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PROVINCE OF SASKATCHEWAN)
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TO WIT:)

IN THE MATTER OF *THE LEGAL PROFESSION ACT, 1990*

Decision of the Benchers on Review

of the Decision of the Admissions and Education Committee

dated August 8th, 2011

in the Matter of the Application of Daniel DeMaria

for Admission as a Lawyer

DECIDED: July 11th, 2012

Timothy F. Huber on behalf of The Law Society of Saskatchewan

Daniel DeMaria on his own behalf

Introduction

1. Mr. Daniel DeMaria (the "Applicant") applied to the Law Society of Saskatchewan (The "Law Society") for admission as a lawyer. The application was referred by the Executive Director to the Admissions and Education Committee for consideration. The Admissions and Education Committee directed a hearing pursuant to Rule 230 of *The Rules of the Law Society of Saskatchewan* (the "Rules") to determine whether the Applicant met the requirements of admissions in Rules 171 and 180.

2. The focus of the hearing was the good character of the Applicant and whether his admission would be inimical to the best interests of the public or the members of the Law Society or would otherwise harm the standing of the legal profession generally. The hearing was held before a hearing committee consisting of George W. Patterson as Chair and Joel A. Hesje, Q.C. and Loreley Berra (the "Hearing Committee")

3. The Hearing Committee convened on three separate occasions to hear *viva voce* evidence and to hear oral argument. The Applicant was represented by William F. Johnson, Q.C. The Law Society was represented by Timothy F. Huber. The matter was taken under reserve by the Hearing Committee. By its written decision of the 8th of August, 2011, the Applicant's application was denied.

4. Pursuant to Section 24(3) of *The Legal Profession Act, 1990* (the "Act") and Rule 240(3) of the Rules, the Applicant applied to the Benchers for a Review of his application for admission. He was self-represented throughout that Review, including the hearing held by the Benchers for that purpose on December 9, 2011 after Convocation in Saskatoon, Saskatchewan.

5. Concurrent with the Benchers' review of the application, the Benchers heard the Applicant's application to allow and consider "fresh evidence". The proposed fresh evidence was proffered, at least in part, to remedy the Applicant's complaint that he was not given proper notice of the hearing and the right to make full answer to the case and evidence against him, thus denying him natural justice and procedural fairness. The proposed fresh evidence was in affidavit form. Counsel for the Law Society opposed the application.

6. At the Review conducted by the Benchers, a quorum was established. There was no objection taken by counsel or the Applicant to the jurisdiction or composition of the panel of Benchers convened for that purpose. There was no preliminary application or other objection to the proceedings.

7. Consistent with the approach recommended by the Supreme Court of Canada in *R v. Stolar*[1] the Benchers heard the Applicant's application for fresh evidence, by permitting the Applicant to file the affidavit evidence, and to make argument as to its admissibility. The Benchers heard from counsel for the Law Society and reserved their decision as to its admissibility. The Benchers then heard from both counsel on the Review itself. That decision was also reserved. Since the hearing on December 9, 2011 the Applicant filed a series of additional case authorities and related arguments.

8. For the reasons set out below the application for review is dismissed.

Jurisdiction and Responsibility

9. Pursuant to the Act, the Applicant applied for the privilege of being admitted as a lawyer. The Act confers upon the Law Society of Saskatchewan the jurisdiction and responsibility to set standards for the admission and ongoing competency and ethical behaviour of its members. The duty of the Law Society is in all respects governed by the provisions of Section 3.1 of the Act which states:

> Duty of society
> 3.1 In the exercise of its powers and the discharge of its responsibilities, it is the duty of the society, at all times:
> (a) to act in the public interest;
> (b) to regulate the profession and to govern the members in accordance with this Act and the rules; and
> (c) to protect the public by assuring the integrity, knowledge, skill, proficiency and competence of members.

10. The Law Society may, but is not bound by the Act to admit every applicant. The Act confers upon the Law Society the responsibility of establishing standards for admission. Section 24(1) states:

> Eligibility as lawyer
> 24(1) Any person may apply to the society to be admitted as a lawyer, and the society may admit that person as a member if that person:

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1 [1988] 1 SCR 480

(a) produces evidence satisfactory to the benchers of service as a student-at-law or practice as a lawyer;
(b) produces evidence that the person has completed a legal education program that is prescribed in the rules;
(c) complies with the rules; and
(d) fulfils any other requirement that the benchers may prescribe.
[emphasis added]

11. Section 10 of the Act authorizes the Benchers to make rules respecting any matter incidental to the Law Society's responsibility of governance, including the admission of lawyers as members:

Rules
10 The benchers may make rules:
(a) establishing committees, determining the duties of committees and conferring on committees the power to act for the benchers in and in relation to any matters that the benchers direct, other than the power to make rules;

[...]

(f) regulating the admission of lawyers as members;

[...]

(cc) respecting any matter that is necessarily incidental to the matters set out in this section relating to the governance of the society and the legal profession.

12. Rule 180 prescribes the process to be followed and test to be applied to applications for admission:

Consideration of Application for Admission as a Lawyer
180.(1) In considering an application under Rules 171 and 172 the Executive Director:
(a) may make whatever enquiries and investigations considered necessary;
(b) shall consider whether the admission is inimical to the best interests of the public or the members or would harm the standing of the legal profession generally;
(c) may approve for admission to membership as a lawyer, an applicant who satisfies the Executive Director that he or she has complied, or will prior to formal admission comply with:
(i) the provisions of the Act and these Rules applicable to the applicant; and
(ii) any requirements imposed by the Benchers under section 24(1)(e) of the Act; or
(d) refer the application to the Committee.
(2) The Executive Director shall promptly notify in writing a person whose application has been refused, stating the reasons for the refusal and the applicant's right to apply to the Benchers under section 24(3) of the Act for a review.
(3) The Benchers may:
(a) approve for admission to membership as a lawyer, an applicant who satisfies them that he or she has complied, or will prior to formal admission comply, with:
(i) the provisions of the Act and these Rules applicable to the applicant, and

(ii) any requirements imposed by the Benchers under section 24(1)(e) of the Act, or

(b) refuse the application.

[emphasis added]

[Rule 180(1) amended December 8, 1994 & June 9, 1999]
[Rule 180(1)(d) and 180(3) amended May 24, 2000; Rule 180(1)(e) and 180(2) added May 24, 2000]
[Rule 180(1) and (1)(a), (c) and (d), (2) and (3)(a) amended December 7, 2007]

13. In this case, the Hearing Committee was established by the Admissions & Education Committee pursuant to Rule 230 to consider the Applicant's application for admission. Rule 230 states:

Security for Costs

230. (1) The Chairperson of the Committee may order that the applicant deposit with the Society as security for costs, an amount which approximates the amount that the Committee may order to be paid under subrule (17).

(2) The Chairperson of the Committee may, on cause being shown, rescind or vary an order made under subrule (1).

(3) The hearing shall not commence until the amount ordered to be paid under subrule (1) or (2) has been deposited with the Society.

Notice and Timing of Notice

(4) When the Committee orders a hearing under this Part, it shall promptly notify the applicant in writing of:

(a) the purpose of the hearing;

(b) the date, time and place of the hearing; and

(c) the circumstances to be enquired into at the hearing.

(5) A notice referred to in subrule (4) shall be served:

(a) in accordance with section 85 of the *Act*; and

(b) not less than 30 days before the date set for commencement of the hearing, unless the applicant or his or her counsel consents in writing to a shorter period.

Adjournment of Hearing

(6) The applicant or counsel for the Society may, by notice in writing which:

(a) is received by the Society not less than 48 hours before the time set for commencement of the hearing; and

(b) sets out the reasons for the request that the hearing be adjourned. 38

(7) The Executive Director shall promptly advise the Chairperson of the Committee and every other party of the request and the reasons for it.

(8) The Chairperson shall, before the attendance of the parties at the hearing, determine whether the request is granted, and shall advise the parties accordingly.

(9) The Chairperson may, after a hearing has been commenced, adjourn the hearing to a specified date, time and place.

[Rule 230(1), (2), (4) and (7) amended December 8, 1994]
[Rule 230(1), (2), (4) and (7) amended December 7, 2007]

Attendance at the Hearing and Right to Counsel

(10) The applicant:

(a) shall, unless the Chairperson otherwise orders, personally attend the entire hearing; and

(b) may appear with counsel.

Public Hearing

(11) Every hearing shall be held in public unless the Committee determines, in the public interest, that a specific individual or the public generally may not be present at part or all of the hearing.

Transcript

(12) All proceedings at a hearing shall be recorded by a Court Reporter and a person may obtain, at his or her expense, a transcript of any part of the hearing which he or she was entitled to attend.

Onus and Burden of Proof

(13) At a hearing the onus is on the applicant to satisfy the Committee that he or she has met the requirements of the *Act* or these Rules, as the case may be.

Procedure at Hearing

(14) Subject to the *Act* and these Rules, the Committee may determine the practice and procedure to be followed at a hearing.

Decision of the Committee

(15) The Committee's decision shall be by majority vote.

(16) When the Committee gives written reasons for its decision, it shall take all reasonable precautions to avoid including in those reasons any information before it that is confidential or subject to a solicitor and client privilege.

Costs

(17) The Committee may order that the applicant or student-at-law pay costs to the Society, which may include part or all of one or more of the following costs actually incurred by the Society:

(a) the cost of any enquiries or investigations ordered under these Rules;

(b) the daily witness fee fixed by the tariff enacted pursuant to the Queen's Bench Rules, multiplied by the number of days the witness was required to remain in attendance at the hearing;

(c) reasonable travel and living costs of a witness;

(d) the Court Reporter's fee for attendance at the hearing;

(e) the cost of a transcript of a hearing held under this Rule, if the Society would otherwise be liable for its cost;

(f) the cost incurred by the Society in publishing the decision of the Committee or the Benchers, or both;

(g) a Committee member attendance fee of:

(i) $150 per half day of hearing for the first three days of hearings, plus

(ii) $500 per half day of hearing for each subsequent day of hearing, multiplied by the number of Committee members in attendance.

(h) reasonable fees or costs of counsel;

(i) reasonable disbursements of counsel for the Society; and

(j) any other amount, arising out of the proceedings, for which the Society would otherwise be liable.

[emphasis added]

[Rule 230(11) amended June 9, 1999]
[Rule 230(17)(h) amended December 2, 2010]

14. It is well established that the standard of proof in the administrative and civil contexts, is on a balance of probabilities (*F.H. v. McDougall*[2]).

15. As indicated above, the Applicant now seeks a review of the Hearing Committee's decision pursuant to Section 24(3), (4) and (5) of the Act which state:

> (3) A person whose application for admission pursuant to this section as a member is refused:
> (a) may request the benchers to review the application; and
> (b) has the right to appear before the benchers in support of the application.
>
> (4) The benchers shall make rules with respect to the review of applications pursuant to subsection (3).
>
> (5) The benchers may make rules:
> (a) establishing categories of membership on the basis of the frequency or extent of members' practice of law in Saskatchewan;
> (b) prescribing the conditions on and requirements of each category of member;
> (c) exempting a member or category of members from any provision of this Act or the rules.

16. Reviews of this nature proceed pursuant to Rule 240 of the Rules which states:

> **Bencher Review**
> 240 (1) An application for a review under section 23(4) or 24(3) of the *Act* shall be delivered to the Executive Director within 30 days after the action being reviewed was taken.
> (2) Rule 230 applies to a review, with the necessary changes and so far as it is applicable.
> (3) The Benchers may, after:
> (a) considering the transcript from and exhibits filed at a hearing conducted under Rule 230;
> (b) hearing the applicant; and
> (c) considering any evidence that they may in their discretion permit the applicant to adduce, confirm the decision, or approve the application, subject to any terms and conditions they consider appropriate.
> (4) The Benchers may vary or remove any terms and conditions imposed under subrule (3).

17. As will be indicated below, the standards for admission are informed by the relevant jurisprudence of other Law Societies, and courts of review. The good character requirement is part of this standard. The standard is more broadly stated by the Rules than requiring only good character. The admission must not be inimical to the best interest of the public, other lawyers and must not harm the standing of the legal profession generally.

18. At the hearing before the Hearing Committee both counsel also acknowledged the common law requirement of good character as a condition of admission. Counsel for the

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2 2008 SCC 53

Applicant accepted his onus of meeting the requirements of admission stating the Applicant should be admitted "only if he satisfied the fundamental test of good character which you [the Hearing Committee] must apply in order to protect the public." The evidence and argument presented to the Hearing Committee related to the good character requirement, and the responsibility of the Law Society to make such determination on that issue as was consistent with its duties under the Act to protect the public. At Paragraph 38 of its reason for decision, the Hearing committee articulated the test it applied, broadly stated by Rule 180 as including a good character requirement.

Standard of Review

19. The Applicant's request for a review does not contain any grounds upon which the review should proceed. In the Applicant's email of October 4, 2011 he asserted several grounds for review. Those grounds were refined and restated in his Brief of October 24, 2011 at Paragraph 7 as follows:

> (a) Whether the learned members of the Admissions & Education Committee erred in law in disregarding amendments to *The Legal Profession Act, 1990*;
>
> (b) Whether the learned members of the Admissions & Education Committee erred in failing to provide me with a proper notice of hearing which complied with the Law Society Rules;
>
> (c) Whether the learned members of the Admissions & Education Committee erred in fact and law allowing a copy of improperly obtained draft pleadings into evidence and in their various findings with respect thereto;
>
> (d) Whether the learned members of the A&E Committee erred in giving weight to non-specific accusations of wrongdoing made by Christopher Butz, Louis Mercier, and Nicholas Robinson which were not stated with particularity, or the required prior notice, and which at times were internally inconsistent, speculative, and conclusory;
>
> (e) Whether the learned members of the Admissions & Education Committee erred in fact and in law in failing to consider reference letters which were tendered in support of my application for admission; and
>
> (f) Whether the benchers should permit me to file fresh evidence during this review process.

20. In the case management process preceding the Review by the Benchers on December 9th, 2011, the Applicant and counsel for the Law Society were asked to address the standard of review to be applied by the Benchers on review. Mr. Huber did so in his written Brief dated the 28th of November, 2011. At the hearing Mr. Huber also referred the Benchers to

the decision in *Law Society of Upper Canada v. Kazman*[3]. The Applicant addressed the standard of review in oral argument at the hearing on December 9th, 2011.

21. The Act makes little provision in Section 24(3) as to the nature, scope or standard of the review. The Rules contemplate the review being performed on the transcript and exhibits, upon hearing the Applicant, and upon considering any other evidence the Benchers may in their discretion permit. The Rules allow the Benchers to substitute their own decision for that of the Hearing Committee.

22. The Benchers were urged by Mr. Huber to adopt the same standard of review governing appeals of decisions from administrative tribunals as set out by the Ontario Superior Court of Justice in *Shore v. Law Society of Upper Canada*[4], where the Court stated, beginning at Paragraph 57:

> The Society submits that the standard of review with respect to questions of fact is reasonableness, but with respect to the interpretation of the Act and rules, the Appeal Panel is not required to show deference, as the Hearing Panel has no greater expertise than the Appeal Panel in interpreting the Act.
>
> I agree with the Society's submissions.
>
> This Court has held that an Appeal Panel should review the decisions of the Hearing Panels on matters of fact and conclusions about credibility on the basis of reasonableness (*Law Society of Upper Canada v. Neinstein* (2007), 280 D.L.R. (4th) 263 at para. 40).
>
> However, the Appeal Panel owes no deference to the Hearing Panel's interpretation of the *Law Society Act* and rules, as the Appeal Panel and Hearing Panel have the same expertise interpreting these provisions (*Law Society of Upper Canada v. Evans*(2008), 91 O.R. (3d) 163 (Div. Ct.) at para. 37). Appeal Panels, and one of their functions is to oversee the orderly development of jurisprudence relating to proceedings before the Society.
>
> Therefore, the Appeal Panel correctly identified the governing standard of review with respect to findings of fact or mixed fact and law and correctness with respect to questions of law.

23. Before the hearing, the Chair of the Hearing Committee referred Mr. Huber and the Applicant to and were given copies of the following case authorities, also touching upon the standard of review:

Law Society of Upper Canada v. Neinstein, (2007), 280 D.L.R. (4th) 263
Law Society of Upper Canada v. Evans. (2008), 91 O.R. (3d) 163 (Div. Ct.)
Law Society v. Dobbin, [2000] L.S.D.D. No. 1

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3 [2008] L.S.D.D. No. 46
4 [2009] O.J. No. 1608

Berge (Re), 2007 LSBC 7
H.L. v. Canada (Attorney General) 2005 SCC 25
Martin (Re) 2007 LSBC 20

24. Mr. Huber and the Applicant agreed at the hearing that the standard of review should be one of reasonableness with respect to findings of fact or mixed fact and law, and correctness with respect to questions of law.

25. In *Kazman*[5] the Appeal Panel of the Benchers extensively considered the internal standards of review and appeal at the Law Society, and the external standards of judicial review of the decisions of the Law Society. Under *The Rules of the Law Society of Upper Canada*, the internal Appeal Panel has the authority to determine "any question of fact or law", and to substitute its own decision for that of the Hearing Panel. In *Kazman*, the Appeal Panel concluded that the Appeal Panel, as a "Bencher reviewer" enjoyed, to a meaningful degree, the same advantages as "Bencher triers" on questions of law, but conceded the need for deference to the Hearing Panel on questions of fact, credibility and mixed fact and law. The Benchers stated at Paragraph 38:

> [38] Thus, the Appeal Panel's functions consist in assessing whether a hearing panel's reasons and decisions are correct or reasonable under the applicable standard of review, and putting right, where warranted, any matters that fail under that assessment. The principles are as follows:
>
> i. For questions of statutory and common law including the *Law Society Act* and other statutes and common law closely connected to its functions, constitutional authority, legislative jurisdiction, procedural fairness, natural justice, bias including reasonable apprehension of bias, and Law Society policy, the standard of review is correctness. The Appeal Panel owes little or no deference to a hearing panel on such questions. The Appeal Panel may interfere with the reasons and decisions of a hearing panel on such questions if the Appeal Panel believes that the hearing panel decided them incorrectly.
>
> ii. For questions of fact, credibility, mixed fact and law, and penalty, the standard of review is reasonableness. The Appeal Panel owes higher deference to a hearing panel on such questions. The Appeal Panel may interfere with the reasons and decisions of a hearing panel on such questions only if the Appeal Panel believes that the hearing panel decided them unreasonably.
>
> iii. The standard of review for the reasons and decisions of a hearing panel as a whole is one of reasonableness. If the Appeal Panel finds that a hearing panel incorrectly decided an issue that the hearing panel was required to decide correctly but nevertheless reasonably decided the case as a whole, the Appeal Panel should correct the error, but otherwise not interfere with the acceptable outcome.
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> iv. In performing its functions, the Appeal Panel shall not re-try the dispute at first instance, but shall conduct a somewhat probing examination of the reasons of the hearing panel to determine whether those reasons, taken as a whole, are reasonable, transparent, intelligible, tenable, defensible in relation to the law and the facts, and supportive of the hearing panel's decisions within a range of acceptable outcomes. If they are, the Appeal

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5 *Supra*

> Panel shall not interfere with them even if the members of the Appeal Panel suspect that they might have preferred a different acceptable outcome.
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> v. The Appeal Panel's functions may be expanded only in the not usual circumstances where fresh evidence is permitted before the Appeal Panel, and then only to the extent that the fresh evidence bears upon the case.
>
> [emphasis in original]

26. For the purpose of defining the reasonableness standard as it relates to questions of fact the standard is most clearly stated by the Supreme Court of Canada in *H.L. v. Canada (Attorney General)*[6]:

> 55 "Palpable and overriding error" is at once an elegant and expressive description of the entrenched and generally applicable standard of appellate review of the findings of fact at trial. But it should not be thought to displace alternative formulations of the governing standard. In *Housen*, for example, the majority (at para. 22) and the minority (at para. 103) agreed that inferences of fact at trial may be set aside on appeal if they are "clearly wrong". Both expressions encapsulate the same principle: an appellate court will not interfere with the trial judge's findings of fact unless it can plainly identify the imputed error, and that error is shown to have affected the result.
>
> 56 In my respectful view, the test is met as well where the trial judge's findings of fact can properly be characterized as "unreasonable" or "unsupported by the evidence". In *R. v. W. (R.)*, [1992] 2 S.C.R. 122, McLachlin J. (as she then was) explained why courts of appeal must show particular deference to trial courts on issues of credibility. At the same time, however, she noted (at pp. 131-32) that:
>
> > it remains open to an appellate court to overturn a verdict based on findings of credibility where, after considering all the evidence and having due regard to the advantages afforded to the trial judge, it concludes that the verdict is unreasonable.
> >
> > The statutory framework in criminal matters is, of course, different in certain respects. But as a matter of principle, it seems to me that unreasonable findings of fact — relating to credibility, to primary or inferred "evidential" facts, or to facts in issue — are reviewable on appeal because they are "palpably" or "clearly" wrong. The same is true of findings that are unsupported by the evidence. I need hardly repeat, however, that appellate intervention will only be warranted where the court can explain why or in what respect the impugned finding is unreasonable or unsupported by the evidence. And the reviewing court must of course be persuaded that the impugned factual finding is likely to have affected the result. [emphasis in original]

27. As more recently articulated in *Dunsmuir v. New Brunswick*, 2008 SCC 9, questions of fact, discretion or policy, or questions where legal issues cannot be easily separated from factual issues generally attract a standard of reasonableness.

28. On the question of the standard of review of questions of law, the court concluded in *Dunsmuir* that the standard of review of many legal issues will attract a standard of correctness, but some legal issues will attract the more deferential standard of reasonableness.

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6 *Supra*

By way of example, a question of law that does not rise to the level of "central importance to the legal system" and outside of the "specialized area of expertise" of the administrative decision maker will attract a reasonableness standard. True questions of jurisdiction or *vires* of administrative bodies continue to attract a correctness standard.[7]

29. For the purposes of this review, and on the basis of the submission of both Mr. Huber and the Applicant, the Benchers have applied the standard of review advanced by counsel, namely, a reasonableness standard on questions of matters of fact and/or mixed fact and law; and a correctness standard on questions of law. On review the error must be evident and shown to have affected the result of the decision as a whole. The party seeking review bears the onus throughout. In this case, the burden rests on the Applicant.

The Review

Matters of Law

30. In the Applicant's seven grounds for review restated in his Brief of October 24, 2011, he asserted the following errors of law:

> (a) Whether the learned members of the Admissions & Education Committee erred in law in holding that the onus of proving good character was on the Applicant;
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> [...]
>
> (c) Whether the learned members of the Admissions & Education Committee erred in fact and law allowing a copy of improperly obtained draft pleadings into evidence and in their various findings with respect thereto;
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> [...]
>
> (e) Whether the learned members of the Admissions & Education Committee erred in fact and in law in failing to consider reference letters which were tendered in support of my application for admission;

31. The Benchers do not agree that the latter ground "(e)" raises any error on a question of law. There was no ruling by the Hearing Committee to exclude reference letters. This complaint relates to the Hearing Committee's findings regarding credibility and the weight of the evidence. This is necessarily a question of fact. This ground will be considered in the context of the other grounds for review, all of which involve questions of fact, or mixed fact and law as asserted by the Applicant. Ground "(c)" is also framed as an error in fact and law and will therefore be examined in that same context.

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7 See *Dunsmuir, supra*, paragraphs 53-61

Good Character Requirement

32. The only question of law is whether the Hearing Committee erred in law in applying the good character requirement as an element of the test for admission under Rule 180, and in putting the Applicant to the legal burden of proving the same.

33. At paragraph 14 of the Hearing Committee's Decision, the Committee considered the amendments to the Act proclaimed the 20th of May, 2010, before the Applicant's application for admission as a lawyer. Prior to that date, the Act required an applicant to "produce testimonials satisfactory to the Benchers of good character..." Section 24(1) of the Act also required applicants to fulfill "any other requirements that the Benchers may prescribe".

34. With the amendment to the legislation, the requirement to produce testimonials was removed, but the general requirement to fulfill other requirements prescribed by the Benchers remained. The Applicant argued that this change in the legislation was purposive, that a good character requirement no longer existed, and could not be imposed by the Benchers as a condition of admission as a lawyer. He argued that a restrictive interpretation of the Law Society's powers was required and that prevented this condition from being imposed.

35. The appropriate approach to the interpretation of the Law Society's powers under the Act and in the interpretation of rules made pursuant to the Act was reviewed in *Churko v. The Law Society of Saskatchewan*[8]. The Court referred to the relevant Supreme Court of Canada authorities including *Rizzo & Rizzo Shoes Ltd., (Re)*[9] and *Bell ExpressVu Limited Partnership v. Rex*[10] and the recent decision of the Saskatchewan Court of Appeal in *Cebryk v. Paragon Enterprises (1984) Ltd. (Armstrong's Physiotherapy Clinic)*[11]. In *Churko*, the Court adopted the "modern principled approach" referred to by the Saskatchewan Court of Appeal and in stating:

> 20 In determining the interpretation to be placed on Rule 152(2), the court's task, as encapsulated in *Rizzo v. Rizzo Shoes, supra*, is to consider its provisions in their entire context and in their grammatical and ordinary sense harmoniously with the object of the *Act* and the intention of the Legislature.

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8 2011 SKQB 327
9 [1998] 1 S.C.R. 27
10 2002 SCC 42, [2002] S.C.R. 559
11 2010 SKCA 146

> 21 Rule 152 was promulgated by the Benchers in the exercise of their duty to protect the public by assuring the integrity, knowledge, skill, proficiency and competence of members of the Law Society, including students-at-law. This is set forth in s. 3.1(c) of the *Act*.[12]

36. The Court declined to adopt a literal interpretation instead stating:

> 27 For the purposes of this application, I conclude that the purpose and intent of the Act will best be served by adopting the latter, more liberal and expansive, interpretation.[13]

37. In its reasons for its decision, the Hearing Committee concluded that this change to the Act "in no way removes the requirement of good character from the elements required by an applicant for admission to the [Law Society of Saskatchewan]".

38. The Benchers have concluded the Hearing Committee was correct. The legislative amendment only removes the requirement that testimonials be produced as evidence of good character. As observed by the Hearing Committee, and by other decisions of the Benchers involving discipline, testimonials are of little value, in the context of a determination of character or suitability that must be made by those Benchers having a legislative responsibility to protect the public. A liberal and expansive interpretation of the Act and Rules is required to give life to the scope and meaning of the overriding duty to govern the legal profession.

39. In determining the scope of the Law Society's responsibility to establish conditions for admission, the Act must be read as a whole and in context with the statutory duty of the Law Society under such liberal and expansive interpretation as will achieve the overarching objectives in the Act to protect the public.

40. Section 3.1 of the Act now codifies the overarching duty and responsibility of the Benchers to protect the public and regulate the legal profession in the public interest. This duty has been previously found to exist at common law in the context of admissions and in the determination of a lawyer's ongoing suitability to practice for the purpose of sentencing in the discipline context. This necessarily involves a responsibility to only admit those lawyers of suitable character. A requirement of good character should equally apply where an applicant is seeking the privilege of admission.

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12 *supra* (Paras. 20 & 21)
13 *ibid* (Para. 27)

41. The Benchers do not accept the Applicant's argument that the good character requirement only exists as a condition to admission as a student-at-law and that there is no onus on an applicant to establish good character as a condition of admission as a lawyer. The admission of a student is no guarantee of admission as a lawyer. Any applicant for admission as a lawyer must satisfy the requirements established by the Benchers for the purpose of protecting the public and advancing the public interest. The privileges of being admitted as a practicing lawyer and the risk to the public are distinctly different than those applicable to a student-at-law who is not entitled to be held out as a lawyer. Where the protection of the public is a central objective in establishing standards for admission, it would result in an absurdity if the standard were lower for admission as a lawyer than for admission as a student-at-law. The requirement of good character is and always has been held to be fundamental to the qualities rightfully expected by the public and was correctly applied by the Hearing Committee in determining the Applicant's suitability for admission as a lawyer.

Sufficiency of Notice of Hearing / Application to Adduce Fresh Evidence

42. The Applicant asserted that he was not given proper or adequate notice of the hearing and the evidence to be called against him. He argued that he was not afforded procedural fairness and was denied a fair hearing. At the hearing before the Benchers on December 9, 2011 he suggested the appropriate remedy was to allow his application for fresh evidence or to direct a new hearing. For those reasons, both issues will be considered together.

43. In his complaint about the sufficiency of the notice, the Applicant asserts that he was not given prior notice of the allegations to be raised in the evidence called by Mr. Huber or notice of the circumstances to be inquired into at the hearing. At Paragraph 34 of his Brief of October 24, 2011 he stated:

> 34. This failure of notice breached the rules of nature [sic] justice and procedural fairness, as well as sections 7 and 11 of the Charter of Rights and Freedoms. In these circumstances, it is my respectful submission that this ought to affect the weight given to the allegations against me and that the benchers should allow me to tender new evidence, as discussed further below.

44. The written notice of the hearing, in itself, may have been insufficient to allow the Applicant a reasonable opportunity to understand the nature of the inquiry and to prepare. But

the actual notice, in the manner the hearing proceeded, was more than sufficient in the circumstances. The Applicant received all documentary evidence in the possession of the Law Society, including can-say statements from witnesses called by the Law Society. At the outset of the hearing, the Applicant was given leave, at his request, to effectively split his case. His evidence was called before and after the Law Society called its evidence.

45. In the end, the hearing was conducted at three different times on December 17, 2010, January 17, 2011 and April 13, 2011. The Applicant testified and Mr. Huber called some of his witnesses on December 17, 2010. The hearing continued on January 17, 2011 when Mr. Huber concluded his case and the Applicant testified in rebuttal. It resumed again on April 13, 2011 when the Applicant again testified in rebuttal after stating he was taken by surprise by the testimony of one of his former colleagues, notwithstanding the can-say statement of that witness. He also provided additional evidence, not in the nature of true rebuttal evidence (Page 497 - 503). Notwithstanding the objections of Mr. Huber to some of this evidence, the Hearing Committee allowed it. If the Applicant needed more time, he had an opportunity to seek a further adjournment and leave to call such further evidence as he considered appropriate. No such applications were made.

46. The Applicant also argues that natural justice was denied him in his case as he, for a variety of different reasons, was unable to participate meaningfully in the hearing and decision-making process. First, the Applicant states that, although he was represented by counsel, his lawyer was unable to hear during a large portion of the proceedings and, as a result, the Applicant's interests were not adequately protected or addressed. The transcripts of the Admissions and Education Committee hearing show that when his lawyer did have difficulty hearing testimony or submissions, evidence was repeated to ensure the Applicant's counsel was engaged. During the hearing neither the Applicant nor his counsel indicated that their ability to participate meaningfully in the decision-making process had been limited.

47. The Applicant also indicates that his counsel failed to cross-examine some witnesses on key points and that his counsel did not call certain evidence at the hearing. At the hearing before the Benchers on December 9, 2011, the Applicant stated that there were tactical

reasons for counsel to pursue the approach that he did and that the Applicant's counsel had the Applicant's ultimate approval to conduct the case in this manner.

48. By way of remedy the Applicant requested a new hearing, or leave to adduce fresh evidence consisting of:

(a) Affidavit of the Applicant, dated the 20th of October, 2011;

(b) Affidavit of the Applicant, dated the 21st of October, 2011;

(c) Affidavit of the Applicant, dated the 24th of October, 2011; and

(d) An Affidavit of a former co-worker dated the 8th of April, 2011.

49. The proposed fresh evidence consists of additional "transcripts" of conversations the Applicant states he recorded, allegations of suspected illegal activities of a law firm, the hearing problems and allegedly related limitations of the Applicant's counsel, an explanation of why Dr. Arnold did not testify and more "spark" messages between the Applicant and his co-workers.

50. The Benchers are not persuaded that the Applicant was denied a fair hearing and that a new hearing is therefore required. By the time the Law Society's case was concluded on January 17, 2011, the Applicant and his counsel had sufficient time to prepare additional evidence, and indeed did call additional evidence when the hearing resumed on the 13th of April, 2011. To that point the Hearing Committee demonstrated considerable leniency in allowing the Applicant to call new evidence that was not properly rebuttal evidence. If more time or further adjournment was needed, an application could have been made, but was not.

51. The application to adduce fresh evidence requires further examination in the context of the test for admission of such evidence and the broader question of whether it should be admitted in any event to ensure all relevant evidence is considered by the Benchers.

52. In asserting this remedy the Applicant correctly articulated the test for admissibility of fresh evidence in the civil context, as recently restated by the Court of Appeal in *Gritzfeld v. Zuidema Farms Inc.*[14]

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14 2009 SKCA 51, para. 23

> 23 The so-called Palmer test for admitting fresh evidence is well known. It was recently stated as follows by Vancise J.A. in Wal-Mart Canada Corp. v. Saskatchewan (Labour Relations Board), 2006 SKCA 142 (Sask. C.A.):
>
> > [4] The test for the admission of fresh evidence is well known and was articulated by this court in Maitland v. Drozda (1983), 22 Sask. R. 1 (C.A.). The court identified four factors which must be satisfied before fresh evidence would be accepted. Those factors are:
> >
> > > "The evidence will not be admitted, if by due diligence it could have been used at trial;
> > >
> > > "The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the action;
> > >
> > > "The evidence must be credible in the sense that it is reasonably capable of belief; and,
> > >
> > > "It must be such that if believed could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result."

53. In attempting to meet these elements of the test, the Applicant did not suggest that the proposed evidence had not been discovered at the time of the hearing before the Hearing Committee. Instead, he argued that there was insufficient disclosure of the case to be met and, that he received "reduced assistance from counsel during critical stages of the hearing as a result of my lawyer's malfunctioning hearing aids", that certain Law Society witnesses were absent during the third day of the hearing, thereby precluding him from re-examining those witnesses and that he was "under duress as a result of various threats which [two of those witnesses] made against me with respect to evidence which I would have otherwise brought forward during the hearing".

54. At the hearing before the Benchers on December 9th of 2011, the Applicant conceded that the proposed fresh evidence could have been called at the time of the hearing, but that the Applicant and his counsel made a decision to not call that evidence.

55. Where the first element of the test in *Palmer* is not met, this is not necessarily a barrier to the Benchers considering new or fresh evidence on review. Section 48(10) of the Act provides that the rules of evidence do not bind Hearing Committees hearing formal complaints as matters of discipline:

> (10) A hearing committee may accept any evidence that it considers **appropriate** and is not bound by the rules of law concerning evidence.
> [emphasis added]

56. A similar approach has been followed by Hearing Committees established by the Admissions & Education Committee.

57. Evidence that may be appropriate for these purposes must still be evidence that is relevant, credible and material to the result. The proposed evidence must therefore be evaluated against the other evidence and how such other evidence was presented at the hearing and considered by the Hearing Committee.

58. The proposed fresh evidence goes to the credibility of the Applicant and the other witnesses who testified before the Hearing Committee. The fresh evidence purports to bolster the credibility of the Applicant, and to introduce other elements of evidence impugning the credibility of the former co-workers and employers of the Applicant, who also testified. Some of the evidence relates to notice, disclosure and the Applicant's stated fear of testifying against certain witnesses called on behalf of the Law Society.

59. The subject matter of most of that evidence was not the subject of cross-examination of those other witnesses when they appeared before the Hearing Committee and is only now produced after all evidence has been heard, including the rebuttal evidence of the Applicant, and findings of credibility have been made on that basis by the Hearing Committee. The proposed fresh evidence is in affidavit form and has not been subject to cross-examination.

60. The Benchers are in no position to evaluate, or re-evaluate the credibility of the Applicant and the other witnesses, based on any firsthand observation of their *viva voce* testimony.

61. The Hearing Committee heard firsthand from all the witnesses, and who were subject to cross-examination. The Hearing Committee made findings of credibility and fact. According to the standard of review described above, those findings can only be set aside if they are unreasonable, unsupported by the evidence or palpably wrong. The credibility of any *viva voce* evidence is best determined by hearing the whole of such evidence firsthand. A finding of credibility made on that basis can be legitimately impugned if it involves an objective or otherwise obvious error, such as a fundamental misapprehension. But to the extent it involves a

subjective determination of credibility, the reviewing tribunal has a limited basis to re-evaluate such findings, based only on new evidence going to the issue of credibility.

62. In the circumstances, it would be extraordinary and inappropriate for the Benchers to accept the fresh evidence at face value as credible and as a basis to thereby overturn the findings of credibility and fact made by the Hearing Committee after it had the benefit of hearing the *viva voce* testimony and arguments regarding credibility.

Matters of Fact/Mixed Fact and Law

Admissibility of "Draft Pleadings"

63. The Applicant asserted that the Hearing Committee "erred in fact and law in allowing a copy of improperly obtained draft pleadings into evidence and in their various findings with respect thereto." This error is framed as one of mixed fact and law. The document in question is a draft pleading prepared by the Applicant. The pleading is in draft form. Parts of it consist of the Applicant's handwritten amendments. The Applicant is described as the Plaintiff, in an action styled against two law firms in Canada and three individual lawyers and members of the Law Society of Saskatchewan. One of the lawyers identified as a defendant is Mr. Timothy F. Huber, Discipline Counsel for the Law Society, and counsel in this matter. The pleading alleges racketeering, conspiracy, professional negligence and intentional infliction of emotional distress. The pleading was provided to the Law Society by one of the Applicant's former colleagues who testified it was left behind in his office by the Applicant.

64. At the hearing before the Hearing Committee, counsel for the Applicant conceded that the document was relevant and probative to the issue of good character. But he argued that its prejudicial impact outweighed its probative value. Counsel also argued the document had been improperly obtained by a civil conversion or a criminal taking. Counsel also argued that the document was protected by solicitor and client privilege as it involved a "position which has been thought about and upon which advice has been given..." At the review by the Bencher, the Applicant later asserted in his brief to the Benchers that the document was only a "piece of creative writing".

65. The Applicant argued in his Brief that privilege attached to this document and that, by operation of *The Code of Professional Conduct (Saskatchewan)* (the "Code"), this document was either not admissible in evidence or could not be considered by the Hearing Committee as part of the evidence. The Applicant referred to the restriction in the Code, and similar Codes of Conduct from other Canadian Law Societies suggesting privileged communications obtained improperly by one lawyer should not be kept or used by such lawyer. We were not referred to any case authority elevating this rule to an exclusionary rule of evidence.

66. This ground of review must also be considered in the context of the applicable standard of review. As discussed above, the Applicant bears the onus of demonstrating the decision as a whole is in error. In this case, the pleading in question is consistent with other evidence to support the Hearing Committee's finding that the Applicant attempted to intimidate others. In making this finding, the Hearing Committee considered the whole of the evidence related to this finding, and to its other findings relating to good character. In its reasons, the Hearing Committee referred at paragraph 50 to the evidence of other elements of the Applicant's character indicating "an ongoing series of inexplicable behaviour that included threatening, a tendency to physical violence, lying intimidation, and obsessive behaviour..." While the pleading in question was part of the evidence considered by the Hearing Committee, the Applicant has not shown that such pleading was essential to or determinative of the Hearing Committee's global assessment of his character. The Benchers find no basis to interfere with the Hearing Committee's decision on this ground.

Additional Grounds

67. The Applicant asserted the following additional errors which he suggested amounted to errors of fact and law:

> (c) Whether the learned members of the Admissions & Education Committee erred in fact and law allowing a copy of improperly obtained draft pleadings into evidence and in their various findings with respect thereto;
>
> (d) Whether the learned members of the A&E Committee erred in giving weight to non-specific accusations of wrongdoing made by Christopher Butz, Louis Mercier, and Nicholas Robinson which were not stated with particularity, or the required prior notice, and which at times were internally inconsistent, speculative, and conclusory;

(e) Whether the learned members of the Admissions & Education Committee erred in fact and in law in failing to consider reference letters which were tendered in support of my application for admission

68. These alleged errors will be considered together in the context of the applicable standard of review, and the decision of the Hearing Committee as a whole.

69. As the Hearing Committee stated in its decision, and as referenced above, the question for determination involves an examination of the good character of the Applicant. However, the test for admission is more broadly stated by Rule 180 as encompassing a determination of whether the admission of the Applicant would be inimical to the best interests of the public, or the members or would harm the standing of the legal profession generally.

70. The Hearing Committee stated this at Paragraphs 38 and 39:

> 38. The Committee accepts that it must make its determination of the Applicant's good character and whether the test in Rule 180 is met as at the time of the application, based on the balance of probabilities, recognizing that the onus of proof is on the Applicant. We further accept that the overall test does not require perfection or certainty and the core issue is good character, not the risk of re-offending. The Committee must also review other aspects of the Applicant's behaviour with a view to determining if his admission to the LSS would be inimical to the best interests of the public or the members or would harm the standing of the legal profession generally.
>
> 39. Good character is something that can be hard to define, or if defined, hard to apply as a legal definition to a particular individual. Letters of reference may assist in the determination based on the common sense principle that you know it when you see it. Candid admission of past misconduct and genuine remorse, regret and embarrassment can further assist in the determination.

71. The essential findings of the Hearing Committee relating to that test, including the good character requirement, were:

(a) The Applicant abused the legal system by intimidating witnesses, threatening to commence legal proceedings or to report fellow students to criminal or civil authorities, threatening to bring proceedings against them in foreign jurisdictions and by planning or drafting pleadings for a racketeering action in the United States against counsel for the Law Society, other members of the Law Society, for the purpose of intimidation;

(b) Lying to co-workers at the firm where he was employed;

(c) Failing to show civility to his co-workers and fellow articling students, including the use of physical violence, taping their conversations, accessing a fellow lawyer's computer and screaming and yelling at them; and

(d) His behaviour did not change appreciably, notwithstanding the sanctions imposed by the Violation Hearing Committee after he was found to have collaborated and cheated on his CPLED responsibilities.

72. The Hearing Committee found no evidence of remorse and concluded the Applicant did not appear to believe he was in need of remediation or rehabilitation.

73. In its Reasons for Decision, the Hearing Committee devoted 25 paragraphs of its decision in reviewing the evidence called by the Applicant and the Law Society. This review involved an examination of the strengths, weaknesses and inconsistencies of this evidence, including letters of reference. The Hearing Committee made specific reference to the limited evidentiary value of some of this evidence, including unsworn *pro forma* letters of reference in weighing the evidence of the Applicant against the conflicting evidence of his co-workers. The Hearing Committee made a critical determination of credibility where it stated at Paragraph 49(c):

> The Committee is cognizant of the "he said, she said" nature of some of the evidence adduced, however, where that evidence was conflicting we find the evidence of the three members called by the LSS more compelling. We do not characterize the Applicant's actions since the CPLED Violation Decision to be mere immaturity. We view it instead as lack of character as defined herein.

74. The Hearing Committee heard the witnesses testify in chief and under cross-examination. The Hearing Committee was in the best position to make findings of credibility. There was an evidentiary basis for the essential findings of the Hearing Committee. Many of the essential findings were admitted by the Applicant under cross-examination.

75. The Applicant admitted to repeatedly threatening to report a co-worker to the SPCA for alleged abuse of a pet and repeatedly pressing the same co-worker and LSS witness to self-report to SGI for an insurance fraud the Applicant alleged his co-worker had committed. The Applicant also admitted to delivering a demand letter to the same co-worker, in which he

threatened to bring a defamation action in Florida after that co-worker had reported their joint CPLED misconduct.

76. The Applicant admitted to threatening to sue a co-worker for alleged CPLED wrongdoing.

77. The Applicant admitted to tape recording conversations with at least two co-workers who he believed would be witnesses for the Law Society. On at least one occasion he admitted to doing so without the co-worker knowing that he was being recorded. He admitted in rebuttal to recording a conversation with a co-worker, who was a witness for the Law Society, to gather evidence to report that co-worker to his employer, but without informing the co-worker the conversation was being recorded. He admitted this co-worker was concerned about being recorded and that the co-worker searched the Applicant for a tape recorder.

78. Several co-workers testified that the Applicant called them incompetent, yelled at them, belittled them, and questioned their intelligence. These same co-workers testified that the Applicant punched them, pushed them and in one case, held one of them upside down to shake him down.

79. On the whole of this evidence, there was a legitimate basis for the Hearing Committee to find, as it did, a basis for their conclusions about the Applicant's character, and his suitability for admission as a lawyer. They concluded at Paragraph 50 and 51 of their Decision:

> 50. The Committee is in agreement with the assessment of the LSS Counsel. Is it in the best interests of the public or the profession that the Applicant be admitted as a lawyer? We think not. The evidence before the Committee indicates an ongoing series of inexplicable behaviour that included threatening, a tendency to physical violence, lying, intimidation, and obsessive behaviour. The Applicant surreptitiously accessed a fellow lawyer's computer and regularly taped telephone and personal conversations. All of this activity continued after the CPLED Violation Decision. The Applicant was unable to provide any mitigating circumstances to explain this behaviour. He showed a willingness to misuse the Judicial system through the use of bizarre pleadings and use of threats of litigation against fellow lawyers to suppress testimony.
>
> 51. The overarching consideration regarding Mr. Demaria's application is public protection, despite the grave consequences an adverse decision may have on the Applicant. Although there is no evidence of the Applicant applying the same tactics evidenced in this hearing to clients or with lawyers outside MLG with whom he had contact, the Committee are satisfied that the Applicant's actions vis a vis the lawyers in his firm and

> with respect to this hearing are sufficient evidence of lack of good character to deny admission to the Law Society at this time.

80. The standard of review on these elements of the Hearing Committee's decision is one of reasonableness and not correctness. On the basis of the findings of fact made by the Hearing Committee, it was open for them to conclude the Applicant had not met his onus of proving good character and to deny the Applicant admission to the Law Society on the grounds stated in its Decision. The onus is on the Applicant to demonstrate that the Hearing Committee's decision as a whole is unreasonable for the purposes of this review.

81. There is no indication in the reasons for the Decision itself that the Hearing Committee considered irrelevant evidence or failed to consider evidence relevant to the test under Rule 180. The Decision is internally consistent, intelligible and does not reflect an error of approach or other error in the result as a whole. For these reasons, the Benchers find no basis to interfere with the Decision of the Hearing Committee.

DATED at the City of Regina in the Province of Saskatchewan this 11th day of July, 2012.

Per: _____

Paul H.A. Korpan, Q.C.
Chair, The Benchers