IN THE MATTER OF *THE LEGAL PROFESSIONS ACT,1990*
AND APPLICATIONS TO ACT AS PRINCIPAL
BY CASEY CHURKO AND TIMOTHY TURPLE

REASONS FOR DECISION OF THE ADMISSIONS AND EDUCATION COMMITTEE

INTRODUCTION

1. Mr. Casey Churko, a lawyer with the Regina office of the Merchant Law Group has made an application to the Law Society of Saskatchewan to act as principal for Mr. Anthony Tibbs, who was admitted as a student-at-law on October 28, 2010. Mr. Timothy Turple, a lawyer with the Saskatoon office of the same firm, has made an application to act as principal for Mr. Michael Chi, who was admitted a student-at-law on May 25, 2011.

2. In a letter dated October 28, 2010 (attached as an exhibit to the affidavit of Anthony Tibbs (Exhibit C-5)), Mr. Thomas Schonhoffer, Executive Director of the Law Society of Saskatchewan, responded to Mr. Churko's application as follows:

> Pursuant to Rule 152(2), the Executive Director has the option of approving the application, refusing the application, or referring the application to the Admissions & Education Committee. Information received at two Admissions Hearings by law Students, DD and LM, call into question whether Merchant Law Group is a suitable working environment for the training and development of students-at-law.
>
> I will be reviewing the information in this context and will be reporting to the Admissions & Education Committee. I will also provide a copy of my report to you, so that you may consider a written response. The Admissions & Education Committee may either approve your application, deny your application or make a determination that further information is required through a Hearing.

3. The Admissions and Education Committee decided to appoint a Committee to conduct a hearing on the issue of "whether Merchant Law Group is a suitable working environment for the training and development of students-at-law." There were also exchanges between the Law Society and Mr. Churko concerning his application, and on June 30, 2011, Mr. Churko applied to the Court of Queen's Bench for judicial review of the Executive Director's decision to refer the application to the Admissions and Education Committee on the grounds cited. In a decision dated September 7, 2011, Ball, J. refused the application and found that the Executive Director did have jurisdiction under Rule 152(2) to refer the question of whether the firm provides a suitable environment for articling students to the Admissions and Education Committee. He commented in part:

> The jurisdiction conferred on the Committee by Rule 152(3) to inquire into matters other than those enunciated in Rule 152(2)(a)-(g) recognizes that the integrity, knowledge, skill, proficiency and competence of a student-at-law is informed and influenced by the student's experience with other lawyers within the firm with whom the student is employed. Rule 152(2) should be interpreted in a manner that facilitates, rather than restricts, the exercise of the Committee's jurisdiction under Rule 152(3).

4. The application of Mr. Turple was also referred by the Executive Director to the Admissions and Education Committee. The Committee declined an undertaking proffered by Mr. Turple to ensure that Mr. Chi would not have any involvement with the Regina office of the Merchant Law Group, and instead referred his application to this hearing to be considered along with that of Mr. Churko. The hearing concerning both applications took place in Regina on November 9 and 10, 2011.

5. It should be emphasized that no questions were raised by the Executive Director or by the Admissions and Education Committee about the qualifications or suitability of either Mr. Churko or Mr. Turple themselves to act as principals. Neither was any question raised about the eligibility of either Mr. Tibbs or Mr. Chi to enter into articles.

6. At the hearing before us, the Law Society was represented by Mr. Tim Huber and the applicants were represented by Mr. Gordon Kuski, Q.C. and Ms. Holli Kuski. Mr. Tibbs and Mr. Chi also retained counsel, Ms. Christine Glazer, Q.C.; neither they nor their counsel participated in the hearing – though Mr. Tibbs was present - but were allowed to file affidavits with the consent of both parties.

7. Though under Rule 152(3), the onus is on an applicant to show cause why an order that the applicant should not act as a principal should not be made, counsel for the Law Society agreed to present evidence first, given the unusual nature of the grounds for referring the application to the Admissions and Education Committee. The focus of this evidence was on the events alluded to in the letter from Mr. Schonhoffer referring Mr. Churko's application to the Committee. These events primarily involved Mr. DD and Mr. LM, who were articling students at the Merchant Law Group Regina office in 2008-2009. The Admissions and Education Committee appointed hearing panels to consider the applications for admission as barristers and solicitors of both DD and LM. In the case of LM, the hearing panel decided in 2010 that he should be admitted, but attached conditions to his admission. In the case of DD, his application for admission was denied on grounds related to his conduct and character; the reasons for that decision are dated August 8, 2011.

SUMMARY OF EVIDENCE

8. Counsel called LM to give evidence about the sequence of events that occurred during his articling period. LM described a relationship with DD which began as a collegial and friendly one; they had common interests and worked and socialized together. A third student, Mr. NR, and a junior associate, Mr. Chris Butz, were also part of this group. LM said that his relationship with DD deteriorated, and that he was increasingly subjected to bullying and intimidation. LM testified that the intimidation escalated to the point that he was coerced into cheating on the CPLED course by sharing his work with DD. By early February, 2009, he said, he realized that his own pleas to DD to stop bullying him were having no effect and advised DD that he would have to inform CPLED what was happening. On February 2, he told Mr. Butz of his concerns. He also called Mr. Evatt Merchant, a partner in the firm, and tried to explain what was happening. LM said that he was very distraught during this conversation, and that his call clearly took Mr. Merchant by surprise; he was not aware that Mr. Merchant took any steps as a result of this call. On February 4, he contacted Ms. Corina Farbacher, then Director of CPLED, and confessed that he had cheated by collaborating with DD.

9. LM had no direct knowledge of who was involved in any subsequent discussions within the law firm or between the law firm and the Law Society. In the law firm, his relationship with DD continued to

be tense, though steps were taken to keep the two of them from having direct contact in the office. On February 19, he was served with a Statement of Claim against him naming DD as plaintiff. He said that there were other instances of bullying and harassment by DD as well, including instances of physical coercion and verbal abuse. On March 19, 2009, LM said that he was advised by Mr. Donald Outerbridge, the Executive Director of the Merchant Law Group, that he would be on leave with pay, and that he should henceforth expect to do his work from his home. He would be permitted to deliver documents to and collect documents from the office, and he would be permitted to go to the office to see his principal, Mr. Patrick Alberts, but he should otherwise not be on the premises. A similar arrangement was made with DD, although LM said he thought that DD also undertook a number of work-related trips outside Saskatchewan.

10. Under cross-examination, LM testified that he did not really blame the law firm for his experiences at the hands of DD. He acknowledged that they "probably didn't expect to deal with this kind of situation."

11. From late March until June, LM said he worked almost entirely at home. In June, 2009, his articles were assigned to Mr. Brad Hunter, and he completed his articles at what was then the Hunter Miller law firm. He was subsequently admitted to the bar and found employment with a law firm in North Battleford, where he continues to practice. After the transfer of LM's articles, DD continued his articles with the firm, and was permitted to work from the office.

12. Counsel for the Law Society also called as a witness NR, who was an articling student at the same time as DD and LM, and who continues to practice as a lawyer at the Merchant Law Group. NR gave an account of a somewhat complicated relationship with DD. He said DD was friendly and helpful at times, and they did work and socialize together. At other times, he said he avoided working with DD or having contact with him; he said that his relationship with DD was "at times good, and at times hell." As the tension between DD and LM grew more severe, NR said that he tried to avoid becoming too closely involved. Though his experience bore similarities to that of LM, he responded somewhat differently. He found it stressful when DD spent time in the office after LM's departure in June. Among other things, DD threatened to sue him, indicated that he had taped conversations with NR and others, and filed a false police report claiming that NR had assaulted him. NR himself called the police on one occasion when DD pushed him, although he said he did not want DD to be charged criminally. NR said that when DD reported him to the police, it was very stressful and that he was on the edge of a "nervous breakdown" because of his concerns about the effect this might have on his professional future.

13. NR testified that senior members of the firm, including Mr. Outerbridge and Mr. Tony Merchant, did try to correct DD's behavior. Under cross-examination, he conceded that it might have been difficult for the firm to assess the nature of his relationship with DD. On the one hand, he did complain a number of times about DD to Mr. Tony Merchant, Mr. Outerbridge, and to Mr. Henri Chabanole, NR's principal. On the other hand, he continued to socialize with DD on occasion, and to seek him out at work, even after some of the events he complained of had happened.

14. Both LM and NR testified that they, along with DD and Mr. Butz, did a lot of work on class action files belonging to Mr. Tony Merchant and Mr. Churko. Prior to LM's decision in February to make his revelations to CPLED and to lawyers in the firm, this group often worked long hours together. LM

and NR said that there was an expectation that everyone in the firm, including students, would work hard. NR said the Merchant Law Group was an "incredibly hard-working firm" with "motivated lawyers." He said that there was an expectation he would work evenings and weekends, but he was "happy to be there." NR stated his opinion that articling students at the Merchant Law Group were treated "better than anywhere else in the city" and had access to exciting work.

15. LM said that he saw his principal, Mr. Alberts, about once a month, usually to discuss his CPLED work. He said that Mr. Alberts was a very busy lawyer, and that he took a holiday during the time LM was at the firm. Of the work he did, very little was assigned by Mr. Alberts or directly supervised by Mr. Alberts. Much of the work he did – at his estimate 86% - was class action work; he said this was not his "favorite," but he had understood when he took the job that this would be the focus of his responsibilities. NR testified that approximately 20% of the work he did came from his principal, Mr. Chabanole, with 20% coming from Mr. Churko and about 60% from Mr. Tony Merchant; the work from the latter two was predominantly class action work. NR felt he could go to any lawyer in the firm, including Mr. Tony Merchant, at any time of the day or night.

16. Counsel for the Law Society also called as a witness Ms. Donna Sigmeth, Complaints Counsel and Deputy Director of the Law Society. She testified that Ms. Farbacher had contacted her on February 4, 2011, to inform her of the call she had received from LM. As Ms. Sigmeth recalled, Ms. Farbacher was naturally concerned with LM's confession of cheating, but also about LM's distraught state during the conversation. She went so far as to say to Ms. Sigmeth that she thought he might be suicidal.

17. Ms. Sigmeth followed up this conversation with a call to Mr. Alberts to ascertain what the response of the firm was to LM's allegations against DD. She was unable to reach Mr. Gerald Heinrichs, DD's principal, or Mr. Tony Merchant, though according to her notes (Exhibit C-1.4) Mr. Alberts undertook to speak to Mr. Heinrichs. Mr. Alberts advised her that the firm had established a "wall" between LM and DD, and that they were instructed to communicate with each other only by e-mail. Though Ms. Sigmeth's notes do not indicate that she discussed with Mr. Alberts the possibility that LM was suicidal, she testified that she was certain she had mentioned that to him.

18. Ms. Sigmeth said that she asked Mr. Alberts if there would be any personal consequences to DD if his conduct was repeated; Mr. Alberts, she said, replied that no particular consequences were contemplated but that "it could not continue." Ms. Sigmeth said that she advised Mr. Alberts that some indication should be given of what consequences would ensue from further behavior of a similar sort. She made it clear that she did not think the Law Society should become involved in the human resources issues of the firm, but she wanted to bring to his attention the implications of these circumstances in relation to health and safety issues.

19. Ms. Sigmeth said that she had fairly lengthy interviews with both LM and DD, which took place in the presence of Ms. Melanie Hodges-Neufeld of the Law Society and Mr. Kuski, counsel for the applicants in the present hearing. Both students made admissions about cheating on the CPLED course, but Ms. Sigmeth was concerned about the dynamics which had led to this conduct. She said

the picture she obtained from talking to the students was one in which DD had engaged in threats of violence and minor acts of violence, a threat of civil action against LM, and threats to release copies of LM's e-mails, apparently with little hindrance. She said both students expressed a distaste for going to senior members of the firm over issues they faced, and that the articling students seemed to live in a "mini-universe" within the firm; in cross-examination, she conceded that senior members of the firm may not have been aware of the issues until around the same time they were brought to her attention. She was concerned that the hours the students seemed to be working might have put pressure on them resulting in the cheating that had occurred.

20. In cross-examination, Ms. Sigmeth acknowledged that the conduct imputed to DD was unusual, and that it would have been difficult for a law firm to know exactly how to handle such a situation. She said that in this kind of extreme case of bullying and manipulation, termination of DD seemed like a possible option, though that would be a drastic step to take against a student not yet admitted to the bar. Shown a memo from Mr. Outerbridge dated February 5, 2009 (Exhibit C-1.5) elaborating on the steps that would be taken to create a "wall" between the two students, she said that this did represent a prompt response by the firm. She made notes (Exhibit C-1.6) of a further conversation with Mr. Alberts, in which he reported that he and Mr. Outerbridge had taken LM out for lunch, and he seemed considerably more relaxed, having made his confession and spoken to his family and friends; she said the firm seemed to have established a "road map" and that she hoped to hear no more about it. The interviews with the two students were pursued largely to get to the bottom of the CPLED cheating issues, and were not focused directly on the harassment allegations made by LM. She said that the issues concerning DD's conduct resurfaced primarily because of subsequent calls to the Law Society from NR, who, she said, alleged that DD continued to harass and bully him, and that the firm did nothing about it.

21. In July of 2009, Mr. Alberts applied to the Law Society to be a principal for Mr. Olegas Maksimovicius. Ms. Sigmeth was referred to a letter dated July 28, 2009 (Exhibit C-1.18), setting out the terms, worked out between her and Mr. Alberts, for the supervision of this student. She acknowledged that this document reflected language adopted by the Law Society of Manitoba to flesh out the obligations owed by a principal to a student-at-law. She was invited to compare those terms with the wording of the Law Society of Saskatchewan Articles of Clerkship in place at the time when LM and DD became articling students (Exhibit C-2), and she conceded that the wording of those Articles was very general, being limited to a generic undertakings to "teach and instruct the student in the practice or profession of a lawyer" and "when the student shall have complied with all other necessary requirements therefor, to offer the student every assistance to be admitted as a lawyer in Saskatchewan." Directed to the checklists and forms contained in the CPLED materials for completion by students and principals, she was asked what steps the Law Society would take in the event these documents indicated that the CPLED requirements had not been complied with. She said that at present, there is no direct policing of these requirements, although the Law Society is moving in the direction of being more proactive in monitoring the compliance of principals and students with those requirements.

22. She was invited to examine the revised Articles of Clerkship now in place (Exhibit C-3), which is similar to the wording in the agreement of Mr. Alberts with respect to Mr. Maksimovicius, and acknowledged that she had no reason to think that Mr. Churko or Mr. Turple would not comply with these obligations. Counsel for the applicants referred Ms. Sigmeth to Rule 125, passed in 2004, which conferred on the Admissions and Education Committee the authority to set "standards and

procedures" for students-at-law. Asked whether such standards and procedures had been promulgated, she said that the CPLED materials outlined what students could expect from the articling experience, and stated her view that the indication of an expectation that the principal would play a key role in ensuring the student's compliance with the requirements of CPLED carried with it the implication of mentoring and guidance by the principal.

23. Mr. Kuski called as witnesses a number of members of the Merchant Law Group, including the two applicants. Mr. Churko, who was called to the bar in 2005, testified that this was the first time he had been eligible to apply to take an articling student and he is eager to be a principal. He said that though he works quite long hours, he would not expect that articling students would keep up an overly demanding pace. The firm accommodates the preferred working patterns of its members, including students. He said that while he prefers to work into the evening, other people start earlier in the morning than he does.

24. Mr. Churko was asked whether he would have a concern about an articling student recording the number of hours shown for DD in the spreadsheet presented at the hearing (Exhibit C-1.20); this record showed, among other things, the number of hours docketed for each student. At its highest, the number shown for DD was close to 290 hours per month. Mr. Churko said that he was not aware of any requirement that students work excessive hours or that they are expected to do the firm's work at the expense of their CPLED obligations. He said he had spoken to DD himself about giving priority to CPLED work, and said he regards it as important for students and lawyers to take sufficient personal time.

25. Mr. Tim Turple testified that he had taken a number of articling students over his 19 years with the Merchant Law Group. He acknowledged that he had run into difficulty on two of these occasions. One of these occurred when a lawyer in the firm left, and he took over a second student; a complaint to the Law Society was made because Mr. Turple was not aware of the arrangements made with the departing lawyer concerning the student, but the complaint was dismissed after a review of Mr. Turple's conduct. In the second instance, he found it necessary to part company with the student, who did not have strong legal skills.

26. Mr. Turple said he was unaware of the difficulties between LM and DD until Mr. Outerbridge advised him of the situation after the fact. The Saskatoon office of the firm had no direct involvement in the situation in any case. He testified that the lawyers in the Saskatoon office make an effort to maintain a relaxed and casual environment that will be hospitable to articling students. He said that if a similar situation arose in the Saskatoon office, he would likely refer it to Mr. Outerbridge for resolution. He expressed the view that all law firms have members who bring a variety of personal baggage to the workplace; though "people with law degrees should know better," it is an individual's responsibility to deal with the workplace dynamics as best they can.

27. Mr. Alberts testified that he had been a principal about six times before taking on LM as a student; none of his students had ever been denied admission to the bar, although there were certain

conditions attached to the admission of LM. He testified that before he spoke to Ms. Sigmeth on February 4, 2009, he had been contacted by Ms. Farbacher the day before. Concerned by her description of the emotional state of LM, he contacted both LM and Mr. Outerbridge. He said that he took the situation very seriously, and realized the implications for students of getting in trouble with CPLED. He accepted the approach adopted by Mr. Outerbridge, based on the premise that the firm would not take sides as between DD and LM, that reaffirmed the obligation of the firm to see that both students completed their articles. He did hear LM's side of the story with respect to the conduct of DD, but he did not hear DD's version.

28. In his discussions with Ms. Sigmeth, Mr. Alberts said he understood her to have some concern about the workload for students at the Merchant Law Group. He indicated that students do not have a fixed quota of hours, and, though high quality work is expected of them, the demands on them are not unreasonable. The firm as no fixed policies on how work will be assigned to students; it is up to individual lawyers to assign work that is not beyond their competence, and to review that work. In the case of LM, he did pick out some particular files for him to work on, but the understanding when he was hired was that the majority of his work would be connected with the class action files of Mr. Tony Merchant and Mr. Churko. Mr. Alberts said that a principal has to be able to assume that other lawyers are providing adequate supervision to the students on the work they assign.

29. Mr. Alberts conceded that the 250 hours recorded by LM one month exceeded his own hours for a similar period, but he was not concerned about LM having sufficient time to complete his CPLED obligations. LM knew that he could take the time required to do the CPLED work; unlike some other students, he did not choose to devote a particular day of the week to CPLED work, but this was an option that was open to him.

30. When the "cheating scandal" and the allegations of harassment came to light, Mr. Alberts thought it was a reasonable response to refrain from taking sides. With respect to the allegations made by NR, he thought that "NR was a big boy" and he should be able to handle the situation. All three students were grown men, and it was their decision to stay in the situation that had been created. These circumstances were not known until LM chose to reveal them; in his own case, Mr. Alberts said that he had no knowledge until he was contacted by MsFarbacher. He was not directly involved in the decision that LM should work from home; Mr. Outerbridge took the primary role in making this arrangement, in consultation with Mr. Alberts, Mr. Heinrichs (DD's principal) and Mr. Tony Merchant. He acknowledged that having LM work from home was not ideal, but was a reasonable response in the circumstances; he was safe, and he was able to continue doing his work and consult with the lawyers in the firm, including Mr. Alberts.

31. Mr. Alberts stressed the importance of articling students to a firm. He described them as the "life blood" of the firm, and an important asset. He thought it was critical for the firm to be able to continue to take on students. This sentiment was echoed by other witnesses, including Mr. Heinrichs and Mr. Tony Merchant.

32. Mr. Outerbridge, the Executive Director of the Merchant Law Group, described his role in the firm. He is not a lawyer, but is responsible for the administrative management of the firm – as he put it, "everything but the practice of law." Among other things, he is responsible for human resources issues. He explained the compensation system which is used for articling students in the firm. Articling students are offered a fixed salary of $2500 per month. As an alternative, they may choose to be paid $25.00 per hour docketed. A student is expected to enter his or her own hours for docketing purposes. He indicated that this compensation system was adopted so that the firm can compete for articling students with large firms in centres such as Calgary. A student who dockets in the range of 250 hours in a month will earn approximately what the Calgary rate is. The number of hours docketed is not necessarily the number of hours reflected in a bill for a file; the decision of how many of the student's hours should be included on the bill is up to the lawyer in charge of the file. Lawyers in the firm have a target of around 125 hours per month (1500 per year), and there is no fixed target for articling students.

33. Mr. Outerbridge said that he became aware of the problems in the relationship between LM and DD when he was advised of LM's confession concerning the cheating on CPLED. In their initial conversation, LM was in such a highly emotional state that Mr. Outerbridge found it difficult to understand the details, but he was shocked by LM's revelations. After many years in law firms, and many interactions with articling students, he was still not prepared for anything of that kind. His impression prior to February 4, 2009, was that the articling students were all getting along well.

34. Mr. Outerbridge testified that he heard two different versions of events from the students; DD denied the allegations both of cheating and bullying. Mr. Outerbridge discussed the situation with Mr. Evatt Merchant, as well as with Mr. Alberts as LM's principal and Mr. Heinrichs as DD's principal. He then drafted a memo to the two students (Exhibit C-1.5), which commenced as follows:

> I want to reiterate that it is the firm's utmost desire to have both of you successfully complete your articles and receive your calls to the bar of Saskatchewan. To this end, we believe certain ground rules need to be put in place and understood by all in order to achieve our collective goal.

35. The memo went on to describe the "virtual wall" which would be put in place between the two students. The memo specified that there should be no physical contact unless a third person was present, that files should be exchanged through secretaries, that all communication should be by e-mail, and that neither of them should make use of the other's computer system without "task-specific permission." It concluded with a direction that the students should respect each other's privacy and should consult their principals about any further issues. Mr. Outerbridge and Mr. Alberts also took LM out to lunch to discuss the situation. As he reported to Ms. Sigmeth, Mr. Outerbridge found LM considerably calmer and able to focus on the steps which were being taken.

36. On February 6, Mr. Outerbridge organized a meeting in which Mr. Evatt Merchant and LM participated by phone, while he and DD were in Mr. Outerbridge's office. According to Mr. Outerbridge's notes (Exhibit C-1.7), he and Mr. Merchant used the occasion to reiterate the firm's position and reinforce the ground rules. The notes indicate that the students were told "you will not convince us that one is right/one is wrong," and that "we will not keep one/fire one – both go." The

lawyers stressed that the next four months would be critical to the students' careers, and alluded to the implications of having drawn themselves to the attention of the Law Society at this stage. Mr. Outerbridge said that he hoped the situation would settle down.

37. Mr. Outerbridge said that the firm had a "no harassment policy," and that a memo outlining the policy (Exhibit C-1.8) is sent to all members of the firm at the beginning of each year. The memo indicates that "every employee of MLG is entitled to a working environment that is free of harassment of any kind" and that harassment would not be tolerated. Harassment is defined in the memo as "abusive conduct, swearing, sexual innuendo or language, or anything at all that makes you feel uncomfortable." The memo directs that any harassment should be reported to a senior lawyer.

38. When asked in cross-examination how this policy had protected LM or NR, Mr. Outerbridge said that LM should have come forward sooner than he did, as no one was aware of the difficulties he was having. In the case of NR, Mr. Outerbridge said that on the one occasion NR had approached him, he had mediated a settlement of an issue between NR and DD. Asked why DD had not been terminated, Mr. Outerbridge said that the cost to someone who had not yet been admitted to the bar of having a termination on the record was just too high, and the commitment was made instead to try and get both students through their articles. Mr. Outerbridge acknowledged that it was hard to say that the advice he and others gave to DD to modify his conduct was sinking in. On the other hand, it was hard for him to think of any conduct that would justify the drastic remedy of termination. Mr. Outerbridge said that throughout the period, it was difficult to read the relationship among DD, LM and NR; though at times LM and NR complained about the conduct of DD, at other times they seemed to be getting along well, and sought association with each other. He found it equally difficult to read DD; though "his social skills left something to be desired," Mr. Outerbridge thought he was an able and dedicated person who would make a good lawyer "under some circumstances."

39. As there continued to be difficulties between LM and DD, the decision was made in March that they should both be required to work outside the office. Under cross-examination, Mr. Outerbridge said that the students were instructed not to initiate telephone contact with lawyers in the office, and that it was up to the lawyers assigning work to them to work out a system for supervising and reviewing the work. Through the spring of 2009, there were a number of developments concerning LM and DD. They were both temporarily suspended from CPLED (Exhibits C-1.15 and C-1.16). On April 8, 2009, Mr. Outerbridge sent a memo to DD (Exhibit C-1.14) outlining the uncertainties for the future created by the difficulties with CPLED, and said that, though his articles could not be continued indefinitely if the situation were not resolved, he could continue for the present to act as an "off-premise consultant" for the firm.

40. Mr. Outerbridge testified that the circumstances relating to LM and DD were highly unusual, and represented a significant departure from the usual relationship between the firm and its students. He produced a list (Exhibit C-1.24) of all of the students who had articled with the firm starting 1986, and pointed out that 32 of those students are still with the firm as lawyers .

41. Mr. Heinrichs testified that he had acted as principal to a number of students, and that DD was the only one of them who had any difficulty being admitted to the bar. Mr. Heinrichs recalled signing the Articles of Clerkship in the form indicated in Exhibit C-2, and did not recall receiving any other documents which would provide guidance concerning the duties of a principal. He did recall completing reports on what DD was doing for CPLED.

42. Although Mr. Heinrichs' own files probably accounted for less than 5% of the work done by DD, he said that DD consulted him frequently about legal questions, and saw him as the "go-to guy" on these issues. He said he sometimes saw DD four or five times a day, and certainly saw him on a weekly basis. Although their conversations were not always very long, Mr. Heinrichs said he did feel he was in touch with the work being done by his student. Mr. Heinrichs said part of his responsibility as a principal was to make sure a student wasn't "in over his head" and he never had the sense that DD was being asked to do anything beyond his capability; he never heard from other lawyers that there was any doubt about DD's competence. He knew that DD was a "busy beaver," and that he worked hard. He was present at a meeting with students in October of 2008 when the students were advised they should maintain a good work-life balance, and leave room for other pursuits; his impression was that DD "just wanted to do law." Mr. Heinrichs said that he himself usually works 50 to 60 hours per week, but only dockets billable time, which would be somewhat less than that.

43. Mr. Heinrichs said that he was aware that students should have sufficient time to do their CPLED work, and he was not sure what arrangements DD made to complete that work. DD did not complain that he needed more time to get it done.

44. Mr. Heinrichs said that he became aware that there was tension between DD and LM around the beginning of February when DD complained that LM was giving him trouble. He did have discussions with Mr. Outerbridge, and accepted the approach taken to resolve the situation. He felt that his own obligation was to try and get DD through his articles and he "stuck with him as much as possible." Though he did not think the solution of having DD work outside the office was ideal, he did remain in touch with him by phone and met with him occasionally, and was satisfied that he was continuing to do legal work.

45. Though what LM and NR experienced was unfortunate, Mr. Heinrichs felt that the firm had responded promptly and as effectively as it could. When he signed a statement for the Law Society in June of 2009 attesting to the fitness of DD to be admitted to the bar, Mr. Heinrichs said that he did so on the basis of what he knew of DD from his own experience, not what DD was rumoured to have done. He had no direct knowledge of incidents like the false police report about NR and the taping of conversations in the office, and did not feel it would be fair to take these into account in assessing DD, although later he accepted that those "rumours" were well-founded. In his own interactions with DD, he had found him to be a cordial, decent person who did good work.

46. The final witness called in support of the applicants was Mr. Tony Merchant. Mr. Kuski did not conduct any examination in chief, but Mr. Merchant answered questions from counsel for the Law Society. Mr. Huber asked him why DD was not terminated at least in August of 2010, when all of the allegations concerning cheating on CPLED, harassment, threats of litigation and other things had been brought forward. Mr. Merchant said that not all of these allegations came to light at the same

time; there was no consensus to depart from the original commitment to see DD through his articles and by the summer of 2010 the wisest course seemed to be to let the Law Society process go forward to determine whether the allegations were well-founded.

47. Mr. Merchant said that at a number of points it was difficult to make sense of the allegations that were being made. The cheating story initially seemed incredible to lawyers in the firm, as their impression was that DD did not need LM's help to succeed. There were also rumours about LM having personal issues which might suggest his description of bullying at the hands of DD had been exaggerated. With respect the relationship between DD and NR, NR gave very mixed signals about his alleged problems with DD. Though he often complained about DD, he also initiated social contact with him and offered to bring in food, and sometimes seemed to be goading him.

48. When DD initiated his lawsuit against LM in mid-February, Mr. Merchant said he told DD that it was "incredibly stupid." Mr. Merchant was somewhat concerned about the impact DD seemed to be having on others in the office and suggested he might seek counseling if he was having trouble resolving his issues with LM. Mr. Merchant nonetheless undertook to serve the Statement of Claim on LM in order to prevent the two having personal contact. DD declined to seek counseling because he was afraid he might have to disclose contact with a psychologist if he decided to seek admission to the bar of an American state; though this seemed "silly" to Mr. Merchant, he accepted it as a legitimate concern on DD's part.

49. It was the fall of 2010 when Mr. Merchant said that he became convinced that DD was more than a "blowhard;" at that time he became aware that DD had reported to the police about the alleged assault by NR, and that he had been taping conversations. He said that if he had had all the accumulated information at an earlier time, a decision to terminate DD might have been more likely. In the summer and fall of 2010, however, it seemed the wisest course to let the Law Society process move forward so that all of the allegations could be fully tested.

SUMMARY OF ARGUMENT

50. Counsel for the Law Society argued that in making a judgment about whether the Merchant Law Group provides a suitable environment for articling students, we should take into account whether the situation involving LM, DD and NR in 2008-2009 was adequately dealt with by the firm, and whether there is any indication that future articling students would be any better protected than NR and LM. He pointed to a number of factors identified in the evidence.

51. One of these was the question of the workload of articling students. The record reflects that the group of students at the Merchant Law Group in Regina in 2008-2009 docketed on occasion between 250 and 300 hours per month, an amount that Mr. Alberts, at least, was prepared to suggest might be excessive for a student, and that exceeded the work targets of some established lawyers in the firm. The evidence also raises the question of whether this pattern of excessive working hours was linked to the incentives provided by the firm's unusual compensation system for students.

52. Counsel for the Law Society further argued that the evidence showed that there was a lack of effective supervision of the students. Both Mr. Alberts and Mr. Heinrichs said that relatively little of their own work was assigned to LM and DD respectively, and they said they did not directly review the work done by the students for other lawyers. If they were not supervising the work of the students, counsel asked, who was? Much of the work done by the two students concerned files from Mr. Tony Merchant and Mr. Churko, neither of whom was qualified to act as a principal at the time, Mr. Churko because he had not been at the bar long enough, and Mr. Merchant because of previous disciplinary history with the Law Society.

53. Counsel argued that the response of the firm when the circumstances involving LM and DD came to their attention was totally inadequate, and in fact amounted to a non-response. They continued to tolerate the "toxic force" of DD in the face of repeated concerns about his conduct, and in the end left it to the Law Society to figure out what action should be taken about him. They required DD and LM to work outside the office for a significant period, which raises the question of the quality of the articles the students were receiving when they could not freely contact others in the office. The firm failed to offer protection to NR and LM on the grounds that they should be even-handed to all the students, which was an mistaken view of what allegations of harassment required.

54. In devising their response to the allegations made against DD, lawyers in the firm deferred almost completely to Mr. Outerbridge, which, counsel argued, was an abdication of their professional obligations. Mr. Outerbridge is not a lawyer, is not accountable to the Law Society and has no reason to be versed in the professional aspects of the student-principal relationship. There are reasons why the Law Society requires students to be supervised by qualified lawyers, and has in place processes for assessing those qualifications. By leaving the matter in the hands of Mr. Outerbridge, the lawyers in the firm failed to fulfill their professional obligations in relation to the nurturing of students.

55. Mr. Kuski argued that, while the situation involving LM and DD was unfortunate, it must be understood as a rarity, and law firms could not be expected to anticipate circumstances so extreme. The situation arose because of personal characteristics of the two students, and focusing on these past events does not provide a fair prognostication as to the future. Mr. Kuski noted that Ms. Sigmeth had expressed the reluctance of the Law Society to become too involved in the internal human resources issues of law firms, and he approved this position.

56. Though the response of the law firm failed to ameliorate the situation in some ways, the Merchant Law Group did take steps promptly when the tensions between LM and DD were brought to the attention of senior lawyers. By the fall of 2010, when full information concerning DD's conduct was available, the firm took the stance that it would be far too prejudicial to DD to sever his relationship with the firm, and Mr. Kuski argued that this was an acceptable position to take. He alluded to the comment of Ball J. on judicial review of Mr. Schonhoffer's decision that the Law Society should be cautious about proceeding down the "slippery slope" of intrusion into the principal-student relationship on grounds related to the environment in a firm.

57. He further argued that an examination of the events surrounding LM, DD and NR provides no useful basis for an estimation of the firm's ongoing suitability as an environment for articling students. The likelihood of another confluence of events and personalities like those described in the proceedings concerning LM and DD is exceedingly slim. The Law Society has not alleged that there is any basis for believing that Mr. Churko or Mr. Turple would not carry out their responsibilities properly.

58. Mr. Kuski turned to two of the concerns expressed by the Law Society in relation to the articling experience of LM, NR and DD, one of these being the number of hours docketed by the students, and the other being the level of supervision they were receiving from their principals. With respect to the workload issue, Mr. Kuski said that articling students work in an environment where professional people must complete the work there is to be done. He challenged the proposition that the students were working an excessive number of hours; by his calculations, the three of them worked an average of between 37.5 and 46.1 hours per week. In any case, there was no quota of hours for them to work, and other members of the firm showed respect for the decisions they made about working hours. Though the allegation was made that the compensation system in place at the Merchant Law Group was "unusual," this was not really demonstrated; every large firm provides rewards for hard work, although they may do it differently.

59. In connection with the supervision issue, Mr. Kuski argued that it is a common pattern for articling students to perform work for lawyers other than their principals, and in fact it is of benefit to students to interact with different lawyers and do different kinds of work. Principals have to be able to assume that the people they work with are competent and that they will be reviewing the work done by students on their files. A law firm is "not day care," and adequate supervision by a principal cannot entail constant monitoring of how a student is getting along.

60. Mr. Kuski said that the events that occurred concerning the 2008-2009 articling year and the process in which the firm has become enmeshed since then has been therapeutic in itself and has provided a sufficient cautionary tale for the Merchant Law Group going forward.

ANALYSIS

61. Based on the evidence we have heard and the arguments made by both parties, we would like to begin with two general observations. The first is that we think the Law Society was entirely justified in asking the Admissions and Education Committee to undertake more careful scrutiny of the issue of whether the Merchant Law Group provides a "suitable working environment for the training and development of students-at-law." The information the Law Society had concerning the conduct of DD and the response of the Merchant Law Group to that conduct fully justified their concern about the wisdom of exposing new articling students to the risk that they would face conditions similar to those experienced by LM and NR.

62. The second observation we would make is that both the Law Society and the applicants, as well as Ball, J., are right to caution us about the need to tread carefully in imposing a greater degree of regulation on the principal-student relationship. That relationship has in the past not been subject to very specific direction or standards, in keeping with the notion that the articling student is an

emerging professional person, and must be able to act with increasing autonomy and self-reliance. There have not been previous instances where the Law Society has called into question a law firm's operational or cultural environment as a relevant factor in determining whether a principal's application to take a student should be accepted. It is, of course, relatively common to examine the qualifications or conduct of the principal him- or herself, but there was no suggestion here of such a shadow over either of the applicants.

63. Though we agree that the Admissions and Education Committee needs to proceed with caution, we do not agree that the Law Society should not step onto this turf in appropriate circumstances. There are reasons why the Law Society plays a role in overseeing the articling period, why the Law Society continues to train and test students-at-law, examines the credentials and character of principals and students, and reacts when the experience of the student appears to be unsatisfactory. Though articling students have law degrees, the Law Society in its capacity as a regulator in the public interest continues to define them as students rather than fully-fledged lawyers in order to ensure that they have a period when they practice practicing law under the careful supervision of lawyers – their principals - who have undertaken particular responsibility for them. In this connection, the question of whether the law firm a principal is associated with can provide a suitable environment in which a student can become a lawyer capable of meeting the professional demands outlined in the Rules of the Law Society and the Code of Professional Conduct is a fair one for the Law Society to ask.

64. Some of the evidence that was adduced concerning the conduct of DD and the way that the firm responded was certainly troubling. We accept that lawyers in the firm only became aware of the serious nature of the situation in early February when LM confessed to cheating and suggested that he had succumbed to pressure from DD; LM and NR both testified that they tried to handle their concerns themselves initially, without bringing them to the attention of the lawyers. We also accept that Mr. Outerbridge, in consultation with other members of the firm, crafted a response in fairly short order, this response including discussions with the students involved, reference of the students to their principals for advice, and the creation of a "wall" to limit future contact between LM and DD. The response ultimately included as well the direction that LM and DD were to work outside the office and not to initiate contact with others in the firm except under limited conditions. The representatives of the firm, notably Mr. Outerbridge and Mr. Evatt Merchant, made it clear to the two students that they would not differentiate between them and that they regarded the primary responsibility of the firm as to get both of the students through their articles. Mr. Tony Merchant gave evidence that he approved this position, and saw no reason to depart from it at a later stage, as he assumed the process being followed by the Law Society would determine the ultimate fate of the students.

65. In our view, the response of the firm to allegations of bullying and harassment was not adequate, and did not, among other things, provide an illustration that the "no harassment" policy Mr. Outerbridge claimed was in place operated effectively in that workplace. Ms. Sigmeth indicated that she attempted, without insinuating the Law Society into the day to day management of the Merchant Law Group, to caution Mr. Outerbridge that the firm might be exposing itself to proceedings under the *Occupational Health and Safety Act* or other anti-harassment legislation, and our conclusion is that the firm does need to consider more carefully its legal obligations in this respect. By indicating from the outset that they would not "choose sides" with respect to the allegations of harassment made by LM, they effectively ensured that the merits of those allegations would not be determined, and that LM (and later perhaps NR) were denied any recourse for having

their complaints dealt with. Indeed, the allegations of harassment were never actually subject to any fact-finding process and did not, except indirectly, result in any ultimate consequences for DD, supposing for a moment that he was guilty of harassment.

66. As the policy distributed to members of the firm every year suggested, every member of the firm is entitled to a workplace that is free of harassment. Provincial health and safety legislation makes it clear that this does not just include sexual harassment or harassment based on race, but includes all conduct of a non-trivial nature that is demeaning to others. The provincial Department of Labour provides templates for harassment policies which they regard as compliant with the legislation; one feature of the sample policy is that it contains a number of options for considering allegations and providing effective redress. Adopting the position that LM's allegations would not be examined further in order to treat the two students equally calls into question how the no-harassment policy could be expected to have any effect, or what kind of message this might send to others who experienced harassment in the future. By failing to get to the bottom of the allegations against DD, it is possible that the firm consigned LM to an inferior articling period; though he may have been a victim of DD, he was treated in the same way, and a number of witnesses acknowledged that working away from the office was not an ideal setup.

67. The reason given for taking the position that the firm would not take sides as between LM and DD was that the overriding obligation of the firm was to ensure that both students could complete their articles. The potential implications for DD of being the central figure in a harassment investigation, particularly if it proved necessary to take disciplinary action of some kind against him, was, of course, an important consideration, and one which the firm was entitled to give weight to. On the other hand, the implications for others in the firm, including actual or potential victims of DD's conduct, or, to cast the net wider, for others he might encounter in his future career, were also worthy of consideration; these implications could not be fully reflected in a policy of dogged determination to see DD through his articles. We accept the evidence of Mr. Tony Merchant that the full scale of DD's destructive behavior did not come to light until some time later, but it is possible that calling him to account at an earlier stage, through an effective investigation of the allegations of LM and NR, might have enabled the firm to balance a laudable concern for DD's professional future with an assessment of whether he should be held accountable for his actions.

68. It is our view that the Law Society also had cause for concern about the level of supervision that the students were receiving. Whether or not the atmosphere in which the three articling students worked actually lived up to Ms. Sigmeth's "Lord of the Flies" description, it certainly seems to have been the case that the students were left to their own devices a considerable proportion of the time.

69. As Mr. Alberts and Mr. Heinrichs both pointed out, and as Mr. Kuski argued, articling students are adults, and it can be expected that they will be able to conduct themselves properly without having a lawyer sitting at their elbow at all times. It is also a normal feature of the articling experience, and indeed a benefit to students, that they receive work from a variety of lawyers in addition to their principals; it may be that much of the work they do does not fall directly within their principals' areas of expertise, and principals may have to rely on the lawyers assigning work to ensure that the work done is of a satisfactory standard. Thus, an articling student may be supervised in different

ways by different members of a firm, and it is true that there is no expectation that the principal will direct a student at every task or review in detail every piece of work the student does.

70. It seems to us, however, that the relationship between a student and a principal must amount to more than a routine completion of CPLED forms or a pro forma "any questions?" kind of encounter. The requirements of an articling period and a relationship with a senior lawyer were devised by law societies to ensure not just that a student meets technical requirements, but that he or she is introduced to the ethical canons and professional traditions of the law by someone who can model professional characteristics and act as a mentor. The Law Society is entitled to expect that the students who were taken on by members of the Merchant Law Group were not seen simply as grist for the class actions mill, but that their principals would engage with them in a positive, systematic and intentional way to assist them in moving towards the next stage of their professional lives. In this respect, though we accept that both Mr. Alberts and Mr. Heinrichs met with the two students on a fairly regular basis, we are not convinced that they knew much about the work the students were doing for other lawyers, or that they considered how that work fit into their progress towards professional competence.

71. One aspect of this that should be mentioned was the reliance by all of the lawyers concerned on Mr. Outerbridge to deal with the harassment allegations made by LM when they first arose. Mr. Outerbridge clearly plays a critical role in the management of the firm, and there is nothing wrong with recruiting administrative expertise; he took overall responsibility for human resources matters, and no doubt his oversight of those issues could be expected to bring about greater consistency in their management. We would suggest, however, that the student-principal relationship requires that the principal play a somewhat more active role in matters involving student conduct than appears to have been the case here. The conduct of students is impossible to disentangle from their advancement towards admission to the legal profession, and it is hard to see how Mr. Outerbridge, who is not a lawyer, could fairly be expected to assess the professional development aspects of the problem he faced. Though the evidence indicated that he consulted with Mr. Alberts and Mr. Heinrichs, their role in setting the course seems to have been somewhat peripheral.

72. To summarize, the evidence we heard indicated that though the response of the Merchant Law Group to the allegations initially made by LM was fairly prompt, it did not constitute an adequate approach to allegations of harassment and bullying coming from more than one student. We also heard evidence suggesting that the principals involved may have played less than a fully-engaged mentoring role.

73. The Law Society also expressed concern about the workload which seemed to be expected of articling students at the Merchant Law Group. Mr. Huber and Ms. Sigmeth both saw it as a possibility that the compensation system in place there induced the students to work long hours and that this may have contributed to the decision of LM and DD to cheat on the CPLED course. LM and NR both testified that they did work long hours, though the time sheets presented (Exhibit C-1.20) indicate that there was considerable variation from month to month. The lawyers who gave evidence all said that there was an expectation that the students would work diligently, but they also said that students were expected to arrange sufficient time to do the CPLED work, and also advised that they should build in personal time for non-work activities.

74. As we have said, we think the Law Society was justified in calling for extended scrutiny of the environment at the Merchant Law Group. Mr. Kuski argued that it is unfair to focus on the events that occurred in 2008-2009 as a basis for making a general decision about the suitability of the firm as a site for the training of articling students. The evidence indeed suggests that the situation that occurred during that year was unusual, and that much of what happened must be attributed to DD. There were aspects of the actions of the firm, however, that are of legitimate concern to the professional regulator.

75. We are not satisfied, however, that the Law Society has shown how the situation at the Merchant Law Group differs from the conditions in place at other law firms. It was intimated to us that the compensation system at the Merchant Law Group was unique, that the students were expected to work unusually hard, and that there was something distinctive about the way students-at-law were supervised by their principals. It is possible that this is true, but in order to determine this we would need to have information about how other law firms and other principals oversee their relationships with articling students.

76. Under the Rules of the Law Society, the burden rests on a principal to show cause why he or she should be allowed to take on an articling student. In our view, however, it would be unfair to require a principal to answer for their entire law firm in the absence of fairly clear standards concerning the principal-student relationship.

77. To some extent, Ms. Sigmeth conceded this in her testimony. She indicated that the Law Society has been moving in the direction of articulating more specific guidance for principals. In this connection, she alluded to the changes which have been made in the documentation in the CPLED materials outlining what students are expected to accomplish in that course, and what is required from principals in terms of verification. The requirements of the CPLED course are not the only component of the student-principal relationship, of course. Ms. Sigmeth pointed out that since 2008-2009, the Articling Guide has been modified (C-3) to include a lengthier and more specific list of responsibilities for principals in the Articles of Clerkship; she also indicated that this list, which is based on a list developed by the Law Society of Manitoba, was used as the basis for the conditions imposed on Mr. Alberts (C-1.18) when his application to act as a principal for Mr. Maksimovicius was approved in 2009.

78. It is our opinion that these efforts to provide more concrete guidance to principals are to be applauded. It is possible that the more generic and somewhat nebulous responsibilities contained in the earlier Articles of Clerkship (C-2) served adequately at a time when there was a strong professional consensus about how principals should approach their relationships with their articling students. More recently, however, it is open to doubt whether principals will absorb these professional traditions by osmosis. There will always remain a need to rely on the professional principles of members as the most important feature of their relationships with students-at-law and junior lawyers, but lawyers who assume the role of principal would also be well-served by a fuller indication from the Law Society about the parameters of that role.

79. As we have indicated earlier, we think it was reasonable for the Law Society to link the question of the environment provided by the law firm as a whole with their assessment of the capacity of a principal to carry out the obligations associated with mentoring a student-at-law. It is legitimate for the Law Society to insist that the articling period be viewed as an opportunity for students to become familiar with the expectations of a professional career, and that the focus not be on the labour the students can provide for the firm. In this context, the Law Society might consider obtaining commitments from law firms to put in place policies and guidelines that will maximize a student's ability to learn and grow as a lawyer during the articling period. The Law Society could provide a useful service by formulating templates for such policies or lists of best practices to guide law firms in this task.

CONCLUSIONS

80. We have unanimously concluded that the applications of Mr. Churko and Mr. Turple to act as principals should be accepted. Given that we have also concluded that the response of the Merchant Law Group to the events of 2008-2009 gave the Law Society legitimate grounds for concern, we place the following conditions on the grant of the applications:

- That Mr. Churko review every work assignment given to Mr. Tibbs by other lawyers of the Merchant Law Group in order to satisfy himself that the assignment lies within Mr. Tibbs' capabilities and does not represent an excessive workload; and that he review every assignment when it is complete to verify that Mr. Tibbs has completed the assignment in a satisfactory way, and that the lawyer who has assigned the work, if that lawyer is not Mr. Churko, is satisfied that the work has been satisfactorily performed.
- That Mr. Turple perform the same functions with respect to Mr. Chi.
- That Mr. Churko and Mr. Turple take steps to ensure that their respective students are setting aside adequate time to attend to their obligations with CPLED.
- That Mr. Churko and Mr. Turple each provide to the Law Society on or before March 31, 2012, an interim report on the progress of their respective students towards admission to the Law Society, indicating in particular what steps they have taken to provide professional mentorship to the students.

DATED at Saskatoon, Saskatchewan, the   day of December, 2011.

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Beth Bilson, Q.C.

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Laura Lacoursiere

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Greg Stevens