4] The issue to be determined at this hearing is whether the Applicant satisfies the requirements of section 19(1) of the *Legal Profession Act* for call and admission to the Law Society of British Columbia. That section provides:

> 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.

[5] The Applicant has the burden of proving that he meets the character and fitness test on a balance of probabilities under Law Society Rule 2-67.

[6] The Law Society expressed a concern as to the "fitness" of the Applicant based upon the material provided relating to the substance abuse allegation. The Law Society was concerned also that the Applicant's character was in issue due to the criminal convictions and his answers to several questions on the application for enrolment.

[7] The issue before this Panel was to determine whether the Applicant has met the burden of proving that he is of "good character and repute and fit to become a barrister and a solicitor" as is required for call and admission to the Law Society as set out in section 19(1) of the *Legal Profession Act*.

[8] The parties provided an Agreed Statement of Facts and a volume of material containing documents in respect of the issues under consideration and a significant written communication history between Law Society staff and the Applicant. The documents and correspondence were agreed to be evidence of the fact that the documents existed and that the written statements were made. It was for the Panel to determine the extent to which the statements were true or otherwise.

THE LAW

[9] There is a well-developed body of law as to what constitutes "good character and repute". That question has been the subject of both judicial consideration and decisions of hearing panels of the Law Society. Similarly, "fitness" for membership has been canvassed and opined upon by previous Law Society panels. There is not significant debate about the principles.

[10] Most decisions on credentials applications refer to the succinct statements on the subject found in *McOuat v. Law Society of BC* (1993), 78 BCLR (2d) 106, where the Court of Appeal of this province adopted the writing of Mary Southin, QC (as she then was) "What is 'Good Character'?", published in *The Advocate*, 1977 v. 35, at 129, as follows:

> 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:
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> 1. An appreciation of the difference between right and wrong;
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> 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:
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> 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.

[11] The Panel has adopted this reasoning in its deliberations on the issue of the Applicant’s character and reputation.

[12] On the “fitness” issue, it falls to the Panel to weigh the evidence to determine if the Applicant has met the burden imposed upon him to explain the circumstances in his history that, absent an appropriate explanation, would raise doubt as to his “fitness” to become a member of the Law Society of British Columbia.

SUMMARY OF THE EVIDENCE

[13] In December 1997, Mr. Eckardt was married in California, and the couple had three children. His wife became a medical doctor, and the couple relocated to Washington State to accommodate a career choice of his wife. The marriage ended badly, and an acrimonious divorce followed. That family law proceeding has been the subject of an astounding number of interlocutory applications over the six-year period from 2006 to 2012.

[14] Mr. Eckardt is devoted to his children, and his concern for their well-being is at the heart of the difficulties before us. It was his anxiety to protect them from the nightmare of testifying in a criminal proceeding against their father that motivated the guilty plea in circumstances where that plea was likely not appropriate.

[15] Following the divorce and the layoff from the insurance company, Mr. Eckardt relocated to Vancouver, his childhood home. During this time he met and cohabited with a woman (TL) who had her own child from a previous relationship. This new relationship was not a positive event in the life of the Applicant.

[16] TL was needy, demanding and jealous of his time away from her. She treated him badly, and from time to time she would attack him physically. Over time a protocol developed where Mr. Eckardt was required to defend himself and on occasion he would slap TL in response to attacks from her. He is clear that he did not ever initiate the violence and that, to the best of his recollection, he did not strike her on the head or face.

[17] The relationship was fundamentally dysfunctional from the beginning, and though Mr. Eckardt knew that he should be elsewhere, he was not able to extricate himself from his relationship with TL. Most of his time with her was during the 16-month period of time during which he was unemployed following his layoff from the insurance company.

[18] When he became employed by ICBC, Mr. Eckardt accelerated the frequency of his visits to Seattle to see his children as he was then able to afford to do so on a more frequent basis. TL resented these visits as she was jealous of his relationship with his children and saw the time he spent with them as time he should have been devoting to her.

[19] In November 2010, these events all came together in a most difficult series of circumstances. Mr. Eckardt had arranged to rent a hotel room in Seattle where he planned to spend the weekend with his children near their home. Despite his request to the contrary, TL insisted on joining him for this trip and required that Mr. Eckardt bring her daughter with him to join them all in Seattle. TL had gone ahead of Mr. Eckardt and met with a customer in Seattle on the same day.

[20] By the time Mr. Eckardt arrived at the hotel after picking up both TL's daughter in Vancouver and his own children in Seattle, TL was wholly impaired from the benefits of the hotel's "happy hour(s)" and was sleeping in the bedroom of the suite that had been arranged for the "family".

[21] An ugly scene developed where TL, in her inebriated state, was seeking to impose rules about who was going to sleep in what room etc. Mr. Eckardt had finally (it appears) had enough of this and responded forcefully. In the result, TL attacked him, scratching his face and neck, and puncturing the skin on his arms when she sought to drag him to the bedroom by digging her fingernails into his skin. TL's daughter became involved in the dispute to assist her mother, and was herself apparently struck by Mr. Eckardt. Everyone (including TL's daughter) agreed that no one hit her intentionally.

[22] Mr. Eckardt was able, with some difficulty and further struggles, to leave the hotel room with his own children, and he returned them to their mother. She noticed the blood on his face and arms and following a discussion of the circumstances took some photographs of his injuries for subsequent verification if it became necessary. Mr. Eckardt returned to Vancouver that night and removed his belongings from TL's residence. His relationship with TL was ended on that weekend.

[23] The legal fallout from the hotel room altercation was occasioned by the need for counselling by Mr. Eckardt's son following his exposure to the violence in the suite. It appears that the counsellor was required to report the events to the police and an investigation followed. Statements were taken from all parties, and the police ultimately charged Mr. Eckardt with two counts of domestic assault. One relating to TL, the other, to her daughter. Inexplicably, no charges were laid against TL.

[24] Mr. Eckardt was represented by a public defender in the criminal proceeding, and although there appeared to be a full answer to the charges (self-defence) there was no certainty that a judge would "get it right" following a trial. Two further considerations motivated the plea bargain "guilty" decision. First, as indicated above, that outcome spared Mr. Eckardt's children from the requirement to testify in the trial. This was important given their ages at the time, 11, 8 and 4 years. Equally important in the decision is that the plea bargain was to "Assault 2" rather than "Assault 4" as initially charged. Assault 4 carries a mandatory six-month term of incarceration, whereas Assault 2 allows for a probationary outcome.

[25] At the same time as the criminal proceedings were progressing, Mr. Eckardt's wife was initiating child protection applications in the matrimonial action. These initially took the form of a no-contact injunction, subsequently modified to allow access with conditions. One such condition was enrolment in an alcohol assessment program in which Mr. Eckardt was required to participate. It appears that the need for the alcohol dependency assessment was driven by the events of the November 2010 hotel incident although Mr. Eckardt was not drinking at any time during that day or evening.

[26] In December 2010, in response to a court order related to child access, Mr. Eckardt arranged an alcohol assessment with a company called "Advanced Choices" in Washington State. Though the assessor advised of no concern following the meeting, the resulting report identified a need for a treatment program and made a finding that Mr. Eckardt was in denial about his alcohol issues. Though Mr. Eckardt did not agree with the assessment, he was unable to refute the allegation in any effective manner and complied.

[27] It appears that Mr. Eckardt went along with the alcohol dependency testing and subsequent required regimes (AA or similar attendance six-week "Daytox" program) to comply with the requirements of the child access orders. It is Mr. Eckardt's evidence that he does not have a drinking problem, though he acknowledges that he does drink socially and occasionally (historically) to relieve stress and depression.

[28] Following the hotel incident, Mr. Eckardt did go through a period in which he abstained entirely from alcohol and testified that he did not have any problem with the period of abstinence ultimately abandoning

the regime as unnecessary. The Panel heard testimony from his fiancée and is satisfied that there is no basis for any suggestion of a substance abuse problem in this case. It appears to be a leftover piece of the contentious and protracted matrimonial dispute suffered by Mr. Eckardt.

[29] To the present it appears that the former wife has considerably mellowed recently in her relationship with Mr. Eckardt and that they have, at least for the present, abandoned the acrimony that has dominated their relationship since the separation. He is unable to explain the change but welcomes it. The children are now spending more time with Mr. Eckardt and his fiancée, and the former wife appears to be supportive of this relationship going forward.

DISCUSSION

[30] The concerns of the Law Society as to "fitness" relate to the question of the extent to which, if any, the Applicant has issues with dependency on alcohol. As indicated above, and with the benefit of a thorough cross-examination of the Applicant by counsel for the Law Society, together with the additional evidence provided by the fiancée to the Applicant (a current member of the Law Society), this Panel is satisfied that the Applicant has no issues with dependency or abuse of alcohol.

[31] That is, however, not the end of the substance abuse component of this hearing. In his application for enrolment, the Applicant replied "no" in response to two questions relating to substance abuse. The questions are:

> a) Based upon your personal history, your current circumstances or any professional opinion or advice you have received, do you have a substance use disorder?, and
>
> b) Have you been counselled or received treatment for a substance abuse disorder?

[32] The Applicant's response to the first question is, in the view of the Panel, correct. The Applicant is clear in his own mind that he does not have a substance abuse issue, and the Panel has been persuaded to that view based upon the sworn testimony of the Applicant and that of his fiancée.

[33] As to the second question, this answer is clearly false in the circumstances, and the Applicant was required to provide an explanation for the apparently misleading response. The Applicant testified that he was participating in the alcohol counselling programs to ensure compliance with court orders, which in turn would ensure access to his children. He was not engaged in the programs because he had any concerns with his alcohol consumption, and therefore did not feel that his answer to the question was inappropriate. In other words, he was not in the program to receive counselling; he was in the program to continue to see his children. On that basis, his answer was true from his perspective. After hearing the testimony of the Applicant and seeing his response to the difficult cross-examination on this subject, the Panel is satisfied that the Applicant did not intend to mislead the Law Society with his response to that question.

[34] A more difficult question arises in terms of what is the impact of a criminal conviction on an assessment of character. In most circumstances, a recent criminal conviction (from a guilty plea or otherwise) will raise serious concerns as to the character and repute of the subject applicant. In that circumstance it will be necessary for the Panel to closely examine the events surrounding the conviction and the underlying reasons for the outcome.

[35] We note here that this Applicant has recently made some extraordinarily bad decisions and choices in his interpersonal relationships. Of particular note is the continuation beyond all reason of the dysfunctional situation with TL, ending only after a catastrophic scenario plays out in a hotel room in Seattle.

[36] With that background however, it permits the Panel to determine that there is a reasonable explanation

for the conviction. We have accepted that explanation. With that explanation comes some relief for the Applicant from the usual negative inference that would be drawn from a criminal conviction. He swears that the decision to plead guilty was entirely motivated to bring the events to an end with a manageable consequence and with the ultimate goal achieved of sparing his young children from an appearance in court to testify against their father. An entirely plausible explanation for an otherwise aberrant outcome.

[37] We have also considered the apparent inconsistency in application of the law where the Applicant is charged for his defensive response behaviour while TL appears to have avoided all negative outcomes though she was clearly the more aggressive and accordingly, the more responsible of the two protagonists in the situation.

[38] We also do not understate the circumstance that the conviction was for a misdemeanour and not a felony. This is an important characteristic of the outcome and, as described above, is one of the pieces of the puzzle that encouraged the Applicant to accept the guilty plea.

[39] We next considered the negative responses to the questions asked on the application form as follows: 4. Is there, at the present time, a civil action or a civil judgment outstanding against you? and, 5. Have you ever failed to obey a court order?

[40] It is probable that the judgment for outstanding unpaid child maintenance arrears that existed at the time the application was submitted to the Law Society mandated a positive answer to question 4. It is also probable that the fact of unpaid amounts of court ordered child support suggest that the negative answer to question 5 was similarly inaccurate. The Applicant was provided an opportunity to explain the apparent inconsistency in his responses to those questions. He replied to the Law Society in writing, and he also responded to questions from Law Society counsel while under cross-examination.

[41] The Applicant explained that “with the benefit of hindsight” he probably had provided an inaccurate response to the questions. He noted that, in the course of six years of a substantially contested matrimonial dispute, there were numerous court orders with respect to no contact and other custody matters. He did not think of the obligation to pay child maintenance in terms of it being embodied in a court order but acknowledged that he should have done.

[42] During the course of his matrimonial dispute he successfully challenged an early maintenance order against him on the basis that it contained errors that overstated the amount of his monthly obligation. Child maintenance in Washington State is calculated by reference to a formula based upon respective incomes of the parents. The Applicant’s ex-wife earns nearly $300,000 per annum while the Applicant, before his layoff from the insurance company, was earning slightly in excess of $100,000. For a time, and until his ex-wife had the original maintenance amount re-instated with an ex parte application, he had overpaid his child maintenance obligations. He acknowledged that, during the period of his unemployment, he was often unable to pay required child support payments and accordingly was in breach of a court order.

[43] The Panel accepted the explanation for the incorrect answer as being the response from an applicant who had been substantially battered by the family law litigation and the orders that often accompany the most contentious of those proceedings. The whole family litigation was troubled by the financial imbalance of the parties, with the Applicant doing his own legal work, often badly due to inexperience, while his ex-wife’s substantial income advantage allowed her the choice of counsel.

[44] It was for financial reasons that the Applicant did not ever get an ultimately correct order as to the amount of child support he should be paying on a monthly basis. The ordered amount was initially calculated incorrectly and then not appropriately amended to reflect the loss of employment with the insurance company. At the end of the day, and as a result of the recently developed accommodation with

his ex-wife, enforcement of the arrears of maintenance has been stayed, at least until the Applicant's situation with respect to becoming a lawyer in British Columbia is resolved.

DECISION

[45] As indicated above, the Panel granted the Applicant's request to be enrolled in the Law Society Admission Program. He presents as a very sympathetic victim of his own serious errors in judgment, compounded by some difficult financial circumstances.

[46] The Panel is satisfied that the Applicant is of good character and repute and is fit to become a barrister and a solicitor of the Supreme Court.

COSTS

[47] The Panel was not asked to make an order in respect of costs, and we presume that the deposit provided by the Applicant is sufficient in that regard. If a further order is required in respect of costs the Panel will consider written submissions.

NON-PUBLICATION

[48] The materials and evidence at the hearing disclosed certain information that affects the privacy interest of third parties, in particular the privacy interest of minors. The personal information is highly personal and sensitive and, beyond the references in this decision, its disclosure is not required. Pursuant to Rule 5-6(2)(a) except for the use made in our reasons, the information contained at Tab 4 of the Law Society Book of Documents (Exhibit 2 in the proceeding) must not be disclosed or published. References in the transcript of the hearing to the information described in this paragraph must also not be disclosed or published.