Decision No. 20131218

THE LAW SOCIETY OF MANITOBA

IN THE MATTER OF

***The Legal Profession Act*, CCSM c. L107,**

AND IN THE MATTER OF

Applicant A,

applicant

A panel of the Admissions and Education Committee:

Robert Dawson, *panel chair*
Joyce Dalmyn
Miriam Browne

For the applicant: Self-represented
For the Law Society of Manitoba:
Ms Leah C. Kosokowsky

Reasons for decision: 7 May 2014

REASONS FOR DECISION

THE PANEL:

[1] An applicant for admission to the CPLED program and the status of articling student appeals from the decision of the Chief Executive Officer's designate, who refused to admit him. For the reasons set out below, the appeal is dismissed.

A. Facts

[2] The applicant, Applicant A, had practiced law for approximately 12 years in Sri Lanka until 2007. He then became a permanent resident of Canada and, since 2010, has worked in support of the practice of an Ontario lawyer. In 2012, [Applicant A] obtained a certificate of qualification from Canada's National Committee on Accreditation, whose function is in part to assess the legal education and professional experience of individuals who have obtained their credentials outside of Canada but who now make application to access the bar admissions process of almost any law society in the Canadian common-law jurisdictions.

[3] By his written application dated 27 August 2013, Applicant A applied to the Law Society of Manitoba for admission to both the Manitoba CPLED program and the status of articling student. In his application's cover letter, dated 1 September 2013, Applicant A explained that he did not want to sit the written examinations that are a required part of the Ontario bar admissions process. Instead, he preferred Manitoba's CPLED program, which uses a different method for evaluating competency. Unspoken but underlying this entirely-permitted strategy are the national mobility rules that would usually permit lawyers called to the Bar in Manitoba to apply for admission to the Ontario Bar, but without need for any requalification.

[4] Applicant A continued his cover letter dated 1 September 2013, requesting an exemption from both the Manitoba CPLED program and the articling requirement. In support, he pointed to his Sri Lankan legal practice and his work since 2010 for an Ontario lawyer. This prompted the Director of Admissions and Membership, Mr Richard Porcher, to write to Applicant A on 12 September 2013. Noting that the cover letter had first expressed Applicant A's preference for the Manitoba CPLED program

but that the letter had gone on to request an exemption from that program, Mr Porcher asked for clarification. In addition, Mr Porcher explained that, even if exempted from Manitoba's usual bar admissions requirements, an applicant would nonetheless have to sit three examinations and also practice under the supervision of a Manitoba lawyer. By his e-mailed reply of 12 September 2013, Applicant A indicated that he preferred "the CPLED system which is familiar to me [rather] than sitting for the 3 exams mentioned in your letter."

[5] That same e-mailed reply of 12 September 2013 also began the chain of events that would ultimately lead to this appeal. "My greatest problem," wrote Applicant A, "is Articling in Manitoba for 12 months / working under the supervision of a lawyer in Manitoba since I do not know any lawyers in Manitoba." As Applicant A correctly suggested, he would need a Manitoba lawyer to act either as his principal if he were required to article or as his supervisor as a condition to his being called to the Bar after exemption from the articling requirement. Indeed, Mr Porcher confirmed this second alternative in his e-mail note of 16 September 2013, informing Applicant A that,

> if you are exempted from the articling requirement, please be aware that you will not be eligible for call to the Bar in Manitoba until you have a supervisor in place and that lawyer has been approved to act as your supervisor by the Law Society of Manitoba.

[6] The issue of supervision was entirely hypothetical at that time, because no decision had yet been made to exempt the applicant from articles. Nevertheless, Applicant A responded on 16 September 2013 with a list of questions about such supervision, to which Mr Porcher made an e-mailed reply on 17 September 2013:

> You can not [*sic*] have an online supervisor and, as with finding a Principal, you must find your own Supervisor. The Law Society of Manitoba does not find Principals or Supervisors for individuals. Your Supervisor must be a Manitoba lawyer who practices in Manitoba. How frequently you will need to meet with your Supervisor and reporting requirements have not yet been determined.

[7] The need for a supervisor obviously weighed upon Applicant A, who, in less than an hour after Mr Porcher had sent his above-quoted e-mailed reply of 17

September 2013, had twice written back, first asking more questions about the requirement for a supervisor and then reporting that

> I just phoned a lawyer in Manitoba who agreed to act as my supervisor. However, that person has less than 3 years experience as a lawyer.... Though it is a costly exercise I hope to fly from Toronto to Manitoba from time to time to meet with the Supervisor as I am keen to adhere to any condition set by you to meet the CPLED qualification criteria.

[8] In his e-mail response of 18 September 2013, Mr Porcher reminded Applicant A about the prematurity of his attempts to secure a supervisor, noting that,

> you will be required to successfully complete [*sic*] the CPLED program before you will be eligible to be called to the [B]ar. As you have missed some CPLED modules, and those won't be offered again until next fall, you will not be able to complete the CPLED program until sometimes next fall. Accordingly, the earliest that you would be eligible to be called to the bar is October or November, 2014. After you are called to the bar in Manitoba then you would begin to practise under supervision.

Mr Porcher then went on to correct Applicant A's apparent misunderstanding of the supervisory requirement:

> One of the conditions of your admission will be that you not practise as a sole practitioner and that you practise under supervision. Accordingly, you and your supervisor must be employed by the same law firm/employer. Your supervisor must first be approved by the Law Society and he/she will be required to provide a signed undertaking to the Law Society which will set out the requirements of the supervision.

Accordingly, Mr Porcher concluded with the suggestion that "you wait for my letter of decision regarding your application [for an exemption from the articling requirement] before you make any further plans/inquiries."

[9] After acknowledging receipt of this response by Mr Porcher, the applicant then communicated by e-mail with at least 3 Winnipeg lawyers. First, on 18 September 2013 at approximately 6:07 p.m., Applicant A wrote to Ms Catherine Howden, a Winnipeg lawyer:

Dear Ms Howden:

Myself (Applicant A) and my friend (Applicant B) (copied herewith) who come from Toronto hope to do the CPLED and to be called to the Manitoba bar in June 2014.

The reason for opting to do the Manitoba CPLED is because of its similarities with the Sri Lankan exam system. However Ontario which has a multiple question system is totally alien to us.

Due to our experience as lawyers back in Sri Lanka, the Law Society of Manitoba has shown a inclination to exempt us from Articling on condition we do the CPLED under the supervision of a lawyer from Manitoba. Unfortunately, we do not know any lawyer in Manitoba.

The processing of our 2 applications has been stalled since we do not have a Supervisor and if we do not send the name of a Supervisor within this week it would not be possible for us to catch-up with the missed modules (CPLED has already commenced) and our dream of being called to the bar in June 2014 would only remain a dream.

Being supervised while doing CPLED would only involve having an occasional meeting with the Supervisor for around 15-20 minutes until CPLED is over in September 2014. Once we are called to the Manitoba bar we hope to get transferred to the Ontario bar under the Mobility Agreement.

The Supervisor we believe needs to have at least 3 years experience as a lawyer. The Supervisor will also have to issue 2 letters confirming that he or she has agreed to become the Supervisor for me and my friend Applicant B. Myself and Applicant B would be travelling from Toronto to Winnipeg from time to time to meet with the Supervisor.

Considering the above I would be most grateful if you could kindly consider becoming our supervisor.

Please help us realise our dream of becoming lawyers in Canada.

[10] In a follow-up e-mail note to Ms Howden, Applicant A wrote on 19 September 2013 at approximately 10:30 am:

Dear Ms Howden:

PS to yesterday's email.

We have received exemption from Articling.

What the Law Society of Manitoba wants is a lawyer to act as a Supervisor during our CPLED. It would mean meeting the Supervisor occasionally and would **not** involve working in the law Office.

Hope you could kindly assist us or alternatively introduce us to one of your lawyer friends. I feel a personal introduction would have a better rate of success hence this plea from you.

Both Applicant B and I are helpless as we do not know any lawyers in Manitoba.

[emphasis in original]

[11] Ms Howden made no reply, but apparently referred the e-mails to Ms Tracey Epp, another lawyer at her firm, who in turn informed Applicant A that she had forwarded his inquiries to the Law Society of Manitoba and would, if requested, respond only directly to the Law Society.

[12] Applicant A also sent a separate e-mail note on 19 September 2013 at approximately 10:48 am to another Winnipeg lawyer, Ms Anita Southall:

Dear Ms Southall

We are writing to your good self in desperation seeking your kind assistance.

Myself (**Applicant A**) and my friend (**Applicant B**) (copied herewith) come from Toronto.

We are law students and have received exemption from Articling. The Law Society of Manitoba wants us to find a lawyer to act as a Supervisor during our CPLED. It would mean meeting the Supervisor occasionally and would **not** involve working in the law Office.

The reason for opting to do the Manitoba CPLED is because of its similarities with the Sri Lankan exam system. However Ontario which has a multiple question system is totally alien to us.

Due to our experience as lawyers back in Sri Lanka, the Law Society of Manitoba has shown an inclination to exempt us from Articling on condition we do the CPLED under the supervision of a lawyer from Manitoba. Unfortunately we do not know any lawyer in Manitoba.

The processing of our 2 applications has been stalled since we do not have a Supervisor and if we do not send the name of a Supervisor within this week it would not be possible for us to catch-up with the missed modules (CPLED has already commenced) and our dream of being called to the bar in June 2014 would only remain a dream.

Being supervised while doing CPLED would only involve having an occasional meeting with the Supervisor for around 15-20 minutes until CPLED is over in September 2014. Once we are called to the Manitoba bar we hope to get transferred to the Ontario bar under the Mobility Agreement.

The Supervisor we believe needs to have at least 3 years experience as a lawyer. The Supervisor will also have to issue 2 letters confirming that he or she has agreed to become the Supervisor for me and my friend Applicant B. Myself and Applicant B would be travelling from Toronto to Winnipeg from time to time to meet with the Supervisor.

Considering the above I would be grateful if you could kindly consider becoming our supervisor.

Hope you could kindly assist us or alternatively introduce us to one of your lawyer friends. I feel a personal introduction would have a better rate of success hence this plea from you.

Both Applicant B and I are helpless as we do not know any lawyers in Manitoba. Please help us realise our dream of becoming lawyers in Canada.

[emphasis in original]

[13] On 20 September 2013, Mr Porcher wrote to Applicant A, requesting that the applicant contact him about e-mail messages sent to Ms Howden:

Applicant A, [*sic*]

> Please call me today to discuss this matter. Ms Epp has forwarded to the Law Society copies of the emails that you sent to her office. Those emails contain incorrect information. In particular, I note that you advised Ms Howden that you have received an exemption from articling. That is not correct. I have not made a decision regarding your application. You have also made other statements regarding the nature and extent of the supervision and I do not not [*sic*] on what basis you have made those statements.
>
> I strongly recommend that you do not contact any possible supervisors until you receive my letter of decision.
>
> I look forward to speaking with you today.

[14] Applicant A made a prompt e-mail reply on 20 September 2013, explaining that

> I am on the road and will call you today. I admit that you have not made a decision on my application. I wrote to around 12 lawyers in Manitoba due to 3 reasons:
>
> 1) I would need to provide you with a name of a supervisor once you conclude processing my application
>
> 2) Since under normal circumstances CPLED students are not supervised some of the potential supervisors wanted to know the reason hence the statement on "exemption on articling"
>
> 3) Some potential supervisors while showing an inclination to act as my supervisor during CPLED withdrew their interest hearing they would have to supervise me even during employment.
>
> As you would kindly see I had to balance my little knowledge of what your final decision would be and finding a supervisor.

[15] The next document before the panel is dated 10 October 2013, when Mr Porcher wrote to Applicant A, requesting his comments and explanation about "false and/or unfounded statements" in the e-mail messages sent to Ms Howden and Ms Southall. Mr Porcher went on to particularize the statements that concerned him:

1) In your email to Ms Howden dated September 18, 2013 you made the following statements:

a) the processing of your application has been stalled since you did not have a supervisor;

b) if you do not have a supervisor within the week it would not be possible for you to catch up on the missed CPLED modules; and

c) being supervised would only involve having an occasional meeting with your supervisor for around 15 to 20 minutes until CPLED was over in September 2014.

2) On September 19, 2013, you again emailed Ms Howden and you indicated that:

a) you had received an exemption from articling; and

b) that having a supervisor would include meeting with a supervisor occasionally and would not involve working in the law office.

3) In your email to Ms Southall dated September 19, 2013 you made the following statements:

a) you had received an exemption from articling;

b) that having a supervisor would mean meeting with the supervisor occasionally and would not involve working in the law office;

c) that the processing of your application has been stalled since you did not have a supervisor;

d) that if you did not have a supervisor within the week it would not be possible for you to catch up with missed CPLED modules; and

e) that having a supervisor would only involve having an occasional meeting with the supervisor for around 15 to 20 minutes until CPLED was over in September 2014.

Mr Porcher therefore concluded that Applicant A

> ... knew that the above noted statements were incorrect or unfounded at the time you sent the emails. In particular, you knew that I have not made a decision regarding your applications and, specifically, you have not received an exemption from articling. In addition, I had previously advised you by email that the frequency of the meetings with a supervisor and the reporting requirements had not been determined. Further, I had also specifically advised you by email that you could not practice as a sole practitioner and that you and your supervisor must be employed by the same law firm/employer. Finally, at no time did I advise you that your application was stalled until you had found a supervisor. In fact, the opposite was correct in that I had indicated that you should wait for my letter of decision regarding your applications before you made any further plans or inquiries.

[16] In reply, Applicant A wrote to Mr Porcher in a letter dated 16 October 2013. He began by "unreservedly apologis[ing] should I have given any wrong impressions to the lawyers in Manitoba I have communicated with regard to my CPLED." He then explained that he had contacted potential supervisors, because,

> since I had no contact with any lawyer in Manitoba I had to anticipate your next question once my CPLED application had been processed, "Applicant A – who is going to be your Supervisor."

Feeling a need to press ahead, Applicant A had felt that he "had to balance my little knowledge of what your final decision would be [with] finding a supervisor." In addition, his statements to potential supervisors aimed to address the problem that

> ... while showing an inclination to act as my supervisor during CPLED [they] withdrew their interest as I could not give convincing answers to their queries – how long / how many times / till when etc. Therefore I had to think on my feet and assume certain things – though admittedly unverified – as I had to make an extra effort to find a lawyer in Manitoba.

Applicant A closed his letter, emphasizing that

> ... my honest attempt was to convince a lawyer in Manitoba to help me and not to mislead anyone in anyway though I admit my answers may have let to that assumption. Again please accept my sincere apologies for any inconvenience caused to you / lawyers concerned.

[17] On 23 October 2013, Mr Porcher issued a decision letter, denying Applicant A's application for admission on the ground that Applicant A had failed to rebut the presumption that he is not of good moral character and a fit and proper person to be admitted. The decision letter pointed to the "false and/or unfounded statements" that Mr Porcher had earlier particularized in his letter dated 10 October 2013 and addressed to Applicant A. Drawn from e-mail messages sent by Applicant A to Ms Howden and Ms Southall, these statements created in Mr Porcher's opinion a rebuttal presumption against the pending application for admission. After considering Applicant A's responding letter of 16 October 2013, Mr Porcher nonetheless concluded the applicant's submission had failed to rebut the presumption. He specifically noted that, in your reply,

> 1. You attempt to justify making the false and misleading statements because you had to "... think on your feet and assume certain things..." and because you "... had to make an extra effort to find a lawyer in Manitoba...." You try to justify your statements by putting them in "perspective."
>
> 2. You do not acknowledge your misconduct. Instead, you minimize the misconduct by stating that "... should I have given any wrong impressions...." You also do so by stating that your answers were an "honest attempt" to convince a lawyer in Manitoba to help you. However, your statements were not truthful and you knew they were false.

Mr Porcher therefore concluded that

> you do not acknowledge or accept responsibility for your misconduct nor do you appreciate the seriousness of your misconduct....
>
> It is my decision that the information provided by you is insufficient to demonstrate that you currently meet the good character requirement.
>
> You have the burden of rebutting the presumption that you do not meet the good character requirement. The information provided by your response falls short of what is necessary to discharge this burden. It is my decision that on a balance of probabilities you do not currently meet the good character and fitness to practice requirement.

[18] Applicant A made a quick reply on 23 October 2013, trying to remedy the deficiencies that the Porcher decision letter had noted and essentially requesting that Mr Porcher reconsider his decision:

> Dear Mr Porcher
>
> I was sad to receive your letter rejecting my CPLED application. It appears that I have not used the correct terminology in my letter dated 16 October 2013 giving reasons why I made false statements to the lawyers concerned.
>
> When I meant I apologise what I meant was I acknowledge that I had knowingly made untruthful statements and that I was admitting the misconduct. It was the incorrect language that I used and it is my fault for not directly acknowledging same. I should have used more precise language.
>
> **To clear any ambiguity I am herewith admitting that I knowingly made false statements / accept responsibility to misconduct by knowingly making false statements to at least 2 lawyers Ms Southall and Ms Howden.**
>
> **I understand the gravity and seriousness of such misconduct as lawyers are expected to be of extremely good character and be an example to society. I take my life very seriously and would not like to jeopardise my future career. I have spent many thousand dollars for my NCA exams even though my monthly income is meagre because I desperately want to become a lawyer in Canada.**
>
> Kindly consider this email as an addendum to my previous letter dated 16 October 2013. I do not want to appeal. I would also send this email by express post.
>
> **I could also phone you and admit that I knowingly made false / misleading statements and admit my misconduct. It was absolutely foolish on my part for not making these sentiments clear in my letter dated 16 October 2013.**
>
> I look forward to your sympathetic response to this email.
>
> [emphasis in original]

[19] By his e-mail reply of 24 October 2013, Mr Porcher declined to reconsider his decision.

[20] On 27 October 2013, Applicant A gave notice of his appeal of the decision of the Director of Admissions and Membership.

[21] The panel convened on 18 December 2013 to consider the appeal, but on its own motion chose to adjourn the consideration. On 13 December 2013, the applicant had written to the panel, advising that he had received

> ... the voluminous Brief and Authorities from Counsel to the Law Society of Manitoba (Counsel) only on Thursday 12 December 2013 (6 days before the hearing) even though Law Society of Manitoba (LSM) received my appeal on 15 November 2013 (4 weeks back).

Although the applicant wanted to proceed, the panel was concerned that fairness required that an opportunity be given for Applicant A to review and respond, if he chose, to the Law Society's submission. The panel therefore issued a procedural order on 18 December 2013, setting out a timetable by which the applicant might make reply. A copy of that order is appended to these reasons. The panel also reminded the applicant that he could retain his own lawyer to advise him and represent him in this appeal.

[22] The applicant filed no submission, except to write to the panel on 10 February 2014, explaining that he had chosen not to retain counsel because he could not afford the expense. For the purpose of deciding this appeal, the panel has ignored the applicant's written communication of 10 February 2014. First, the impecuniosity of the applicant is irrelevant to the issues of the appeal. Secondly, to the extent that the applicant had expected the panel to receive his comments, he provided his letter well past the filing deadline that the panel had prescribed in its procedural order of 18 December 2013.

[23] Accordingly, the panel re-convened on 13 February 2014 to consider and decide the appeal, for which these are the panel's reasons for decision.

B. Written submissions and other relevant materials considered by the panel

[24] Pursuant to Law Society Rule 5-28(3), the panel confined its consideration to written submissions and other relevant materials. Because the applicant did not request an oral hearing of his appeal and because the chairperson of the Admissions and Education committee did not direct that the panel convene an oral hearing, the panel considered only the following:

1. Applicant's certificate of good standing from the Sri Lanka Supreme Court, dated 1 February 2008;
2. Applicant's Transcript from Sri Lanka Law College, dated 6 February 2008;
3. Letter from Citizenship and Immigration Canada, dated 19 April 2012, explaining applicant's name on Permanent Residency card, including copy of card;
4. Applicant's Certificate of Qualification from the National Committee on Accreditation, dated 8 August 2012;
5. Letter from Bertie Mihindukulasuriya, dated 16 August 2012, in support of applicant's application;
6. Letter from Law Society of Upper Canada, dated 3 October 2012, exempting applicant from articling requirement;
7. Applicant's application for admission to the Manitoba CPLED Program and as an articling student, dated 27 August 2013, including cover letter dated 1 September 2013;
8. Applicant's certificate of character by John Erickson, dated 27 August 2013;
9. Applicant's RCMP criminal records certificate, dated 28 September 2013;
10. Letter from John Erickson, dated 28 August 2013, in support of applicant's application;

11. Applicant's application for exemption from articling and CPLED requirements based on foreign practicing experience, dated 5 September 2013, including cover letter dated 5 September 2013;

12. Applicant's summary of practice experience in a foreign jurisdiction, dated 5 September 2013;

13. Applicant's CPLED professional integrity agreement, dated 5 September 2013;

14. Applicant's e-mail, dated 11 September 2013, enclosing information about Law Society of Upper Canada's "Ethics and Professionalism" course, including attached letter from Law Society of Upper Canada dated 1 November 2012, three-day course agenda, and Law Society of Upper Canada transcript, dated 11 April 2013;

15. Letter from Richard Porcher, dated 12 September 2013, requesting clarification about application;

16. Applicant's e-mail, dated 12 September 2013, providing requested clarification about application;

17. Exchange of e-mail messages, dated 16, 17, and 18 September 2013, between the applicant and Richard Porcher about supervisor requirement;

18. Applicant's e-mail dated 18 September 2013 to Catherine Howden about supervisor requirement;

19. Exchange of e-mail messages, dated 19 September 2013, between the applicant and Tracey Epp about supervisor requirement;

20. Applicant's e-mail dated 19 September 2013 to Anita Southall about supervisor requirement;

21. Exchange of e-mail messages, dated 19 and 20 September 2013, between the applicant and Richard Porcher about e-mail to Catherine Howden;

22. Letter from Richard Porcher, dated 10 October 2013, requesting applicant's rebuttal of presumption that he does not have good moral character;

23. Applicant's letter, dated 16 October 2013, commenting on e-mails sent about supervisor requirement, including copies of e-mail messages to Catherine Howden and Tracey Epp;

24. Decision letter from Richard Porcher, dated 23 October 2013;

25. E-mail from the Law Society of Manitoba, dated 23 October 2013, enclosing decision letter;

26. Exchange of e-mail messages, dated 23 and 24 October 2013, between the applicant and Richard Porcher about reconsideration of decision; and,

27. Notice of appeal, dated 23 October 2013.

In addition, the panel has received and considered the applicant's written submissions that are set out in his letter dated 1 November 2013 and his e-mail note of 13 December 2013. The respondent Law Society of Manitoba filed its undated written brief and book of authorities in early December 2013, and the panel has received and considered those materials.

C. Issues

[25] The instant appeal raises the following issues:

(a) By what standard does this panel consider the decision of the Director of Admissions and Membership?

(b) Do Applicant A's statements to Ms Howden and Ms Southall give rise to a rebuttal presumption that he is not of good moral character or a fit and proper person to be admitted as an articling student?

(c) If so, Has Applicant A rebutted the presumption that arose out his statements to Ms Howden and Ms Southall?

D. Applicable legislation and other materials

[26] The following legislation and other materials are relevant to the instant appeal:

(a) *The Fair Registration Practices in Regulated Professions Act*, CCSM c. F12;

(b) *The Legal Profession Act*, CCSM c. L107;

(c) Law Society of Manitoba Rule 5-4;

(d) Law Society of Manitoba Rule 5-28 and 5-28.1, including the "Guidelines for Appeals and Admissions" referenced at Rule 5-28(1);

(e) Law Society of Manitoba Code of Professional Conduct Rule 2-1.1; and,

(f) "Guidelines for Good Character Applications under Rules 5-4, 5-24(2), 5-28.1, and 5-28.2".

E. Analysis

E.1 The standard of review is correctness

[27] The respondent Law Society of Manitoba submits that the panel should adopt a standard of correctness when it considers the decision of the Director of Admissions and Membership. This submission follows the approach that other panels of the Admissions and Education Committee have adopted: see, for example, *Applicant A* v. *The Law Society of Manitoba*, File no. 20090826B (9 October 2009) at para. 120; *Applicant A* v. *The Law Society of Manitoba*, File no. 2010811B (25 November 2010) at para. 40; *Applicant A* v. *The Law Society of Manitoba*, File no. 20130213 (25 April 2013) at para. 37.

[28] The applicant's submission was silent on this point.

[29] When an administrative decision is under review, leading cases such as *Dunsmuir* v. *New Brunswick*, 2008 SCC 9 (especially at para. 47, 63, and 64) and, subject to the changes required by *Dunsmuir*, the earlier *Law Society of New Brunswick* v. *Ryan*, 2003 SCC 20 (especially at para. 47 and 48) set out two ways by which to conduct such a review: on the one hand, a review can confirm that all or part of an administrative decision was correctly decided (*i.e.*, the correctness standard); on the other hand, a

review can confirm only that the reasons for a decision, taken as a whole, support the decision made (*i.e.*, the reasonableness standard). The latter standard focuses upon the decision-making process, the defensibility of the decision, and the range of acceptable outcomes within which the decision must fall. The reasonableness standard also accords greater deference to the administrative decision-maker whose decision is under review. From the strategic perspective of a person seeking review of an administrative decision, the correctness standard is preferred, because it provides a greater opportunity for interference with the decision under review. Contextual factors help to determine which standard will apply, including the purpose of the administrative decision-making system, the nature of the question at issue, and the expertise of the administrative decision-maker. Because parts of a decision under review may require differing degrees of deference, different standards of review may apply to different parts of the decision.

[30] However, even before it can consider which standard of review applies in the instant appeal and to which parts of the Director's decision, the panel must first establish that the instant appeal is not a hearing *de novo*; that is, a fresh hearing divorced from any consideration of the decision under appeal. Only after ruling out a hearing *de novo* could the panel determine the appropriate standard of review to apply.

E.1.a. The instant appeal is a hearing on the record, not a hearing de novo

[31] The Rule that governs these proceedings refers to an "appeal" and also uses variations of that word. There is no legislative mention of a hearing *de novo*, let alone the prescription of some standard of review. Law Society of Manitoba Rule 5-28(1) provides that

> ... a decision of the chief executive officer made pursuant to the rules in this division [about admissions] may be appealed to the [Admissions and Education] committee by the completion and filing of the required notice of appeal within 14 days of receipt of written confirmation of the decision and the right to appeal.

Rule 5-28(1) goes on to require that "[t]he appeal process will be governed by guidelines adopted by the benchers." The French version of the Rules is similarly unhelpful, using terms such as "appel" and its variants. Even the broader *Fair Registration Practices in Regulated Professions Act*, CCSM c. F12, sets out at s. 7(1) only that "[a] regulated profession must provide an internal review of, or appeal from, its registration decisions within a reasonable time", while s. 2 of that Act defines an "internal review or appeal" to mean

> ... a rehearing, reconsideration, review or appeal, or another process provided by a regulated profession in respect of a registration decision, regardless of the terminology used by the regulated profession.

[32] However, the mere fact that legislation provides a right of appeal from an administrative decision-maker to an appellate administrative body does not necessarily mean that the process is limited to a consideration of whether the decision under appeal contains some reversible error. Instead, such an appeal in some legislative contexts could require a hearing *de novo*; that is, a fresh and full hearing on the merits, including all questions of fact, law, and public policy. In the words of Finch C.J.B.C. for a unanimous court in *British Columbia (Chicken Marketing Board)* v. *British Columbia (Marketing Board)*, 2002 BCCA 473 at para. 15, apprv'd *Paul* v. B*ritish Columbia (Forest Appeals Commission)*, 2003 SCC 55 at para. 44 *per* Bastarache J., the nature of an appeal to an appellate administrative body does "not have a fixed meaning and must be read having regard for the legislative scheme and for the purposes of the Act."

[33] In deciding the meaning to give to Rule 5-28's use of the word "appeal", the panel finds assistance in the approach that the Manitoba Court of Appeal employed in *Friesen (Brian Neil) Dental Corp. et al.* v. *Director of Companies Office (Manitoba) et al.*, 2011 MBCA 20, where Steel J.A. considered the similar problem arising out of statutes that do not clearly identify the nature of what a court is supposed to do when an administrative decision is under consideration. At para. 18, she identified two guides: "the statute as a whole in its appropriate context, and any prior cases that dealt with similar legislation."

[34] Applying the contextual rule of statutory interpretation set out in the leading case of *Re Rizzo & Rizzo Shoes Ltd.*, 1998 CanLII 837 (SCC) at para. 21, the panel has

construed Law Society of Manitoba Rule 5-28 and its referenced guidelines as precluding a hearing *de novo*, at least in the instant appeal.

[35] First, Rule 5-28(3) requires a panel to limit its consideration to only written submissions and other relevant materials, except if an oral hearing is convened:

> A panel must conduct an appeal based on a consideration of written submissions and other relevant materials, except where the chairperson of the committee directs or the appellant requests an oral hearing....

In the instant appeal, no oral hearing was convened.

[36] Secondly, Rule 5-28(7) does not extend the dispositive powers of a panel beyond those already given under Rule 5-4(2) to the Director of Admissions and Membership acting in his capacity as the delegate of the Chief Executive Officer:

> The panel may dismiss the appeal, make any decision the chief executive officer could have made, or allow the appeal with or without conditions.

[37] Finally, pursuant to the guidelines referenced by Rule 5-28(1), applicants may file new information as part of their appeal. However, Guideline 5 diverts that filing and first puts it before the Director of Admissions and Membership *qua* delegate of the Chief Executive Officer. If that new information convinces the Director to revise his decision in a way that is acceptable to the applicant, the matter is settled without a hearing before a panel. However, where no resolution is found and the appeal proceeds, Guideline 7 bundles the new information, which becomes part of the record that a panel then considers:

> 4. In advance of the appeal, the appellant and counsel for the Law Society may submit additional information not previously considered by the chief executive officer.
>
> 5. If additional information is submitted in advance of the appeal, it will be provided to the chief executive officer who may change the original decision and, if so, will advise the appellant and counsel for the Law Society of the new decision.
>
> 6. If the appellant accepts the new decision, the appeal will be deemed withdrawn.

> 7. If the appellant does not accept the new decision, the appellant may appeal the new decision by submitting a new Notice of Appeal to the secretary to the Admissions and Education Committee within 14 days in accordance with Law Society Rule 5-28(1).

[38] The panel therefore concludes that, in the circumstances of the instant appeal, these proceedings are not a hearing *de novo*; instead, they are a review on the record.

[39] To be sure, in circumstances very different from the instant appeal, proceedings before a panel of the Admissions and Education Committee could amount to a hearing *de novo*. For example, the above-excerpted Rule 5-28(3) anticipates that an oral hearing may be convened, and Guideline 19 allows for the testimony of witnesses, who

> ... may be called during oral hearings only with leave of the appeal panel and only in exceptional circumstances as may be determined by the appeal panel.

As explained in the *dicta* that appears at para. 121 of *Applicant A* v. *The Law Society of Manitoba*, File no. 20090826B (9 October 2009),

> ... it should be noted that in certain circumstances – particularly where significant issues of credibility are involved – it would not be appropriate to proceed solely on a written record supplemented by oral submissions. Rather, a *de novo* proceeding, including if necessary *viva voce* evidence, may be the fairest and most appropriate means to hear an appeal.

E.1.b. The standards of review analysis

[40] Having determined that the instant appeal is not a hearing *de novo*, the panel must next select the standard of review by which to consider the decision under appeal.

[41] Prior appeals before the Admissions and Education Committee have applied correctness as the standard of review. At para. 119 of *Applicant A* v. *The Law Society of Manitoba*, File no. 20090826B (9 October 2009), reasonableness was rejected as the appropriate standard by which to review decisions of the Director of Admissions and Membership, because

> [a] standard that high would seriously curtail the effectiveness of any appellant's appeal rights and particularly where, as here, the Panel is in at least as good a position to determine the issue (if not in a better one, by virtue of hearing directly from the Appellant) it would not be appropriate to preclude a panel from doing what it thinks right in the circumstances.

The panel appreciates this reasoning, recognizing it as an example of the standards of review analysis required by *Dunsmuir* v. *New Brunswick*, 2008 SCC 9 at para. 64.

[42] The same *Dunsmuir* decision aims at para. 57 to relieve reviewers from the requirement that they conduct an exhaustive standards of review analysis in every case. Instead, they may rely upon earlier decisions that have considered which standard to apply. Partly for this reason, the panel adopts the correctness standard that earlier panels have applied when considering decisions by the Director of Admissions and Membership.

[43] To those earlier standards of review analyses, the panel adds and notes that, in the circumstances of the instant appeal, there is no compelling reason to apply anything other than the correctness standard. The Director of Admissions and Membership has no advantage over this panel in considering and assessing the questions that arise, so deference is not owed to his decision. As the panel concludes in its consideration below of the issues in play, there are in this case no significant questions of fact, credibility, or mixed fact and law. The facts are uncontested, and the issues relate to the determination of whether the applicant's conduct shows that he is not of good moral character. The Director's direct contact with the applicant therefore affords him no advantage over this panel. There is no compelling reason to apply a standard of reasonableness when reviewing any part of the Director's decision. Instead, the instant appeal turns upon statutory interpretation and the application of legal principles to the established facts, and this panel can read the legislation and apply the law just as well as the Director. In addition, the legislative scheme aims to give applicants the opportunity to make a substantive appeal from unfavourable decisions by the Director of Admissions and Membership, and this panel's undue deference to a decision under review would defeat that public policy consideration.

[44] Therefore, in considering the relevant parts of the decision under appeal in the instant proceedings, the panel has adopted the correctness standard. This conclusion is consistent with previous decisions of the Admissions and Education Committee: in *Applicant A* v. *The Law Society of Manitoba*, File no. 2010811B (25 November 2010), the questions before the panel related to the application of legal principles, and the material facts were not in dispute, so the panel applied the standard of correctness; and, in *Applicant A* v. *The Law Society of Manitoba*, File no. 20110531 (6 July 2011), the issues related to jurisdiction, procedural fairness, and the application of legal principles, so the correctness standard was adopted. In contrast, in both *Applicant A* v. *The Law Society of Manitoba*, File no. 20090826B (9 October 2009), and *Applicant A* v. *The Law Society of Manitoba*, File no. 20130213 (25 April 2013), questions of fact and credibility were in play, but both of those panels convened oral hearings, thus putting themselves on an even footing with the Director in assessing the facts and credibility and thus justifying the application of the correctness standard.

E.2 A rebuttable presumption arises that the applicant is not of good moral character or a fit and proper person to be admitted

[45] Law Society of Manitoba Rule 5-4(1)(d) requires an applicant for admission to "provide proof that he or she is of good moral character and a fit and proper person to be admitted". As part of the application process, applicants must disclose certain information, such as the existence of any criminal convictions; findings of liability involving breach of trust, fraud, perjury, immorality, dishonourable conduct, misrepresentation, dishonesty, or undue influence; courts orders about vexatious proceedings or conduct; evidence of disrespect or abuse of the court and its processes; suspension, disqualification, censure, or disciplinary action as a member of any profession or organization; denial or revocation of any licence required proof of good character; and, any condition that may comprise the ability to practice. In addition to this information, the Law Society also takes into account "other relevant matters otherwise learned of by the Law Society": "Guidelines for Good Character Applications

under Rules 5-4, 5-24(2), 5-28.1, and 5-28.2. On the basis of all this, the Law Society may presume that an applicant is not of good moral character or a fit and proper person to be admitted, and it then falls to the applicant to rebut that presumption.

E.2.a. The nature of the requirement that applicants be of good moral character and a fit and proper person to be admitted

[46] Applicants for admission need to prove that they are of good moral character and a fit and proper person to be admitted, because integrity is central to the practice of law. It is unlikely only a coincidence that The Law Society of Manitoba's *Code of Professional Conduct* defines as its first and opening obligation the duty that lawyers have "to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity": Rule 2.1-1. *The Legal Profession Act*, CCSM c. L107, similarly underlines the centrality of integrity, fixing the statutory mandate of the Law Society of Manitoba to "uphold and protect the public interest in the delivery of legal services with competence, integrity and independence": s. 3(1).

[47] The importance of integrity informs Rule 5-4(1)(d)'s requirement that applicants prove themselves to be of good moral character and fit and proper persons to be admitted. Writing only about the good character requirement, Gavin MacKenzie explained in *Lawyers and Ethics: Professional Responsibility and Discipline* (loose-leaf) (Toronto: Carswell, 2001), p. 23-2 and 23-3, that

> [t]he purposes of the good character requirement are the same as the purposes of professional discipline: to protect the public, to maintain high ethical standards, to maintain public confidence in the legal professional and its ability to regulate itself, and to deal fairly with persons whose livelihood and reputation are affected.
>
> ...

> [The good character requirement] recognizes that character is the well-spring of professional conduct in lawyers. By requiring lawyers to be of good character, law societies protect the public and the reputation of the profession from potential lawyers who lack the fundamental quality of any person who seeks to practise as a member of the legal profession; namely, integrity.

[48] Unlike many other Canadian jurisdictions, the requirement set out in Rule 5-4(1)(d) is twofold, expecting applicants to be both of good moral character and fit and proper persons to be admitted. However, the Rule is silent as to the meaning of those components, and no Manitoba court has had occasion to define them.

[49] Nevertheless, the Admissions and Education Committee has previously considered the nature of the good character and fitness requirements. For example, in *Applicant A* v. *The Law Society of Manitoba*, File no. 20090826B (9 October 2009), the panel adopted at para. 148 the notion set forth in *Re Preyra*, 2000 CanLII 14383 (ON LST) at para 7 that

> [t]he definition of good character is... an evolving definition. The definition is not exhaustive, and refers to a bundle of attributes, which taken together, amount to good character: "Character is that combination of qualities or features distinguishing one person from another. Good character connotes moral or ethical strength, distinguishable as an amalgam of virtuous attributes or traits which would include, among others, integrity, candour, empathy and honesty."

The 2009 panel also accepted the view of Mary Southin in an article that she had written before her appointment to the Bench ("What is 'Good Character'?" (1977) 35 The Advocate 129), where she concluded at p. 129 that good character requires:

> (1) An appreciation of the difference between right and wrong;
>
> (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 consequence may be to one's self;
>
> (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.

[50] Following upon earlier case law and commentary, this panel defines the requirements of good moral character and fitness that Rule 5-4(1)(d) sets out:

1. An applicant must demonstrate both that the applicant is of good moral character and that the applicant is a fit and proper person to be admitted.

2. The fitness requirement is broad, referring to those qualities that a person must possess in order to be suitable to practice law.

3. Good moral character is one of the traits that comprise the fitness requirement, so an applicant's proof of good moral character is necessary, but not sufficient, to demonstrate that the applicant is a fit and proper person to be admitted.

4. Character determines the ethical choices that a person makes. Good moral character presumes the person's ability to distinguish between what is right and what is wrong. It compels the person to choose to do what is right, even if the person believes that such a choice is not in the person's own interests. Good moral character precludes the person from doing that which is wrong or tolerating others who do wrong.

5. A person of good moral character is honest, trustworthy, and frank and open when candour is appropriate. Such a person has integrity, displays empathy, and accepts responsibility for the person's own conduct. If lacking in good moral character, a lawyer cannot act in accordance with the *Code of Professional Conduct*.

6. Fitness ensures the suitability of a person to the practice of lawyer.

7. Apart from possessing good moral character, a fit and proper person to be admitted will submit to governance by a professional regulator. Such a person will also zealously defend and advance the interests of a client, act in accordance with the lawful instructions of clients, and scrupulously discharge all fiduciary and other trust obligations. A fit and proper person to be admitted shows soundness in professional judgment.

E.2.b. Application of the character and fitness tests to the instant facts

[51] It is common ground for the applicant and respondent that Applicant A sent e-mail messages on 18 and 19 September 2013 to two Manitoba lawyers. As a preliminary point, the panel finds that these e-mail messages fall within the "other information" that the Director of Admissions and Membership may take into account when assessing an applicant's character and fitness.

[52] It is the respondent's position that those e-mail messages contain several false statements. Pointing to Applicant A's e-mail message sent to Ms Howden on 18 September 2013, the respondent says that the following are false statements:

a) "The processing of our 2 applications has been stalled since we do not have a Supervisor".

b) "[I]f we do not send the name of a Supervisor within this week it would not be possible for us to catch-up with the missed modules".

c) "Being supervised while doing CPLED would only involve having an occasional meeting with the Supervisor for around 15-20 minutes until CPLED is over in September 2014".

In the follow-up e-mail message sent to Ms Howden on 19 September 2013, Applicant A is said to have made these false statements:

a) "We have received exemption from Articling".

b) "What the Law Society of Manitoba wants is a lawyer to act as a Supervisor during our CPLED".

c) "It would mean meeting the Supervisor occasionally and would not involve working in the law Office".

Lastly, the respondent submits that the following are false statements, found in the applicant's e-mail message sent to Ms Southall on 19 September 2013:

a) "We are law students and have received exemption from Articling".

b) "The Law Society of Manitoba wants us to find a lawyer to act as a Supervisor during our CPLED".

c) "It would mean meeting the Supervisor occasionally and would not involve working in the law Office".

d) "The processing of our 2 applications has been stalled since we do not have a Supervisor".

e) "[I]f we do not send the name of a Supervisor within this week it would not be possible for us to catch-up with the missed modules".

f) "Being supervised while doing CPLED would only involve having an occasional meeting with the Supervisor for around 15-20 minutes until CPLED is over in September 2014."

The respondent contends that all of the preceding statements are false, being either outright lies or unfounded speculation that the applicant nevertheless represented as fact. By way of example, the respondent notes that no decision had yet been made about the applicant's exemption from articles, and no details about any supervisory requirement had yet been settled. Nevertheless, the applicant advised Ms Howden and Ms Southall that he was exempt from the articling requirement, and he also set out as if fact his own conjecture about the supervisory arrangement. In addition, the Director of Admissions and Membership had expressly stated that the applicant and his supervisor must be in the employ of the same firm, and the applicant's e-mail flatly contradicts that statement. The respondent further notes that the applicant certainly received the advice of the Director of Admissions and Membership, because the applicant had acknowledged receipt of those e-mail messages.

[53] In the light most favourable to the applicant, these statements could be taken as mere exaggerations without foundation, which, like a door-to-door seller desperately trying to land a foot inside the house of a potential customer, Applicant A had simply put forth in order to interest Manitoba lawyers in his proposal that they should act as his supervisor. At worst, though, these statements are lies that the applicant knowingly put forward as part of his deliberate strategy to gain an advantage. In his decision letter

of 23 October 2013, the Director of Admissions and Membership chose the latter classification, describing the applicant's statements as "false and misleading".

[54] In his submissions to the panel, the applicant concedes and does not "dispute the allegations of misconduct": applicant's submission of 1 November 2013 at para. 1. In respect of some false statements, the applicant candidly admits that "I lied": applicant's submission of 13 December 2013 at para. 7**.** At the same time, Applicant A has repeatedly apologized in almost every document that he has since directed to the Law Society, including his written submissions filed in support of his appeal to this panel.

[55] Despite the applicant's own characterization of his statements as lies and his subsequent apologies, the panel chooses to discount and ignore these incriminatory words. The panel expresses concern that there is no documentary record about that first confrontation when the Director of Admissions and Membership talked by telephone with Applicant A. According to an e-mail exchange between the two of them on the morning of 20 September 2013, the Director reported having received a copy of the e-mail messages sent to Ms Howden. He wanted to discuss the inaccuracies that the e-mail messages contained, and he asked Applicant A to telephone him. By his prompt reply, the applicant agreed to call later in the day. In his written submission of 13 December 2013, Applicant A helpfully confirms that the telephone conversation did take place, although he was unsure if it happened on 20 December 2013 or slightly later. Nevertheless, the panel does not know what was said. The substance of that call could be important. The panel notes that, in his e-mail reply on that morning of 20 September 2013, Applicant A does not characterize his e-mail messages to Ms Howden as lies, and he is not apologetic. The tone of his e-mail reply instead suggests that he believed that he had done nothing inappropriate and that the substance of his e-mail messages were necessary puffs, not misrepresentations intended to lure a potential supervisor. When Applicant A next writes about this matter, the date is 16 October 2013, and his attitude has changed: he is entirely incriminatory and apologetic. Moreover, all subsequent writings received from Applicant A, including his submissions to this panel, have adopted that same incriminatory and apologetic style. The shift could simply be Applicant A's reaction to the Director's formal letter of 10 October 2013, where the applicant saw in writing for the first time the peril in which he had placed his

application for admission. On the other hand, because any telephone conversation on 20 September 2013 went undocumented, the panel is left to wonder if Applicant A thinks that he received from the Director some cue on how he must react in order to salvage his application. It seems unlikely that the Director would have given an applicant such advice, and it would be unfortunate if an applicant had misconstrued something else that the Director might have said. However, in the absence of documentation, the panel simply does not know what was said, or how it could have been misconstrued. Given this gap in the record, the panel finds unreliable the incriminatory characterizations that the applicant has given to his conduct. The panel therefore discounts and ignores those characterizations. If a presumption against the applicant's character and fitness is to arise, the respondent must find a basis only in a construction of the applicant's e-mail messages sent to Ms Howden and Ms Southall on 18 and 19 September 2013. In addition, the respondent may point to the applicant's e-mail note sent to the Director of Admissions and Membership on the morning of 20 September 2013, which preceded the telephone conversation that later took place. While this ruling arguably impacts the Law Society's response to the instant appeal, the panel concludes that this approach ensures fairness to the applicant and will encourage full documentation on the record of those oral conversations that the Director of Admissions and Membership may have with future applicants.

[56] Accordingly, having ignored the applicant's own incriminatory characterization of the statements that he set out in his e-mail messages to Ms Howden and Ms Southall, the panel must construe those statements either as insignificant puffs or as deliberate lies.

[57] In his e-mail reply of 20 September 2013, the applicant briefly responded to the Director's reaction to the e-mail messages sent to Ms Howden. Applicant A explained his problem: "[s]ome potential supervisors while showing an inclination to act as my supervisor during CPLED withdrew their interest hearing they would have to supervise me even during employment." As a strategy to avoid initial rejection, Applicant A decided upon a different tact: "[a]s you would kindly see I had to balance my little knowledge of what your final decision would be and finding a supervisor." Despite the explanation that the applicant has set out in his e-mail message of 20 September 2013,

the panel rejects the applicant's characterization. Although the panel can understand the frustration and even desperation that Applicant A was suffering, the contents of the e-mail messages sent to Ms Howden and Ms Southall are patent lies or unsubstantiated conjecture. His words were not mere inadvertent expressions. He must have known that his representations were false at the time that he had written them. His words were deliberate and constructed, and he intended them as part of a scheme that he hoped would gain for him an advantage that he believed would not otherwise accrue. Worse, the lie was protracted: it was first told in the e-mail to Ms Howden sent on the evening of 18 September 2013; it was then bolstered and supplemented in the second e-mail sent to Ms Howden on the next morning; and, it was lastly repeated in the e-mail sent to Ms Southall on the afternoon of 19 September 2013.

[58] The conduct of Applicant A shows a lack of honesty and an absence of candour. His strategy aimed to advance his own interests through deception. Applicant A knew that potential supervisors would not likely receive his pitch favourably if he told them that they would have to employ him or make a significant commitment of their time. Instead, the applicant calculated that, if he told a better story, potential supervisors would at least hear him out. Because few lawyers are familiar with the Law Society's rarely-needed supervisory requirements, Applicant A effectively exploited the ignorance of his targets, substituted his own version of facts, and hoped to land a supervisor. The applicant's apparent thinking shows a misguided understanding of the distinction between right and wrong; in the alternative, his strategy betrays the applicant's unwillingness to subjugate his own interests to the truth and a readiness to take advantage of those on a different footing.

[59] Therefore, by application of the panel's definition set out above, the applicant's conduct gives rise to a presumption that he is not of good moral character. In arriving at this conclusion, the panel recognizes that the standard by which to judge the applicant is not perfection: *Applicant A* v. *The Law Society of Manitoba*, File no. 20090826B (9 October 2009) at para. 155. Instead, the applicant's character should be assessed reasonably, fairly, and dispassionately. Moreover, as required by *Applicant A* v. *The Law Society of Manitoba*, File no. 20090826B (9 October 2009) at para. 161, this assessment considers only the applicant's character at the present time. Because the conduct in

question occurred during the application process itself, the panel is relieved from the additional complications that arise where an applicant submits that his or her character has improved since the problematic conduct had taken place. Although it is conceivable that, since writing the e-mail messages on 18 and 19 September 2013, Applicant A's character may have changed, the applicant has not advanced this argument, and, regardless, the panel finds no basis for such an argument, given the very brief period of time that has passed.

[60] At para. 10 of his written submission dated 13 December 2013, the applicant argues that, if the instant facts sustain the Director's finding that he is not of good moral character, the resulting penalty would be disproportionate to the applicant's misconduct; namely, the applicant would be denied admission, the applicant would be barred from making a new application for admission for two years, and the applicant would have to report the decision to any future professional regulator to which he might apply, regardless of the jurisdiction or the profession.

[61] Applicant A correctly notes that a disciplinary panel would be unlikely to impose a comparable sanction and disbar a practicing lawyer who made false statements akin to those found in the applicant's e-mails sent to Ms Howden and Ms Southall. From past Manitoba discipline cases involving practicing lawyers, the panel has collected the following dispositions: 60-day suspension (*The Law Society of Manitoba* v. *Troniak*, 1996 MBLS 1); reprimand (*The Law Society of Manitoba* v. *McMullan*, 2001 MBLS 1); reprimand (*The Law Society of Manitoba* v. *Arthur*, 2008 MBLS 9); disbarment (*Smith* v. *The Law Society of Manitoba*, 2011 MBCA 81); and, 30-day suspension (*The Law Society of Manitoba* v. *Guttman*, 2011 MBLS 2).

[62] However, the panel rejects the applicant's submission on the effect of the penalty. First, it is not a principle of statutory interpretation that the harshness of a penalty determines the readiness of a decision-maker to make a finding. While it is correct that the cogency of the evidence must be scrutinized more closely as the gravity of the allegation and the seriousness of the consequences increase (*Law Society of Upper Canada* v. *Kazman*, 2005 ONLSHP 32 at para. 11), a harsh penalty must not discourage a decision-maker from applying the law to the facts.

[63] Secondly, the submission ignores the public policy consideration at play in Rule 5-4(1)(d), which establishes the character and fitness requirements that must be met by every applicant for admission. These requirements in turn reflect the need for integrity, which is a concept that s. 3(1) of *The Legal Profession Act* incorporates into the statutory mandate of the Law Society; namely, "to uphold and protect the public interest in the delivery of legal services with competence, integrity and independence." Rule 5-4(1)(d) therefore is a standard that the Law Society has established in order to fulfil its statutory mandate. The admission stage is the only point in a lawyer's professional career when the intending lawyer cannot escape the scrutiny of the Law Society. Once a lawyer is called to the Bar, the Law Society may peer into his or her practice only if there is a complaint against the lawyer or during a routine trust account audit. In the case of the lawyer who will never be the subject of a complaint and will never maintain a trust account, the admission stage is the Law Society's only opportunity to vet the applicant for integrity. The "all-or-nothing" outcome is appropriate, and the applicant is wrong to complain about the harshness of being denied admission. After all, where there are doubts about an applicant's good moral character or the fitness of the person to be admitted, the application should be blocked in order to protect the public interest and promote integrity in the delivery of legal services.

[64] Thirdly, the applicant's submission about the harshness of the penalty does not address the reality of the circumstances. In her usual blunt but apt words, Mary Southin concluded her above-cited article "What is 'Good Character'?", observing at p. 136 that

> [a] principal argument of those Benchers who favour admitting these applicants is that they have done their years as students and it would be harsh to refuse them on the basis of one event. I think it is sad that anyone would compromise his academic career and his future career at the bar for such a trivial thing as a [stolen] book or a pen. But that is the problem of the applicant, not of you, me, or the public at large.

E.3 The applicant's failure to rebut the presumption that he is not of good moral character or a fit and proper person to be admitted

[65] Accordingly, where an applicant for admission lies during the application process itself and where those lies are deliberate and intended to secure an advantage that might not otherwise accrue to the applicant, the conduct gives rise to a presumption that the applicant is not of good moral character. It therefore falls to the applicant to rebut that presumption.

[66] In his written submission of 1 November 2013, the applicant asks the panel to make allowance for the reply that he had sent to the Director of Admissions and Membership on 10 October 2013. Applicant A explains at para. 2-7 of his submission that he had misunderstood the Director's invitation for "comments and explanation", not realizing that his response was expected to rebut the presumption formed that he is not of good moral character or a fit and proper person to be admitted. Applicant A repeated this explanation at para. 12-17 of his written submission dated 13 December 2013, noting later at para. 18-19 the full meaning of an apology in the applicant's Sri Lankan culture.

[67] The panel accedes to the applicant's request and will therefore read his reply of 10 October 2013 as his explanation of the motives underlying his conduct. In addition, the panel will import into the applicant's apology an expression of regret, an acceptance of responsibility for the actions, and a recognition of the seriousness of his conduct. However, apologies are irrelevant. While appreciating his repeated apologies as complete and sincere, "the admissions panel is not in the forgiveness business", in the words of *Re Preya*, 2000 CanLII 14383 (ON LST) at para. 9, appl'd *Applicant A* v. *The Law Society of Manitoba*, File no. 20090826B (9 October 2009) at para. 164. This panel's only function is to decide here if the applicant has met the character and fitness requirements set out in Rule 5-4(1)(d).

[68] In his written submission of 13 December 2013, the applicant seeks to rebut the presumption that he is not of good moral character. First, he underlines at para. 5 that, by his e-mail of 19 September 2013, it was he himself who had forwarded his original message sent to Ms Howden. The unspoken premise in the applicant's argument is that, if he had believed his e-mail to reflect bad character, Applicant A would not have

voluntarily produced it for the Director. Such a conclusion would diminish the respondent's submission that the applicant had made statements that he knew to be false. However, such a conclusion would alternately highlight the applicant's apparent inability to appreciate that he is communicating either false statements or conjecture lacking any factual basis. For this reason, the panel concludes that this point does not help the applicant to rebut the presumption.

[69] Secondly, the applicant argues at para. 6 of his submission dated 13 December 2013 that he was not unfounded in his assumption that he would be exempt from Manitoba's articling requirement. Applicant A explains that Ontario had already provided him with such an exemption and that, being already in possession of all documents comprising the application for admission, the Manitoba Director of Admissions and Membership could have informed Applicant A much earlier if an exemption from articling was to be denied to him. Instead, their correspondence had revolved around what is expected from an applicant who is exempt from articling and the applicant's responsibility to find a supervisor. Applicant A therefore submits that he was under a strong impression that he would be exempt from articling. However, the panel notes that it was only after Applicant A's e-mail message of 12 September 2013 that the correspondence with the Director shifted to a discussion about supervisors. In that e-mail message, the applicant himself had raised the topic and had been anticipatory and premature in concerning himself with the supervisory requirement. The Director had merely responded to Applicant A's questions, and these questions then continued in subsequent e-mail messages at the initiative of the applicant. Quite apart from all of this, even if one accepts that there was a foundation for Applicant A's believe that he would be exempted from articling, there is a difference between a strong likelihood and actual reality. In his e-mail messages to Ms Howden and Ms Southall, Applicant A expressly stated that he had received an exemption from the articling requirement. While he might have had grounds to expect such an exemption, his e-mail messages are simply false, and he must have known that those statements were untrue at the time that he wrote them. If anything, this point confirms the basis for the presumption raised against him.

[70] Thirdly, at para. 7 of his submission dated 13 December 2013, the applicant expresses the view that, because the Director would not help him to find a supervisor, Applicant A had no alternative except to lie to potential supervisors. This petulant excuse is entirely without merit. The applicant shows himself very ready to lie where such misconduct is a convenient means by which to overcome an obstacle to the advancement of his own interests. The excuse also undermines the applicant's repeated apologies, by which he tells the panel in his submissions that he also means to accept responsibility for his misconduct. However, by this excuse, a supposedly-unhelpful Director is cast as the prime mover behind the applicant's lies. The panel therefore concludes that this is another point that confirms the basis for the presumption raised against the applicant.

[71] Fourthly, Applicant A underscores that his actions arose out of his panic and confusion as an out-of-province applicant: applicant's written submission, 13 December 2013, especially at para. 9. However, the panel declines to characterize the appellant's misconduct as simply a baffled confusion. The applicant must have known at the time that he sent the e-mail messages to Ms Howden and Ms Southall that at least some of those representations were either false or without foundation. Despite any panic, confusion, or ignorance, an applicant should not lose moral direction. The panel therefore concludes that this point confirms the basis for the presumption raised against the applicant.

[72] Fifthly, Applicant A reminds the panel that he can do no more to make things right, having apologized, admitted his conduct, and recognized the gravity of his actions: applicant's written submission, 13 December 2013, para. 11. However, the panel is precluded from taking apologies into account for the reason set out above, so this point has no bearing upon the applicant's rebuttal of the presumption raised against him.

[73] Sixthly, the applicant pledges not to engage in similar behaviour in future: applicant's written submission, 13 December 2013, para. 22. However, the subject matter of the good character requirement focuses only upon the character of the applicant at present. The panel makes no attempt to extrapolate or otherwise anticipate the applicant's future character, because any determinative guess would be both unfounded

and irrelevant to a proper assessment of present character. Therefore, this point is irrelevant.

[74] For these reasons, the panel finds that the applicant has failed to rebut the presumption that the applicant is not a person of good moral character and a fit and proper person to be admitted, after that presumption appropriately arose out of the false statements that the applicant had set out in his e-mail messages sent to Ms Howden and Ms Southall on 18 and 19 September 2013.

F. Order

[75] This panel hereby dismisses the applicant's appeal of the 23 October 2013 decision of the Director of Admissions and Membership, denying the applicant admission to the CPLED program and the status of articling student.

G. Right of appeal, and application for judicial review

[76] Pursuant to Rule 5-28(7), a decision of the panel in respect of the subject matter of the instant appeal is final. However, any party to these proceedings may apply to the Manitoba Court of Queen's Bench for judicial review of this decision.

For the unanimous panel,

7 May 2014

Original signed by

Robert Dawson, *panel chair*

THE LAW SOCIETY OF MANITOBA

IN THE MATTER OF

***The Legal Profession Act*, CCSM c. L107,**

AND IN THE MATTER OF

Applicant A,

applicant

A panel of the Admissions and Education Committee:
Robert Dawson, *panel chair*
Joyce Dalmyn
Miriam Browne

For the applicant: Self-represented
For the Law Society of Manitoba:
Ms Leah C. Kosokowsky

Order published: 18 December 2013

PROCEDURAL ORDER 1

THE PANEL:

[77] An applicant for admission as an articling student appeals from the decision of the Chief Executive Officer's designate, who refused to admit him. For the reasons set out below, the hearing of the appeal is adjourned.

Facts

[78] On or about 1 November 2013, the applicant filed his Notice of Appeal, dated 27 October 2013. He appealed from the decision of the Law Society of Manitoba's Director of Membership, who had refused to admit the applicant as an articling student.

[79] The applicant did not file a brief or book of authorities in support of his appeal. However, together with his Notice of Appeal, he did provide additional written information and documents that post-date the decision under appeal.

[80] On or about 10 December 2013, the Law Society filed its brief and book of authorities.

[81] On or about 12 December 2013, the applicant received a copy of the Law Society's brief and book of authorities.

[82] On or about 13 December 2013, the applicant filed a written submission, whose first two paragraphs are:

> 1) I received the voluminous Brief and Authorities from Counsel to the Law Society of Manitoba (Counsel) only on Thursday 12 December 2013 (6 days before the hearing) even though Law Society of Manitoba (LSM) received my appeal on 15 November 2013 (4 weeks back).
>
> 2) Since time is of essence and I am psychologically suffering each and every passing day since the termination of my admission I thought of responding to Counsel's brief to the best of my ability (even though I am not a Counsel) and as a matter of urgency since I wish to have a resolution to this most difficult time in my life.

Applicable guidelines

[83] The Law Society of Manitoba has published guidelines that relate to the conduct of an appeal before a panel of the Admissions and Education Committee. Among other things, those guidelines prescribe deadlines for the filing of submissions that the parties may choose to make, although there is no obligation upon any party to make written submissions or supply additional information for the panel's consideration.

[84] First, Guideline 13 provides an applicant with the opportunity to file a brief, book of authorities, and other written materials, and the Guideline further imposes a filing deadline of at least 21 days before the date scheduled for the hearing of the appeal:

> In support of the appeal, the appellant must provide the secretary to the Admissions and Education Committee with five copies of: any additional information not previously considered, facts and arguments, documents, and any authorities at least 21 days before the appeal date.

[85] By way of reply and pursuant to Guideline 15, the Law Society may then file its own brief, book of authorities, and other written materials at least 7 days before the hearing date:

> In response to the appeal, counsel for the Law Society must provide the secretary to the Admissions and Education Committee with five copies of: any additional information not previously considered, facts and arguments, documents, and any authorities at least 7 days before the appeal date.

[86] Guideline 18 denies the applicant an automatic right of rebuttal:

> The appellant and counsel for the Law Society may submit further written materials only with leave of the appeal panel.

The procedural problem

[87] Procedural fairness requires that, in most instances, an applicant should have a full opportunity to put the applicant's position before the decision-maker. In the instant case and on its own initiative, the panel is not satisfied that the applicant has received that opportunity.

[88] Although the Law Society had filed its brief and book of authorities within the deadline that Guideline 15 imposes, the applicant says that he did not receive those materials until "6 days before the hearing". There is no affidavit of service or other indication that contradicts the applicant's statement, so the panel accepts that the applicant received the Law Society's materials on 12 December 2013. Given that the applicant's address for service is located in another Canadian province, a delay between filing and service is understandable.

[89] Despite this timing concern and his description of the Law Society's materials as "voluminous", the applicant did not seek an adjournment of the hearing of his appeal. Instead, he chose to respond "to the Counsel's brief to the best of my ability (even though I am not a Counsel)." While it notes the applicant's readiness to adapt to the present circumstances, the panel is mindful of the importance of this appeal, especially because an outcome unfavourable to the applicant could have significant and long-lasting consequences for him.

[90] The panel further notes the applicant's motivation for moving forward with this appeal "as a matter of urgency". In his most-recently filed submission, as excerpted above, the applicant describes how he is "psychologically suffering each and every passing day since the termination of my admission". He naturally wants "to have a resolution to this most difficult time in my life." Such candid expressions trouble the panel, leaving it to worry that, almost as if he felt himself under duress, the applicant could compromise the quality or extent of his submission to this panel, simply because, to his mind, expediency requires it.

[91] Therefore, the panel is not satisfied that it would be fair to the applicant if the panel were to proceed to hear and decide his appeal in the circumstances.

[92] Although the panel has come to this conclusion flowing from its own initiative, the applicant should naturally not rely upon the panel to protect his interests or advance his position. The panel is an independent and neutral decision-maker. While the applicant is entitled to act on his own behalf in these proceedings, the panel reminds

the applicant that he may retain his own lawyer to advise him and represent him zealously in this appeal.

Resolving the procedural problem

[93] The panel has adjourned its consideration of the applicant's appeal, and it has decided to ensure procedural fairness by extending an opportunity to the parties to make written submissions in accordance with a timetable that is set out below.

[94] The panel cautions the parties that these submissions are not an appropriate vehicle by which to put additional facts and evidence before the panel. Appeals from a decision of the Director of Membership proceed only on the basis of the written record that was before the Director at the time that he made the decision now under appeal. The admissibility of other facts and evidence requires leave of the panel: Guideline 18.

Procedural order

[95] This panel orders that:

a. The hearing of the instant appeal on the basis of the written record and written submissions only, is adjourned to 17 February 2014 at 9:30 a.m.,

b. To the extent that the applicant chooses, the applicant shall, before 16 January 2014, file with the secretary to the Admissions and Education Committee five (5) copies of any written brief and/or book of authorities that he may wish the panel to consider;

c. To the extent that the Law Society of Manitoba chooses to replace, amend, or supplement its already-filed brief and book of authorities, the Law Society of Manitoba shall, before 28 January 2014, file with the secretary to the Admissions and Education Committee four (4) copies of any written brief and/or book of authorities that the Law Society of Manitoba may wish the panel to consider, and the Law Society of Manitoba shall also serve the applicant before 28 January 2014 with a true copy of any written brief and/or book of authorities that it has filed;

d. If and only if the Law Society of Manitoba chooses to file materials pursuant to the above paragraph (c), and to the extent that the applicant chooses, the applicant shall, before 8 February 2014, file with the secretary to the Admissions and Education Committee five (5) copies of any written brief and/or book of authorities, which material shall be confined only to

the rebuttal of submissions that the Law Society of Manitoba may have made in materials filed pursuant to the above paragraph (c);

e. This panel is seized of this appeal.

For the unanimous panel,

18 December 2013

Original signed by

Robert Dawson, *panel chair*