Decision No.20150223

In the Matter of:	Applicant A — Appeal of Articling/CPLED Admission Decision
Hearing Date/Location:	February 23rd, 2015, 219 Kennedy Street, Winnipeg, Manitoba
Panel:	Todd A. Rambow — Chair
	Neil Cohen
	Rachel E. Margolis

DECISION

Re: Appeal of October 18th, 2013 Articling Student and CPLED Admission Decision by Richard Porcher, Director of Admissions and Membership (on behalf of the Chief Executive Officer, Law Society of Manitoba)

INTRODUCTION

The practice of law is a time-honoured and noble profession. While it may bring benefit to many, financial or otherwise, it also demands great responsibility.

To that end, only those of good moral character and fit and proper persons ought to be admitted to the practice of law.

This is consistent with the mandate of the Law Society of Manitoba to uphold and protect the public interest in the delivery of legal services with competence, integrity and independence.

This appeal deals with the issue of good moral character and fitness to practice, in the context of the Law Society of Manitoba's decision to deny Applicant A's admission as an Articling Student and into the 2013-2014 Manitoba CPLED program.

BACKGROUND

Applicant A is a resident of Ottawa, Ontario. He was born in 1959 and is currently 55 years old. He is currently single and has two sisters aged 50 and 53. He describes a very close-knit family.

He speaks multiple languages and has a legal degree from studies in Italy. He took common law legal training at Trinity College in Dublin, Ireland. He later in 2010 received his Bachelor of Laws degree in French from the University of Moncton, in New Brunswick.

He has articled in Ottawa with two different lawyers, firstly with Michael Crystal between July 5th, 2010 and May 5th, 2011, and then for the Leonard Max between June 6th, 2011 and January 26th, 2012.

He has twice attempted to be called to the Bar in Ontario, but has not passed the requisite exams.

With applications noted as received on May 30th and June 28th, 2013, respectively, Applicant A applied to the Law Society of Manitoba for admission to the Manitoba CPLED program and as an articling student, having arranged with a practitioner in Winnipeg by the name of Norman Boudreau to act as Principal.

He has family ties to Winnipeg and can practice in French, which would be an asset to Mr. Boudreau, in addition to his ability to bring in Spanish and Italian speaking clientelle.

THE DECISION UNDER APPEAL

On October 18th, 2013, Richard Porcher, Director of Admissions and Membership for the Law Society of Manitoba wrote to Applicant A and advised him that he was denied on his application for admission to the Manitoba CPLED program and as an articling student.

Specifically, Mr. Porcher found that there was, by virtue of information disclosed to or otherwise learned of by the Law Society a rebuttable presumption that Applicant A did not meet the good character and fitness requirement, and that Applicant A had failed to rebut that presumption. Mr. Porcher referred specifically to Law Society Rules 5-4, 5-24(2), 5-28.1 and 5-28.2. In particular, Mr. Porcher noted the following:

1) The disclosure that Applicant A was found liable for committing the tort of deceit in an arbitration decision of the Honorable James Chadwick, Q.C. dated May 14th, 2010 (Exhibit 1, Tab 24, later upheld on Appeal by Mr. Justice Smith of the Ontario Superior Court of Justice, Exhibit 1, Tab 25), created a rebuttable presumption that he did not meet the good character and fitness to practice requirement.

2) Applicant A made no comment to the arbitrator's findings that he had made improper charges to the account of the [address omitted] property, including a charge for work done (plumbing fixtures) at his personal residence. Applicant A also made no comment about the arbitrator's findings that his company, [company name omitted], received a kickback in the amount of $31,565.00 from [company name omitted].

3) Applicant A did not make disclosure of a second action against him in the Ontario Superior Court of Justice [court file # omitted] pertaining to allegations of fraudulent conveyance of money or property in order to defeat creditors. This information, including the decision of Mr. Justice Kane dated October 10th, 2012 (pertaining to a failure by Applicant A to satisfy his undertakings on an examination in aid of execution, and resulting costs awarded), had not been disclosed by Applicant A in either of his applications for admission, and should have been pursuant to either Questions 17.a), 17.b) or 22 or the "catch-all" disclosure requirement immediately following (which includes disclosure having to be made by the applicant whom is

being sued or is the subject of proceedings in any matters from questions 11 to 22). Mr. Porcher noted that when on September 5th, 2013, he wrote Applicant A about these omissions, he did not provide his own written response, but instead chose to rely upon the written response of his counsel representing him on the second action, Mr. Leonard Max, Q.C.. This response, Mr. Porcher noted, failed to provide any explanation why Applicant A did not disclose the second action, in circumstances where Applicant A was being sued and where the claim being brought against him alleged fraudulent behaviour which touched upon his conduct, character and reputation. Mr. Porcher noted that Applicant A in these circumstances had an obligation to disclose his involvement in these proceedings.

4) Applicant A failed to give any explanation or details as requested for the claim against him in the Ontario Superior Court of Justice [court file # omitted] other than to supply copies of the Orders dismissing the main action and the 3rd party claims as well as a Release provided by the Plaintiff.

5) Applicant A failed to give satisfactory explanation through the response of Leonard Max, Q.C. on his behalf regarding full and complete disclosure of the judgement against him to the Law Society of Upper Canada, as required by his application for licensing as an articling student to the Law Society of Upper Canada.

6) Applicant A was found in the arbitration to have committed the tort of deceit, and the arbitrator's decision raised additional concerns regarding his credibility, including:

   a. Having selective memory of events for such a well educated man

   b. The lack of an appropriate or credible explanation for the mysterious disappearance of corporate books and records for [company name omitted] and [company name omitted]

   c. The kickback of $31,565.00 received by his company, [company name omitted] and the sum of $2,344.25 improperly charged to another property, [address omitted].

d. That he did not know the difference between a shareholder and a director, despite being in his 3rd year of law school at Moncton.

7) The evidence provided by Applicant A failed to rebut the presumption that he did not meet the good character and fitness to practice requirement, both in the past and currently, and that the information considered by the Law Society of Manitoba raised current concerns about his character and a failure to act with integrity. There was no evidence of remorse for his past misconduct, nor any acknowledgement of the seriousness of the misconduct or how it had affected others. He had provided no evidence of any attempt to satisfy the judgment against him. On a balance of probabilities, he did not meet the good character and fitness to practice requirement.

Applicant A has appealed this decision. The appeal was heard by this panel on February 23rd, 2015, at 219 Kennedy Street, Winnipeg, Manitoba, with Mr. Dave Hill appearing as counsel for Applicant A and Ms. Leah Kosokowsky appearing as counsel for the Law Society of Manitoba. Evidence was called (Exhibits 1 to 5 and the oral evidence of Applicant A), written briefs provided, and oral submissions made by each party. The decision of this panel was reserved to provide written reasons. We do so now.

APPLICANT A'S POSITION

Applicant A, with the able assistance of his counsel, Mr. Hill, points out that the issue before this panel on appeal is *present* good character and fitness.

They ask that this panel conclude whom to better evaluate that than his former principal, Mr. Leonard Max, Q. C. whom worked with him and had the chance 3 to 4 times a week to evaluate him? Mr. Max had provided a number of glowing letters of recommendation for Applicant A which made their way into evidence before us (Exhibit 1, Tab 22; Exhibit 2, Tabs 3, 4, 9 and 10). Mr. Max in his letters articulates that Applicant A is a diligent, competent, capable and ethical individual, a "straight shooter" to use common parlance, and someone whom he would have no hesitancy in recommending him as an appropriate candidate for any articling position.

They refer specifically to Mr. Max's letter dated September 23rd, 2014 (Exhibit 2, Tab 10) as showing the true measure of the man appearing before this panel, a man whom is not irresponsible and whom has shouldered his responsibilities, particularly those to his family in very difficult circumstances (which is further fleshed out in Exhibit 1, Tab 8, which is an email from Applicant A to the Law Society of Manitoba on June 4th, 2013). Mr. Max describes Applicant A as very involved in his community and a man whom has sacrificed much in caring for not one, but two, elderly and sick parents. They argue he is genuine, and that there ought to be respect for a man of Applicant A's age whom despite past errors in judgment is making a genuine attempt to improve himself. While there may have been issues in the past regarding his good character, he has currently demonstrated good character "in spades". They argue that "to err is human, to forgive divine", and that worse offenders have been admitted to the bar in Manitoba. They ask that we take into account the unimaginable pressure he was under while both working and caring for his ill mother, when we consider what information he provided/failed to provide to the Law Society of Manitoba when applying for admission to articles and CPLED.

They argue that he has admitted his deceit and is sorry for what he has done. He accepts the arbitrator's decision and regrets each day what happened. They submit that he has not paid the outstanding judgment against him and some of the court costs because he has no money to pay them.

Finally, they argue that we ought not to hold against Applicant A any bad advice he received from Mr. Leonard Max, Q.C. or Eric Williams whom he either consulted when filling out his applications to the Law Society of Manitoba or had them provide information on his behalf to Mr. Porcher.

They say that Applicant A has disclosed his issues to Mr. Boudreau, and Mr. Boudreau notwithstanding is prepared to accept him as an articling student in Winnipeg, Manitoba. He says that he has always wanted to be a lawyer, and wants to finish what he started. He asks that this panel give him the opportunity to do so.

They argue that forgiveness must be part of the test to assess *present* good character and fitness to practice (if the penal system recognizes it, why wouldn't this panel on the appeal?), and that change can take place without formal counselling, treatment or rehabilitative programs. In that regard, they refer to the self-motivated efforts of Applicant A as detailed in Exhibit 2, Tab 10 and that he has learned his lesson from what took place. They point out that this proceeding ought not to be a re-trial of the arbitration, otherwise, what would be the point of an appeal? The real issue is whether Applicant A has now addressed or met any concerns which Mr. Porcher had originally when denying admission. They

say he has completely. They say that the proposed principal, Mr. Boudreau, will act as a gatekeeper to ensure that the public will continue to have confidence in the legal profession and the Law Society of Manitoba.

They submit the standard of review for this panel is one of correctness.

Applicant A asks that his appeal be allowed.

THE LAW SOCIETY OF MANITOBA'S POSITION

Ms. Kosokowsky argued on behalf of the Law Society of Manitoba that all lawyers need to act with integrity, and that the role of the Law Society is for the public to be served by an honorable and competent profession. Practicing law is a privilege, not a right, and the role of the good character requirement is preventative, as opposed to punitive. The Public must have confidence in the profession and its ability to govern itself. The Law Society is the gatekeeper for the profession and has to maintain high confidence in the public about its ability to self-govern.

She argued that the issue before this panel is good character *today.* It is not about rehearing the arbitrator's decision, nor is it about forgiveness or 2nd chances.

She submitted that the standard for review on this appeal is correctness, and argued that the evidence before the panel demonstrates a rebuttable presumption Applicant A is not of good character, and that he has failed to discharge the onus on him to rebut the presumption on a balance of probabilities.

She asked the panel to consider the nature and extent of the misconduct, whether the Appellant has unreservedly taken responsibility for the misconduct, how the Appellant has conducted himself since the misconduct, and what efforts the Appellant has made to rehabilitate himself.

She argued that Applicant A's conduct was not an old or isolated incident of misconduct. She made reference to the specific misconduct as identified by the arbitrator in his decision (Exhibit 1, Tab 24), and that these were repeated acts of dishonesty to his personal benefit and at the considerable expense of his business partners (ie. misrepresentations, secret management fees, kickbacks, improperly invoiced expenses, missing company books with no proper explanation preventing a proper accounting being done, etc). She also points out that since the sale of the [address omitted] property in 2004 and the related

arbitration in 2010, there is evidence of continuing concerns about Applicant A's character, including his failure to pay the outstanding judgment against him, the 2nd action against him for allegedly fraudulently conveying property to defeat his judgment creditors, and his failure to meet his undertakings and resulting costs against him (Exhibit 1, Tab 26; Exhibit 3, Tab 1)

She argued that in these circumstances, the burden of demonstrating a change in character is a heavy one, one which Applicant A has failed to discharge.

Ms. Kosokowsky referred this panel to Exhibit 1, Tabs 2 and 3, which are Applicant A's applications to the Law Society of Manitoba. She argues that Questions 11 to 22, and the "catch-all" question immediately following Question 22 are specifically designed to elicit information on the Applicant's character. The application forms conclude with a solemn declaration that the information provided is complete and true in all respects. She says that utmost good faith was required by Applicant A in his responses and that he failed to meet his high onus in this regard, especially with his significant omission of relevant information (Exhibit 3, Tab 5, paragraphs 172 to 177).

She argues that Applicant A's explanation is to blame others, including the lawyers in Ottawa whom he consulted when completing his applications to the Law Society of Manitoba. She says that he has not unreservedly taken responsibility for his misconduct and he has no demonstrated before the panel genuine remorse. She notes specifically that in many of his written materials to the Law Society, blame is placed on his former business associate [name omitted], as opposed to himself (for example, Exhibit 1, Tab 18 or Exhibit 2, Tab 5), when the arbitrator specifically found that Applicant A well knew what he was doing when committing the tort of deceit/misrepresenting to his former business partners (Exhibit 1, Tab 24, paragraph 150).

She argues that the first time Applicant A has ever taken any semblance of responsibility for his actions was before this panel today, and that his remorse is not genuine nor directed to the severe impact he had on his victims, that he is more concerned about the consequences of the arbitration to him and his family than about taking actual responsibility for it.

She argues that if there was a true change of character on Applicant A's part, he would have paid the outstanding court judgments and costs awarded against him, he would have provided the appropriate answers or documents on his undertakings, and so on.

She argues that Applicant A has given no evidence of rehabilitative efforts or steps to reform his character, which is a process of change. Without this, he does not have appropriate insight into his misconduct and what caused it to happen.

She says that the Law Society of Manitoba accepts that Applicant A is a devoted family member and has engaged in conduct to the betterment of his community, but these are only some of the considerations on the issue of good character and fitness to practice. While they speak of positive aspects of Applicant A's character, they are insufficient in and of themselves to prove that he has undergone a substantial change of character.

She says that Applicant A has failed to rebut the presumption and that this panel ought not to be in the business of forgiveness or predicting the future.

She asks that this appeal be dismissed.

THE LAW

This panel is of the view that the law relating to the issue of good moral character and fitness to practice is well and succinctly stated in the decision provided at Tab 5 of Exhibit 3, that of Decision No. 20090826B involving Applicant A on August 26th and 27th, 2009. We do not intend to reproduce herein what we regard as a clear statement of the law and relevant principles to apply on this appeal, particularly those at paragraphs 154 and following which discuss how the 7 requirements comparable to character and fitness are to be applied.

We have also considered the article by Mary F. Southin, Q.C. (as she then was), which is quoted by Ms. Kosokowsky in her submissions and found in Exhibit 3, Tab 5, at paragraph 144, entitled "*What is Good Character*" (1987) *The Advocate* 129, wherein she considered the meaning of good character and repute, and concluded that it comprises of at least three qualities as follows:

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 oneself; and

3. 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.

THE LAW APPLIED TO THE FACTS OF THIS CASE

This panel acknowledges that Applicant A has admirable qualities, particularly those relating to his extended vigil in caring for his ill mother and his efforts to assist those less fortunate in his community. Those are qualities which this panel has considered very carefully in addressing this appeal.

However, this panel states at the outset that it has significant concerns about Applicant A's credibility.

First, the panel is not convinced that Applicant A is truly remorseful for his past misconduct, especially insofar as recognizing the impact it had on his victims. His answers in direct examination and cross-examination were more about "accepting" or "moving on" or "bound by the decision whether he agrees or not" or "taking responsibility for" the results of the arbitration and regretting its impact on himself and his family than truly recognizing what he did was wrong. It was not until he was questioned by the panel that he fully admitted what he did was wrong, but this came across as self-serving and an attempt to tell the panel what he thought it wanted to hear.

Second, Applicant A continues to blame others for his misfortunes. During the arbitration and beyond, he blamed [name omitted] for all the wrongdoing which was attributed to him (ie. He "set the up for a fall") and maintained that he was not guilty of any deceit. Only at the hearing before this panel has he resiled from that position. However, he now blames Leonard Max, Q.C. and Eric Williams for their flawed judgment in the responses they gave to the Law Society on his behalf when further information was sought on his applications. He blames them for poor advice which they gave him on how his application forms initially ought to be filled out in light of his personal circumstances.

Thirdly, on the issue of undertakings which remain unsatisfied and for which Applicant A has been found liable for costs, we find it absolutely untenable that Applicant A would not have any more

knowledge of same than what he testified before this panel. Applicant A's evidence was that he had given everything he had to his counsel (Max/Williams), and did not know what they had done with it from there. While this answer would make perfect sense in the situation of a traditional solicitor-client relationship, it doesn't make sense in the context of Applicant A's legal training, his professional relationship with. Mr. Max and the order of costs against him. To suggest he never did any follow-up with Mr. Max or ask any questions of him, especially after being found liable for costs after not meeting his undertakings, is simply not believable to this panel.

We agree with the argument of the Law Society that the misconduct chronicled in the arbitration award cannot be viewed as a single and isolated example of misconduct. Even at the hearing before this panel, Applicant A at one point tried to justify why the undertakings had been met with explanations of how certain property had already been sold or no longer existed to convey, or how money had never been advanced to [name omitted], as opposed to giving clear evidence of honest and forthright attempts to comply with the undertakings. The panel found it incredible when Applicant A testified that he had no direct knowledge of the October 10, 2012 decision of Mr. Justice Kane of the Ontario Superior Court of Justice on the issue of unmet undertakings (Exhibit 1, Tab 26).

We found it equally hard to accept that he was unaware of the costs awarded against him by Mr. Justice Smith on June 15th, 2011, as contained in Exhibit 5, in the amount of $20,000.00, or that he had just become aware of the costs decision of Mr. Justice Kane on February 8th, 2013 in the amount of $5,000.00 (Exhibit 3, Tab 1).

We also do not accept that Applicant A would not appreciate the distinction between the original action which was arbitrated and resulted in judgment against him, and the second action relating to fraudulent conveyance of property to defeat his judgment creditors. While the litigants were indeed the same in the first and second action, and while a layperson might not appreciate the distinction, this panel feels that Applicant A with his legal background and training was fully aware of the distinction and if truly complying with the standard of utmost good faith, would have disclosed the second action to the Law Society of Manitoba either in his original application or subsequently if it only later came to his attention. It is clear to this panel that the Law Society of Manitoba gave Applicant A numerous chances to provide better/clear information, yet he did not avail himself of the opportunity (see for example, Exhibit 1, Tab 14, Tab 16, Tab 19, and Tab 21).

This panel is of the view that the matters identified by Mr. Porcher in his decision letter dated October 18th, 2013, certainly did in fact and law create a rebuttable presumption that Applicant A did not meet the requirement of good moral character and fitness to practice. We find that Mr. Porcher was correct in this conclusion.

We find based on the totality of the evidence before us that this rebuttable presumption continued to be in place at the hearing before this panel. This placed an evidentiary burden on Applicant A to provide us with evidence to rebut the presumption.

Applicant A, put simply, seems more concerned about form over substance. He does not seem interested in complying with the *spirit* of court orders against him, or the *spirit* which was required of him when filling out his applications to the Law Society of Manitoba. For example, it seems pretty clear to this panel that Applicant A on his evidence has been insolvent since the arbitration, yet on his applications to the Law Society of Manitoba (Exhibit 1, Tabs and 3), he indicates in answer to Question 17.a) "no". Applicant A would appear to justify this answer by saying he wasn't technically bankrupt when answering, when he should have just been fully candid and said "yes". Rather than looking for the "best answer" or the "correct answer", as Applicant A suggested he did in consultation with Leonard Max Q.C., Eric Williams and/or his sister, he should have just answered fully and truthfully. We are cognizant of the requirement of "utmost good faith" and the high burden it imposes on an applicant such as Applicant A (Exhibit 3, Tab 5, paragraphs 172 to 175).

His representations to the Law Society of Manitoba and to this panel cannot, respectfully, be taken at face value and he does not present with the integrity and candour that is required to be admitted as an articling student or to CPLED in Manitoba. That is not to say he cannot change, but his panel feels he has some work to do before he can meet the requisite standard.

For the reasons as set out above, we conclude that Applicant A has failed to rebut the presumption, even taking into account that our focus need necessarily be on his *current* character and fitness, and the issue before this panel was clearly *not* to re-litigate the issues from the arbitration. In this regard, we also regard Mr. Porcher's decision as being correct and continuing to accurately reflect concerns about Applicant A's good moral character and fitness to practice even at the present moment.

CONCLUSION

For the reasons as stated above, the appeal is dismissed.

DATED: The 11th day of March, A.D. 2015

Unanimous Decision of the Panel

Todd Rambow, Chair

Neil Cohen

Rachel E. Margolis