Decision No. 20090826B

THE LAW SOCIETY OF MANITOBA

In the Matter of:	**Applicant A - Appeal of Admission Decision**
Hearing Date:	**August 26 & 27, 2009**
Panel:	**James E. McLandress – Chair** **Linda Brazier Lamoureux** **Mark Toews**

DECISION

Re: Appeals of August 10, 2009 Admissions Decision & August 18, 2009 CPLED Decision

REASONS FOR DECISION

INTRODUCTION

1. According to the 19th Century French journalist and novelist Alphonse Karr "Every man has three characters: that which he shows, that which he has, and that which he thinks he has." The-same might be said of a person's fitness to engage in a given activity. This is particularly apt in the context of the present appeals.

2. Applicant A (the "Appellant" or "Applicant A") has appealed two decisions of the Law Society of Manitoba (the "Law Society"). The first appeal is from an August 10, 2009 decision of the Director of Admissions & Membership for the Law Society (the "Director") rejecting his application for admission to the Manitoba Canadian Centre for Professional Legal Education (CPLED) Program and as an articling student for 2008-09 (the "Admissions Decision"). The second appeal is from an August 18, 2009 decision of the Director rejecting his request for immediate, without prejudice, enrolment in the 2009-10 CPLED Program pending completion of any appeals in respect of the Admissions Decision

(the "CPLED Decision"). In his August 19th Notice of Appeal in respect of the CPLED Decision the Appellant stated that he had "already submitted the arguments facts and supporting documents relevant to the current appeal." Although they relate to different decisions the issues raised by the two appeals are identical.

3. In addition, on August 21, 2009 the Appellant filed three motions with the Panel and during the course of the hearing brought three more.

4. The appeals and motions were all heard on the afternoons of August 26th and 27th, 2009. Applicant A was unrepresented. Ms. Darcia Senft appeared on behalf of the Law Society. The parties proceeded on the basis of their written materials and oral submissions; no witnesses were called and no sworn testimony was presented.

5. All but one of the six motions was dismissed during the hearing. At the conclusion of the hearing the Panel reserved its decision on the two appeals. The sixth motion was disposed of in the Panel's decision of September 2, 2009. In that motion the Appellant sought immediate enrolment in the 2009-10 CPLED program pending completion of the appeal process. The Panel was unanimous in concluding that the Appellant was not currently of good moral character and a fit and proper person to be admitted and therefore dismissed the motion.

6. The two appeals before the Panel relate to the application of the provisions of Rule 5-4(c) of the *Law Society Rules* (the *Rules)* requiring that *a* prospective student "provide proof that he or she is of good moral character and a fit and proper person to be admitted." (We will refer to these as the "character" requirement and the "fitness" requirement respectively.) We are not aware of any prior decisions from Manitoba which address the character and fitness requirements of the Rules and in that sense this case is without precedent.

7. In our September 2nd ruling the Panel acknowledged that although our conclusion would necessarily dispose of the appeals as well we did not wish to deal with them summarily and so would prepare and deliver full written reasons at a later date. What follows are the Panel's reasons for dismissing the appeals.

RELEVANT LEGISLATION

8. These matters proceeded under Rule 5-28, which provides, in relevant part, as follows:

> **"Appeal of admissions decisions**
> **5-28(1)** A decision of' the chief executive officer made pursuant to the rules in this division may be appealed to the committee within 14 days of receipt of' written confirmation of the decision and the right to appeal.
>
> **Chairperson to appoint panel**
> **5-28(2)** The chairperson of the committee must select a panel of three members of the committee to consider any appeal made under subsection (1).

Hearings
5-28(3) A panel must convene an oral hearing to consider an appeal at the direction of the chairperson or at the request of an appellant.

Hearing to be public
5-28(4) An oral hearing convened under sub-section (3) must be open to the public unless the panel makes an order under sub-section (5).

…

Decision of panel final
5-28(7) A decision of the panel is final, except a decision to refuse to issue a practising certificate or a practising certificate free of conditions, which decision may be appealed to the Court of Appeal pursuant to section 76 of the Act."

9. The *Fair Registration Practices in Regulated Professions Act,* SM *2007* C-21 (the *Fair Registration Practices Act)* is also relevant to the conduct of this proceeding. It provides an overarching framework under which appeals such as the present ones are to be conducted.

10. Section 4 of *the Fair Registration Practices Act* imposes *a* general duty on all regulated professions, including the Law Society, to "provide registration practices that are transparent, objective, impartial and fair." It otherwise provides in relevant part as follows;

Timely decisions, responses and reasons
6 A regulated profession must

(a) make registration decisions within a reasonable time;

(b) provide written responses to applicants within a reasonable time; and

(c) provide written reasons to applicants within a reasonable time in respect of all

(i) registration decisions refusing to grant registration, or granting registration subject to conditions, and

(ii) internal review or appeal decisions, including, where practical, information respecting measures or programs that may be available to assist unsuccessful applicants in obtaining registration at a later date.

Internal review or appeal
7(1) A regulated profession must provide an internal review of, or appeal from, its registration decisions within a reasonable time.

Submissions by applicant
7(2) A regulated profession must provide an applicant for registration with an opportunity to make submissions respecting any internal review or appeal.

How to make submissions
7(3) A regulated profession may specify whether submissions respecting an internal review or appeal are to be submitted orally, in writing or by electronic means.

Information on appeal rights
7(4) A regulated profession must inform an applicant of any rights that he or she may have to request a review of, or appeal from, the decision, and provide information about the procedures and time frames of a review or appeal.

Decision-maker
7(5) No one who acted as a decision-maker in respect of a registration decision may act as a decision-maker in an internal review or appeal in respect of that registration decision.

11. The *Legal Professions Act,* C.C.S.M. c. L107, is the governing statute in respect of the substance of these appeals. The relevant portions provide as follows:

Purpose
3(1) The purpose of the society is to uphold and protect the public interest in the delivery of legal services with competence, integrity and independence.

Duties
3(2) In pursuing its purpose, the society must

(a) establish standards for the education, professional responsibility and competence of persons practising or seeking the right to practise law in Manitoba; and

(b) regulate the practice of law in Manitoba.

…

Who is a member
17(1) The following persons are members of the society;

(a) lawyers registered in the rolls of the society;

(b) persons registered in the student register;

(c) other persons who qualify as members under the rules.

Qualification for membership
17(2) No person may become a member or be reinstated as a member unless the benchers are satisfied that the person meets the applicable membership requirements.

…

Rules about membership and authority to practise
17(5) The benchers may make rules that

…

(b) establish requirements, including educational and moral requirements, and procedures for admitting persons as members, which may be different for different categories of membership;

(c) govern the admission program for articling students;

…

12. Pursuant to these provisions the benchers have passed the following rules

related to applications for admission as an articling student:

> **Application for admission as an articling student**
> **5-4** Subject to rule 5-4.1, an applicant for admission as an articling student must, by May 31 in the calendar year in which articles commence:
>
> (a) provide proof that he or she has a bachelor of laws degree or juris doctor degree from a faculty of common law at a Canadian university (a "Canadian common law degree") or an equivalent qualification, dated not more than 6 years before the date of the application for admission; or
>
> (b) provide proof that he or she is the recipient of a certificate of equivalency from the National Committee on Accreditation dated not more than 6 years before the date of the application for admission;
>
> and must
>
> (c) provide proof that he or she is of good moral character and a fit and proper person to be admitted;
>
> (d) enter into an articling agreement with a practising lawyer who has been approved by the chief executive officer to act as a principal and submit an acceptable Education Plan;
>
> (e) furnish all documentation required by the chief executive officer; and
>
> (f) pay the student admission fee under subsection 19(1) of the Act.

13. In these appeals only *Rule* 5-4(c) is in issue.

MATERIALS BEFORE THE PANEL

14. The following written materials were before the panel at the commencement of the hearing on August 26, 2009:

i) Booklet with cover memo from the Law Society dated August 14, 2009 and containing:

a. Notice of Appeal dated August 11, 2009 in respect of the Admissions Decision;
b. The August 10, 2009 Admissions Decision & covering email to the Appellant, which decision includes excerpts from the July 27, 2009 report of the Law Society's investigator (the Investigation Report);
c. Sections 17(1) through 18(2) of the *Act*;
d. Rules 5-1 through 5-5(1); and
e. Rules 5-25(2) through 5-28.1.

ii) Booklet from the Appellant dated August 17, 2009 referred to by him at the hearing as "My Appeal" & email to the Panel dated August 17, 2009 from D, Rossol of the Law Society advising of a typographical error on p. 12 of the document.

iii) Booklet with cover memo from the Law Society dated August 21, 2009 containing:

a. Applicant A's October 28, 2008 Application for Admission to Manitoba CPLED Program & as an Articling Student for 2008-09 (the Application);
b. August 13, 2009 letter from the Director to the Appellant;
c. The August 18, 2009 CPLED Decision;
d. August 18, 2009 letter from the Appellant containing additional information & three preliminary motions; and
e. Notice of Appeal dated August 19, 2009 in respect of the CPLED Decision.

iv) Appellant's List of Authorities dated August 24, 2009 referred to by him as "My Brief" containing the following authorities:

a. *Law Society of Manitoba*, *Appeal of Admission Decision,* Sept. 29, 2008;
b. *Law Society of Upper Canada v. Ashmalla* [2009] LSDD No. 60;
c. LSUC v. Shore [2006] LSDD No. 63*;*
d. *LSUC v. Levesque* [2005] LSDD No. 38; and
e. *Hutton v. Law Society of Newfoundland* [1992] CarswellNfld 84.

v) Brief and Authorities of the Law Society received August 25, 2009, which included the following case authorities:

a. *Law Society of Upper Canada v. Weisman* [1997] LSUC;
b. *Re Preyra [2000]* CarswellOnt 8545;
c. *Hutton v. Law Society of Newfoundland* [1992] CarswellNfld 84;
d. *McOuat v. Law* Society *(British Columbia)* [1993] CarswellBC 91;
e. *Jackson (previously known* as *Subramaniam) v Legal Practitioners Admission, Board* [2006] NSWSC 1338;
f. *Walker* v. *Government of P.E.I.* (1993) 107 DLR 4th 69 (PEI C.A), Aff'd [1995] 2 SCR 407 (SCC); and
g. *Law Society of Manitoba, Appeal of Admission Decision,* Sept. 29, 2008.

15. During the hearing on August 26, 2009 the following additional authorities were provided by counsel for the Law Society:

a. Excerpt from Jones & de Villars, *Principles of Administrative Law* (3rd *Ed.)* Carswell, 1999, pp 401-2.
b. *Fletcher v. MPIC, 2004* MBCA 192 (CanLll).
c. *Simcoff v Simcoff,* 2009 MBCA 80 (CanLII).

16. The Panel has also taken the following decisions into consideration:

a. *Pearlman v. Law Society of Manitoba*, SCC [1991] CarswellMan 201.
b. *Kuntz v. College of Physicians & Surgeons (B.C.),* 1987 CarswellBC 694 (BCSC), 1988 CarswellBC 744 (BCCA) *&* 1999 CarswellBC 185 (BCSC).
c. *K.F. Evans Ltd. v. Canada (Minister of Foreign Affairs),* 1996 CarswellNat 37.
d. *LSUC* v. *Birman,* LSUC Hearing Panel [2005] CarswellOnt 10260.
e. *MacAdam v. Law Society (Nunavut)* [2007] CarswellNun 36.

ISSUES

Motions

17. The Appellant filed three preliminary motions in his August 18th submission and three more motions during the course of the proceedings on August 26th.

18. The following issues arose from the August 18th motions*:*

i) Whether the Appellant should immediately be enrolled in the 2009-10 Manitoba CPLED Program on a without prejudice basis and pending a completion of all different appeal proceedings regarding his application?

ii) Whether a reasonable apprehension of bias exists with respect to the Chief Executive Officer of the Law Society and the Deputy CEO of the Law Society on the basis of "ties to [the Appellant's] former parents-in-law"?

iii) Whether the "Report on the Good Character of [Applicant A]" prepared by Mr. Joe Gallagher (Mr. Gallagher) and dated July 27, 2009 (the Investigation Report or the Report) should be expunged in whole or in part on the basis that it contains "bias, irrelevancies, inaccuracies, double hearsays, gossip, rumours, slander, speculation and other scandalous, frivolous and inflammatory information"?

19. The following issues arose from the August 26th motions*:*

iv) Whether a reasonable apprehension of bias exists with respect to Panel Member, Mr. Mark Toews, on the basis that he is a partner in a law firm that performs custodial work on behalf of the LSM and that he himself has performed or is performing custodial work in respect of the files of a deceased lawyer?

v) Whether the Panel should order production of the entire Investigation Report for review by it and the Appellant?

vi) Whether the Appellant should be permitted to call Mr. Gallagher to give *viva voce* evidence before the Panel?

Appeals

20. The following issues arise from the appeals:

i) What is the standard of review that the Panel should apply in respect of the appeals from the Admissions Decision and the CPLED Decision?

ii) What standard of proof is required in respect of allegations related to character and fitness?

iii) What, if any, application does the Canadian *Charter of Rights & Freedoms* (the *Charter)* have in considering the question of character and fitness?

iv) Did the disclosures made by Applicant A in the Application establish a rebuttable presumption that he is not of good character and a fit and proper person to be admitted?

v) If so, has Applicant A rebutted that presumption?

FACTS

21. Given our conclusion that the Director's decisions are to be assessed on the basis of correctness (see below) and given the seriousness of the implications of these appeals for both parties an extensive review of the facts is warranted.

22. The Panel has relied particularly on the two judgments of Madam Justice Allen (dated July 30, 2007, reported at 2007 MBQB 197 (CanLII) and filed in these proceedings with the Law Society's brief, (the 2007 Judgment) and August 4, 2009, unreported, (the 2009 Judgment)) and on the transcripts of proceedings filed by the parties or referred to in the Investigation Report. Reliance is also placed on the investigator's direct observations and on his description of interviews of various persons, most notably the character references given by the Appellant.

23. The Panel also had the benefit of being able to observe the Appellant during the hearing, which lasted a total of approximately seven hours.

24. As discussed below although the Appellant disputed various items in the Investigation Report the sources upon which the Panel bases its conclusions were not the subject of any, or at least any serious, dispute. While at times first hand evidence might have been of assistance to resolve certain conflicts in the evidence those conflicts were not determinative of the ultimate issues. The Panel is satisfied that it had before it sufficient evidence of a reliable quality to enable it to dispose of the appeals. The Panel accepts that the following facts have been established on a balance of probabilities.

The Appellant

25. Applicant A is 41 years old. An Israeli citizen, he came to Canada in October, 2002 with his then wife and their two young daughters. Applicant A's wife was from Winnipeg. They met in Israel and married in 1995.

26. Before leaving Israel the Appellant was a member of the Israeli bar, having received his law degree from the University of Tel-Aviv in 1995, articled with a private firm and practiced with several firms in Israel. As of the hearing before this Panel he remains a member in good standing of the Israeli bar. According to Applicant A Israel is a common law jurisdiction requiring members of the bar to be of good character and fitness.

27. Shortly after the family moved to Winnipeg the wife commenced divorce and custody proceedings in the Manitoba Court of Queen's Bench, Family Division. The proceedings were protracted and bitter; in her 2009 Judgment Justice Allen described the parents as having "a long and hostile history together". As is sometimes the case, the dispute spilled out of the court room and into the community in which the family lived.

28. A central element of the Appellant's submissions is that the events which he sees as being of particular concern to the Law Society arise entirely out of his domestic litigation and that they are a thing of the past that he has put behind him. To assess the strength of that submission it is necessary to examine those events in some detail.

The Domestic Litigation & Related Matters Prior to the Application

29. Justice Allen issued her 2007 Judgment following a 37-day trial that commenced in February 2007 and finished in the latter part of May.

30. Drawing heavily from the findings in the 2007 Judgment the following events of relevance had occurred up to the date of that decision (items in quotation marks are taken directly from the judgment):

a) In September 2003, the Appellant and his children were in the cafeteria at the Asper Campus when the Appellant "caused an unpleasant scene" that led to him to be banned from the Campus the next day. Following this incident the Appellant returned to Israel where he remained for about nine months until he returned to Winnipeg in June 2004.

b) From June to September 2004, the Appellant's visits with his children were "problematic". "At times, the wife had to have security guards or the police intervene when he refused to let her and the children leave at the end of a visit in a public place." Also during this time, the Appellant "picketed the Asper Campus on a regular basis" wearing "a sandwich board protesting the fact that the Campus would not allow him access to his children at their daycare". He also "chose to picket the wife's synagogue on the High Holy Days, a local shopping mall and in front of his in-laws' home. Despite advice from his friends he refused to stop."

c) In September 2004, the court made a prevention order under the *Domestic Violence & Stalking Act* whereby the Appellant was enjoined from contact with the wife and children, from attending the children's recreational activities and from his in-laws' residence.

d) "Angry that daycare workers had filed affidavits in support of the wife's application for supervised access" the Appellant began to "bombard the members of the daycare board with phone calls and e-mails. He sent e-mails to other prominent people connected to the Asper Campus. The content of the emails embarrassed the wife and raised concerns as to whether other people's children would be safe from [him]."

e) Although his visits with the children appeared not to be an issue, the Appellant "would not abide by the agreed upon rules regarding pick-ups and drop-offs". If he raised inappropriate topics, the access supervisor was able to redirect him. "However, he did not seem to learn from her redirection efforts."

f) "Through counsel, the wife let the [Appellant] know she would be attending the synagogue for several events in March [2005] so that he would not attend and be in breach of the prevention order. The [Appellant] attended the synagogue, ostensibly to worship, and created an ugly scene in front of his children and others in attendance at the event. The wife called the police and the [Appellant] was charged."

g) The access supervisor quit in April 2005 "because the [Appellant's] behaviour during the visits deteriorated and he was no longer willing to redirect his conversations with the children."

h) "As the [Appellant]'s behaviour became more and more outrageous, the wife returned to court for more protection." In June 2005 the court "strengthened the earlier

prevention order, among other things, forbidding the Appellant from attending synagogue when the wife or children would be present" and setting out "a perimeter boundary around the Asper Campus within which the Appellant could not enter."

i) Commencing in August, 2005 the Appellant became a self-represented litigant in the family proceedings and has remained so to the present.

j) During supervised access visits the Appellant appears to have continued to "test" the rules set out by those agencies that he found "demeaning or insulting", but took direction from the visit monitor and accepted confiscation of gifts or toys that were not allowed by agency policy.

k) Justice Allen found that while his time with the children during this time was appropriate, "his activities in the community continued to cause concern. He was enraged about the children's daycare workers and an employee of [Jewish Child & Family Services] providing affidavits on behalf of the wife in the domestic litigation. He launched lawsuit after lawsuit. He gave interviews in the community newspaper about his family situation and what he believed to be the wife's parents' influence in the community. He contacted parents of the children's classmates. He sent information from a daycare worker's personal domestic file to parents of the daycare. The last straw came when he sent probate information about the wife's grandfather's estate to a host of community members."

l) "In February 2006, the court found that the [Appellant]'s use of these documents was psychological and emotional abuse of the wife and the children, constituting domestic violence." The Appellant was forbidden access to any court files other than his own, and only then under the supervision of court staff. He was also forbidden to contact staff and parents of the daycare, school and the Asper Campus. He appealed this order and the Court of Appeal varied it slightly to permit access to files in the course of any employment as a law student.

m) Meanwhile, the Appellant "continued his vendetta against the daycare and one board member in particular" (Ms. X.). "In January 2005, [Ms. X.] went to the police and the Appellant was charged with uttering threats. As part of his bail conditions he was ordered to have no contact with the complainant."

n) "The [uttering threats] charges were stayed in March 2005 in return for his entering into a peace bond. As well, the daycare board obtained an injunction against the Appellant forbidding him from attending near [Ms. X.] or from violating her privacy." (See paragraph 31 for further discussion surrounding the injunction.)

o) Ms. X. "continued getting harassing telephone calls. After an investigation, the police arrested the Appellant and charged him with criminal harassment and violation of the [injunction]. Ultimately, in 2006, the Appellant plead guilty to violation of the [injunction] and the harassment charge was dropped." (See paragraph 31 for further discussion of the circumstances surrounding the guilty plea.)

p) "In October 2006 the board of directors of the wife's synagogue banned the Appellant from attending its premises."

q) In December 2006 the Appellant resolved all his other outstanding lawsuits. (According

to the investigation Report, the Appellant entered into a consent order before Madam Justice Beard. The order is in effect until October 10, 2018.) He agreed that he would not commence any other litigation against those he had sued until his children were adults. Justice Allen concluded that "[i]n essence, the [Appellant] basically agreed he was a vexatious litigant."

31. The circumstances surrounding the Appellant's guilty plea in respect of the harassing phone calls was the subject of considerable discussion before the Panel. The following is based on the materials filed by counsel for the Law Society and in particular on the transcripts of Provincial Court proceedings:

a) The Appellant disposed of these charges in November, 2006. He pled guilty to violation of the injunction and the harassment charge was dropped.

b) The transcript of the sentencing proceedings indicates that the injunction was issued by Madam Justice Keyser on March 16, 2005 in favour of the daycare centre and included, amongst others, conditions that he be restrained from harassing, threatening or intimidating the daycare, its past, present and future employees and board members. The injunction specifically identified three women and their families, one of whom was Ms. X.

c) During her submission counsel for the Law Society demonstrated that Justice Allen's reference to violation of a "peace bond' in her judgment was in error and that in fact, the guilty plea was in respect of the breach of the injunction. The Panel accepts this submission.

d) The Honourable Judge Meyers presided at the sentencing proceeding. The Appellant plead guilty to the violation of the injunction order by making a telephone call to Ms. X. The transcript of that sentencing proceeding was filed as part of the Law Society's brief. Judge Meyers' reasons for sentence were filed by the Appellant.

e) In his appeal brief the Appellant characterized this as a "single annoying phone call". Counsel for the Law Society took issue with that characterization and pointed to the extensive submission of the Crown Attorney to Judge Meyers as evidence that there was more to this incident than a "single annoying phone call". Briefly stated that submission suggests that although Applicant A was pleading guilty in respect of only one phone call there was evidence which, had the matter proceeded to trial, could lead to the conclusion that between November 2005 and April 2006 he had in fact made over 30 "hang-up" calls to the complainant between the hours of 9:13 p.m. and 6:35 a.m. from MTS payphones within three city blocks of his apartment. The fact that the Crown would make this submission was part of the plea bargain.

f) In the result, Judge Meyers accepted the joint recommendation of two years probation and imposed a conditional discharge which included the condition that Applicant A not be allowed to use a public telephone between 9:00 p.m. and 7:00 a.m.

g) Before the Panel the Appellant denied that he made any other calls and indicated that he entered the guilty plea out of expediency.

32. The chronology is picked up again from the Investigation Report:

(a) In April, 2007 the Appellant was charged with causing a disturbance and breach of the November 2006 probation order in respect of an incident involving a 17-year old female clerk at a McDonald's Restaurant. The charges were stayed on October 16, 2007 when he agreed to be bound by a one year peace bond.

(b) Although not elaborated upon during these proceedings the Investigation Report indicates that during the course of the domestic litigation the Appellant was twice found to be in contempt of court. The Appellant confirmed this in response to questions from the Panel.

33. As part of the 2007 Judgment the Appellant was ordered to pay some $126,000 in costs to his ex-wife. That amount remains outstanding although the Appellant advised the Panel that he fully intends to pay it when he has the financial means to do so.

34, In her 2007 Judgment Justice Allen also made extensive comments with respect to Applicant A's credibility. They were referred to by the Director in the Admissions Decision and quoted at length in the Investigation Report. As they bear directly on the issue of the Appellant's character and fitness they are reproduced here as well:

> "[45] Before examining the legal issues, I must comment on the husband's behaviour in court, towards his family, the community and when dealing with any persons in authority, and the impact that behaviour has had on his credibility.
>
> [46] I found the husband to be the most disrespectful person who has ever appeared before me. Even allowing for the stress of representing himself in a lengthy trial with a myriad of legal and emotional issues, I found his manner excessive and almost uncontrollable. He continually disregarded my instructions/admonishments, showed no regard for courtroom decorum, and interrupted and erupted whenever he felt like it. His self control was minimal.
>
> [47] In order to manage his behaviour I was required to use measures such as the use of hand signals to signal that he must stop talking, the imposition of "time outs", sending him out into the hallway so counsel could read documents uninterrupted, and instructing witnesses not to answer his questions until he was seated so that the witness would not be bombarded with further questions and argument in the middle of an answer. If an evidentiary ruling went against him, he usually reacted by threatening to call a prominent member of the Jewish community as a witness.
>
> [48] Although a qualified lawyer in Israel, the husband's fixation on a "conflict of interest" between what he called the wife's family's power and influence in the Jewish community and their perceived influence on the Jewish institutions from which he has now been banned caused him to lead a myriad of irrelevant evidence, most of which harmed his case.
>
> [49] For example (but one of many), the husband called both the rabbi and the president of the synagogue which had banned the husband from its premises. On this point, the evidence had been that there was a prevention order preventing the husband from attending the synagogue when the wife was to be there, and that there had been some harassing behavior towards the wife in the presence of others at the synagogue before the general ban was put into place.

[50] Once these two witnesses had given their testimony, I had learned of the husband's disrespectful behavior towards the rabbi and others both inside and outside the place of worship, and even during the ceremony of worship itself. As a result, I conclude that the husband's inability to control himself in court is not simply attributable to the stress of the trial itself but extends into any place where he feels the wife's family's influence stretched, including the synagogue, regardless of the sacred nature of that place of worship.

[51] In Israel, the husband held the relatively senior rank of captain in the Israeli army. When he returned to Israel in 2003, he was called up for reserve duty, so I assume that he was able to follow orders and behave appropriately in a military environment. Knowing this background, his inability to take direction, whether from the court, the visit supervisors or from his friends, was all the more unfathomable. When queried on this point, the husband's evidence was that he could and did follow orders when "his life was on the line" but fighting for his children was far more important than life itself. I find this distinction means the husband sees himself free to act out whenever he wishes if he feels it appropriate to do so. I therefore question what parts of his behaviour are calculated and what parts he simply cannot control. Certainly, when told by a court that his behaviour was "torpedoing" his case, the expectation is that the behaviour will improve: for the husband, it did - for about 30 minutes.

[52] Many times during the trial, I was reminded of a two year old having a tantrum saying, "I'll stop if you give me what I want." Indeed, in evidence, the husband said, "the only solution to my problem is for me to see my kids." He blames his anger and outbursts on all the external forces preventing him from getting his wish. The list is long and includes the wife's family and their perceived influence in the Jewish community, the wife's lawyer, the daycare, most Jewish organizations, the court backlog, the access supervisors' restrictions on his role as a father and the failure of many persons in authority to sit down and talk with him. However, in my view, the husband's version of talking would be for him to harangue and overwhelm the other side until he got what he wanted.

[53] In examining the husband's attitude and demeanour throughout the trial, it became clear he would say whatever he thought most expedient in the heat of the moment. He pleaded guilty to a charge of making a harassing phone call, but tried for some "wiggle room" by saying that his lawyer and not himself, entered the plea. He pointed to the settlement of all his various lawsuits and the agreement that he was in essence a vexatious litigant, as proof that all that was behind him, yet it was very clear in his handling of witnesses who had been part of any of those lawsuits that his anger at the various people and institutions who he felt had wronged him was still clearly present. His witness list included many of the people connected to his other litigation, even though most of these witnesses had only slight or tangential relevance to the issues before the court.

[54] At times, the husband out and out lied to the court. While the husband was on the witness stand giving his evidence, he was first suspended and then terminated from the access agency. He was asked what he had told the children in their nightly phone call. Despite knowing that the wife tapes all calls, he denied telling the children he was on a "time out," denied that he had talked to them about the nice judge who had three children herself, denied that he had said he and mommy were seeing the nice judge every day, and denied saying that soon he would see the children more and without other people around.

[55] The tape was played and indeed the husband had said all those things and more. His explanation was that it had been a terrible day for him as it was the day he found out that, despite his reinstatement at the access agency three clays before, they were now terminating

his use of the centre based on his flouting of their authority the night before.

[56] I note that the husband, when confronted with promises he had made and then broken (for example telling the motions judge that he would stop picketing or signing an agreement with the access agency that he would not communicate except in writing), had elaborate rationales for why he was justified in breaking his word. Regarding the promise to the judge, he said he thought he was agreeing to this because she said he could see his kids in a few months and when he could not, he felt the judge had broken her word first. He said he only signed the agreement so he could see the children, and anyway, a phone call to the agency he made was only regarding a fax he had sent and so did not count as a communication.

[57] Finally, in argument, the husband said he was going to apologize for his courtroom behaviour. He gave a litany of excuses and rationales for his actions. He then moved to a different topic, saying; "well the apology is done." However, I had heard no apology and when I commented on that fact, he seemed quite startled and finally offered his apology to the court.

[58] As a result of the many overstatements, misstatements and fabrications of the husband, I find that I am unable to rely on his evidence. Where it conflicts with that of any other witness, I prefer the,other evidence than that of the husband."

35. Justice Allen made further comments of relevance regarding the Appellant's conduct leading up to the 2007 Judgment:

"[61] ...He demonstrated, time and time again throughout the trial, that he is incapable of letting go of issues and what he perceives as slights. He showed some small ability to appreciate another point of view, but that positive factor was offset by his unjustified view that the wife's family and their influence is the cause of all his problems rather than his own actions.

…

[80] These children unfortunately have a father who has behaved in ways far off the mainstream of life in Winnipeg. He has done foolish things, embarrassing things and harmful things. He has harassed people. He has almost no ability to self monitor or ask himself whether his children would be proud of his behaviour or humiliated by it. In large part, I expect that if the children were old enough, they would be humiliated if they knew of many of the things he has done.

[81] On the other hand, the assessor found a marked improvement in the [Appellant]'s behavior at the time of the second assessment. She likened his courtroom antics while she was giving her evidence to his behaviour during the first assessment, but said that he had shown some improvement during the second one. As well, she noted the parent-child interactions showed marked improvement. During the home visits, she found his parenting to be superb and exemplary.

…

[84] The [Appellant] blames his "misbehaviour" on the "absurd" nature of the WCAA's rules and procedures. He finds it humiliating to have to follow their rules and as a result engages in a stealth war, trying to wiggle around every rule he can.

…

[86] In his battles with the WCAA, the [Appellant] has chosen to put his interests over the children and for the moment has lost that place of last resort for the children to see their father. In my view, he can blame no one but himself for continuing his pattern of sabotaging his relationship with his children."

The Application

36. The process that led to Applicant A's appearance before the Panel began with his submission on October 28, 2008, of an Application for Admission to Manitoba CPLED Program and as an Articling Student for 2008-09. Since this matter stems from what was and what was not disclosed in the Application it is useful to include relevant excerpts from the form that Applicant A was asked to fill out. [All emphases in bold are contained in the original.]

37. The first page contains the following admonition:

"All questions must be answered fully in legible printing according to the instructions. The answers are to be declared before a Notary Public or Commissioner for Oaths. The utmost good faith and fullest disclosure are required. **Omissions or inaccuracies will be grounds for rejection of the application, or expulsion from the Manitoba CPLED Program. Please review the Guidelines for Good Character.**

If there is not enough space provided for any answer, complete the answer on separate pages, with each page signed at the bottom."

38. The following questions of particular relevance to these appeals are among those that the Appellant answered. The Appellant's responses are set out in paragraphs 42 to 50.

"8. Were you ever suspended or expelled, or found guilty of academic misconduct by any post-secondary institution? (If "yes", please elaborate on a separate sheet).

10. Have you ever been found guilty of a crime or any other offence under any statute, regulation or law, with the exception of three or less convictions under *The Highway Traffic Act, The Liquor Control Act,* or any municipal by-law? (Offences for which incarceration was ordered, or a conditional or absolute discharge has been granted, or for which a pardon has been obtained must be disclosed).

APPLICANTS MUST PROVIDE A PERSONAL CRIMINAL RECORD SEARCH CERTIFICATE RECORDED IN THE NATIONAL REPOSITORY OF OTTAWA.

11. Have you ever been convicted or found liable as a result of breach of trust, fraud, perjury, immorality, dishonourable conduct, misrepresentation, dishonesty or undue influence in any civil, criminal or administrative proceeding?

12. Are you currently charged with any offence under a federal statute?

13. Have you ever been suspended, disqualified, censured or had disciplinary action imposed on you as a member of any profession or organization?

14. Have you ever been denied or had revoked any license or permit, the procurement of which required proof of good character?

If any part of questions 10 to 14 are answered in the affirmative, or if you are currently being sued or are the subject of proceedings in any matters above, **refer to the attached guidelines for good character applications. Full details of your history must be provided on a separate sheet attached to your application.**

15. a) Have you ever been, or are you now involved in, or do you have pending any involvement in matter's concerning bankruptcy or insolvency on your part or the part of any corporation or enterprise in which you are a principal, director or shareholder?

b) Are you the subject of any order by a court or tribunal with respect to the above mentioned matters?

16. Have you ever had an order of committal or an order for the issue of a writ of attachment made against you?

17. Do you have any outstanding judgments, including unpaid fines, against you?

18. Have you ever previously applied for admission as a bar admission student or articling student in Manitoba or in any other jurisdiction?

19. Are you, or have you been a student or member in the Law Society of any other jurisdiction, or of any other professional body in Manitoba or another jurisdiction?

20. Is there to your knowledge or belief any event, circumstance, condition or matter not disclosed in your replies to the preceding questions that touches on or may concern your conduct, character and reputation, and that you know or believe might be thought to be an impediment to your admission, or any matter that could warrant further inquiry by the Society?

If you answered yes to any of questions 15 to 20, **please provide full details on a separate page.**"

39. And, at the end of the form the prospective student is required to give an undertaking, which includes the following:

"**I undertake that if admitted, I shall so far as it is in my power, faithfully observe the rules of the Society, meet and maintain the standards of professional conduct required of an articling student, faithfully discharge my obligations under the articling agreement with my principal, and punctually meet all debts and perform all academic and other obligations owed to the Society and the Manitoba CPLED Program.**

…

I shall promptly and fully report to the Law Society any event, circumstance or condition occurring or arising that to my knowledge or belief concerns my

reputation, character and fitness to be called, admitted and licensed.

…

I,_____, the applicant in the above Application for Admission, DO SOLEMNLY DECLARE that the statements contained in this Application for Admission and in any added pages are complete and true in every respect.

I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath. "

40. The "guidelines for good character applications" (the Guidelines) referred to in the paragraph immediately following Question 14, are set out in full below. These are the same guidelines referred to in the Admissions Decision; they provide as follows:

"Candidates applying for admission to the Manitoba CPLED Program and as an articling student, or seeking permission to resume active practice or transfer to the Manitoba Bar must disclose the following:

(a) all convictions for crimes or other offences under any statute, regulation or law, except convictions under *The Highway Traffic Act*, *The Liquor Control Act*, or municipal bylaw, unless there are four or more violations or a term of incarceration;

(b) any conviction or finding of liability as a result of breach of trust, fraud, perjury, immorality, dishonourable conduct, misrepresentation, dishonesty or undue influence in any civil, criminal or administrative proceeding;

(c) any order made against the candidate regarding institution of vexatious proceedings or vexatious conduct of a proceeding, pursuant to s. 73(1) of *The Court of Queen's Bench Act*, or such similar legislation as may be in effect in any other Canadian jurisdiction;

(d) any suspension, disqualification, censure or disciplinary action imposed as a member of any profession or organization;

(e) denial or revocation of any licence requirement, the procurement of which required proof of good character;

In addition, applicants must disclose whether they have ever suffered from or been treated for, or are currently being treated for, any condition which may compromise their ability to practice.*

The Law Society may consider other information which, though not strictly fitting within the categories above, might constitute behaviour coming under Rules 5-4, 5-24(2) and 5-28.1, such as conduct which demonstrates or indicates an attitude of disrespect or abusiveness of the Court and its processes.

Any such disclosures by a candidate or other relevant matters otherwise learned of by the Law Society will establish a rebuttable presumption that a candidate is not of good character and a fit and proper person under Rules 5-4, 5-24(2) and 5-28.1. In

considering whether such a presumption has been rebutted by the candidate, the Law Society may have regard to the following:

1. the applicant's candour, sincerity and full disclosure in the filings and proceedings as to character and fitness;
2. the materiality of any omissions or misrepresentations;
3. the frequency and recency of the conduct or behaviour disclosed that gives rise to the presumption;
4. the nature and extent of the applicant's voluntary treatment or rehabilitation;
5. the applicant's current attitude about the subject of their disclosure;
6. the applicant's subsequent constructive activities and accomplishments;
7. evidence of character and moral fitness including the reasonably informed opinion of' others regarding the applicant's present moral character; and
8. in light of the entire record of the applicant, whether admission of the applicant would adversely affect the confidence of the public in the legal profession in Manitoba as an honourable, ethical and competent profession.

Where the disclosure relates to a criminal law matter or offence, the following criteria may also be applied by the Law Society;

9. the nature and character of any offences committed;
10. the number and duration of offences;
11. the age and maturity of the applicant when any offences were committed;
12. the social and historical context in which any offences were committed;
13. the sufficiency of the punishment given for any offences;
14. the grant or denial of a pardon or discharge for any offences committed;
15. the number of years that have elapsed since the last offence was committed, and the presence or absence of misconduct during that period;
16. the extent to which the applicant has made restitution and to which, if known, the restitution was made voluntarily at the initiative of the applicant, or as a consequence of the order of the Court"

*Examples of conditions which could compromise one's ability to practice include alcoholism, addictions and substance abuse, gambling, illnesses or disabilities.

41. Applicant A filled out his application by hand, dated it October 27, 2008 and as noted, submitted it to the Law Society on October 28, 2008. Certain of his responses are relevant to these proceedings.

42. In response to Question 8, Applicant A answered "No".

43. In response to Question 10, Applicant A answered "Yes" and added a note that he had "one discharge" and "no convictions or pending charges".

44. In response to Questions 11 through 15(a) & 15(b) Applicant A answered "No".

45. Applicant A omitted to answer Question 16 (although nothing appears to turn on that fact).

46. In response to Question 17, Applicant A answered "Yes", stroked out the words "unpaid fines" and added a note that reads "only in my divorce proceedings in Court: File [number removed](Q.B,) (FD) [number removed]: Unpaid trial costs since July of 2007" with a footnote that reads "All of which can be easily and fully viewed on-line [(website link removed)]."

47. Applicant A answered "Yes" to Questions 18 and 19.

48. In response to Question 20, Applicant A answered "No".

49. It appears that the only additional documentation attached to the application were three pages of printouts of the "File Details" from the Manitoba Courts website with respect to File FD [file number and case name deleted vs Applicant A].

50. In particular, no further details appear to have been provided by Applicant A in respect of his affirmative answers to Questions 10 and 17.

The Investigation

51. According to the Admissions Decision, as a result of the disclosures in Questions 10 and 17 the Law Society commenced an investigation into "the question of [the Appellant's] good character and fitness to practise."

52. The Appellant provided his written consent to the investigation on November 10, 2008.

53. The investigation was conducted by Mr. Joe Gallagher, a former employee of the Law Society now in private practice as a lawyer in Winnipeg. It continued for some eight months concluding with Mr. Gallagher's report to the Law Society dated July 27, 2009.

54. The investigation was extensive, it included:

a. A review of various court decisions from the domestic litigation in which the Appellant was involved (among them the 2007 Judgment);

b. Mr. Gallagher's observation of Applicant A during five court appearances (in both the Provincial Court and the Court of Queen's Bench);

c. A review of various communications from the Provincial Crown Attorney's office and transcripts of various criminal proceedings in which Applicant A was involved;

d. An examination of an incident in March, 2009 regarding Applicant A's obtaining and use of an internal Manitoba Justice memorandum (and including interviews with Mr. Maury Stephenson, Mr. Sean Boyd and Mr. Izzie Frost, the Manitoba Justice lawyers involved in the incident); and

e. Interviews with numerous persons, including the ten character references provided to Mr. Gallagher by the Appellant, the Appellant's ex-wife and on May 21, 2009 for a period of some seven or eight hours, the Appellant himself.

55. The Investigation Report appears to be at least 32 pages in length plus a three

page email from Applicant A to Mr. Gallagher dated May 23, 2009. Neither the Appellant nor the Panel was provided with the full report pursuant to the Law Society's claim of solicitor-client privilege over the portions not disclosed. As described below this was the subject of one of the Appellant's motions.

56. Further reference will be made to the Investigation Report in the discussion below. In the meantime, however, the Panel notes that it is not placing any weight on the following incidents described in the Report:

a. Section 5 "Possibly misleading staff of the Society".

b. Section 6 "Concerns raised by Manitoba Justice, Prosecutions Services".

c. Section 8 "Photographs shown to court staff person".

d. Section 9 "Unauthorized possession & use of internal Mb. Justice document".

e. Section 10 "The latest criminal charges".

57. In the case of Sections 5 and 8, on the basis of the Appellant's submissions these may have been legitimate misunderstandings, particularly given the Appellant's recognized capacity to "rub people the wrong way" as one of his references put it. While not determining the issue one way or the other the Panel has simply chosen to give no weight to these items.

58. In the case of Section 6 the Report indicates that the allegations were based on a February 15, 2008 letter from the Assistant Deputy Attorney General to the Law Society but that on following up it appears that the Investigator was unable to interview any of those directly involved. It is significant that the Assistant Deputy Attorney General would go to the trouble of writing what appears to have been a fairly detailed letter expressing concerns about Applicant A's conduct. However, the Panel is left with no direct evidence on the point and therefore declines to give it any weight.

59. Section 9 is somewhat more troubling. This was the subject of considerable discussion during the hearing and is one of the areas where direct evidence may have been of assistance in resolving the Panel's concerns about what transpired. It is concerning that in discussing this allegation with the Investigator Applicant A stated "I am afraid I misled Tony Kavanagh about telling him I had received an email... This one I am ashamed of but found the contents of the memo so shocking I wasn't thinking straight." However, the Appellant vehemently denies that he took the memo deliberately and having no direct evidence to the contrary the Panel declines to give this allegation any weight.

60. Finally, Section 10 relates to charges of sexual assault and sexual interference on the part of the Appellant. Applicant A vigourously denied the allegation. The charges were ultimately stayed on May 12, 2009 after he entered into a one year peace bond. More significantly, in Justice Allen's 2009 Judgment (discussed immediately below) the factual underpinnings of the allegations were dismissed in a civil proceeding, i.e., on a balance of probabilities. From the Panel's perspective the only possible relevance of these allegations at this point is to explain some of the delay in completing the investigation, as clearly the Law Society could not simply ignore them. Accordingly, for the purpose of deciding these appeals the Panel ascribes these allegations no weight.

Justice Allen's 2009 Judgment

61. On August 4, 2009 Justice Allen issued a further judgment in the domestic proceedings.

62. The Appellant describes the 2009 Judgment as an accurate reflection of his current character and urges the Panel to give great weight to it and little or none to the 2007 Judgment. Accordingly, it is appropriate to pay careful attention to this decision as well. Of note in the 2009 Judgment are the following comments:

> [5] At the time of my original order, the father, a qualified lawyer in Israel and new immigrant to Canada, was, in many ways, basically out of control. He was at "war" with what he believed to be the mother's rich and powerful family who he felt were exerting their influence in the mother's community against him. As a result of those beliefs, he acted in a very negative fashion in that community and was banned from two of the central religious and cultural institutions of that community.
>
> [6] While I found the father to be a rude and disrespectful person who lacked almost any vestige of self control when he perceived himself to be threatened, I also found that he did have something to offer his children. Indeed, the psychologist who assessed him called his parenting, albeit under close supervision, 'exemplary." I further accepted her findings that the children would suffer a sense of loss should the father be removed from their life. However I was concerned that the father, while in charge of the children, might "lose it" if he perceived he was being slighted. I also was concerned that the father would speak negatively about the mother and her family to the children. Accordingly, I ordered that all access take place in the company of a friend of the father's who was charged with the responsibility of removing the children if the father "lost it" during a visit. I also required her to caution him if he veered into negative discussions about the mother's family and friends, and if he persisted, to cut short the visit and return the children to the mother.
>
> [7] I further ordered that the father not return to court for one year without leave of the court in order to give the high conflict family some litigation peace.
>
> [8] Despite that order, during the year post judgment, the father made several court applications, all but one of which were dismissed for lack of merit.
>
> . . .
>
> [51] Based on the affidavit material, I find that the father has improved his behaviour significantly since the trial. I further find that the father has improved his behaviour in the courtroom. While he still was prone to interrupt and talk over opposing counsel, overall, and particularly given the emotional issues relating to the abuse allegations, I find that the father acted no worse than many self-represented parties and often behaved much better. Clearly, his ability to control himself has improved.
>
> [52] Further, the fact that the children's classmates' parents permit their children to socialize with them at their father's house demonstrates that at least some members of their community find the father's behaviour acceptable. I also note that the father has been permitted by the parents' association at the school to participate in off school property events. This again, is a marked improvement from the trial when parents were reluctant to let their children associate with the [name omitted] children for fear that they would somehow be drawn into the maelstrom that was occurring then. I also consider that the father appears to have made other friends who

have children and those people have found socializing with the father and the children a pleasant experience.

[53] There is no doubt that the children love their father. There is independent third party evidence that they want to spend more time with their father and do not understand exactly why their situation is so different from that of other friends whose parents are separated or divorced.

[54] Further, there is no doubt that these children are the product of an extremely high conflict divorce with all the baggage that entails. The worker who interviewed the children around the abuse allegations particularly noted the older daughter's reluctance to speak of her situation. Her comment that she doesn't say much to her mother or to her father about the other parent reflects the sad reality of her life. The mother says she does not pry but is concerned about the children's unwillingness to share with her what they do with their father. She sees this as sinister and says should have a supervisor who will report on visits. I do not see this as sinister but rather a byproduct of being caught in the middle of high conflict parents.

[55] While the genesis of the mother's attitude arises from the years of outrageous behaviour on the part of the father, I am concerned that the mother does not appear to recognize the positive changes the father has undergone. While the mother pays lip service to the children's need to see their father, the most she would admit on cross examination was that the children "possibly" loved their father. She feels he is little more than a playmate to them. However, as she has never sent homework with them on a visit, she certainly is not encouraging him to be anything else but a playmate. I further question her commitment to fostering a relationship because, at the end of the motion when I ordered some brief access for the next day the mother said that only the older child could go because the younger one had plans to go to a friend's cottage, a surprising comment given that the children had not had face to face contact with their father for some six months. I also query the mother's explanation to the children for the suspension of access; in my view giving the children the details of their father's arrest and the reasons for it was not age appropriate.

[56] I find most of the items on the mother's list of the father's shortfalls are not significant. In determining access, the court requires the father to be a "good enough" parent, not a paragon.

[57] I find that there are three areas of potential concern. The first is the fact that the father, on at least three occasions in the last 16 months, has continued to denigrate the mother's family. The father knows this is a concern to the court and should know that this kind of talk is damaging to his "beloved" daughters. However, it is no secret to children placed in the middle of a high conflict divorce that their parents do not get along and probably despise each other. In those circumstances, the solution rarely encompasses supervision or termination of access except in the most extreme eases. In this case I do not find that the father has gone beyond the pale, but do find that any talk about the mother's family diminishes his ability to be the best parent possible to his children.

[58] The second area is the father setting up the older daughter's email account and sending three emails to her. I find the father's explanation as to how that occurred ludicrous.

[59] The father knew this form of communication was in breach of my order and his rationalization about it defies common sense. This was a testing of the mother's limits and is far more reminiscent of his continual testing of the rules when under supervision during the time frame leading up to the trial and during the trial.

. . .

> [77] I have imposed a lengthy phase-in period in order to hedge against the risk of the father's harmful talk about the mother's family resuming. Clearly he has achieved great progress but he still has work to do in keeping his feelings to himself."

63. The third area of concern referred to by Justice Allen related to the allegations of sexual assault and sexual interference referred to above. As indicated, the Panel places no weight on them.

The Appellant's References

64. The Appellant provided the Investigator with the names of ten character references; eight lawyers and two lay persons. All of them were interviewed and the results of the interviews are set out in the Report. Drawing directly from the Report, their views can be summarized as follows:

a. Howard Tennenhouse - Mr. Tennenhouse was the Appellant's counsel in the family proceedings until August 2005 and "feels that he is probably best informed to provide an opinion about [him]." He believes the Appellant to be “a very honest person and misunderstood on many levels." He thinks that he is "settling down now -- did a lot of stupid things and didn't have the skill or experience required at his trial." He describes the Appellant as having been, at least at times, "uncontrollable" in the past and that his "judgment was not good at times." He does not think that the Appellant "should be judged on the basis that he does not fit in here." When asked as to his opinion of the Appellant's character and fitness he said "You have to ask whether he deserves to be a lawyer" and "feels that the Society should let [Applicant A] have a chance and then deal with him if he proves not to be a good lawyer."

b. Greg Littlejohn - Mr. Littlejohn could not provide any opinion as to the Appellant's character or fitness. He stated that he only knows the Appellant casually and that he has found him to be pleasant.

c. John Ramsay - Mr. Ramsay knows the Appellant through past contact with Mr. Ramsay's office and by casual observation at the courts. He advised the Appellant that "the way in which he was conducting his family proceedings was damaging to his long-term legal career in the province." He said that while some clients might "love the way he handles things that style doesn't work well here." He described the Appellant's style as "extremely aggressive." He felt that, "with the right principal to guide him, [Applicant A] should be given a chance."

d. Lynda Grimes - Ms Grimes knows him from her office and ongoing contact over the past several years. She sees him as "a person of integrity such as when speaking about a decision she has never heard him speak disrespectfully about the court or a judge even if the decision went against him." She said that he has made errors in judgment but "thinks this can be learned and the way he leaves no stone unturned can be valuable for his clients." She thinks that "he ought to have the chance to be admitted and should not be denied the chance - she feels what he has done was all in the fight for his children."

e. Martin Glazer - Mr. Glazer knows the Appellant as a friend. He believes Applicant

A "has integrity and is trustworthy". He described the Appellant as "very zealous, maybe over zealous at times, with an aim to get his children back but he is rough around the edges." Mr. Glazer is "impressed with what [Applicant A] has learned through experience but believes he has to learn you can get more bees with honey than with vinegar. He has to find a balance but this is something that he will learn over time with experience." He feels that the Appellant's "judgment is sometimes affected by his drive but he does not see him as deceptive or devious." He is of the opinion that the Appellant "is a person of good character and a fit and proper person to be admitted as an articling student." Mr. Glazer described the Appellant as "a diamond in the rough who may later come to be regarded as a senator."

f. Jackson H. Mugerwa - He has known the Appellant from Mr. Bortoluzzi's office. He has found the Appellant "to be a person of great integrity and to be very tenacious and a person who he can trust to get the job done." Mr. Mugerwa finds the Appellant to be "very resourceful and thorough." He acknowledges Applicant A "has ruffled feathers but has shown himself to be a very ethical person." He believes that "issues became personal for [Applicant A] and this affected his judgment and he rubbed people the wrong way especially when his family matters were involved." When asked as to his opinion of Applicant A's good character and whether he should be admitted to articles, Mr. Mugerwa gave "what he describes as resounding `yes' based on what he has seen of [Applicant A]."

g. John Sinclair - Mr. Sinclair met the Appellant through a colleague and has spoken with him in his (Mr. Sinclair's) office. He believes the Appellant to be "a father who was really fighting for his children and who was respectful of the courts, but not afraid to challenge them." Mr. Sinclair described the Appellant as "emotional but not crazy" and that he "is not afraid of a fight but follows all the rules." He feels that Applicant A "has good judgment". He had "no hesitation in saying [Applicant A] is a person of good character and should be admitted" Mr. Sinclair thinks that the Appellant "would be an asset to the profession and if admitted he would become more comfortable and relaxed."

h. Fred Bortoluzzi - Mr. Bortoluzzi met Applicant A approximately one year ago when he was referred by Mr. Glazer for an articling position. Mr. Bortoluzzi "hired [Applicant A] to do some work process serving and do some research but ended the relationship in January 2009. He found [Applicant A] to be very respectful but difficult to direct as he has his own strong opinions on how to do things." He stated that "he can't question Applicant A's integrity." As to his character and fitness to be admitted as an articling student, "Mr. Bortoluzzi stated that he has offered Applicant A an articling position and thinks he should be given an opportunity to prove himself."

i. Rami Meged - Mr, Meged is a "very close personal friend". He provided the Certificate of Character in support of Applicant A's Application. He stated that "if you do one favour for [Applicant A] he will do five back for you." He "has integrity° and on a professional level is "extremely ethical and committed to completing a job." He believes that the Appellant is "striving *to* improve and is getting better all the time". He feels that when the Appellant's "child access issues are settled he will be a different person and he has the potential to be a great lawyer." He believes that the Appellant is "a person of excellent character and should be admitted."

j. Susan Koskinen - Ms Koskinen is a personal friend and has been the court-ordered supervisor of the Appellant's visits with his children. In her view, the Appellant is "very trustworthy". She noted that "while he will explode and has a wicked tongue she finds him to be very ethical and more recently has seen him ask for a recess in court when he sensed a difficult moment." She feels that it is only in his family matters that he reacts in that way and that "he is controlling his emotions better." She is of the view that the Appellant is a person of good character and should be admitted as an articling student. She said that "you have to see past the surface with [Applicant A] and she believes he will be an asset because he will fight for what is right."

65. In addition, according to the Appellant Mr. Gallagher also interviewed the Appellant's ex-wife and she was supportive of his application to article.

66. In the Admissions Decision the Director concluded that the Appellant did not provide complete disclosure in the application process, but "demonstrated sincerity in the investigative process."

67. The Appellant is apparently working from time to time as a legal secretary for Mr. Bortoluzzi.

THE MOTIONS

68. As indicated previously all but one of the six motions (the first, related to immediate enrolment in CPLED) were disposed of during the hearing. For the sake of completeness those rulings are reiterated here although the legal underpinnings for the rulings have been expressed more fully than they were at the hearing.

69. During the hearing the Appellant was at pains to point out that he meant nothing personal or disrespectful in bringing the various motions that he did. As we indicated at the time the Panel accepts that.

REASONABLE APPREHENSION OF BIAS ON THE PART OF MR. TOEWS

70. Although there appeared to be some confusion during the hearing, the essence of this allegation was that because the firm of which Mr. Toews is a partner has a contract with the Law Society to perform occasional custodial work in respect of the files of deceased lawyers and because Mr. Toews has himself worked on at least one such file, the Law Society is a client of Mr. Toews and his firm and he therefore has a bias in favour of the Law Society.

71. Given the impact that the outcome of this motion could have had on the remainder of the hearing the Panel dealt with this motion first.

72. After hearing submissions from the parties the Panel adjourned to deliberate. Mr. Toews assured the remaining panel members that he did not feel in any way conflicted or unable to render a fair and impartial judgment as a result of his firms' involvement in the custodial work for the taw Society. Mr. Toews then withdrew from the boardroom leaving only the two remaining panel members to make the decision.

73. The law with respect to allegations of bias on the part of an administrative

tribunal is well settled.

74. The onus of establishing that a reasonable apprehension of bias exists is on the Appellant. As set out in Jones & de Villars, *Principles of Administrative Law,* Carswell, 1999 at p.401:

> "The courts will start with a presumption that the tribunal has acted without bias,.. The meaning of the presumption of legality is simply this: the onus of establishing a reasonable apprehension of bias is on the party making the allegation. The tribunal has no onus to justify its conduct in the face of a bare allegation; it has, at most, a strategic onus of fending off allegations of bias that would otherwise be sufficient to establish a *prima facie* case. The applicant has to establish a case. Mere speculation will not do."

75. The Manitoba Court of Appeal's 2004 decision in *Fletcher v MPIC,* 2004 MBCA 192 (CanLII), provides a good synopsis of the test. Quoting the Supreme Court of Canada's 2002 decision in *Wewaykum Indian Band v.* Canada, 2003 SCC 45 (CanLII) the Court defined "bias" as follows:

> "... [A] leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case."

76. Again quoting *Wewaykurn* the Court in *Fletcher* accepted the test for a reasonable apprehension of bias as;

> "… [W]hat would an informed person, viewing the matter realistically and practically -- and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

77. Citing another Supreme Court decision, *R. v. S. (R.D.)* [1997] 3SCR 484, the Court noted that:

> "… [The test] contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. [Citations omitted] Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including `the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold'."

78. It also confirmed that the threshold for establishing such an apprehension of bias is a high one:

> "Nonetheless the English and Canadian case law does properly support the appellant's contention that a real likelihood or probability of bias must be demonstrated, and that a mere suspicion is not enough. ...

> Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high."

79. The Supreme Court's 1991 decision in *Pearlman v. Law* Society *of Manitoba,* SCC 1991 CarswellMan 201, is helpful in considering the application of these principles to self-regulated professions. Speaking directly to the issue of alleged bias on the part of professional discipline bodies the Court agreed with the comments of Monnin, CJM in an earlier Manitoba Court of Appeal decision (*Law Society of Manitoba v Savino,* [1983] 6 WWR 538). In *Savino* Monnin, CJM had concluded that

> "No one is better qualified to say what constitutes professional misconduct than a group of practicing barristers who are themselves subject to the rules established by their governing body."

80. In *Pearlman* Iacobucci, J accepted that conclusion and went on to say that:

> "Consequently, it is in this wider context, i.e., a self-regulating profession which has set up formal structures for maintaining the discipline and standards of conduct appropriate to the legal profession, that the reasonable apprehension of bias test should be applied in the instant appeal."

81. The proper test in this case is therefore whether the perceived interest that Mr. Toews is alleged to have in a rejection of Applicant A's appeals creates an apprehension in a reasonably well-informed person that the Panel will probably not decide the matter fairly.

82. Also and as recognized in *Fletcher,* it is significant that the ultimate decision of the Panel in respect of the appeals would not be that of Mr. Toews. Rather, it would be the decision of all three panellists.

83. As noted, Mr. Toews did not take part in the decision on this motion.

84. The remaining panel members concluded that the alleged interest on his part was too remote and the allegation too speculative to find a reasonable apprehension of bias on the part of Mr. Toews. The informed person, viewing the matter realistically and practically and in the context of a self-regulated profession --- and having thought the matter through -- would not think it probable that Mr. Toews would consciously or unconsciously be unable to decide the appeals fairly. Rather he or she would believe that the Panel, including Mr. Toews, would discharge their duties in the recognized "tradition of integrity and impartiality".

85. In saying this we do not simply dismiss Applicant A's perceptions out of hand. However, the perception of a reasonable apprehension of bias must be assessed on an objective basis not a subjective one. Thus, while relevant, his perceptions are not determinative.

86. The motion was dismissed.

REASONABLE APPREHENSION OF BIAS ON THE PART OF THE CEO AND DEPUTY CEO

87. In his August l8th letter the Appellant's motion sought:

"[A]n order instructing that the CEO of the Law Society and his Deputy have no impact on the process and outcome of the appeal before the committee, due to bias on their side against the [A]ppellant, resulting from their ties to his former parents-in-law."

88. The parties approached the motion as being an allegation that a reasonable apprehension of bias exists with respect to the Chief Executive Officer of the Law Society and the Deputy CEO of the Law Society on the basis of "ties to [the Appellant's) former parents-in-law".

89. The relevant law is set out above. In addition, s. 7(5) of the *Fair Registration Practices Act* requires that "[n]o one who acted as a decision-maker in respect of a registration decision may act as a decision-maker in an internal review or appeal in respect of that registration decision".

90. The Appellant provided no actual evidence of the alleged "ties to his former parents-in-law" that could lead to an apprehension of bias. His motion was based simply on the suggestions that the CEO and the Deputy CEO attend the same synagogue as his former parents-in-law, that the school at which their children had attended or may be attending is or was funded by them and other similar connections that might fairly be described as "community-based".

91. The Panel concluded that the Appellant offered nothing more than speculation to support his motion.

92. Moreover, the motion itself ignores two key facts. First, that it is the Pane! and not the Law Society's CEO or the Deputy CEO that will decide the appeals and second, that to the extent that the CEO or Deputy CEO may have been involved in the original decisions it would violate s. 7(5) of the *Fair Registration Practices Act* for them to participate in these decisions. The Panel's decision must be (and has been) made without any impact or influence whatsoever from either the CEO or the Deputy CEO.

93. No properly informed person viewing the matter realistically and practically and in the context both of a relatively small Jewish community in Winnipeg and of an even smaller legal community -- and having thought the matter through --- would think it probable that the alleged connections between the CEO and the Deputy CEO and the Appellant's former parents-in-law could lead to the appeals being dealt with unfairly by the Panel.

94. The Panel dismissed the motion.

EXPUNGING OR PRODUCTION OF INVESTIGATION REPORT

95. The Appellant's motion to expunge the Investigation Report in whole or part and the motion to have the Report produced for review were argued together.

96. The motion to expunge was based on the following concerns:

a. The Appellant understood Mr. Gallagher to be acting as an "independent" investigator and that Mr. Gallagher "misrepresented" himself as such;

b. The Report is missing the first eight pages and an unknown number at the end;

c. Mr. Gallagher had told him that he would make a positive recommendation about the Appellant and that he would recommend the need for Applicant A to work with a "strong principal" and that he had spoken to the Appellant's ex-wife who was supportive of his application to be an articling student, yet none of these positive items are in the portion of the Report that was produced;

a. The missing portions include positive comments and are, in any event, relevant to the proceedings and fairness dictates that they should be disclosed or much of the remainder expunged.

97. The motion to have the Report produced was presented as an alternative to the motion to expunge but was based on the same concerns.

98. The Law Society's position is as follows:

a. The portions not produced were subject to a claim of solicitor-client privilege, the Appellant had offered no factual foundation to challenge the validity of that claim and the law is clear that solicitor-client privilege is only to be abrogated in the rarest of circumstances; and

b. The Appellant has been treated fairly in respect of the Report in that he has received those portions of it that outline the results of the investigation, including summaries of the information that was put to him directly by Mr. Gallagher and his responses as communicated by Mr. Gallagher and in that the Appellant was aware of, had consented to, and had participated in the investigation.

99. The fact that Mr. Gallagher may or may not have been acting as an "independent investigator" -- whatever that may mean -- is irrelevant as there is no requirement that he be so. The suggestion that Mr. Gallagher "misrepresented" the nature of the investigation is a serious one; not one that can be established on the basis of the Appellant's bald allegation. On the contrary, it appears clear from the record that the Appellant had a sufficient understanding of the circumstances surrounding the investigation to be aware of the nature of Mr. Gallagher's work for the Law Society.

100. The Law Society advises that the missing portions of the Report are subject to a claim for solicitor-client privilege on the basis that these portions contain legal analysis and legal advice to the Law Society. The Appellant offers no evidence to suggest that the claim is ill-founded.

101. Solicitor-client privilege is jealously guarded by the courts and by the legal profession; it is not to be interfered with lightly. The *Simcoff* case filed by counsel for the Law Society is but one of many examples of this principle in action. The Law Society has not waived privilege and has done nothing to put the privileged portions of the Report in issue in the proceedings. The missing portions thus remain subject to a claim for solicitor-client privilege and there is no basis upon which to disturb that claim.

102. Finally and as the Panel indicated at the time, in an administrative proceeding such as this the strict rules of evidence do not apply. The Panel advised that it took due

note of the concerns that the Appellant had expressed regarding hearsay, etc., and that these concerns could factor into the weight to be given to such portions of the Report.

103. The Panel dismissed both motions at the hearing.

104. The Panel's conclusion that the claim of solicitor-client privilege should not be disturbed is a complete answer to the Appellant's motions regarding the Report. However, the Appellant was clearly concerned about the fairness of the matter and the Panel feels that he deserves the benefit of an answer on that point.

105. In this case fairness does not demand the Report be either expunged (in whole or part) or produced for review.

106. The request to expunge raises issues of fairness in an administrative law sense. In that context the duty of fairness requires at its core that the before a decision adverse to a person's interests is made the person should be told the case to be met and be given the opportunity to respond.

107. According to the Appellant the missing portions of the Report contain certain positive comments with respect to his character. The Panel is prepared to accept that the Appellant's ex-wife is supportive of his application to become an articling student. That leaves the suggestion that Mr. Gallagher was prepared to make a positive recommendation regarding Applicant A's application. But, and with the greatest of respect, what of it? It is the Director's decision that is under appeal, not Mr. Gallagher's recommendation. More importantly, as set out below the Panel is looking at that decision afresh and so, Mr. Gallagher's recommendation is even further removed from the decision-maker.

108. The Report makes it clear that the issues of most significant concern to the Investigator were put to Applicant A at his meeting with Mr. Gallagher on May 21, 2009 and Applicant A's responses were set out in the Report. His follow up email to the Investigator of May 23rd is further evidence of his awareness of the "case he had to meet." The portions of the Report upon which the Director relied were clearly set out in her decision. The elements of the Report that he disputed were discussed at the hearing - in some cases extensively - and as set out above he has had some success in convincing the Panel that portions of the Report should be disregarded. In his dealings with the Investigator and before the Panel the Appellant was aware of the allegations being made against him and had a full opportunity to respond to them.

109. The request to have the full document produced for review raises issues of fairness in the context of the law of evidence. Privilege can be waived inadvertently in a case where, for example, some but not all of an otherwise privileged document is produced. In this case it is clear that the Report is an investigatory report of the sort that the Law Society could reasonably be expected to commission under the circumstances. Such reports can be the subject of claims for privilege, as is the case here. Whether the claim is based on "solicitor-client" privilege or is more properly characterized as "litigation" privilege is an interesting point but it makes no difference in this case; the claim for privilege can only be ignored if and to the extent that fairness and consistency demand. (See, for example, *K.F. Evans Ltd. v. Canada (Minister of Foreign Affairs),* 1996 CarswellNat 37)

110. In this case the Law Society has not produced any portions of those sections of

the Report over which it claims privilege nor has it purported to rely on such portions. Based on the material before us both the Appellant and the Panel have been made aware of all portions of the Report upon which the Law Society rests its case. Nothing in the Law Society's conduct in disclosing only certain portions of the report has reached the point at which fairness requires that privilege over the remainder should cease.

VIVA VOCE EVIDENCE FROM MR. GALLAGHER

111. Finally, the Appellant requested that Mr. Gallagher be called to give testimony in person.

112. The Panel is free, within reason, to determine its own procedures and those procedures will vary with the nature of the inquiry and the circumstances of the case. Ensuring that the process is objectively fair is the key. As described earlier a central element of the duty of fairness is that the applicant must "know the case that he has to meet". Along with that he must be given the opportunity to "correct or contradict any relevant statement against him". [*Kuntz v College of Physicians & Surgeons* 1987 CarswellBC 694 (BCSC), 1988 CarswellBC 744 (BCCA) & 1999 CarswellBC 185 (BCSC)]

113. From the *Kuntz* case it is clear that the principles of natural justice do not establish an absolute right to cross examine the author of a report such as the one prepared by Mr. Gallagher. In exercising its discretion to deny the Appellant the opportunity to cross-examine Mr. Gallagher the Panel fully recognized how significant these proceedings are for the Appellant. However, the discretion to allow cross examination should not be exercised so as to needlessly complicate a proceeding. By its very nature the hearing process is intended to be reasonably expeditious while at the same time affording the Appellant the ability to adequately respond to the Director's concerns.

114. Denying his request to have Mr. Gallagher testify would neither prejudice the Appellant's ability to provide a full defence to the allegations made against him nor undermine his right to a fair hearing. The Appellant did not express concerns regarding Mr. Gallagher's credibility but rather focused on portions of the report which were not disclosed or which were based on hearsay. The Panel took note of the facts from the Investigation Report that the Appellant challenges and as previously stated the Panel has chosen to rely on facts not seriously in dispute. Having Mr. Gallagher provide oral testimony with respect to his investigation would not have been of significant probative value in this situation and would not have outweighed the benefits of maintaining an expeditious proceeding.

115. The motion was dismissed.

IMMEDIATE ENROLMENT IN CPLED

116. For the reasons set out in the Panel's written decision of September 2, 2009, this motion was also dismissed.

THE APPEALS

WHAT IS THE STANDARD OF REVIEW THAT THE PANEL SHOULD APPLY IN RESPECT OF THE APPEALS FROM THE ADMISSIONS DECISION AND THE CPLED DECISION?

117. During the hearing, the Panel asked the parties for their positions with respect to the standard of review that it should apply in considering the Director's decisions. The question was posed in terms of whether "reasonableness" or "correctness" was the proper standard. The Appellant said that the proper standard is "correctness". The Law Society did not take a position but argued that on either standard the Director's decisions should stand.

118. The *Rules* do not give any specific direction as to the nature of appeals from decisions such as this or as to the standard of review or the process to be followed. They merely set out that among other things, the role of the Admissions & Education Committee is to "consider appeals of ...admissions decisions made pursuant to the rules in this division and conduct hearings as required" [5-2(b)]. Otherwise, the only direction is found in Rule 5-28 as set out in paragraph 8. The *Fair Registration Practices Act* confirms that general principles of transparency, objectivity, impartiality and fairness apply.

119. The Panel cannot accept that reasonableness is the appropriate standard by which it is to judge the Director's decisions. 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.

120. Accordingly correctness is the standard that the Panel will apply in this case.

121. However, 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. As credibility is not a factor in these appeals, this is not such a case.

WHAT STANDARD OF PROOF IS REQUIRED IN RESPECT OF ALLEGATIONS RELATED TO, CHARACTER AND FITNESS?

122. As with all civil matters, the evidentiary standard is the balance of probabilities. The *Rules* provide that the burden is on the applicant (in this case the Appellant) to establish his or her character and fitness:

> "**5-4** Subject to rule 5-4.1 [which is not relevant here], an applicant for admission as an articling student must, by May 31 in the calendar year in which articles commence:
>
> …
>
> (c) provide proof that he or she is of good moral character and a fit and proper person to be admitted;"

123. The Guidelines (see paragraph 40] confirm that any "disclosures [in respect of a series of questions directed towards this issue] by a candidate or other relevant matters otherwise learned of by the Law Society will establish a rebuttable presumption that a candidate is not of good character and a fit and proper person under Rules 5-4, 5-24(2)

and 5-28.1."

124. Thus, where evidence of bad character or unfitness has been disclosed or comes to the Law Society's attention the burden is clearly on the applicant to establish -- on a balance of probabilities -- that he or she is indeed of good moral character and a fit and proper person to be admitted.

125. That is not to say that any suggestion of bad character or unfitness would be sufficient to create this rebuttable presumption. Mere speculation, for example, would not suffice. As recognized by the Law Society of Upper Canada in respect of an application for admission to the bar assessments of this nature are akin to assessments of misconduct allegations. In *LSUC v. Birman,* the panel held:

> "If the Society is able to make out an allegation of misconduct to the requisite degree of proof, the applicant must prove on a balance of probabilities that he is nonetheless presently of good character. If the Society is unable to make out an allegation of misconduct to the requisite degree of proof, then the evaluation of whether the applicant has proven on a balance of probabilities that he is presently of good character is made without reliance upon the unproven allegations. In the ordinary course -- where the Society's opposition to the application is entirely based upon unproven allegations of misconduct -- the applicant's present good character will otherwise be presumed, and the application will generally succeed."

WHAT, IF ANY, APPLICATION DOES THE *CHARTER* HAVE IN CONSIDERING THE QUESTION OF CHARACTER AND FITNESS?

126. In his written materials and during the hearing the Appellant made reference to the Canadian *Charter of Rights and Freedoms* and in particular to the proposition that drawing a negative conclusion regarding his character on the basis of criminal charges is a breach of the presumption of innocence guaranteed by s. 11(d).

127. Simply put the *Charter*-guaranteed presumption of innocence does not apply in this context. The Law Society is not a government entity, these are not criminal, quasi-criminal or penal proceedings and the Appellant has not been "charged with an offence", which is the precondition *to* the application *of* s. 11 *Charter* rights.

128. In his written materials the Appellant also suggested that the Director's decisions interfered with his "most basic right to carry on a profession or occupation" and that "in doing so the Director is not taking into account the fact that the opportunity to pursue freely the practice of a profession is a component of liberty that can only be removed in accordance with the principles of fundamental justice." In this submission the Appellant is also mistaken. As indicated in the *Walker v P.E.1* case (filed by the Law Society) such arguments have all been dismissed by the Supreme Court of Canada.

DID THE DISCLOSURES MADE BY APPLICANT A IN THE APPLICATION ESTABLISH A REBUTTABLE PRESUMPTION THAT HE IS NOT OF GOOD CHARACTER AND A FIT AND PROPER PERSON TO BE ADMITTED AND, IF SO, HAS APPLICANT A REBUTTED THAT PRESUMPTION?

129. This brings us at last to the heart of the matter; the Appellant's character and fitness to become an articling student.

130. If the Appellant is to be admitted as an articling student he has the burden of

establishing that he is of good moral character and *a* fit and proper person to be admitted. (R.5-4(c)]

THE LAW RELATING TO CHARACTER & FITNESS

General

131. As noted at the outset the Panel is unaware of any Manitoba cases that have considered the character and fitness requirements of the *Rules.*

132. In Manitoba there are two "gates" through which the Appellant must pass before admission can be granted; (1) "good moral character" and (2) "fit and proper person to be admitted." Valuable albeit incomplete guidance as to the meaning of these terms can be found in the available jurisprudence and commentary.

133. Before examining those sources, however, two preliminary comments need to be addressed.

134. First, while jurisprudence and commentary exists with respect to the assessment of "good character" or "character and repute" in the context of admission to the *bar,* the Panel was not directed to any that deals directly with applications to *article*.

135. That said there is no basis to apply different standards in respect of an application to article than would be applied in respect of an application to be admitted to the bar. The underlying principles are the same and the language used in the Rules (specifically in Rule 5-12(d) regarding eligibility for call to the bar) confirms that there should be no different approach taken. Rule 5-12(d) uses the words "continues to" in the phrase, "continues to be of good moral character and a fit and proper person to be called to the bar". This would be illogical if the term "good moral character and a fit and proper person" was intended to have some different meaning. The principles established in the case law and commentary are therefore equally applicable to both circumstances.

136. Second, although the concept of "good character" is universal within the common law jurisdictions of Canada as a pre-requisite to admissions as a student or lawyer some jurisdictions including Manitoba - appear to go further than that. Certain jurisdictions refer only to "good character" (Ontario, Nunavut, NWT and Yukon). Others refer to both "good character" and either "repute" or "reputation" (B.C., Alberta, Saskatchewan and Newfoundland). In Manitoba the terms are "good moral character" and "a fit and proper person to be admitted". Nova Scotia is almost identical referring to "good character" and a "fit and proper person"; P.E.I. is very similar, referring to "good moral character and fit to practice"; and New Brunswick refers variously to "good character", "character and repute" and to "moral character and sober and temperate habits".

137. The jurisprudence brought to the Panel's attention focuses on the issue of character alone or on both character and reputation. This is obviously a function of the fact that the cases cited come from different jurisdictions. As noted, there is no Manitoba jurisprudence on the question.

138. The benchers in Manitoba have adopted both "good moral character" and "fit and proper person to be admitted" as the guideposts for admission. There is no doubt that the concepts adopted in Manitoba are *similar* in their overall intent to those adopted

elsewhere. However, the Manitoba language was deliberately chosen to include two distinct concepts and while many of the same considerations could factor into an assessment of either issue the concepts of "character" and "fitness" are not and are not intended to be synonymous.

139. With those comments in mind and without for the moment focusing on the specific wording of the Manitoba rules, what is the overall intent behind these various provisions?

140. In *Lawyers & Ethics, (Toronto:* Thomson Canada Ltd., 2004), the author Gavin MacKenzie, writes at p. 23-2 & 23-3:

> "The 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 profession and its ability to regulate itself and to deal fairly with persons whose livelihood and reputation are affected.
>
> The requirement that applicants be of good character is preventative not punitive. It recognizes that character is the well-spring of professional conduct by lawyers. By requiring lawyers to be of good character, the 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."

141. Regardless of any differences in the exact language of the provisions Mr. MacKenzie's comments are equally applicable in Manitoba. The purpose of the Manitoba requirements for character and fitness is preventative; it facilitates the achievement of the Law Society's fundamental purpose, namely, "to uphold and protect the public interest in the delivery of legal services with competence, integrity and independence." [*Act* s. 3(1)]

142. We turn now to the provisions of Rule 5-4(c) of the Manitoba *Rules*.

"Good Moral Character"

143. The meaning of "good character" has been the subject of considerable comment. In *LSUC v Levesque,* cited by the Appellant, the panel noted that

> "Good character is somewhat elusive and at times an emotive sense of the value of a person's conduct, but it consists of, at least in part: integrity, candour, empathy and honesty."

144. An article by Mary F. Southin, Q.C. (writing before her appointment to the bench), entitled *"What is `Good Character'?"*[±] has been cited with approval both in *Hutton v. Law Society of Newfoundland* (cited by both parties) and in *LSUC v Birman.* That article considers the meaning of "good character and repute". *Hutton* summarized the "good character" element as follows:

> "20 [The article] concludes that `good character', in the context of admission to practice law means `those qualities which might reasonably be considered in the eyes of

[±] (1987), 35 The Advocate 129

reasonable men and women to be relevant to the practice of law'. She concluded it comprises at least three qualities:

(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.

145. Does the use of the qualifier "moral" in the Manitoba rules materially modify the word "character" such that it has a different meaning than that described in *Levesque* and by Southin? We do not believe so.

146. The Oxford English Dictionary (OED) defines "character" as, among other things:

"1. The mental and moral qualities distinctive to an individual - strength and originality in a person's nature - a person's good reputation. 2. The distinctive nature of something."

147. The OED's relevant definition of "moral" is:

"1. Concerned with the principles of right and wrong behaviour and the goodness or badness of human character. 2. Adhering to the code of behaviour that is considered right or acceptable."

148. It is clear that the terms "moral" and "character" are closely related and the Panel is of the view that the description of "good character" offered by *Levesque* and by Southin is a fair equivalent to the term "good moral character" used in Rule 5-4(c).

"Fit and Proper Person to be Admitted"

149. As noted, the fitness requirement goes beyond the character requirement and must mean something different.

150. The relevant definition of "fit" given by the OED is:

"1. Of a suitable standard, quality or type; socially acceptable: `a fit subject' - (fit to do something). ..,2. Be or make able to occupy a particular position, place or period of time."

151. And of "proper" is:

"..,2. Suitable or appropriate; correct - respectable."

152. In our view the distinction between the character requirement and the fitness requirement is that "fitness" is a broader concept than character. "Character" is an internal quality; it focuses on personal virtues such as honesty, integrity and a sense of right and wrong. The assessment of character is inherently more subjective. As the panel said in *Levesque* it is a "somewhat elusive and at times an emotive" concept. "Fitness" on the

other hand is an external quality; its focus is on a person's ability to do the job, an assessment that could take any number of factors into account. The assessment of whether someone is a "fit and proper person to be admitted", though clearly not without its subjective elements, is essentially an objective assessment.

153. A candidate could be of "good moral character" but still be unfit for some other reason or vice versa. To give an example, a person may be "fit" in that he or she has an excellent reputation in the community, is highly accomplished in their field and has done much to further the activities of the profession yet, not be of "good moral character" for reasons completely unknown to others; for example, by virtue of having committed some morally reprehensible crime in their private life. On the other hand, a person may be of unquestioned virtue yet unfit due to their inability to actually do what is required of them to work effectively in the profession. That inability may be entirely beyond their control, for example as a result of a medical condition - dementia perhaps - or, it may derive from something that is within their control, an inability to manage their practice perhaps or to comply with the rules of the profession or simply an inability to conduct themselves in a sufficiently appropriate manner.

Application of the Requirements

154. Guidance is offered in the case law as to how requirements comparable to character and fitness are to be applied. The following general propositions can be drawn from the cases.

155. First, an applicant's character and fitness must be assessed as fairly and as dispassionately as possible but, no applicant should be held to a standard of perfection. (*Birman*)

156. Second, these qualities are not to be seen as immutable; rather, they evolve over a lifetime of experiences. In *Re Preyra,* the panel found that,

> "Character is not stagnant and unchanging, but rather evolves over time."

157. In *Levesque* the panel noted that,

> "People are not born with good character; they earn it. No matter how egregious their conduct may be in the past, good character can be earned."

158. Many aspects of our legal system are premised on the notion that people can and do change for the better; the character and fitness requirements are such provisions. In short, the law recognizes that people can change.

159. Third, while it is true people can change they do not do so overnight. Again quoting *Preyra:*

> "The transition from being a person not of good character to one of good character is a process, not an event. It may or may not happen to someone who was not of good character."

160. In *Birman* the panel adopted the reasoning from an earlier decision of the Law Society of Upper Canada *(Re Michael John Spicer* dated May 1, 1994), which included the following statement:

"Because every person's character is formed over time and in response to a myriad of influences, it seems clear that no isolated act or series of acts necessarily defines or fixes one's essential nature for all time."

161. Fourth, the proper focus is on *current* character and fitness. Past character and fitness are instructive but not determinative. Future or potential character and fitness are irrelevant; what matters is the present state of affairs. See for example, *Re Preyra* and *MacAdam v*. *Law Society (Nunavut).* Both in paragraph 17 of the Appellant's August 17[1h] materials and during the hearing, the Appellant acknowledged this to be the case.

162. Fifth, in assessing whether a change in character has taken place a number of factors must be considered. According *to Birman,*

"15 Because the Act contemplates that a person's character may change, it of course follows that misconduct may demonstrate the absence of good character when that misconduct occurred, but not necessarily at a later date when the application for admission is brought or considered. Accordingly, even where misconduct has been admitted or otherwise proven, the Panel needs to consider, *inter alia:*

(a) the nature and duration of the misconduct;

(b) whether the applicant is remorseful;

(c) what rehabilitative efforts, if any, have been taken, and the success of such efforts;

(d) the applicant's conduct since the proven misconduct."

163, These concepts are all reflected in the 16 factors set out in the Guidelines and reviewed by the Director in the Applications Decision.

164. Sixth, concepts such as forgiveness or "giving someone a second chance" are not appropriate considerations. As stated rather bluntly by the panel in *Preyra:*

"9 It is important not to confuse the good character requirement for admission with notions about forgiveness or about giving an applicant a second chance. The admissions panel is not in the forgiveness business, the test to be applied is clear, and the admissions panel is to determine if the applicant is of good character today. *The Law Society Act* does not permit an admissions panel to apply any test other than that relating to the applicant's good character at the time of the hearing."

165. Finally, and specifically with respect to Manitoba's fitness requirement, we would add that an applicant's fitness to be admitted ought to be assessed relative to the jurisdiction in which he or she seeks to be admitted. Whatever else may be an appropriate consideration in assessing an applicant's fitness the applicant must at least be seen to have the capacity to function effectively as a member of *Manitoba's* legal community.

APPLICATION OF THE LAW TO APPLICANT A'S SITUATION

The Appellant's Position

166. The Appellant's position is summarized at paragraphs 34 to 41 of his August 17th materials. His oral submissions were consistent with it and we reproduce that summary here:

> 34. In handling his private matters in Court so far the writer might have done things that he regrets. These actions might have hurt people's feelings, and in fact hurt his case as well. At the time the writer was facing a cultural shook, a language barrier, and was terrified by the idea of losing all access to his two young beloved daughters, his only reason for being in Canada and his only family in Canada.
>
> 35. In a sharp contrast to his ex-wife, her family and friends, the writer had no funds and no support net. He was certainly traumatized by the divorce proceedings initiated by her, and by her seeking termination of all access by him to their children. He was then practically homeless, in a country new to him, and without ways of supporting himself.
>
> 36. The writer was mainly overwhelmed by the success of the ex-wife, through a team of highly priced assertive lawyers, to limit to a minimum his relationship with his children. He also anyhow felt shunned within his own community, of where the ex-wife's family is known to have significant influence,
>
> 37. The writer is now a 41-year-old perfectly healthy man with a great deal of life experience. He does not have a criminal record or pending charges. Obviously, the writer is now feeling more confident and better adjusted than when first moving to Canada, five years ago. The writer is determined to rebuild his life even from scratch.
>
> 38. In the heights of his army career in Israel the writer was in charge of up to a 120 soldiers. For over seven years, in his homeland that is also a common law system, and until moving to Canada, the writer practiced law, including as a self-employed. The writer intends to stay and settle down in Manitoba, so that he can at all times be close to his daughters, and he wants to make them proud of him by being a productive member of society.
>
> 39. The writer is well aware of the ethical and other professional and moral duties owed by an officer of the court to the public, to the courts and to his colleagues. The writer has the utmost respect to these duties, and he fully understands the good reasons for why all members of the legal community need to strictly abide by them in all places and at all times. He also acknowledges that an officer of the Court must conduct himself as such even when handling his private legal and other affairs, regardless of any negative emotions involved and difficult personal circumstances experienced.
>
> 40. As an officer of the court the writer will also be under intense scrutiny by the Law Society and his principal, and subject to sanctions if he betrays the trust put in him. The writer has no intensions whatsoever to do so!
>
> 41. In a friendly province of a free country, of where diversity is encouraged, the

> writer, who comes here from a different continent where people tend to be more emotional and outspoken and to abide less by authority, believes that he deserves a second chance. When eventually called to the bar the writer intends to pay my debt to society and prove to all who believed in him that they were not wrong, by doing pro-bona work for our vulnerable and less fortunate fellow citizens.

167. There are two central themes to the Appellant's submission. The first is that his actions were the product of a very particular and extremely emotional set of circumstances, namely, his domestic litigation and that they do not reflect on his character or fitness to be admitted. The second and related argument is that his actions are a thing of the past and that he has made sufficient improvement to warrant a second chance.

ANALYSIS

168. Guided by the principles set out in paragraphs 131 to 165 and operating on the premise that the Director's decisions are to be assessed on a standard of correctness, our analysis properly begins with Applicant A's October 28, 2008 application to be admitted to the Manitoba CPLED Program and as an articling student.

The Application Form

169. In the Admissions Decision the Director concluded that the Appellant did not provide full and candid disclosure in the Application. The Panel agrees with that conclusion.

170. The application form demands full and complete disclosure of any matter that might reasonably shed light upon an applicant's character and fitness to become a member of the legal community in Manitoba. This is clear from the statement on the first page of the form:

> "The answers are to be declared before a Notary Public or Commissioner for Oaths. The utmost good faith and fullest disclosure are required. Omissions or inaccuracies will be grounds for rejection of the application, or expulsion from the Manitoba CPLED Program. Please review the Guidelines for Good Character."

171. By virtue of the declaration before a notary or commissioner for oaths the document is in effect given under oath.

172. "Utmost good faith" is a deliberately chosen legal term of art. It imposes an extremely high burden of disclosure on an applicant. The reason for such an approach is perhaps obvious; the information upon which the Law Society might assess character and fitness is, absent an investigation, all in the applicant's possession. It is the applicant who has the most direct and complete knowledge of his or her circumstances and so, in making admissions decisions the Law Society necessarily relies heavily upon the information provided by the applicant. Accordingly, it is not for the applicant to determine what may or may not be of interest to the Law Society. Rather, it is the applicant's job to fully disclose everything that might be relevant to the issues of character and fitness and the Law Society's to determine what if anything to make of such disclosure.

173. The type and level of disclosure required is also made plain by the nature of the questions posed in the form. Twelve of the twenty questions (numbers 8 through 20) that

the applicant is asked to answer relate directly to matters of character and fitness and the last of these (Question 20) is an entirely open-ended, "catch-all" question:

> "20. Is there to your knowledge or belief any event, circumstance, condition or matter not disclosed in your replies to the preceding questions that touches on or may concern your conduct, character and reputation, and that you know or believe might be thought to be an impediment to your admission, or any matter that could warrant further inquiry by the Society?"

174. In the Panel's view, the seriousness of the process and the frankness and candour required of an applicant are plain and obvious.

175. There is no reason to suspect that the Appellant did not appreciate the gravity of the document he was being asked to complete; particularly since he was at the time already a member of the Israeli bar. Nonetheless, the Application contains a number of significant omissions including the following:

a. Two findings of contempt of court. The Appellant said during the hearing that in retrospect his failure to disclose these was a mistake and that in hindsight he "should have mentioned it." These could have been disclosed in response to Question 11 regarding findings of "dishonourable conduct". At the very least they should have been disclosed in response to Question 20 of the Application, particularly given the statement in the Guidelines that "The Law Society may consider other information which, though not strictly fitting within the categories above, might constitute behaviour coming under Rules 5-4, 5-24(2) and 5-28.1, such as conduct which demonstrates or indicates an attitude of disrespect or abusiveness of the Court and its processes."

b. Three occasions of being charged with criminal offences in the three to four years prior to his application. In all but the one incident that he did disclose (which resulted in a guilty plea and a conditional discharge) the charges were stayed in return for his entering into peace bonds. Peace bonds are not, as the Appellant suggested during the hearing, "meaningless" or "nothing". It is not sufficient for him to say, as he did at the hearing, that "peace bonds aren't convictions." That is a highly technical argument. It may well suffice in other circumstances but in the context of this case, with multiple charges on several occasions over a relatively brief period of time and all coming to the same result the Appellant should have disclosed this information in response to Question 20.

c. The "vexatious litigant" order. Subsection (c) of the Guidelines, requires disclosure of "any order made against the candidate regarding institution of vexatious proceedings or vexatious conduct of a proceeding, pursuant to s. 73(1) of *The Court of Queen's Bench* Act, or such similar legislation as may be in effect in any other Canadian jurisdiction". It uses the very word - "vexatious" - that Justice Allen used so there can be no claim of misunderstanding. The Appellant acknowledged during the hearing that this was a vexatious litigant order. The Guidelines demanded that it be disclosed.

d. The 2007 Judgment itself. He disclosed the existence of the domestic proceedings in the Application but, only in response to Question 18 regarding "outstanding judgments". Yet, on any fair reading of the 2007 Judgement, the costs award was

> one of the least concerning of the matters raised by Justice Allen. Indeed, decisions as damning of a party's behaviour are rare. The Appellant himself has argued strenuously that the issues that have become the focus of these proceedings are related to his domestic litigation and should not be held against him now. He therefore accepts the relevance of the events but, says that they "are in the past". However, as stated above it was not for him to decide what the Law Society should make of the information. It was his obligation to disclose the contents and results of the 2007 Judgment far more fully than he did. At the very least Question 20 demanded a much fuller response.

176. The information that the Appellant chose not to disclose is unquestionably material to the assessment of his character and fitness to be admitted as an articling student. The details of these further matters did come to light in the course of the investigation conducted by the Law Society and the Panel accepts that Director's conclusion that the Appellant "demonstrated sincerity in the investigative process". However, the onus to make full and complete disclosure was on the Appellant and he fell far short of discharging that onus.

177. The Appellant's serious failure to complete the Application with the requisite frankness and candour raises obvious concerns about his character and fitness and necessarily creates a difficult hurdle for him to overcome in convincing the Panel that he is currently of good moral character and a fit and proper person to be admitted.

178. In considering whether he has in fact overcome that hurdle the Panel has focused on a number of issues, namely:

a. His argument that his actions were or should be isolated to his domestic litigation;

b. His demonstrated attitude toward the legal system;

c. His current character and fitness; and

d. The remaining factors in the Law Society's Guidelines for Good Character.

The Appellant's Argument

179. The Panel understands the Appellant to argue that his actions were the product of a very particular and extremely emotional set of circumstances, namely, his domestic litigation and that they therefore should not reflect on his character or fitness when it comes to being admitted as an articling student.

180. It is true that domestic litigation, particularly that involving custody or access issues can, to use the vernacular, make otherwise sane people do crazy things. In that sense and to some degree the Appellant's behaviour was at least understandable and there is logic to attributing at least some of his behaviour to his circumstances.

181. However, the fact that there may be an explanation for his behaviour, even one that may make it understandable, does *not* make that behaviour acceptable. As recognized in the indicia of good character set out in the Southin article, good character requires understanding the difference between right and wrong and having

> [t]he 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.

182. In this case we make allowance for a number of factors: cultural differences; possible differences between how law is practiced in Israel and in Canada; the difficult personal circumstances in which the Appellant found himself (a new country, a new culture, a new language, alone in a hostile environment, no money, a fight on unfamiliar ground with his children at stake); and the fact that he was unrepresented for much of the litigation.

183. But even with those allowances what the Appellant did in the context of his domestic litigation was simply unacceptable; it was wrong. According to the record and as described in detail elsewhere in these reasons that behaviour continued -- albeit in an apparently abated form - up until at least earlier this year. Yet, the Appellant is an obviously intelligent, 41-year old man. He is a lawyer in Israel. He is the father of two young girls. In short, he is an adult and a professional and he should know better.

184. The Panel accepts that he saw himself to be lost in extremely difficult circumstances. We are sympathetic and accept that it is difficult to imagine what that might be like. However, it is just such extreme circumstances that "put people to the test." No matter how difficult or, to use Southin's terminology, how "uncomfortable" it may have been for him to resist giving in to his emotions that is exactly what he should have done.

185. Moreover, it is also clear that the Appellant did not limit his behaviour to those directly involved in his domestic litigation. The McDonald's clerk, a teenage girl, had nothing whatsoever to do with the litigation. The daycare board members and workers were simply bystanders caught in the middle. The Crown attorneys dealing with his various charges and the presiding judges and the Law Society's counsel were all simply doing their jobs. Similarly, there is no connection at all between the domestic litigation and his application to the Law Society.

186. Finally, as described above the incidents of concern have occurred on numerous occasions and all within the last five years; some of them as recently as this year. In a very real sense the conduct has been continuous. There has been no passage of time and certainly no material passage of time since the events that give rise to the concerns as to the Appellant's character and fitness. It is therefore impossible to conclude, as the Appellant would have us do, that this sort of behaviour is behind him.

The Appellant's Demonstrated Attitude Toward the Legal System

187. The description of the Appellant's behaviour up to and including the time when Justice Allen issued her 2007 Judgment is set out above at paragraphs 30 to 35; there is no need to reiterate it. The words "outrageous", "offensive" and "reprehensible" would all be appropriate characterizations of how the Appellant behaved during this time toward the legal community and toward others not part of that community.

188. Although we have chosen to focus our comments on the Appellant's dealings with the legal system that does not mean that his behaviour towards others not directly a part of the legal system (for example, the daycare board members and workers, his ex-wife, or the McDonald's clerk) was in any way appropriate or that it would be irrelevant to a determination of character and fitness. Quite the contrary; it could be entirely relevant. However, in order to give the benefit of the doubt to the Appellant's submissions we have chosen to focus only on his dealings with members of the legal community.

189. The comments of Justice Allen regarding his behaviour in court and in particular her comments set out at paragraphs 34 and 35 demonstrate an attitude of disrespect for the legal system. Justice Allen concluded that "he would say whatever he thought most expedient in the heat of the moment", that he "out and out lied to the court", and that "[a]s a result of the many overstatements, misstatements and fabrications of the husband [she was] unable to rely on his evidence." These comments alone would be sufficient to establish poor character and unfitness at least as of 2007.

190. However, Justice Allen is not the only person to have had an opportunity to observe the Appellant's behaviour. There are more recent observations which are also relevant. Mr. Gallagher had occasion to directly observe the Appellant in various court proceedings and to review transcripts of prior proceedings. His observations are set out in his Report but can be summarized as follows.

a. August 9, 2007 - QB proceedings before Duval J, bail variation in the McDonald's Restaurant matter. [Transcript Review] To quote Mr. Gallagher, "[Applicant A] did not show a great deal of respect for the prosecutor and continually interrupted her." The transcript also shows that he referred to the charges as "those Mickey Mouse charges" and that after the Appellant had apparently interrupted the prosecutor several times as she was making her submission, Madam Justice Duval cautioned him by stating, "-- sit down, [Applicant A], I don't want to hear from you until I ask to hear from you, you understand? You're not to interrupt. I'll have you held in contempt if you can't control yourself." Later, at page 34 he says of the complainant [the 17-year old McDonald's clerk], "I'll get to grill her on the stand."

b. October 1, 2007 - Provincial Court pre-trial hearing before Judge Stannard. [Transcript Review] Again to quote Mr. Gallagher, the transcript "reveals numerous examples of [Applicant A] being disrespectful, condescending and flippant towards the prosecutor". Page 27 of the transcript quotes the Appellant as saying, "This is an organized campaign and I'm not paranoid, however, not naïve too. By the Crown, by Mr._____[name omitted by Mr. Gallagher to protect privacy] and others, a witch-hunt, a witch-hunt, There is no reason for the public to spend that much money on, on, on such a charge."

c. November 13, 2008 - QB proceedings before Duval J in file [file number deleted] challenging the Law Society's authority to conduct an investigation into his good character. [Direct Observation] The Appellant "repeatedly interrupted" opposing counsel and "continued to speak when the judge attempted to intervene and take control of the proceedings." After a number of interruptions Justice Duval told the Appellant to "sit down until (Law Society counsel] completed her submission and that if he interrupted again she would hold him in contempt." He complied. Mr. Gallagher observed that while he was in the courtroom, "[Applicant A] had shown little or no respect for the court, the presiding justice or counsel for the Society."

d. January 15, 2009 - Provincial Court proceedings before Judge Finlayson regarding a motion to vary bail conditions. [Direct Observation] The Appellant "showed that he is impulsive, shows little respect for others or for the court process, and does not listen well or take direction, even from a judge. He challenged and frequently interrupted Crown counsel and the judge. After [Applicant A] was warned more than once about his behaviour and did not comply, the judge, in a harsh tone,

directed [Applicant A] to sit down and be quiet. [Applicant A] also ridiculed and berated Crown counsel for not having all the police reports in court even though the charges had not yet been laid (the Information was not sworn until the next day, January 16, 2009) and the Crown indicated the reports had not yet been received by their office."

e. January 20, 2009 - Provincial Court proceedings before Judge Smith (continuation of January 15th proceeding). [Direct Observation] The appellant "became very upset with the Crown's position on the video statement of the complainant. He became quite loud and argumentative with the judge who cautioned him that she would have the Sheriffs officers called and she then immediately asked the clerk to call a Sheriff's officer to attend the courtroom. There were no further outbursts by [Applicant A] and the matter concluded shortly thereafter."

f. January 22, 2009 - Provincial Court proceedings before Judge Smith (continuation of January 15th proceeding)." [Direct Observation] (One presumes in an attempt to forestall *a* repeat of the prior appearance), "at the commencement of the January 22, 2009 proceedings, Judge Smith advised [Applicant A] that, "if you want to have a career in law here you should let the judge ask questions and not interrupt her." [Applicant A] did not respond."

g. February 4, 2009 - QB family proceedings before Allen J. [Direct Observation] "[Applicant A] had difficulty containing himself when [opposing counsel] was speaking and he would be up and down, constantly interrupting and disrupting the proceedings even after being warned several times by the judge to sit down. At one point he became so agitated and unable to stop from jumping up and verbally abusive to the lawyers that Madam Justice Allen ordered him out of the courtroom. The proceedings then continued in [Applicant A's] absence before he was invited back in after 5-7 minutes, with the admonition by the judge that he would be sent out again if there was a recurrence. There was none as the hearing adjourned very shortly thereafter."

191. Nor can we overlook two comments in Justice Allen's 2009 Judgment in paragraphs 7 and 8 and 60 and 61 of her reasons (see paragraph 62 above). First, the Appellant ignored a court order to refrain from bringing court applications without leave and instead brought several applications, all but one of which was dismissed for lack of merit. Second, not only did he breach an order to refrain from email communication with his daughter but the Court rejected his explanation for doing so as "ludicrous" and "def[ying] common sense".

192. Despite the obvious concerns raised by the above and to give the Appellant due credit for having made improvements, it would seem that things at least appear to be better than they were in the time leading up to and including the 2007 trial. In her 2009 Judgment, Justice Allen said;

> "[51] Based on the affidavit material, I find that the father has improved his behaviour significantly since the trial. I further find that the father has improved his behaviour in the courtroom. While he still was prone to interrupt and talk over opposing counsel, overall, and particularly given the emotional issues relating to the abuse allegations, I find that the father acted no worse than many self-represented parties and often behaved much better. Clearly, his ability to control himself has improved."

193. The Panel also had the benefit of Applicant A's personal appearance before it.

194. Over the course of the hearing he was variously rude, condescending, interruptive, and overly argumentative. He regularly had to be reminded to stick to relevant matters and to stop editorializing. On a number of occasions he would only stop behaving in this way when the chair raised his voice after repeating his name several times. Mr. Bortoluzzi described the Appellant as "difficult to direct" and that was certainly the Panel's experience as he clearly had *a* hard time taking instruction from it. From what we observed of the Appellant his behaviour before us was much as it was described by Justice Allen and by Mr. Gallagher in the Investigation Report.

195. The Appellant says that he "comes here from a different continent where people tend to be more emotional and outspoken and to abide less by authority". While allowance can be made for *some* differences in approach it is difficult to imagine that his behaviour would be tolerated for long by any court, Israeli or otherwise. Obviously diversity in Manitoba's legal profession is to be encouraged and mere differences in behaviour or approach are not sufficient to deny admission. It would be a loss to the profession if all of the colour were to be drained from its practitioners by the application of an overly rigid and inevitably arbitrary code of behaviour, but an applicant must be able to work in a Canadian and in particular, a Manitoba milieu. That is the context in which his or her character and fitness must be judged. He or she must have the capacity to function effectively as a member of *Manitoba's* legal community.

196. This is not simply a matter of appearances. The Panel also has to consider how a reasonable member of the public might perceive his conduct and how that would reflect on the legal profession. From all that the Panel has read in the materials and seen of the Appellant's behaviour during the hearing and however much his demeanour in a court or a court-like setting may have improved over time, it is still not yet even remotely appropriate for the practice of law in Manitoba. In our view, the public would not perceive his conduct favourably and to in effect condone it by granting admission at this time would lessen the public's confidence in the profession and the public's faith in its ability to govern itself.

The Current State of the Appellant's Character and Fitness

197. In her 2007 Judgment, Allen J made a comment that might easily be seen as prophetic:

> "[97] While I cannot predict when, if ever, the [Appellant] might be able to bring his emotions under control so as to have more normalized access, I think the first step would be for him to make his peace with the past. He may well have been treated badly at times, but his reactions to that treatment have been extreme and harmful to himself and his relationship with the children. Despite his flaws, the [Appellant] has many good qualities as a parent and he needs to accent those positives and move forward."

198. Certainly, there are signs of improvement on Applicant A's part; his references confirm this as does Justice Allen in her 2009 Judgment. That is obviously commendable and speaks well of the Appellant.

199. However, almost all assessments offered by persons who know him or have had the opportunity to observe him closely use language that conveys his character and fitness as "a work in progress". For example, in her 2009 Judgment Justice Allen, even after

noting the improvement in Applicant A's behaviour, went on to conclude at paragraph 78 of her decision:

> "I have imposed a lengthy phase-in period in order to hedge against the risk of the father's harmful talk about the mother's family resuming. Clearly he has achieved great progress but he still has work to do in keeping his feelings to himself."

200. His references speak in similar terms; acknowledging his poor actions in the past but suggesting, in essence, that "he's getting better" and so should be "given a chance" to article. The relevant comments are as follows:

a. Howard Tennenhouse - He thinks that he is "settling down now - did a lot of stupid things and didn't have the skill or experience required at his trial." ..."you have to ask whether he deserves to be a lawyer" and "feels that the Society should let [Applicant A] have a chance and then deal with him if he proves not to be a good lawyer."

b. John Ramsay -- ...while some clients might "love the way he handles things that style doesn't work well here." He described the Appellant's style as "extremely aggressive." He felt that, "with the right principal to guide him, [Applicant A] should be given a chance."

c. Lynda Grimes - he has made errors in judgment but "thinks this can be learned..." ..."he ought to have the chance to be admitted..."

d. Martin Glazer -- "impressed with what [Applicant A] has learned through experience but believes he has to learn you can get more bees with honey than with vinegar. He has to find a balance but this is something that he will learn over time with experience." ..."judgment is sometimes affected by his drive..." .,"a diamond in the rough..."

e. John Sinclair –"...if admitted he would become more comfortable and relaxed."

f. Fred Bortoluzzi - "...difficult to direct as he has his own strong opinions on how to do things." "...he should be given an opportunity to prove himself."

g. Rami Meged - the Appellant is "striving to improve and is getting better all the time". He feels that when the Appellant's "child access issues are settled he will be a different person and he has the potential to be a great lawyer."

h. Susan Koskinen - it is only in his family matters that he reacts in that way and that "he is controlling his emotions better."

201. This language is all reminiscent of a comment by Allen, J In her 2007 Judgment when she said "the [Appellant] argues that his behaviour would improve if only he had regular access." In other words, if only things were different he too would behave differently.

202. In the Investigation Report, after describing his observations of Applicant A in court Mr. Gallagher suggested that

> "While in Canada, both prior to and during his lengthy involvement with the courts,

> [the Appellant] does not appear to have had any role model(s) or mentor(s) to guide him or offer proper advice at times when his emotions rather than reason were controlling his responses to situations or events."

203. That may well be true and the Panel is certainly sympathetic to the challenging situation in which the Appellant found himself; however, this again speaks to a future, not a current condition.

204. Finally, even the Appellant himself acknowledges the work that he has left to do. In addressing the issue of protecting the public he said:

> "The public is not that dumb. The public knows better than we think the public knows. And the public might be appreciating that you are open enough to be forgiving, to acknowledge that characters evolve, to welcome to the profession people who might have a different style or people who speak their truth or their client's truth a certain way.
>
> I'm not saying that there will not be a need for a huge drastic change by me. There will be a need. But I trust that the CPLED program is a very good program that can teach me a lot about it."

The Factors in the Guidelines

205. In the Guidelines the Law Society has determined that in considering whether a presumption of bad character or unfitness has been rebutted certain factors may be particularly relevant to that assessment. The list, while comprehensive, does not purport to be exhaustive.

206. The Director applied the criteria from this list in the Applications Decision. A number of the factors have already been discussed above so we will elaborate only on those which have not already been addressed:

a. Nature and extent of voluntary treatment or rehabilitation.

There is no evidence before the Panel that the Appellant has made any attempt to deal with his apparent difficulties in maintaining self-control by means of professional counseling or advice.

b. Applicant's current attitude about the subject of their disclosure.

The Panel is not satisfied that the Appellant has accepted accountability for his behaviour. The language he uses in his submission [see paragraph 166] is indicative. He does not acknowledge that he has *in fact* done anything that he regrets; nor does he acknowledge that his actions have *in fact* hurt people, as clearly they have. Rather, he merely suggests that this *"might'* have been the case. He does, however, say that he "in fact hurt his case as well." He cites external factors (cultural shock, language barrier, terror at the idea of losing access to his children, etc.), but at no point does he acknowledge his own responsibility for what he has done. His focus is entirely self-centred.

c. Subsequent constructive activities and accomplishments.

As noted in our discussion on the Appellant's demeanor there appears to have been some improvement. Similarly, the volume of litigation relating to the Appellant appears to have abated.

d. Evidence of character and moral fitness and present moral character.

The Appellant's references speak well of him and of his prospects. They see potential in him and the Panel agrees with that assessment, but the key word is "potential". As discussed previously the Appellant's references fundamentally speak to his *future* rather than his *current* character and fitness. Finding as we do that the Appellant is not currently of good moral character and a fit and proper person to be admitted does not, as he suggested at the hearing, mean that the Panel is being "disrespectful" of the opinions of other lawyers or saying that "they don't matter". On the contrary, the Panel takes their comments very seriously. However, they are only one part of a broader canvas and the Panel is obliged to consider the entire picture.

Conclusion

207. Practicing law is a privilege not a right. In determining whether the Appellant is currently of good moral character and a fit and proper person to be admitted the Law Society and therefore this Panel must consider the protection of the public and the public's confidence in the legal profession in Manitoba as an honourable, ethical and competent profession.

208. During his submission the Appellant said that the public is sophisticated enough to appreciate forgiveness and in both his submission and his written materials he said that he deserves a second chance. The law, however, is clear; these proceedings are not about forgiveness or second chances, they are about the here and the now.

209. Although he appears to be making progress, the Appellant does not yet appear to have made "peace with his past" to use the words of Justice Allen. If his progress continues, the Appellant may well meet the requirements at some point in the future and in that regard the Panel sincerely wishes him well.

210. However, what may or may not come to pass is not the issue before the Panel. Our task is to assess his *current* character and fitness. By that standard and for the reasons set out above, the Panel finds that the Appellant does not meet the requirements of s. 5-4(c) of the Law Society's Rules.

211, The Director's decisions were correct; the disclosures did establish a rebuttable presumption that the Appellant is not of good character and a fit and proper person to be admitted and the Appellant has failed to rebut that presumption. The appeals must therefore fail.

DISPOSITION

212. The appeals are dismissed.

Signed by

James E. McLandress, Chair
Linda Brazier Lamoureaux
Mark Toews

October 9, 2009