Decision No. 20161031

**THE LAW SOCIETY OF MANITOBA**
**ADMISSIONS AND EDUCATION APPEALS COMMITTEE**

| | |
|---|---|
| **In the Matter of:** | **Ewald Bergen v. Law Society of Manitoba** |
| **Hearing Date:** | **October 31, 2016 and November 1, 2016** |
| **Panel:** | **Grant Driedger (chair)**<br>**Jim Wolfe**<br>**Todd Rambow** |

## DECISION

**RE: The Law Society of Manitoba and the Appeal of Ewald Bergen**

1. This panel of the Admissions and Education Appeal Committee of the Law Society of Manitoba considered whether the Appellant's request to be readmitted to the practice of law in Manitoba should be granted, or not, with focus upon the "good character" prerequisite.

2. Legions of authority support the notion that character and integrity are foundational for the practice of law in our society. The confidence of the public in a self-regulated legal profession requires stringent watchfulness in both the discipline and admissions processes when matters of integrity and character are at issue.

## I. OVERVIEW

3. In 1988 Ewald Bergen received his call to the bar and was admitted into the Law Society of Manitoba ("LSM" hereafter) to practice law in the Province of Manitoba. He ceased actively practicing in Manitoba in August, 2005. In 2012 he applied to the LSM be readmitted to practice in Manitoba. The Director of Admissions rejected his request. A second

request for readmission, with additional materials, was submitted in 2013. Again, the Director rejected the request. In both rejections the Director's decision was grounded in the view that the Appellant failed to meet the LSM's "good character" requirements.

4. During the tenure of his practice years and, to some extent in the time shortly thereafter, Mr. Bergen was the subject of various proceedings in which findings adverse to him were made by judicial and quasi-judicial bodies. These incidents raise questions as to his fitness to practice law. In particular, some of Mr. Bergen's entanglements created a rebuttable presumption that he fails to meet the "good character" condition precedent for admission into the LSM. The Director of Admissions was not satisfied that the presumption had been rebutted, and in fact concluded that Mr. Bergen deliberately omitted and misrepresented material details in his application for readmission.

5. Mr. Bergen appealed the Director's decision to this committee. For the following reasons this panel dismisses the appeal, and affirms the decision of the Director, based on a finding that the Appellant does not satisfy the good character requirements necessary for admission into active practice with the Law Society of Manitoba.

## II. PARTICULARS OF APPLICATION AND HEARING

6. The Appellant's application to resume active practice was made December 10, 2012, with supporting material. The Director rejected the application by letter dated January 11, 2013, citing a failure to meet the good character requirements. A request was made for reconsideration, with further materials submitted by legal counsel whom the Appellant had retained following the initial rejection. The second decision of the Director, again rejecting the application on grounds of failing to meet the good character standards, was written in a letter dated February 4, 2014.

Both decisions were appealed in 2014. The hearing before this panel of the Admissions and Education Appeal Committee of the Law Society was held October 31st and November 1st, 2016, in the City of Winnipeg at the offices of the Law Society of Manitoba. There was significant delay between the filing of the Notice of Appeal and the scheduling of the Hearing.

## III. ISSUES

8. From the outset of the application process the issue has been whether the Appellant meets the good character requirements for admission into active practice with the LSM.

9. That question was narrowed further in submissions before the panel. Counsel for the LSM conceded that the Appellant had presented sufficient evidence to rebut the presumption against good character that had been raised by his prior history, except for the fact that LSM believed the Appellant had intentionally misled it in the course of making his request to LSM for readmission. The narrow issue of fact, therefore, was not about the historical events, but whether or not Mr. Bergen had been deliberately deceptive in the course of his application for readmission to the LSM.

## IV. FACTS

10. Facts were established based upon voluminous written materials provided in advance of the hearing, and approximately six hours of *viva* voce testimony of the Appellant.

### (a) Background Facts

11. At the time of the hearing the Appellant was 57 years old, divorced with adult children, and resided in Calgary, Alberta. He received his law degree from the University of Alberta in 1987, and articled at a firm in Winnipeg during the 1987-88 year. He received his call to the Bar in Manitoba in 1988. He carried on a varied practice, primarily in litigation, at a number of small firms and as a sole practitioner from 1988 until he left Manitoba in August of 2005.

12. The Appellant has not practiced law since 2005. During the intervening years he has used his legal skills to find gainful employment as a consultant and as a paralegal. Most recently he has been employed by a Calgary law firm, Maurice Law, assisting it in doing historical research and writing to make claims for certain indigenous groups.

13. Both the firm, in its letters of support, and the Appellant, in his testimony, took pains to emphasize that he has not been engaging in the practice of law, having regularly consulted with a practice advisor at the Law Society of Alberta. Rather, his role has been in developing the factual narrative to support the legal arguments to be made by practicing lawyers with the firm. That point was not challenged by LSM. Maurice Law has clearly been more than satisfied with the Appellant's work in this field.

### (b) Incidents

14. In the course of time, some years after being admitted to the practice of law, the Appellant was embroiled in a number of controversial matters. Judicial or quasi-judicial findings against him included:

(i) Law Society of British Columbia Proceeding

The Appellant applied for transfer to practice in British Columbia, in November of 2005. His application for transfer was denied, and following an appeal hearing in 2007 the Law Society of British Columbia concluded that he had deliberately mislead the LSBC, and rejected the transfer application (hereinafter "the LSBC Proceeding").

(ii) Convictions Under *The Retail Sales Tax*

In August of 2005 he was convicted of three offences for violating Manitoba's *The Retail Sales Tax Act.* One charge was for failing to register as a vendor; one count of failing to remit RST; and one count of obstruction for refusing to produce records ("the RST convictions", hereafter). Three other counts were dropped by the prosecution at the time of his guilty plea. He plead guilty and was granted an absolute discharge by Judge Collerman in the Provincial Court of Manitoba.

(iii) LSM Discipline History

He had a discipline history with LSM, including two convictions for misconduct issued on September 14th, 2006 and one formal warning letter ("the LSM Discipline History" hereafter). One conviction was for failing to file an accounting form, despite repeated reminders and warnings that he needed to do so. The second conviction was for Breach of a Conflict of Interest between him and his client. The charge arose from him directing his client to ignore a Canada Revenue Agency "Requirement to Pay" that had been served upon that client, in which she had been ordered to pay to CRA money otherwise owed to the Appellant. The Appellant directed the client to ignore the Requirement to Pay and instead pay the money to him, in direct contravention of the terms of the Requirement to Pay. The two charges were heard together, and resulted in a fine of $5,000.00, and reprimand. The formal caution had been issued some years previously, in 1997, for a concern as to conflict of interest when had acted as counsel in a contentious custody proceeding for his common-law spouse.

15. None of these convictions or findings were appealed. Any of these, on their own, created a rebuttable presumption that the Appellant was not of good character.

16. In addition to the formal findings, there were other incidents that, while less severe, merit some comment. These included instances where three different judges with the Manitoba Court of Queen's Bench expressed concern, in writing, about the Appellant's conduct in proceedings before

the court. He had been convicted of contravening a City of Winnipeg regulatory by-law related to alarm systems and generating an excessive number of "false alarms". He also had been charged criminally with assault and mischief in 1997 following an incident with a common-law spouse. The Appellant denied any wrongdoing in that matter, and the charges were stayed by the Crown when the complainant failed to attend the trial.

1T The materials before the panel also included certain references to complaints made by prior clients. These had been a point of some attention in the course of the LSBC hearing. They received virtually no attention from LSM in the course of this proceeding.

18. None of these more minor incidents rose to the level that they created a rebuttable presumption of bad character, though they do inform the history of the Appellant's conduct. LSM focused its concern on the Appellant's recent conduct, therefore the more minor historical affairs warrant little attention.

**(c) Medical Evidence**

19. A report dated September 10th**,** 2013 was issued by Dr. Baillie, a psychologist in Calgary who also holds a law degree. He had been provided with an assortment of materials, including Volume I and Volume **II** of the LSBC Proceeding (though, as will be examined in detail later in these reasons, he did not have the opportunity to consider Volume III of the transcript of that proceeding). Dr. Baillie also conducted a series of psychological tests on the Appellant.

20. From his examinations Dr. Baillie did not identify any significant psychological defects or mental disorders, describing the Appellant as "...an individual who has no major mental health problems". He did note a mild attention deficit, though he described the impairment as "not severe".

21 After an extensive and detailed review of the reasons for decision from LSBC, as well as his consideration of Volume I and Volume II of the transcript of the proceeding, Dr. Baillie opined that there were alternative explanations for the Appellant's non-disclosure. Dr. Baillie posited that it was "quite likely that Mr. Bergen did not turn his mind to considering other charges he had faced". Dr. Baillie also suggested that the error was a result of an "...understandable slip in his attention".

22. Part of Dr. Baillie's opinion was based upon Mr**.** Bergen having described, "so many losses in the period of time preceding his application to LSBC". Dr. Baillie referred to the Appellant having experienced estrangement from his daughters, losing his career as a litigator, losing the home he jointly

owned with his mother and where she had resided, and acrimonious disentanglement from his wife in 1988.

23. It was conceded by the Appellant that Dr. Baillie had certain points wrong. Some of the losses which Dr. Baillie referred to actually occurred after the LSBC proceeding. The panel also noted that he had noted that Dr. Baillie had not been provided with Volume III of that proceeding.

### (d) Character References

24. Letters of support were written by dozens of individuals. The character references deserve weight. Some were dated, from as early as 2005, and some were rather general and abstract and did not reflect a deep understanding of the Appellant's history and circumstances. Those warranted less weight. Others, though, were from 2016 and expressly referred to having been given extensive materials in regards to his history, including the decision of LSBC. Several members of the Alberta bar still signalled support of him, having had extensive dealings with him. Certain Manitoba lawyers, and other members of the community, had written in support of Mr. Bergen, some more than once.

25. That support matters. LSM acknowledged and accepted the good character references, and conceded that they were sufficiently persuasive to overcome the good character hurdle, save and except for the issues arising from the current proceeding. Because LSM accepted that, but for issues arising from the current application to it, the Appellant had rebutted the presumption that he was not of good character it is not necessary to review the character references in depth.

## V. POSITION OF PARTIES

26. The Appellant argues that, his past foibles notwithstanding, he is currently of good character. His past mistakes are sufficiently distant, and relatively minor in nature. In recent years he has been an upstanding citizen, having stayed out of trouble and made contributions to society that demonstrate good character. He points to the character references, which support admission to practice again.

27 The LSM position was very succinctly summarized in its brief, where it stated: *"...a liar is not fit to practice law. Mr. Bergen was, and is, a liar."* It says that the denial on good character is rooted not simply in the past conduct, but that in the course of his application to LSM he has made material misrepresentations and omissions, which demonstrate a continuing course that he is not of good character.

28. Mr. Bergen denies that he has been misleading in his current application. He has explanations for each point cited by the Director and LSM that gave rise to their concerns.

## VI. LAW

29. Applicable authorities include both the governing statute, prior decisions of this committee and others like it, as well as case law from judicial review applications in superior courts.

### (a) The Legal Profession Act and Related Rules

*30.* *The Legal Profession Act (C.C.S.M.* c. L107, "the Act" hereafter) creates and governs LSM. The Act provides LSM with the authority and the duty to regulate the legal profession in the Province of Manitoba. Section 3(1) of the Act enshrines the *raison de etre* of the LSM as being "... *to uphold and protect the public interest in the delivery of legal services with competence, integrity and independence."*

31 Sections 3(2) and 17 of that Act permit the Law Society to pass rules that may govern admission into membership in the society, and the practice of law. Rules have been passed, and published, that are pertinent to this appeal. In particular, Rule 5-28.2 sets out the criteria to be considered when a member who is non-practising, inactive or who has completed a period of suspension applies to resume active practise. Included at 5-28.2(a) is the pre-requisite that the person provide, *"proof that he or she is of good moral character and a fit and proper person to practise".* That rule also includes other criteria which are not material to this proceeding.

32. LSM has published guidelines for good character applications under these rules. These include a requirement that applicants, including applicants to the CPLED Program and as an articling student, disclose convictions. Of some academic interest, though not particularly pertinent to the issue before this panel, the questions in the LSM application refer to convictions and findings. In the LSBC Proceeding the questions that the Appellant answered referred to "charges", rather than convictions, casting a wider net including proceedings that may not have resulted in a conviction.

33. The guidelines expressly set out that a rebuttable presumption arises that a candidate is not of good character and a fit and proper person to practice law if there are convictions of the ones enumerated. When considering whether the presumption can be rebutted the guidelines set out 16 criteria to be considered. They state that LSM "...may have regard to the following:

(1) the Appellant's candor, 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 of behavior disclosed that gives rise to the presumptions;
(4) the nature and extent of the Appellant's voluntary treatment or rehabilitation;
(5) the Appellant's current attitude about the subject of their disclosure;
(6) the Appellant's subsequent constructive activities and accomplishments;
(7) evidence of character and moral fitness including the reasonably informed opinion of others regarding the Appellant's present moral character; and
(8) in light of the entire record of the Appellant, whether admission of the Appellant would adversely affect the confidence of the public in the legal profession in Manitoba as an honourable, competent, and ethical profession.

Where the disclosure relates to a criminal 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; and
(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.

**(b) Case Law**

**34.** The Panel was provided with a number of decisions by counsel. There appears to be only one decision from the Manitoba Court of Queen's Bench on point, *Kalo v. The Law Society of Manitoba,* January 7, 2010, unreported reasons from Justice Martin, in which he affirmed the findings of a prior panel of this committee in *Appellant A (Kalo) v. The Law Society of Manitoba, Decision No. 20090826B),* which was also before the Panel. Two additional decisions from prior panels of this appeal committee, *The*

*Law Society of Manitoba v. Jolly* (2016 MBLS 4) and *Appellant A,* Decision No. 20150223, were also considered.

35. Several decisions from the Law Society of Upper Canada were provided by counsel for the Appellant: *Smithen v. The Law Society of Upper Canada, 2011, ON LSHP 0044; Preyra v. The Law Society of Upper Canada, 2003 CanLII 48959; Armstrong v. The Law Society of Upper Canada, 2011, ONLSAP 0001.* Counsel for the Appellant also provided one decision from the Ontario Superior Court of Justice *(Watt v. The Law Society of Upper Canada, 2005 CanLII 2111, ON SCDC).*

**(c) Summary of the Law**

36. A number of principles were agreed upon by counsel for the Law Society and counsel for the Appellant. These include the following:

(i) Standard of Review

37. In their briefs the parties agreed that the standard of review on appeals from the Director is generally one of correctness. That standard has in the past been applied fairly consistently.

38. In the course of the hearing, however, it was noted that some recent panels of this committee have taken the view that these hearings are always "fresh" (see the *Jolly* decision), whether or not new evidence was submitted. The decision of Justice Martin in *Kalo* affirmed that panel having approached the matter as a "hybrid", something between a standard of correctness and a fresh, or *"de novo",* hearing.

39. As a matter of law, it appears as though there is some degree of uncertainty as to what the standard of review typically ought to be for hearings of this nature. It has been applied as correctness, *de novo,* or even a "hybrid" between those two.

(ii) Rebuttable Presumption on Balance of Probability

40. The Appellant has been the subject of at least six separate judicial or quasi-judicial decisions, any of which would create a rebuttable presumption that he does not meet the good character requirements. The case law and the LSM Rules make clear that the Appellant bears the onus to rebut the presumption on a balance of probabilities.

(iii) Current Character, Not Past, To Be Determined

41. Mr. John Craig, a lawyer from Calgary, wrote one of the letters of support for the Appellant. In it he stated that *"time and circumstance, experience*

*and learning generally have a way of changing us all'.* Mr. Craig wrote that not as a legal opinion but as a general view of the world. His philosophical statement, however, accurately reflects the state of the law on good character considerations for admission.

42. It was a matter of agreement by counsel for both parties, and supported by the case authorities submitted, that the ***current*** state of the Appellant's character is to be assessed, not the past, nor the future. Character may evolve over time. Speculation as to future character developments should not occur. Past conduct may inform the assessment of current character, to some extent, but past misconduct is generally not fatal for all time. In some of the LSUC cases, such as *Smithen, Preyra* and *Armstrong* fairly serious past conduct was overcome by those Appellants.

(iv) General Description of Character Requirements

43. Many efforts have been made to describe good character, though to some degree it remains a subjective assessment, a "know it when we see it" quality. One of the most commonly quoted summaries of character is that of Mary Southin (later J.A.), in an article entitled "What is Good Character" ((1987) The Advocate 129) where she considered the meaning of good character and repute, and concluded that there are at least three qualities:

(1) 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 consequences may be; and
(3) Belief that the law at least so far as it forbids things, must be upheld and encouraged to see that it is upheld.

44. The case law marks a difference between "character" and "fitness". While character refers to internal qualities, fitness considers a reputation in the community, and an element of public perception.

(v) Criteria to Assess Rebuttable Presumption of Bad Character

45. The *Watt* case from the Ontario Supreme Court set out certain guidelines assessing whether the presumption can be rebutted, using a six-part test. A similar approach was used in two of the LSUC cases. The guidelines produced in the LSM rules contain comparable criteria. The phrasing and nuances vary to some degree, but the factors to be considered are largely consistent, and the list from the LSM guideline provides an essential framework for considering the issue.

46. The eighth point from the LSM list, that of the public interest and confidence in the proceeding, merits an additional comment. Indeed, the

overarching purpose of all of the Canadian Law Societies is to protect the public and regulate the legal profession. That foundational factor, therefore, must be given significant weight.

## VII. ANALYSIS

47. Applying those principles to the evidence before the Panel resulted in the following conclusions.

### (a) Standard of Review

48. As noted above, the standard of review seems to have become a bit of a moving target in proceedings before this committee. For this particular appeal, that was not an issue. It was agreed that new evidence not before the Director was admissible in this proceeding, including certain letters of reference in support of the Appellant and approximately six hours of direct *viva* voce testimony from the Appellant himself.

49. Furthermore, more than two years had passed since the time of the Director's decisions. Character is to be assessed as current character, not past character, and the passage of time may change the assessment.

50. Therefore, given the extensive new evidence that had not been before the Director, and given the passage of more than two years since the Director's decisions had been made, this hearing was conducted *de novo,* a fresh hearing in which the decision of the Director was owed no particular deference. This panel proceeded on the basis that it was fit to do as it thought right, without any need to parse the reasons of the Director.

51. That conclusion was reached in the particular circumstances of this case. In cases without new evidence or where there had not been such a lengthy gap in time it may be that a standard of correctness would be more appropriate than a hearing entirely afresh.

### (b) Credibility of the Appellant

52. The credibility of the Appellant was of central importance. If his explanations were accepted by the panel, LSM conceded that he had otherwise provided sufficient evidence to rebut the presumption that he was not of good character. On the other hand, if his evidence was found wanting, the inescapable logical conclusion was that he had continued to exhibit bad character by misleading LSM in his application for readmission. Assessing credibility, in this case, was crucial.

53. Mr. Bergen presented as deferential, articulate and mostly contrite in giving his testimony. To his credit, he treated everyone respectfully, even counsel for LSM when he was subjected to pointed cross-examination.

54. There were, however, troubling inconsistencies and nonsensical elements in the testimony. Ultimately, this panel concluded that there were too many inconsistencies and points that simply did not make sense. His testimony and in particular his explanations regarding the LSBC proceeding and the current application to LSM were not accepted. There were numerous aspects of his evidence that caused concern for the panel.

(i) Shifting Explanation For LSBC Non-Disclosure

55. As noted above, the LSBC determined that he had deliberately misled it in failing to disclose the RST convictions. In rejecting the application for readmission the LSM Director cited as a major point of concern that Mr. Bergen had shifted his explanation as to why he had failed to disclose the RST convictions. Before the LSBC he claimed that he had, in essence, misinterpreted the question. In the application to LSM his letter of December 2012 attributed the non-disclosure as having been because he had "blocked it from his mind". He suggested there was a psychological phenomenon at play, and referred to a letter from a friend, Mr. Lind, who described himself as retired teacher/school psychologist. In his letter Mr. Lind suggested that person under stress might suppress memories of traumatic events. It was unclear whether Mr. Lind had any medical qualifications.

56. He need not be tried twice for the same issue, and counsel for the Appellant correctly argued that should not have to "confess" if he continued to maintain that he had been truthful in the original LSBC Proceeding. However, it is fair to examine his explanations for the prior events, and consider whether there was consistency in his account of events.

57. Given the importance of this issue and how other points related to it, a detailed unpacking of the history is needed.

58. Many of the surrounding facts are undisputed. In August of 2005 the Appellant entered a plea of guilty that resulted in the RST convictions. At his sentencing hearing, in asking for leniency from Judge Collerman of Manitoba's Provincial Court, he specifically cited the fact that he would have to answer for his conviction when seeking to practice law in British Columbia.

59. Three months later he applied to the LSBC. One of the questions on the application asked:

*"Have you ever been charged in Canada or elsewhere with any crime, offence or delinquency under a Statue or ordinance, excluding parking or speeding tickets if you have received fewer than five such tickets in the last three years? Please provide full particulars."*

60. In reply to that question he answered "Yes", but did not initially provide particulars. LSBC requested further detail, beyond the simple "Yes" he had answered with. In his reply to LSBC, he noted the 1997 criminal charges that had been stayed, describing them as based upon a "completely fictitious complaint". In neither the initial answer nor in the follow up email did he disclose the RST convictions that had occurred a few months earlier. LSBC rejected the application, citing the non-disclosure and therefore a failure to meet the good character requirements.

61 Mr. Bergen appealed, and a four-day hearing was conducted. In the LSBC Proceeding in 2007 the primary thrust of his explanation was that he misread the query. In both direct and cross-examination he maintained that it had been a mistake of interpretation, that he had perceived the question as being focused upon criminal matters. An innocent misunderstanding. In the reasons for decision issued in the LSBC Proceeding that panel clearly and emphatically rejected that argument, not believing that a person with legal training and litigation experience could so badly misunderstand the question, particularly in light of the statements made to Judge Collerman merely months earlier.

62. In December 2012, when writing the LSM Director, he claimed that the non-disclosure was because the matter had been blocked from his mind. In support of this explanation he referenced the letter from Mr. Lind that purported to claim a quasi-medical reason.

63. In this proceeding the Appellant, in his testimony, attempted to weave the undisputed facts into a coherent explanation that they were all true. He described the shift in explanation as "two sides of the same coin". To the extent that both denied a deliberate misleading of LSBC that may be true. They are, however, as different as heads are from tails, and cannot both face up at the same time. Either he considered the question, and concluded the RST charges did not apply, or else he had somehow forgotten about them.

64. Much was made by the Appellant, in this proceeding, that he had also testified in the LSBC Proceeding that he had "blocked" the events from his mind. This rested upon one statement made in reply to questions from a member of the LSBC panel, contained in Volume III of the transcript.

65. That particular statement as recorded in the transcript was not, in the view of this panel, convincing evidence of a consistent string of testimony over the years. In direct examination before LSBC, in answer to questions by his chosen counsel who had prepared for the hearing with him, his answers were rooted in the misinterpretation narrative. On cross-examination, the same. in the Volume Ill answers, the LSBC panel member asked in approximately six separate ways whether the Appellant had been suffering from significant stress in his life at the time that the November 2005 application and follow-up answers were made. He consistently denied that as a factor, saying that getting established in a new community and finding a place to live were "the only real challenges I was facing at that time".

66. He stuck to his guns and repeatedly answered that stress in his life had not been a factor, that the non-disclosure had been based on misreading the form. Only near the end of the transcript, in what reads as something of a rambling statement while searching for a response, did the Appellant utter the word "blocked", or anything like it. It comes across in the transcript as a throw away statement, made without reflection or emphasis. It was not considered at all in the LSBC reasons for decision. Clearly, from both the transcript and the reasons for decision, the main explanation made again and again was that he had misunderstood the question.

67 That this explanation was rejected in the LSBC Proceeding cannot be seen as surprising. Given the wording of the question, which even clarifies the scope as to matters such as speeding and parking tickets, that was not a credible explanation from an experienced lawyer.

68. In the view of this panel, the Director was correct in detecting a material shift in how he explained the non-disclosure. The entire theme of the explanation changed.

69. Furthermore, the current theory proffered, that he had "blocked" the proceeding from his mind was even less probable than that an experienced lawyer had misread the question. Dr. Baillie, the psychologist retained by the Appellant, did not provide any sort of medical support that there was a psychological event that suppressed the memory, the notion espoused in the Appellant's first letter for readmission. Instead, **Dr.** Baillie endeavoured to finesse the answer, suggesting that there was an air of plausibility to the Appellant's evidence in the LSBC proceeding (even though Dr. Baillie did not have the benefit of reading Volume III of that proceeding, presumably did not know that it existed). Absent medical support, a common sense approach to weighing this rationale does not assist the Appellant.

70. The more likely conclusion, in the view of the panel, is that the Appellant has in the course of his application for readmission misled LSM. He wants to continue practicing law, and attempts to colour the historical situation in a more favourable light. Unfortunately, in doing so, he damaged his credibility and tainted the application for readmission.

(ii) Failure to Produce Volume III of LSBC Hearing Transcript

71. In the course of preparing to request reconsideration in 2013 counsel for the Appellant had suggested that he obtain transcripts of the LSBC Proceeding in order to examine exactly what his testimony had been, particularly in light of the Director's emphasis on the shifting explanation in rejecting the application the first time. So, the Appellant ordered the transcripts.

72. Mr. Vincent's letter requesting reconsideration included with it an excerpt from the transcript. The Director requested production of the full transcript, rather than selected excerpts. Counsel for the Appellant provided two volumes to the Director, the only two in his possession. Reading to the end of Volume li the Director observed that it denoted the proceeding to have been adjourned, not concluded, and asked where the rest of the transcript was. It turns out there had been a Volume III, which Mr. Bergen possessed but had not provided to anyone. Not to his counsel, nor to Dr. Baillie when Dr. Baillie prepared his report, nor to the Director when the request was made for a full transcript.

73. The Director drew an adverse inference against the Appellant for having failed to produce Volume III. That clearly played a role in the Director's decision, and in the position LSM took in the hearing.

74. The Appellant attempted to explain the non-disclosure. He testified that he had personally attended to ordering the transcripts from the LSBC proceeding. They arrived in a box. He opened the box, spent five or six minutes to find the relevant portions of his answers in Volume I and Volume II, and then returned the transcripts to the box. He noted Volume III, but spent very little time on the whole exercise and paid Volume III little mind. He put the box away, not wanting to think of it further, because the LSBC hearing had been quite "traumatic" for him, (he related an anecdote of how his hands had been shaking en route to the LSBC hearing). The transcripts were symbolic of the entire event, he said, and he still found the memory of the LSBC proceeding upsetting.

75. When the time came that he was asked to provide the transcripts to Dr. Baillie he brought only Volume I and Volume II because, he testified, he believed Volume Ill contained nothing relevant. He further claims that

Volume III "exonerates" him. This is based on his use of the phrase "blocked" at one point in the Volume Ill transcript, as described above.

76. It was undisputed that Volume Ill contained relevant evidence. It was, at all material times, in the Appellant's possession and control. He did not produce it. Why not? Either the Appellant deliberately withheld what was potentially damaging evidence, or else his narrative as outlined above was true. This panel considered the former more likely than the latter.

77. Several points in the Appellant's version of events were difficult to accept. Volume I and Volume II consisted of nearly 400 pages of transcript, with another 56 from Volume III. He received them in 2013, roughly 6 years after the proceeding. He was able to discern in five or six minutes that he had captured the relevant portions of over 400 pages of transcript? That seemed rather unlikely.

78. Furthermore, the Appellant was an experienced litigator. One of the reference letters he relied upon was from a former legal assistant who described him as meticulous in his preparations, wanting to get things "just right". How did he determine that Volume Ill contained no relevant information without even having read it?

79. There were at least three different points in time when the Appellant would have had to turn his mind to production of the transcripts. Once when he brought them to Dr. Baillie, a second time when he provided them to Mr. Vincent, and at least a third time when the Director requested them. Whatever symbolic trauma the transcripts represented, he took Volume I and Volume II out of the box to bring them to Dr. Baillie, and again when he provided them to Mr. Vincent. Why would he leave one of the three volumes behind? Believing, as he claimed, that Volume Ill did not contain the relevant parts of the proceeding does not adequately explain why he would not have provided it too when he was asked for the transcripts.

80. When he received them back from Dr. Baillie he then provided only partial evidence to his own counsel. At the third opportunity to produce, it was at the request of the Director. That there may have been some sort of symbolic trauma associated with the transcripts does not explain producing two volumes but not the third. Given his history with LSBC and the trouble than inadequate disclosure caused him there, how could it fail to register that he needed to retrieve Volume Ill?

81. The story was not persuasive. More likely was that he was seeking to suppress detrimental evidence. For, despite his claims of "exoneration", it was the view of the panel that the totality of the evidence in Volume III was not helpful to his case. Though there was the one throw away reference to "blocked", the overall tenor of his testimony in Volume III was contrary

to his subsequent explanation that the nondisclosure was the product of a quasi-psychological phenomenon.

(iii) Inconsistent Evidence as to Influences for RST Challenge

82. In his direct testimony the Appellant, when he was explaining his ill considered decision to commit the RST offences, referred to the influences that led to his plan to challenge the RST legislation being applied to legal fees. He specifically cited the "success" of a lawyer named Dugald Christie, who had successfully challenged (at least in the initial round of court proceedings) similar legislation in British Columbia, as a motivating factor. In cross-examination he affirmed that the "success" of *Mr.* Christie had been a significant influence in his decision to mount the quixotic challenge. The materials filed also showed that when the Appellant most recently solicited letters of reference from other lawyers and acquaintances in anticipation of his request to be readmitted, he included a newspaper article describing Mr. Christie's successful ruling in British Columbia. Presumably that article was being included to provide partial explanation for the Appellant's past RST convictions.

83. In cross-examination, after having affirmed that it was Mr. Christie's "success" that influenced him, it was pointed out by counsel for LSM that both the newspaper article and the court judgment that gave rise to it were dated from February 2005. The change in the RST legislation took place July 1, 2004. Whatever decisions the Appellant had made to not register as a vendor for RST and to not remit RST to the Province of Manitoba had to have occurred approximately 8 months prior to the Christie court case, if not earlier.

84. When presented with this inconsistency the Appellant promptly posited that perhaps he had heard of the proceeding, even if the actual successful result came at a later point. While that explanation may have some degree of plausibility, he had placed considerable emphasis on Mr. Christie's success. This was a notable inconsistency, and the quick pivot to an alternative narrative was unconvincing.

(iv) Egregious Error

85. In his letter seeking readmission to LSM the Appellant referred to his failure to disclose the RST convictions to LSBC as an "egregious error". The use of the word "egregious" caught the attention of the Director, and also of counsel for LSM. It was the type of phrase that has the ring of an admission to it.

86. The use of that term in the letter, in itself, may not have been particularly significant, perhaps it was just an awkward way to express a point. But,

the cross-examination of the Appellant on that point left the panel with a sense of unease about the reliability of the Appellant's answers. When pressed to explain his choice of words, the cadence of his answers changed. He appeared to be searching for the best answer, not necessarily the truthful one, as demonstrated by his explanation that "egregious error" did not mean a deliberate misleading of the LSBC but simply that he misled, or that he failed to make the full disclosure that was asked of him. The impression he left during this line of questioning was one of evasiveness, and a lack of candour.

(v) Changing Answers As to "Pressures"

87 Separate and distinct from the fact that his explanation shifted as to why he had failed to disclose the RST convictions to LSBC, the Appellant also changed his answers about one of the underlying factors. Namely, his evidence as to whether he was subject to pressure in his life, and what those pressures were, differed significantly in his evidence at this hearing in contrast to what it had been before LSBC.

88. In the LSBC Proceeding he was asked by the panel several times about pressures in his life in November of 2005. He was dismissive, saying he had felt a sense of relief when leaving Manitoba. In his testimony in this proceeding he emphasized the stress and pressures he was under.

89. Within the discussion about the pressures there was one specific element of it where the shift was particularly pronounced. Among those pressures he testified that one was the breakdown of his relationship with Ms. Paton, common law partner. However, that had occurred in 1997, 8 years prior. When questioned by the Panel said that he had still carried scars. But, that was not at all what he said to LSBC in 2007.

90. It was also notable that Dr. Baillie's report, in its "so many losses" passage described above, considered a list of issues different than those testified to in this proceeding. While it may be that the error there was Dr. Baillie’s it is yet another inconsistency.

91 It seems more likely than not that the answers in the LSBC Proceeding were the most accurate. It seems unlikely that, with the passage of nine years, he had become aware in 2016 that he truly was experiencing these difficulties in 2005, when he did not think that to be the case in 2007, especially on a point such as the dissolution of a romantic relationship. The more logical conclusion is that this part of his testimony was revised intentionally, to better support his new explanation as to why the RST charges had not been disclosed.

92. To be clear: though the inconsistencies in this area of his testimony were in some ways related to his shifting explanation as to the overall reason for non-disclosure to LSBC, the fact that he also changed some of the supporting reasons was a separate and distinct thread of inconsistency. His explanation for non-disclosure shifted from primarily being "I didn't understand the form" to "it was blocked from my mind". Before the panel he also changed his evidence as to pressures in his life, from when he told LSBC that he had virtually none to now reciting a detailed list of pressures. The latter version seemed tailored to support the "blocked from my mind" explanation, rather than a genuine different recollection.

(vi) Additional Inconsistencies

93. In addition to the more significant points set out above, there were a number of relatively minor points where the Appellant's evidence was inconsistent. These smaller inconsistencies served to further detract from his overall credibility.

94. The Appellant repeatedly referred to his having learned the need to get sober second opinions from mentors or senior counsel. In reply to a question as to why he did not run the LSBC application question by another lawyer he initially stated that he had moved to BC and did not know anyone there. He was referred to the character references that approximately a dozen Manitoba lawyers had completed in support of his application. He said that those came at a later date. It was pointed out that a number had been completed in November of 2005, at the very time he had been completing the application. He had no further explanation.

95. The lack of insight into why he did not think, in 2005, to obtain a second opinion was not necessarily a concern. That, in 2016, he appeared to smoothly present incredulous (how had lost touch with everyone in Manitoba in a mere three months?) and outright inaccurate answers, without hesitation, was a concern. His answers changed quickly when he was presented with a scenario he did not have a ready explanation for.

96. There was another inconsistency on a material point as to what the Appellant said he had read prior to answering the fateful question in the LSBC application. He wrote, in the December 7, 2012, letter to the Director in his first application for readmission, that he had read that specific question over three or four times. In this proceeding, his evidence expanded to saying that he had read the entire form over three or four times.

97. Further points that struck that panel as perplexing, from a credibility standpoint:

- the Appellant claimed before this panel that he was uncertain as to what the actual charges had been that resulted in the RST convictions, and said he would need to rely on his own counsel's memory;
- It was argued that, if his letter of December 2012 contained factual errors, that could be attributed to the fact that it was written without the benefit of the LSBC proceeding transcripts and without legal counsel, which led him to place weight upon a non-expert's psychological explanation. It seemed that for such a fundamental point this explanation was a grasping at straws;
- There was a point in the Appellant's testimony where focus was placed upon the difference between "misleading" and "deliberately misleading". While recognizing that there may be a difference between an innocent versus a deliberate misrepresentation, the Appellant's evidence on this subject appeared contrived.

(vii) Conclusion On Credibility

98. The conclusion of this panel was that there were too many points in Mr. Bergen's evidence that simply did not make sense. Some of the inconsistencies were relatively minor, and for some there were potentially plausible explanations. Perhaps one or two minor inconsistencies may have been swallowed. They could not be swallowed as a whole. The totality of the testimony was viewed as lacking in credibility.

99. It may be that this conclusion is not correct, and that Mr. Bergen was entirely candid and truthful. The panel weighed that possibility with care, recognizing the gravity of the issue and all that flowed from it. Considering the matter on the civil standard of a balance of probabilities it determined that the more likely explanation was that these parts of the testimony were adapted by the Appellant as he went along, tailored to paint himself in the most flattering light. Though some explanations were somewhat plausible, in each instance noted above it seemed more likely than not that the simpler answer — that he was being untruthful in an effort to bolster his case — was the correct one. Cumulatively, the panel concluded that multiple material points in the Appellant's evidence were misleading.

**(c) Application of the Facts to Good Character Criteria**

100. Having concluded that the Appellant continued his course of bad conduct by misleading LSM in his readmission application the assessment of the good character criteria requires only limited explanation. Has there been candour, sincerity and full disclosure in the proceedings as to character and fitness? Were the omissions or misrepresentations material? Recency of the behaviours? In light of the entire record of the Appellant,

would his admission adversely affect the public confidence in the legal profession as an honourable, ethical and competent profession?

101. The answers are self-evident. The Appellant has a history of misconduct that place a burden upon him to rebut the presumption he is not of good character. An Appellant who has demonstrated ongoing misconduct on matters of integrity in the course of this application process cannot rebut that presumption. The LSUC cases cited by counsel for the Appellant, such as *Smithen,* the *Preyra* decision, and *Armstrong* all turn on past bad character having been overcome. This panel was not able to conclude that the Appellant had been forthright and candid in this proceeding, making those situations wholly inapplicable.

**CONCLUSION**

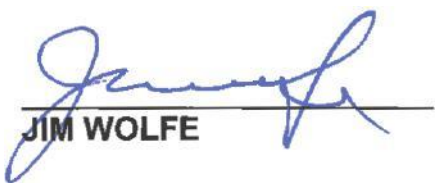
102. Admissions departments of Law Societies across this country carry the burden of being gatekeepers. Good character standards are a preventative measure, to guard against the damage that rogue lawyers can and all too frequently do inflict upon the public at large and the reputation of the legal community. Vigilance remains essential for both the protection of the public and the maintenance of the public trust.

103. Given its conclusion as to the Appellant's credibility on essential points of the proceeding this panel had no choice but to conclude that he failed to meet the good character requirements. The appeal was dismissed, and the decision of the Director affirmed.

This_ day of November, 2016.

**GRANT DRIEDGER (Chair)**

**TODD RAMBOW**



**JIM WOLFE**

would his admission adversely affect the public confidence in the legal profession as an honourable, ethical and competent profession?

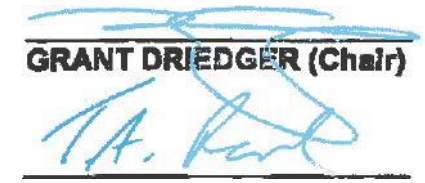
101. The answers are skiff-evident. The Appellant has a history of misconduct that place a burden upon him to rebut the presumption he is not of good character. An Appellant who has demonstrated ongoing misconduct on matters of integrity in the course of this application process cannot rebut that presumption. The LSUC cases cited by counsel for the Appellant, such as *Smfthen,* the *Preyra* decision, and *Armstrong* all turn on past bad character having been overcome. This panel was not able to conclude that the Appellant had been forthright and candid in this proceeding, making those situations wholly Inapplicable.

## CONCLUSION

102. Admissions departments of Law Societies across this country carry the burden of being gatekeepers. Good character standards are a preventative measure, to guard against the damage that rogue lawyers can and all too frequently do inflict upon the public at large and the reputation of the legal community. Vigilance remains essential for both the protection of the public and the maintenance of the public trust.

103. Given its conclusion as to the Appellant's credibility on essential points of the proceeding this panel *had* no choice but to conclude that he failed to meet the good character requirements. The appeal was dismissed, and the decision of the Director affirmed.

This 28th day of November, 2016.




TODD RAMBOW