2014 LSBC 37
Decision issued: August 27, 2014

THE LAW SOCIETY OF BRITISH COLUMBIA

In the matter of the *Legal Profession Act,* SBC 1998, c. 9

and a section 47 review concerning

APPLICANT 6

APPLICANT

DECISION OF THE BENCHERS ON REVIEW

Review date:	June 5, 2014
Quorum:	Herman Van Ommen, QC, Chair Lynal Doerksen Thomas Fellhauer Craig Ferris Benjimen Meisner Phil Riddell Elizabeth Rowbotham
Counsel for the Law Society:	Jean P. Whittow, QC
Appearing on his own behalf:	Applicant 6

[1] Many of us sometimes dream of leaving behind all life's worries and running off to some far off land in the hopes of starting life afresh. The Applicant actually realized this dream when he left his law practice and his life in Canada behind him in 1999 to pursue a new life in France. Unfortunately, the Applicant left before all his affairs were in order, and this resulted in financial loss and inconvenience for former clients and others such as the Law Society and the Applicant's bank.

[2] Life did not work out so well for the Applicant in France either. After experiencing financial difficulties, the Applicant returned to Canada in 2010 and worked as a realtor and as a taxi driver. In January, 2012 the Applicant applied to be reinstated as a member of the Law Society of British Columbia.

[3] A three day credentials hearing was held in July of 2013 to determine if the Applicant "is of good character and repute and is fit to become a barrister and a solicitor of the Supreme Court." After the admission of an Agreed Statement of Facts and after hearing the Applicant and a witness (a former client) called by the Applicant to testify, the Panel granted the application for reinstatement with conditions. (See 2013 LSBC 34.)

[4] The Law Society applies for a review of that decision. The Law Society submits that "the Hearing Panel's conclusion was unreasonable" and "the findings [of fact] made by the Panel do not support a decision to approve this application."

RELEVANT LEGISLATION AND RULES

[5] The relevant provisions of the *Legal Profession Act* (the "Act") before the hearing panel are 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.
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> (2) On receiving an application for enrollment, call and admission or reinstatement, the benchers may
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> (a) grant the application,
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> (b) grant the application subject to any conditions or limitations to which the applicant consents in writing, or
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> (c) order a hearing.
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> 22(1) This section applies to a hearing ordered under section 19(2)(c).
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> …
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> (3) Following a hearing, the panel must do one of the following:
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> (a) grant the application;

(b) grant the application subject to conditions or limitations that the panel considers appropriate;

(c) reject the application.

[6] Rule 2-67(1) establishes who bears the onus at a reinstatement hearing:

> 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.

STANDARD OF REVIEW

[7] Section 47 of the Act permits either the Applicant or the Law Society to apply for a review of the hearing panel's decision and subsection (5) provides the options available to the Benchers on a review:

> (5) After a hearing under this section, the benchers may
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> (a) confirm the decision of the panel, or
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> (b) substitute a decision the panel could have made under this Act.

[8] The standard to be applied on review is correctness or, in other words: applying the facts as found by the hearing panel to the statutory framework, is the result correct? There is one important caveat to the standard of correctness: the Benchers must give deference to the hearing panel on findings of fact and credibility unless the hearing panel has committed an overriding or palpable error.

[9] Support for this standard of review is found in the cases of:

(1) *Law Society of BC v. Hordal*, 2004 LSBC 36 at paragraphs 8-20;

(2) *Mohan v. Law Society of BC*, 2013 BCCA 489 at paragraphs 29-35.

[10] This Review panel does not take issue with the findings of fact made by the hearing panel.

THE HEARING PANEL'S FINDINGS OF FACT AND OTHER FACTS IN THE RECORD

[11] The findings made by the hearing panel are extensive and thorough and are summarized as follows:

1. The Applicant practised primarily in the area of personal injury law between 1986 and 1998.

2. The Applicant borrowed substantial sums from a chartered bank (the "Bank") to purchase a property in Vancouver (the "Chilco property"). The Applicant's law corporation also borrowed substantial sums of money from the bank.

3. In 1997 the Applicant was required to refund approximately $200,000 to a client after his contingency fee agreement was found to be unreasonable by a Master of the Supreme Court of British Columbia. The Applicant refunded the required amount.

4. In 1998, in a separate matter, a Justice of the Supreme Court of BC set aside the Applicant's contingency fee agreement in which the Applicant had collected a fee of approximately $290,000. The Applicant filed an appeal but did not pursue it. The Applicant did not refund to the client any of the fees he had collected.

5. The Applicant decided that the solution to his financial problems was to leave the country.

6. The Applicant destroyed all his financial records and files shortly before or upon his departure in January of 1999.

7. Despite his membership ceasing as of December 31 1998 due to a failure to pay membership fees to the Law Society, the Applicant provided legal advice in January 1999 concerning one client for whom he held $175,000 in his trust account.

8. The Applicant left no forwarding address or other contact information and took steps to conceal his whereabouts.

9. The Applicant did not comply with the Law Society Rules regarding winding up his practice, and a custodian had to be appointed by the Law Society. The custodian was not discharged until March, 2002.

10. Complaints were received by the Law Society from former clients and lawyers unable to contact the Applicant.

11. The Applicant abandoned the Chilco property and did not notify the Bank of his whereabouts. The Bank foreclosed on the Chilco property, but the proceeds of the subsequent sale were not sufficient to satisfy the outstanding

mortgages. The Bank obtained judgment against the Applicant and his law corporation in excess of $400,000.

12. The Applicant left Canada for Europe at the end of January 1999 with $300,000.

13. The Applicant settled in France and sold real estate.

14. In 2009 the Bank sued on the judgments it had obtained in 1999, and the amount owing was now in excess of $600,000.

15. The Applicant took no steps to deal with the Bank or determine his indebtedness.

16. The Applicant returned to Canada in 2010 after his real estate business in France failed.

17. The Applicant left debts owing in France.

18. The Applicant destroyed his financial records upon leaving France. (See p. 642, Volume I of Record; p. 1602-3, Volume III of Record.)

19. The Applicant made an assignment into bankruptcy in November 2010 and was discharged from bankruptcy in June, 2012.

20. The following paragraphs from the decision sum up the matter for the hearing panel:

> [157] The onus is on the Applicant to satisfy us, on a balance of probabilities, that he has met the requirements for reinstatement as set out in section 19(1) of the Act and as articulated by the court in cases such as *McOuat*, (1993), 78 BCLR (2d) 106.
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> [158] With two important exceptions, the Applicant appears to have carried on a successful practice focusing on personal injury claims for 13 years. During this period of time, he was able to purchase what he describes as a unique and desirable residence. His External Accountant told the Investigator that he was not aware of the Applicant having had any financial problems and that the Applicant "spent a lot because he made a lot."
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> [159] The two exceptions to the Applicant's otherwise successful and competent practice arose as a result of very large bills to two

clients for whom he obtained large settlements, both of which were billed on a contingent fee basis.

[160] He charged the first of these two clients, Ms. C, a fee of approximately $298,000. After his bill was reviewed, he was required to, and did, pay a refund of approximately $205,000 to that client in 1997.

[161] The Applicant rendered a very large bill to the second client, Mr. E, and had already been paid from the settlement amount received in trust for him. In early 1998, it became clear that the Applicant was very likely going to be required to pay a very substantial refund to Mr. E.

[162] By the end of 1998, the Applicant and his law corporation owed the Bank approximately $769,000 and had a then unquantified liability to Mr. E of between $200,000 and $300,000. The Applicant's significant assets were the Chilco Property, which he knew had a value of less than $795,000, and $300,000 cash. Payment of a refund to Mr. E would have been a financial disaster for the Applicant and could have reduced his net worth to nothing or even a negative amount.

[163] Instead of taking steps to satisfy or otherwise deal with his obligations to the Bank and Mr. E, the Applicant decided to quit practising law, abandon the Chilco Property and leave the country with $300,000.

[164] When he left the country, the Applicant knew or ought to have known, that a large part, and perhaps all, of the $300,000 cash he took with him was money that he should have refunded to his client, Mr. E.

[165] The Applicant also knew, or ought to have known, that there was a good possibility that the security the Bank held in the Chilco Property would be insufficient to satisfy the Applicant's debt to the Bank and that he would continue to owe monies to the Bank after the Bank foreclosed on its mortgage.

[166] The Applicant did not disclose to any of his clients or the Law Society that he was intending to leave Canada permanently, and he left messages on his voice mail that erroneously implied that he

would be returning to his office. He did not leave any forwarding address, nor did he make arrangements that would allow his clients, the Law Society or anyone else to contact him.

[167] The Applicant is presumed to have known when he left Canada in 1999, and we find that he either did know or ought to have known, that the Rules of the Law Society required him to retain his financial records for at least ten years and that he was required to inform the Law Society of his intended disposition of his open and closed files and his trust accounts and trust funds. The Applicant did neither. He failed to comply with the requirements of the Law Society with respect to his withdrawal from practice, and he breached Rules 3-68(2) and 3-80.

[168] The manner in which [the Applicant] dealt with his two major creditors, including leaving Canada without notice, departing with a substantial cash asset and taking steps to conceal the location of his new residence to prevent persons from finding or communicating with him, reveals there were flaws in his character. This is particularly so with respect to Mr. E. The Applicant was obligated to justify the amount of the fee payable by Mr. E and the amount of this fee would have been substantially less than the fee he actually charged and collected. Mr. E was entitled to a substantial refund. By leaving the country with $300,000, the Applicant preferred his own financial interest to that of his client, Mr. E. In doing so, he exposed Mr. E not only to the risk of an avoidable loss but to an actual loss of a substantial amount of money, which the Applicant used for his own benefit instead of paying it to Mr. E.

THE HEARING PANEL'S CONCLUSIONS

[12] The hearing panel then reviewed the Applicant's complaint history with the Law Society and stated:

[177] There is no question the Applicant has made some serious mistakes in the past in the conduct of his practice and in fulfilling his duties as a lawyer. However, as noted above, he has acknowledged his mistakes and is remorseful. This Panel must now determine whether we are satisfied the Applicant, having learned from his mistakes, is currently of good repute.

[13] The hearing panel then states that they are satisfied that the Applicant is of "good repute" based on the evidence of a former client and current reference letters:

> [178] It is clear from the evidence of Ms. A and from the letters of reference from six of his current and former employers, his External Accountant, his former bookkeeper, Mr. V, and three landlords, and supported by the interviews conducted by the Investigator, that they all have a very favourable view of the Applicant and believe he has a good reputation. *There was no evidence before this Panel that the Applicant currently has anything but a good reputation*. We therefore find that the Applicant, on a balance of probabilities, has satisfied us that he is of good repute.
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> [emphasis added]

[14] And further, with respect to "good character" the hearing panel accepts the Applicant's expression of regret for his prior conduct.

> [179] A second determination the Panel must make is whether we are satisfied the Applicant is now of good character. As noted above, we have found the manner in which the Applicant dealt with his two major creditors in 1999, one of whom was a client, and the manner in which he left Canada, *was evidence that he was not of good character*. We also find, however, that these were *a series of related but isolated actions* and that they are not consistent with the rest of the Applicant's practice history or his conduct after settling in France and returning to Canada.
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> [180] We accept the Applicant's testimony that *he regrets* having dealt with his two major creditors in 1999 in the manner in which he did and that *he is very remorseful* that he chose to leave Canada in the manner that he did. We are satisfied that he would act differently today if faced with the same circumstances. We therefore find that the manner in which he dealt with his debt to the Bank and his liability to Mr. E and the manner in which he left Canada in 1999 are not predictors of future bad character and that the Applicant has established, on the balance of probabilities, that he is currently of good character.
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> [emphasis added]

[15] Finally, the hearing panel concludes that the Applicant is fit to practise as he had shown in his 13 years of practice that he was a competent lawyer and properly represented his clients. With respect to the client who did not receive the refund to which he was entitled, the hearing panel stated:

> [184] The other was the fee charged to Mr. E, which exceeded the maximum contingent fee allowed by the Act and the Rules and which the Applicant took payment of from the settlement monies he held in trust for Mr. E. The Applicant did not deal with this issue properly. *We have found, however, that he regrets the manner in which he dealt with this matter and is genuinely remorseful regarding his conduct*. We are satisfied that, if he were faced with the same situation today, he would not deal with it as he did in 1999.
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> [185] We therefore find that the Applicant has satisfied us on a balance of probabilities that he is now fit to become a barrister and a solicitor of the Supreme Court.
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> [emphasis added]

[16] The Law Society submits that this is where the error occurred: more evidence is required of the Applicant to show that he has rehabilitated himself - simply saying you are sorry is not enough.

ESTABLISHING REHABILITATION

[17] There is no question that the Applicant committed acts of misconduct in leaving the country and his profession in 1999. The Applicant's character is the issue in this application. In determining the character and fitness of a former lawyer applying to be reinstated as a member of the Law Society, the hearing panel must determine if the Applicant has been rehabilitated.

[18] The hearing panel concluded that the Applicant's actions surrounding his departure in 1999 are evidence of bad character (see paragraph 179 of the Decision). Once evidence of bad character has been found, as here, how does the Applicant rehabilitate himself and prove on a balance of probabilities that he is now of good character? What constitutes evidence of rehabilitation?

[19] The test the hearing panel should have applied to determine if the Applicant has been rehabilitated is found in the case of *Watt v. Law Society of Upper Canada*, [2005] OJ No. 2431 (Divisional Court) at paragraph 14. This test was recently

adopted in this jurisdiction in a Bencher review, *Law Society of BC v. Gayman*, 2012 LSBC 30 at paragraph 25. The *Watt* test, modified for this case is:

(1) Is there a long course of conduct showing that the applicant is a person to be trusted?

(2) Has the applicant's conduct since [ceasing to be a member] been unimpeachable?

(3) Has there been a sufficient lapse of time since [the Applicant ceased to be a member]?

(4) Has the applicant purged his guilt?

(5) Is there substantial evidence that the applicant is extremely unlikely to misconduct himself again if readmitted?

(6) Has the applicant remained current in the law through continuing legal education or is there an appropriate plan to become current?

[20] Further guidance can be taken from the case of *Levenson v. Law Society of Upper Canada*, 2009 ONLSHP 98, which sets out ten principles to be considered when using the six-part *Watt* test. These principles were also adopted and referred to in *Law Society of BC v. Gayman* at paragraph 23:

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.

[emphasis added]

[21] The above cases mostly deal with lawyers who have been disbarred and are seeking reinstatement. We are of the view that these cases for reinstatement after disbarment are applicable in this case. Whether the applicant has never been a lawyer, a lapsed lawyer or a disbarred lawyer is simply one of the many facts in every case of this nature. The tests that must be applied are not altered. The test for reinstatement remains the same regardless of how the applicant comes before the hearing panel.

[22] The hearing panel, at paragraph 156 of the decision, referred to the British Columbia Court of Appeal case of *McOuat v. Law Society of BC*, supra, which speaks in broad terms about the Law Society's obligation to ensure only people of good character are permitted to practise law. The hearing panel did not refer to any other cases. Of note, the hearing panel quoted from this passage of *McOuat* at paragraph 6, in which the Court of Appeal adopted the *McOuat* hearing panel's reasons:

> 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, resolve to

> place the client's interest first and never expose the client to risk of avoidable loss and trustworthiness in handling the money of a client.
>
> [emphasis added]

ANALYSIS

[23] If the hearing panel had applied the test as set out in *Watt* (with the *Levenson* principles in mind) would the outcome be different?

Is there a long course of conduct showing that the applicant is a person to be trusted?

[24] The hearing panel found that the Applicant left Canada in 1999 for the purpose of avoiding his financial difficulties. The hearing panel described this as an isolated incident. However, the misconduct did not end in 1999. The evidence before the hearing panel shows the Applicant did nothing to make his creditors, former clients or the Law Society aware of his whereabouts. The Applicant provided no evidence to the hearing panel that he did anything to address the wrong he committed in 1999. The Applicant made no attempts at restitution to any party he left owing money.

[25] The Applicant explains that he faced financial difficulties in France in 2008 and his ensuing bankruptcy has made it impossible to make any restitution. The Applicant promises to make efforts at restitution once he can. However, there is no evidence that the Applicant made any efforts to make restitution between 1999 and 2008.

Has the applicant's conduct since ceasing to be a member been unimpeachable?

[26] This is a matter for the Applicant to bring forward evidence of his conduct since he left Canada. There is very little evidence put forward by the Applicant and even less that is corroborated by other sources. Troubling is the fact that the Applicant left France after experiencing financial difficulties there and, curiously, destroying all his financial records (as he did when he left Canada) before leaving.

[27] Pursuant to the Law Society Rules, the onus is on the Applicant to provide evidence of good character when that is in issue. The Applicant knows the life he has led better than anyone else and certainly better than the Law Society. If there is evidence of good character the Applicant should be able to provide it more easily than the Law Society could provide evidence of bad character.

Has there been a sufficient lapse of time since the Applicant ceased to be a member?

[28] The passage of 15 years would normally be a sufficient lapse of time in a case such as this. However, we agree with Law Society counsel, the mere passage of time itself does not restore one's character or repair the harm one causes.

[29] The lapse of time must be accompanied with other positive conduct.

Has the applicant purged his guilt?

[30] Other than an expression of remorse the Applicant has made no steps to address the wrongs he has done to other parties. He has not sought out the former client (Mr. E) who was entitled to a substantial refund of his fee. He has not even contacted this client to say "sorry". If anything, the evidence shows the Applicant has done everything he can to avoid the consequences of his actions. He left Canada to avoid his financial troubles, he left France when he experienced financial troubles, and he blames the Bank for his continuing financial problems, which led him to seek bankruptcy protection.

[31] As the hearing panel found, the Applicant "preferred his own financial interest to that of his client." There is no evidence on the record that shows that the Applicant has addressed this character flaw other than his expression of remorse.

Is there substantial evidence that the applicant is extremely unlikely to misconduct himself again if readmitted?

[32] The only evidence for this is the Applicant's expression of remorse, which the hearing panel accepted and this Review panel will not disregard. However, as stated in *Levenson*, "rehabilitation will be claimed by virtually all claimants." More than an expression of remorse is needed. Further support for this is found in Re: *Applicant 3,* 2010 LSBC 23 at paragraph 23:

> It is not enough for the Applicant to appear and say, "These events happened a long time ago, and by the way, I have rehabilitated myself." A much more thorough examination is required.

[33] The Applicant put forward many letters of reference in support of his character. The Applicant states that the reference letters he provided "are simply observations from key people … accountant, bookkeeper, bankers, landlords, employers, a client … of their experience with me, many over considerable periods." (p. 11, Submissions of the Applicant)

[34] Unfortunately the letters are of limited value. A referee's opinion is only as strong as his or her knowledge of the Applicant. (See Re: *Applicant 3* at paragraphs 145-148). The reference letters are very brief and general in nature; they do not express knowledge of the Applicant's departure from Canada in 1999.

[35] Another observation: most, if not all the letters of reference are from people the Applicant would be in some degree of dependency. It is not unusual to behave well to those on whom one is dependent for something. A stronger determiner of character is how the Applicant behaved to people who were dependent on the Applicant, such as his clients.

[36] The Applicant put forward a former client to testify about his character. However, the former client only knew "one side" of the Applicant's character and had suffered no harm from the Applicant's conduct. This witness only provided proof that the Applicant did a competent, if not excellent job for the client. However, competency does not equate to good character.

[37] Had the Applicant provided evidence from those he had harmed and, perhaps, had received forgiveness or made some effort to repair the relationship, this may have been sufficient to satisfy this portion of the test.

Has the applicant remained current in the law through continuing legal education or is there an appropriate plan to become current?

[38] There was no evidence put forward by the Applicant on this point. There was no evidence that the Applicant has sought out work in a related area of work. However, given the conditions the hearing panel placed on the Applicant, this Review panel is not concerned about this portion of the test in this case. When the Applicant was a practising lawyer, he appeared to be a competent lawyer. We would not find rehabilitation was not met if this were the only outstanding issue.

CONCLUSION

[39] The Applicant has the burden of proving on a balance of probabilities that he is a person of good character. Applying the evidence found by the hearing panel to the *Watt* test, the Review panel concludes that the hearing panel erred in finding that the Applicant had met the onus to provide evidence that he is a person of good character and repute and is fit to become a barrister and a solicitor of the Supreme Court.

[40] The hearing panel’s decision is set aside, and the Applicant’s application for reinstatement is rejected.