



The Law Society of Saskatchewan

DARBY JANE BACHYNSKI

April 2, 2013

Law Society of Saskatchewan v. Bachynski, 2013 SKLSS 2

**IN THE MATTER OF THE LEGAL PROFESSION ACT, 1990
AND IN THE MATTER OF DARBY JANE BACHYNSKI,
A STUDENT-AT-LAW OF REGINA, SASKATCHEWAN**

**DECISION OF THE HEARING COMMITTEE OF THE ADMISSIONS AND
EDUCATION COMMITTEE FOR THE LAW SOCIETY OF SASKATCHEWAN**

Hearing Committee Members:

Dr. Sanjeev Anand, Q.C. (Chair), Dr. Greg Stevens, David Chow

INTRODUCTION

1. In an email dated November 20, 2012, Student-At-Law Darby Jane Bachynski (the "Student") was informed by the Director of Bar Admissions (the "Director") that she would be assigned a failing grade on a competency evaluation she had submitted as a requirement of her enrollment in the Canadian Centre for Professional Legal Education Program ("CPLED") (sometimes referred to in The Rules of the Law Society of Saskatchewan-the "Rules"-as the Bar Admission Program). The Director had determined that the Student had plagiarized substantial portions of her Module 3 Ethics and Competency evaluation.

2. Plagiarism is explicitly prohibited in CPLED's Professional Integrity Policy. A student who is found to have plagiarized has also breached his or her signed CPLED Program Agreement.

3. The CPLED/Bar Admission Program Handbook dictates that as a consequence of being assigned the academic sanction of a failing grade, a student is not entitled to write a Supplemental Competency Evaluation. As all modules of CPLED need to be passed in order to pass the program, the assignment of a failing grade that is not overturned results in a de .facto failure of CPLED.

4. Rule 171. (1)(b)(i) requires students to complete the Bar Admissions Program (CPLED) successfully before being admitted as a lawyer.

5. Rule 160. (2) requires students who do not successfully complete the Bar Admissions Program to repeat the program (should they wish to apply for admission as a lawyer).
6. The Director's email to the Student referenced Rule 160. (4), which provides her the right to appeal her failure of CPLED to the Admissions and Education Committee (the "A&E Committee") of the Law Society of Saskatchewan (the "LSS"). The Student appealed her failure in a letter dated November 23, 2012.
7. On January 17, 2013 the A&E Committee passed a motion forming the above-noted Hearing Committee (the Panel) in order to adjudicate the Student's appeal.
8. The hearing was held on March 11, 2013. At the hearing, the LSS was represented by Tim Huber and the Student was represented by Daniel Kwochka. The Student attended the hearing, offered sworn evidence, and was questioned by the Panel. A Court reporter was present. Although no members of the public were present, two members of the Law Society staff, Barbra Bailey and Andrea Johnston, attended the hearing with the consent of all parties.
9. At the hearing a Statement of Facts and Admissions (the "SFA", attached at Tab [1]) on behalf of the Student was filed, as was the Notice of Hearing and a written submission by counsel for the LSS.
10. At the conclusion of the hearing the Panel reserved its decision, with reasons to follow. These are those reasons.

JURISDICTION

11. The Student was, at all times material to this proceeding, a Student-at-Law pursuant to the provisions of *The Legal Profession Act, 1990* (the "Act") as well as the Rules, and was enrolled in the CPLED Program.
12. The hearing was conducted according to Rule 230, which governs A&E Committee hearings.
13. The original Notice of Hearing indicated the circumstances to be inquired into at the hearing were the Student's alleged breach of the CPLED Professional Integrity Policy. While the Notice of Hearing indicated the matter was proceeding according to Rule 230, the SFA also indicated the appeal was pursuant to Rule 160(4). Counsel for the LSS and counsel for the Student agreed that the hearing should proceed pursuant to both Rule 160(4) and Rule 230.
14. The hearing proceeded without preliminary motions or objections to any aspect of the hearing, including its jurisdiction and composition of the Panel. Principals, Policies, and Agreements of Students-at-Law.
15. As specified in the CPLED Professional Integrity Policy, "students must conduct themselves with the honesty and professional integrity expected of a lawyer." In addition to being governed by the Rules, students-at-law must also adhere to the policies set in relation to CPLED.

16. The CPLED Professional Integrity Policy states, among other stipulations, that competency evaluations (past and present) are strictly confidential, that all competency evaluations/submissions must not be discussed or disclosed except as authorized, and that "all Assignment Submissions and Competency Evaluation Submissions must be the student's own original work." The policy explicitly prohibits plagiarism.

17. CPLED's Professional Integrity Policy states that for breaches of policy the Director may take such action as the Director deems appropriate, including the imposition of a failing grade.

18. CPLED students must sign a CPLED Program Agreement, which, inter alia, binds the student to abide by the CPLED Professional Integrity Policy, confirms that all work submitted will be original work, and has the student acknowledge that "plagiarism is not tolerated".

PARTICULARS OF CONDUCT

19. To make its determination the Panel had the benefit of the SFA and the testimony of the Student. A brief summary of aspects of that information is set forth below.

20. The Ethics and Competency Evaluation component within CPLED is a five-part exercise incorporated into most of the online modules dealing with the specific content areas covered in CPLED. In the instant situation, the Student plagiarized her first Ethics and Competency Evaluation assignment that involved formulating a response to an ethical issue found within the third of nine CPLED modules, "Drafting Contracts".

21. It is standard practice for the Director to utilize plagiarism detection software when students submit competency evaluations.

22. The plagiarism detection software identified that the Student's submission for the evaluation in question was significantly similar to a competency evaluation submitted in a prior year by a then student who had clerked at the same court where the Student was currently clerking.

23. The Director confronted the Student about the plagiarism allegation during an in-person interview on November 14, 2012. During this interview, the Student stated that she came across the former clerk's assignment in the course of looking for a different precedent document on her work computer. The Student stated that she did not know the former clerk and that the former clerk had no involvement in the matter whatsoever.

24. During the interview, the Student stated that she began to read the former clerk's assignment. However, the Student also maintained that when she became cognizant of the nature of the document, she closed it and deleted it. The Student specifically stated that she did not have the former clerk's assignment open on her computer for reference purposes while the Student completed her own assignment. The Student stated that the assignments were similar because she found it difficult to create her own unique work after having read the assignment authored by the former clerk. In making these statements the Student was not being forthright.

25. In a November 23, 2012 letter addressed to the Admissions and Education Committee of the Law Society of Saskatchewan, the Student admitted that she relied on the assignment it had been alleged she plagiarized. In the SFA, the Student admitted that she had kept the assignment she plagiarized open on her computer and referred back to it on several occasions in the course of completing her assignment.

26. The Student stated that this was the only occasion she plagiarized, that she knew it was wrong to plagiarize, and that she did not self-report her plagiarism.

27. The Student also indicated that, prior to engaging in this instance of plagiarism, she was made aware of *LSS v. Frost-Hinz, SKLSS 7*, the case of a student caught and sanctioned for plagiarizing during CPLED in Saskatchewan in 2012, but that the discussion of this case during the CPLED course was minimal. Submissions on Sentencing

28. Since *Frost-Hinz* in 2012 there have been no written decisions in Saskatchewan, or reported by either counsel as having occurred elsewhere, involving students being caught cheating during CPLED. Consequently, the jurisprudence reviewed in *Frost-Hinz*, and the *Frost-Hinz* decision itself, was the basis for the majority of arguments from both counsel having regard to sentencing.

29. Counsel for the LSS argued that the major component of the sanction in the present case should be a delay in the Student's ability to apply for admission as a lawyer. He submitted that an appropriate delay would be between three and six months following the completion of all articling requirements. While this was the same range of delay argued for in *Frost-Hinz*, counsel did not think it appropriate to suggest the Panel only consider the lower end of that range-as was decided in the *Frost-Hinz* matter. In fact, Mr. Huber submitted that the Student's failure to be forthright with the Director when he confronted her about her conduct and the Student's minimization of her use of the former clerk's assignment represents an aggravating factor that must be taken into account.

30. Counsel for the LSS also offered that it has been the practice in Saskatchewan to have students contribute to the costs of the hearing process (with fines also being levied in some cases) and that in British Columbia students found cheating have often been required to write an essay about their cheating. The writing of an essay was offered as one mechanism to increase the awareness and importance of students-at-law acting with integrity. An essay was seen as an action that might increase general deterrence.

31. Counsel for the LSS emphasized the importance of general deterrence when dealing with integrity issues in general and plagiarism specifically. It was noted that in spite of the *Frost-Hinz* sanction in 2012, two students in the current CPLED program had admitted to plagiarizing. Counsel submitted that perhaps the message regarding the seriousness of plagiarism was not getting through to students. Breaches of integrity are among the most serious in the legal profession and, for the legal system to operate properly, lawyers must be honourable and forthright. The public must be protected and have confidence in the ability of recently admitted lawyers to undertake independent legal work.

32. Counsel for the LSS offered that the facts in the instant matter and *Frost-Hinz* are very similar. Both students had plagiarized one competency evaluation on one occasion, both knew it was wrong, and neither self-reported. In addition, both students expressed extreme remorse and both students cooperated with matters related to the hearing.

33. Where the Student's case and the *Frost-Hinz* case differ is that the Student was not initially forthright when confronted about her conduct. Nevertheless, this aggravating factor should not be overstated as the Student did, of her own accord and in the absence of any precipitating cause, come forth with the truth a mere nine days after her initial interview with the Director.

34. Counsel for the Student submitted that there was very little difference between the facts of the current matter and *Frost-Hinz*. Counsel submitted that the sanction ordered in *Frost-Hinz* would be appropriate and the Student had said as much in her letter of appeal dated November 23, 2012 (attached as part of the SFA).

35. When questioned on the general deterrence impact of *Frost-Hinz*, given the two current cases of plagiarism, counsel for the Student opined that perhaps any consideration of increasing sanctions should wait until knowledge of *Frost-Hinz* (and possibly other decisions involving students plagiarizing) is known more widely-such the next CPLED class (those entering in 2013).

36. When questioned regarding the sanction of requiring the Student to write an essay on her experience of having breached expectations of integrity, counsel for the Student offered that while such a sanction was not a component seen in *Frost-Hinz*, such a requirement would not be unreasonable and might serve to increase general deterrence.

DECISION

37. The importance of those involved in the practice of law operating with honesty and integrity cannot be emphasized enough. It is critical that the public have confidence in, and trust, the legal system and that those in the legal system have trust and confidence in each other.

38. The need for integrity and honesty in those operating within the legal system is emphasized in key decisions dealing with student breaches of integrity (e.g. the *Law Society of Alberta v. Cattermole*, [2008] L.S.D.D. No. 168.; *LSS v. DeMaria and Mercier*; and *LSS v. Frost-Hinz*, 2012 SKLSS 7). Cattermole underscored this point most directly when at para. 29 it is stated that "Next to stealing, cheating and lying are the most egregious activities a lawyer can engage in."

39. It is baffling why students who have successfully completed a law degree, in what can only be hoped is a singular instance of profoundly poor judgment, decide to gamble their reputation by cheating on what is acknowledged by most as a relatively straightforward evaluation.

40. We acknowledge that on most of the relevant dimensions, the fact scenarios are quite similar between the current situation and *Frost-Hinz*. However, the failure of the Student to be forthright when initially confronted with the allegation of plagiarism by the Director constitutes a significant aggravating factor that was not present in *Frost-Hinz* and this factor must be taken into account in assessing the appropriate penalty. As indicated earlier in this judgment, this aggravating factor is somewhat ameliorated by reason of the Student's coming forth with the truth within a relatively short period of time.

41. We agree with previous decisions that have required students to contribute towards the costs of the proceedings. We believe that students should be responsible for a significant percent of the costs associated with their transgressions. We also recognize that students often have debt, limited means, and there may be costs associated with delaying admission as a lawyer.

42. We agree with both counsel that a delay in the Student's entry into the profession is an appropriate major component of her sanction. We are concerned, however, that heretofore students in general might not be "getting the point" and that the public's confidence in integrity of the profession will erode if instances of integrity breaches by students-at-law continue and/or are not seen to be addressed in a serious manner.

43. While this Student must take ultimate responsibility for her actions, we believe future CPLED students could do more to protect any and all documents generated during CPLED. CPLED documents are confidential and should be protected in a manner fitting confidential material, such as password protecting and/or encrypting documents. CPLED documents are not documents of the organization in which a student-at-law works and should not be generally accessible.

44. Weighing our ongoing concern for general deterrence with the similarity of facts between this matter and *Frost-Hinz*, and taking due account of the failure of the Student to initially be forthright when confronted with the plagiarism allegation, we have determined the following penalty to be appropriate.

ORDER

45. The penalty for the Student, in reference to the matters under consideration in the Notice of Hearing dated February 6, 2013, as amended at the Hearing, is as follows. The Student shall:

- a. Be required to write a Supplemental Competency Evaluation for the Ethics and Professionalism Competency Module of the CPLED program as soon as such can be arranged by the Director of Bar Admissions;
- b. Contribute to the costs of the hearing in the amount of \$1,500.00, with the requirement that this amount be paid within six months of the Student being admitted as a lawyer;
- c. Write an essay outlining the nature of her misconduct, the consequences of her misconduct on her and the potential consequences on the public and the profession, and the importance of integrity in the practice of law. This essay must

be completed and submitted to the Director of Bar Admissions prior to the Student being admitted as a lawyer;

- d. Not be eligible to be admitted as a lawyer for four months from the date the Student would have otherwise been eligible to be admitted as a lawyer.

46. Counsel for the LSS stated it was his understanding a Supplemental Competency Evaluation could be arranged and marked in short order. It is anticipated that the requirement for a supplemental evaluation could be arranged so as not to delay beyond four months the Student's potential admission as a lawyer.

47. It is hoped that the Student's essay can be used as general deterrent for integrity breaches by those enrolled in CPLED. After the Student submits her essay it should be anonymized, with the anonymized version, as well as the *Frost-Hinz* decision explicitly referenced and made available at the beginning of future CPLED programs in Saskatchewan.

DATED at the City of Saskatoon, in the Province of Saskatchewan, this 2nd day of April, 2013.

“Dr. Sanjeev Anand”
Chair

AGREED STATEMENT OF FACTS AND ADMISSIONS

JURISDICTION

48. Darby Bachynski (hereinafter the “**Student**”) was, at all times material to this proceeding, a Student-at Law pursuant to the provisions of *The Legal Profession Act*, 1990 (hereinafter the “**Act**”) as well as the *Rules of the Law Society of Saskatchewan* (the “**Rules**”), enrolled in the CPLED Program (the “**CPLED Program**”) sometimes also referred to in the Rules as the Bar Admission Program.

49. This proceeding is an Appeal pursuant to Rules 160(4) and 230 in relation to a decision of Samuel Bergerman, the Director of Bar Admissions (hereinafter the “**Director**”), to assign a failing grade to the Student in relation to her work on the Ethics and Professionalism Competency Evaluation and not permit the Student to write a supplemental evaluation with the result that the Student is unable to complete the CPLED Program.

50. The failing grade was assigned on November 20, 2012 as a result of the Director’s belief that the Student had breached the CPLED Professional Integrity Policy in relation to her work on the Ethics Evaluation. An e-mail letter from the Director to the Student advising of the Director’s decision is attached at **Tab 1**. Attached at **Tab 2** is a copy of the CPLED Professional Integrity Policy. The allegations against the Student also represent a breach of the CPLED Program Agreement signed by all students and a copy of the Student’s signed Program Agreement is attached at **Tab 3**.

BACKGROUND

51. The CPLED Program is one of the cornerstones of the qualification process and is a prerequisite to being admitted as new lawyer in Saskatchewan. The 2012-2013 CPLED Program runs from August 20, 2012 through to April 26, 2013 and is made up of a combination of 3 Face-to-Face and 6 Online Modules designed to test the competence of prospective lawyers in a variety of areas. An excerpt from the 2012-2013 CPLED Guide to Articling in Saskatchewan, including a description of the CPLED Course and the Program Schedule for the 2012-2013 CPLED Course, is attached at **Tab 4**. Modules #1, #4, and #9 are week-long Face-to-Face sessions dealing with skills like chambers advocacy, interviewing skills and negotiations. Modules #2, #3, #5, #6, #7 and #8 are Online Modules dealing with skills such as legal research and writing, written advice and advocacy, drafting (contracts, wills and pleadings) and practice management. Each Module will also focus on a different area of law such as Debtor Creditor, Wills and Estates, Family Law, Real Estate, Business and Civil Litigation.

52. The Ethics and Professionalism Competency Evaluation (the subject matter of the breach of the CPLED Integrity Policy) is a 5 part exercise spread over a series of online modules and incorporated into the scenarios for Competency Evaluations which deal primarily with another skill. For example, the Competency Evaluation for the Wills Module would include an ethical issue within the scenario and students would be asked to provide both a properly drafted will along with separate ethics memo. The purpose of including ethical issues within larger scenarios is to test the ability of a student to identify ethical issues.

53. The Online Modules are intended to be completed by the students either during office hours or on their own time. Each Online Module is generally three weeks long and is comprised of three units including 2 Assignments and 1 Competency Evaluation. Students are provided with background readings, learning exercises and feedback on their Assignments which assist them in preparing for Competency Evaluations. One week is allotted to complete each unit within a Module with deadlines set in accordance with the CPLED Program schedule. Students are required to assimilate information and facts and perform necessary research in order to successfully complete the Assignments and Competency Evaluations.

54. Support for each student is available through the use of an online “Learning Group Facilitator”, usually a lawyer volunteer practicing in the specific area of law. In addition to the Learning Group Facilitator, CPLED students have access to a comprehensive set of procedural and substantive resource materials as well as a variety of other reference materials.

55. In order to successfully complete the CPLED Program, students must attend all portions of the Face-to-Face sessions, complete all Assignments and obtain a passing grade of “Competency Demonstrated” on all Competency Evaluations. Competency Evaluation grades are assessed based on criteria drawn from the Competency Profile, a cornerstone of the CPLED Program, which outlines the skills, knowledge and behavior expected of a competent lawyer.

56. If a student receives a grade of “Competency Not Yet Demonstrated” (a failing grade) on any Competency Evaluation, they are required to write a Supplemental Competency Evaluation.

The Supplemental Evaluation can be completed by the student at any time. If a student is unable to attain a passing grade on a Supplemental Competency Evaluation, they are required to repeat the entire CPLED course.

PARTICULARS OF CONDUCT

57. The chain of events leading to this hearing began with her submission of Part 1 of the Ethics and Professionalism Competency Evaluation (the “**Student Submission**”) on October 18, 2012.

58. On or about November 12, 2012, the Director utilized plagiarism detection software [REDACTED] in relation to all student submissions for Part 1 of the Ethics and Professionalism Competency Evaluation which compared them to all submissions submitted in the previous year. The software identified that the Student Submission had substantial similarities to that of N.B., a student from the previous year (the “**Prior Submission**”).

59. On the same date, the Director compared the Student Submission with the Prior Submission and, supported by the knowledge that N.B. had clerked at the Court of Queen’s Bench in Regina the prior year which is also the Student’s placement in 2012-13, determined that the Student Submission had been plagiarized. Attached at **Tab 5** is a copy of the text of both the Student Submission and the Prior Submission with underlined red text illustrating areas of similarity between the two submissions that were identified by the [REDACTED] software.

60. On November 14, 2012, the Director telephoned the Student, asking her to meet with him regarding his concerns with the Student Submission.

61. The meeting between the Student and the Director, in the presence of Valerie Payne, took place on November 14, 2012.

62. During the interview, after being advised about the fact that her assignment was substantially similar to the assignment of a student from the prior year, the Student admitted having viewed the Prior Submission. The Student explained that she had not sought out the Prior Submission but had come across it in the course of looking for a different precedent document. The Student stated that she did not know N.B. and made it clear that N.B. had no involvement in facilitating the Student Submission and that the two had never communicated at all.

63. During the interview, the Student stated that she began to read the Prior Submission and when she realized what it was she closed it and deleted it. She stated that she did not have the Prior Submission open on her computer for reference purposes while she completed her assignment. She stated that the assignments were similar because she found it difficult to create her own unique work after having read the Prior Submission. In making these statements to Mr. Bergerman and Ms. Payne on November 14, 2012, the Student was not being forthright.

64. During the meeting, the Student stated that she had time to complete the CPLED modules and had not found the assignment to be particularly difficult. The Student has successfully

completed the other modules without any problems or reliance on any CPLED student's past or present work.

65. On November 20, 2012, the Director, assigned the Student a failing grade to the Student Submission as a result of plagiarism and barred a supplemental rewrite for Part 1 of the Ethics and Professionalism Competency Evaluation in the CPLED Program. The Student was informed of this decision via email on November 20, 2012.

66. On November 23, 2012, the Student appealed the Director's sanction to the Admissions and Education Committee. The application includes a request that the Student be permitted to write a supplemental Ethics and Professionalism Competency Evaluation and thereafter be permitted to apply to become a lawyer three months following her successful completion of all aspects of the CPLED Program. Further, the Student accepts that the additional costs of a supplemental Ethics and Professionalism Competency Evaluation will be at her expense and expects that she will contribute to or bear the costs of the hearing. Attached as **Tab 6** is the Student's application letter.

67. In the November 23, 2012 letter the student admitted to improperly relying upon the Prior Submission and confirmed that she did not dispute Mr. Bergerman's finding of plagiarism. More specifically, the Student now admits that she kept the Prior Submission open on her computer and referred back to it on several occasions in the course of completing the Student Submission. Her comments to Mr. Bergerman and Ms. Payne during the November 14, 2012 interview as to the extent of her reliance on the Prior Submission minimized her actual conduct.

68. In support of this application, the Student's principal, Justice P.A. Whitmore, has provided a letter dated November 24, 2012 to the Admissions and Education Committee detailing the Student's good character and his support for the Student's application which letter is attached at **Tab 7**.