THE LAW SOCIETY APPEAL PANEL

BETWEEN:

Michael Terrigno, Applicant, A Student at Law of The Law Society of Alberta

v.

The Law Society of Alberta, Respondent

Before: John Higgerty, Q.C. (Chair)
Rose M. Carter, Q.C.
Shirish Chotalia, Q.C. (resigned September 3, 2009)
James Eamon, Q.C.
James Glass, Q.C.
Peter Michalyshyn, Q.C. (dissenting)
Roy Nickerson, Q.C.
Scott Watson, Q.C. (dissenting)

Heard: June 22, 2009

Counsel: James Rooney, Q.C., for the Applicant
Michael Penny, Esq., for the Respondent

DECISION

INTRODUCTION:

1. After a complaint from a staff member of the Law Society of Alberta (LSA), Michael Terrigno (Mr. Terrigno) was charged with misleading or attempting to mislead the LSA regarding the start date of his articles. In the late autumn of 2006, Mr. Terrigno needed to find articles, so as to qualify to take the Canadian Centre for Professional Legal Education (CPLED) program commencing in January 2007. Otherwise, his admission to the Bar would be substantially delayed. Mr. Terrigno and Mr. Anand Sara (Mr. Sara) signed Articles of Clerkship on November 20, 2006, requesting an effective start date of November 17, 2006. This was accepted by the LSA.

2. The Hearing Committee (HC) found that the relationship of Principal and Student was not created and acted upon from November 17, 2006 to January 15, 2007. Therefore, Mr. Terrigno had misled or attempted to mislead the LSA. Accordingly, the HC found him guilty of the citation on June 18, 2008. A two month suspension, a reprimand, and the payment of costs of the Hearing were ordered. Mr. Terrigno appeals the HC's written decision issued on June 26, 2008.

3. Mr. Terrigno seeks a dismissal of the citation, or, in the event that the citation is upheld, a significant reduction in penalty. The appeal was heard on June 22, 2009. The Appeal Panel reserved its decision. Written submissions were received in September, 2009.

4. The Appeal is allowed and the finding of guilt is set aside.

JURISDICTION:

5. Jurisdiction was established by the entry of Exhibit 1, the letter appointing the Panel of Benchers to hear the appeal, Exhibit 2, Notice of Appeal, and Exhibit 3, the Notice of Hearing of the appeal. Both counsel acknowledged jurisdiction was established.

PRELIMINARY ISSUES:

6. Mr. Rooney, counsel for Mr. Terrigno, made an application to adduce fresh evidence pursuant to section 76(6) of the *Legal Profession Act*, R.S.A. 2000. Mr. Penny objected on behalf of the LSA, but acknowledged that the Appeal Panel could not realistically accept or reject the application without hearing the evidence itself. Accordingly, Mr. Terrigno testified, as if in a *voir dire*. The Panel adjourned briefly to consider the question of admissibility. The Panel took into account the rather wide rules of evidence in the LSA hearing process, the broad wording of the citation, and the duty of fairness to Mr. Terrigno. The Panel ruled Mr. Terrigno's testimony be admitted into evidence.

CITATION:

7. Mr. Terrigno was charged with the following citation:

    a. IT IS ALLEGED that you misled or attempted to mislead the LSA with respect to your articles as a Student-At-Law, and that such conduct is conduct deserving of sanction.

FACTS:

8. Mr. Terrigno obtained his LLB from the University of Ottawa in the spring of 2006, but by the fall of 2006, Mr. Terrigno had not obtained an articling position. He had been informed that he would be placed on a waiting list for CPLED for January 2007 but only if he secured an articling position beforehand.

9. Mr. Terrigno made efforts to secure articles, but without success. Evidently the firms he approached were not agreeable with his stated desire to pursue his business interests for a day a week for the period of his articles. Mr. Gabor Zinner (Mr. Zinner), a member of the

LSA, agreed to be his principal, and the requisite paperwork was submitted. While a law student, Mr. Terrigno worked two summers for Mr. Zinner. In mid-November 2006, Mr. Terrigno learned that the LSA administration had deemed Mr. Zinner unsuitable for the responsibility of a Principal to an Articling Student.

10. Undoubtedly, if Mr. Terrigno waited until Mr. Zinner went through the appeal process, he would not start CPLED until the fall of 2007. He had to move quickly. He approached Mr. Sara, a member of the LSA and former articling student of Mr. Zinner, who had been admitted to the Bar in 1992. Mr. Sara held himself out as working in association with Mr. Zinner, but there was no sharing of staff, offices, expenses or revenue.

11. Mr. Terrigno and Mr. Zinner were by now sharing office space, and they held a meeting with Mr. Sara, who agreed to become Mr. Terrigno's Principal. On November 20, 2006, Mr. Terrigno forwarded the Articles of Clerkship, duly signed by Mr. Sara, to the LSA. The date shown for the commencement of articles was November 17, 2006, the date when Mr. Sara's consent was obtained.

12. Mr. Sara's understanding was that he was helping out by agreeing to have Mr. Terrigno as a Student until the LSA determined Mr. Zinner's suitability as a Principal. He understood how important it was to Mr. Terrigno to gain admission to CPLED in January. Mr. Sara viewed his role as a Principal as a stopgap measure.

13. Prior to January 15, 2007, neither Mr. Sara nor Mr. Terrigno put much effort into the question of just how these Articles were to be carried out. File allocation, salary, days off, reporting and supervision, and other details had not been worked out. To say that the arrangement was loose is an understatement. Mr. Sara did not expect to see Mr. Terrigno at his offices much before the completion of the first week of CPLED which was to commence on January 8, 2007. Mr. Sara was not pressing Mr. Terrigno to get started. It was understood Mr. Terrigno had an existing workload he needed to clear.

14. The physical arrangement for Mr. Terrigno's articles presented an enormous hurdle. Mr. Sara's office space, in northeast Calgary in close proximity to his client base and home, comprised less than four hundred square feet. It was divided into space for Mr. Sara's private office, two work stations for administrative support, plus a waiting area for clients. There was no space for Mr. Terrigno, who already had office space in the building he and Mr. Zinner co-owned in northwest Calgary. However, as discussed below, it is questionable that Mr. Terrigno knew this when he signed articles with Mr. Sara.

15. The citation faced by Mr. Terrigno provides no dates as bookends, but the focus of the prosecution was on the time frame from November 17, 2006 to January 15, 2007. After

this, a proper arrangement for articles was set up by Mr. Sara and Mr. Terrigno. The time period of concern is some 20 working days.

16. During that time, Mr. Terrigno continued to work in close proximity to Mr. Zinner. The HC found on the evidence that at most one face-to-face meeting between Mr. Sara and Mr. Terrigno took place in November 2006, other than the original November 17th date when Mr. Sara took on the obligation of Principal. Mr. Terrigno claimed that in December 2008 he began to take a cursory look at files of Mr. Sara including a transaction concerning land at Olds, Alberta. The HC concluded that this work was from the business end of things, given Mr. Terrigno's acknowledged expertise, but did not constitute legal work consistent with the Principal-Student relationship. Similarly, according to the HC, while Mr. Terrigno performed legal work on Mr. Zinner's files, this too was outside proper articles, given that the LSA had designated Mr. Zinner to be unsuitable as a Principal. Mr. Terrigno was also working on a Provincial Court Civil file, and although Mr. Sara opened a file on the matter, there was no supervision.

17. On December 5, 2006, the LSA sent a letter to Mr. Terrigno, in care of Mr. Sara's office. A follow-up telephone call from the LSA on January 2, 2007 triggered an investigation, when the person answering did not recognize Mr. Terrigno's name. A suspicion arose that the articles which supposedly commenced on November 17, 2006 were a sham.

ISSUES ON APPEAL

18. In essence, the Appeal Panel faced these questions:

    a. What standard of review should the Appeal Panel employ?

    b. Employing that standard of review, did the HC err in finding that Mr. Terrigno misled or attempted to mislead the LSA?

    c. If not, did the HC err in imposing the sanctions it did on Mr. Terrigno? Did it misdirect itself with respect to matters governed by Rule 87(1) (c) of the LSA?

    d. Did the HC err in the sanction process by treating the Appellant unfairly, either in failing to disregard certain aspects of Mr. Procyk's report despite having previously agreed to disregard them, or in applying or creating an "uneven" approach to sanction when compared to LSA actions in regard to Messrs. Zinner and Sara?

WHAT IS THE PROPER STANDARD OF REVIEW?

19. The standard of review analysis, formerly called the pragmatic and functional approach (*Dunsmuir, infra*, para. 63) is applied by the Courts to assess the appropriate standard of judicial review of administrative decisions.

20. In Alberta, the same analysis is applied in determining the standard of review to be applied by one administrative tribunal which hears an appeal of the decision of another administrative tribunal. (*Plimmer v. Calgary Police Service*, 2004 ABCA 175, para. 20).

21. The standard of review governing appeals between administrative tribunals is still emerging and is far from settled. It may require re-examination in light of the *Dunsmuir* decision. (*Hennig v. Institute of Chartered Accountants of Alberta,* 2008 ABCA 241, para. 13).

22. The Supreme Court of Canada attempted to summarize and simplify the state of the law in *New Brunswick (Board of Management) v. Dunsmuir* (2008) SCC 9. Paragraph 51 reads:

> Determining the Appropriate Standard of Review:
>
> Having dealt with the nature of the standards of review, we now turn our attention to the method for selecting the appropriate standard in individual cases. As we will now demonstrate, questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues, however, attract the more deferential standard of reasonableness.

23. In subsequent paragraphs the Court acknowledged the usefulness of existing jurisprudence, and pointed to such factors as privative clauses, the special expertise of the decision maker, purpose of the tribunal and the nature of the question under review, in order to determine the appropriate standard of review. There are significant contextual differences between a review by a Superior Court of an inferior tribunal, and a review within a single regulatory organization. The Appeal Panel must be careful to assess the standard within this context. The contextual analysis mandated by *Dunsmuir* requires and permits the Appeal Panel to do so.

24. We note that in addition to considerations concerning the nature of the hearing and evidence before the tribunal appealed from, and the assessment of relative expertise between the two tribunals, the Appeal Panel must be mindful of considerations of institutional economy and avoiding needless duplication of effort (*Boardwalk REIT v. Edmonton*, 2008 ABCA 220 para. 12).

25. It is necessary to explicitly state the standard of review:

> **11** It is necessary to identify or advert to the standard of review in all cases. However, it is not necessary to perform a fresh standard of review analysis in every case if the standard of review has already been set for the type of question in issue: *Dunsmuir* v. *New Brunswick*, at paras. 57, 62.
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> *Hennig v. Institute of Chartered Accountants of Alberta*, 2008 ABCA 241, para. 11

Accordingly, the Appeal Committee also must take care to formulate the issues under appeal. We have done so in our comments above.

26. The Member Conduct Appeals Guideline, March 2002 (reformatted in December 2008), approved by the Benchers (the "Policy Guideline"), provides a deferential standard of review from findings of fact by a HC. It provides that the standard of review on "issues of law (including what amounts to conduct deserving of sanction)" is correctness. On all other issues, the Policy Guideline presents quotes from various case law essentially to the effect that the standard is deferential (reasonableness, or palpable and overriding error).

27. In respect of the deferential standard, the Policy Guideline cites the decision of the Alberta Court of Appeal in *KV* v. *College of Physicians and Surgeons of the Province of Alberta* (1999), 74 Alta. L.R. (3d) 93 (C.A.), concerning proceedings before the Council under the *Medical Profession Act,* R.S.A. 1980, c. M-12. Though the structure of the legislation was different than that of the *Legal Profession Act*, the structures are sufficiently similar that these rulings are probably applicable to the *Legal Profession Act*.

28. The Court held (para. 12-13) that the Council, like the Court,

> "…should not interfere with any finding of fact made by a committee, whether it arises from an inference or not, unless the finding is unreasonable, or palpably and demonstrably wrong… In short, the standard of review for the Council is the same as the standard of review for the Appeal Court…"

29. In a companion case, *L (P) v. College of Physicians and Surgeons of the Province of Alberta* (1999), 69 Alta. L.R. (3d) 363 (CA), also cited in the Policy Guideline, the Court applied the same standard of review. Again, findings as to credibility and the underlying events giving rise to the complaint were at issue in the appeal. In *George L v. College of Physicians and Surgeons of the Province of Alberta* (1993), 13 Alta LR (3d) 127 (CA) cited in the Policy Guideline, the Court held that the Council (under the *Medical Profession Act*) should apply a deferential standard of review to credibility findings of the investigating committee.

30. In *Merchant v. Law Society of Alberta*, 2008 ABCA 363, para 30, the Court stated with reference to the statutory appeal to the Benchers, it is true that the statutory appeal would not be a *de novo* hearing on the merits, ….

31. In *Plimmer (above)* the Court observed:

> 34 Even in cases of full rehearing on appeal, the fact of a rehearing alone may not compel the conclusion that no deference is due. Economy and efficiency may militate against a clean slate approach to the determination of the issue of punishment because a standard of review requiring no deference could render the hearing before the presiding officer meaningless.

32. An Appeal Panel considered the question in *Law Society of Upper Canada* v. *Shale Steven Wagman* 2007 ONSLAP 006. The quote contained therein from *Law Society of Upper Canada* v. *Renée St. Fort (2001)*, also an Appeal Panel decision, is instructive:

> Errors committed by the Hearing Panel can be corrected without considerations of deference owning [sic] to expertise or institutional independence. But the correction of errors that we commit, when raised at a further appeal from our decision, will be constrained by a need to recognize these two factors. Thus we provide an additional and fuller degree of protection for our member from a wrong decision below and at the same time an additional protection for the Law Society and the public from an equally wrong decision in the member's favour. Our role is different from the Divisional Court and we must accept a full measure of responsibility for a scope of review which is large and which will, after we have left the case, remain to some degree unreviewable.

33. The Appeal Panel in *Wagman* regarded itself bound by the reasoning in *Crozier* v. *The Law Society of Upper Canada* [2005] O.J. No. 4520 (Div. Ct.), which determined that an Appeal Panel should follow the standard of review of reasonableness on findings of professional misconduct and on penalty.

34. Likewise, the Ontario Divisional Court affirmed that standard for Appeal Panels in *Law Society of Upper Canada* v. *Neinstein* [2007] O.J. No. 958 85 O.R. (3d) 446 (Div. Ct.) for findings of facts, conclusions on credibility and assessment of penalty.

35. This Appeal Panel finds that the expertise of the HC and the Appeal Panel is for all intents and purposes identical. Both are composed of Benchers of the LSA. The only difference is that we Benchers of the Appeal Panel outnumber our colleagues on the HC. Therefore, deference owed on that account is at the lower end of the scale.

36. More significantly, the HC usually has the advantage of seeing and hearing the witnesses. The Appeal Panel has discretion to admit additional evidence, but usually does not have the advantage of seeing and hearing the witnesses. This suggests deference on findings of primary fact. The institutional role of the HC and the need to conserve adjudicative resources suggests deference is owed to the HC on matters of inference from the primary facts.

37. In this case, the appeal issue primarily concerns a matter of inference from the facts and circumstances surrounding the articling experience during the time period under review – whether Mr. Terrigno misled or attempted to mislead the LSA in the sense of whether he had the requisite intent to commit deceit. We are satisfied that the proper standard of review on this issue is reasonableness.

38. We noted above that the Policy Guideline suggests that the question whether the conduct amounts to conduct deserving of sanction is determined on the standard of correctness. The HC did not explicitly discuss why the conduct as found by it deserved sanction. It ought to have provided explicit reasons supporting its conclusion. However, as we find that the HC's decision must be set aside because the inference of deceit was not supported, we do not need to address the standard applicable to the issue whether the conduct was deserving of sanction, or whether a decision on that issue that is not supported by written reasons should be set aside for that reason alone.

39. A further issue concerns the standard of review applicable to sanction, assuming the conduct amounts to conduct deserving of sanction. While the standard of review as between Benchers and the Court is reasonableness, different considerations may apply on an appeal from a HC to the Benchers, and to the questions of misdirection concerning Rule 87(1)(c) and overall suitability of the sanction. For the reasons set forth below, we set aside the finding of deceit, so it is not necessary to resolve this issue in this appeal.

40. On matters of procedural fairness, the standard of review is correctness.

REASONABLENESS DEFINED

41. Before *Dunsmuir*, "reasonableness" in the standard of review context was defined as follows:

> …After a somewhat probing examination, can the reasons given, when taken as a whole, support the decision?
>
> *Law Society of New Brunswick v. Ryan*, 2003 SCC 30, para. 46, 48, 55, 56

42. In *Dunsmuir*, the reasonableness standard was revised. The Court stated (para. 47):

> "Reasonableness" is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness enquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making

> process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

43. In continuing, the Court indicated (para. 48) that deference does not mean the courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. Deference as respect requires of the courts not submission, but a respectful attention to the reasons offered or which could be offered in support of a decision. Deference in the context of the reasonableness standard therefore implies that the courts will give due consideration to the determinations of decision makers. It requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the system (*Dunsmuir*, para. 49).

44. Following *Dunsmuir*, the Alberta Court of Appeal has defined the term on more than one occasion as follows:

> A "reasonable" decision must be justifiable, transparent and intelligible, and must fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law: *Dunsmuir* at para. 47. Where a decision is reviewed for reasonableness, the court will not conduct its own analysis of the question and substitute its view for that of the Council.
>
> *Litchfield v. College of Physicians and Surgeons of Alberta*, 2008 ABCA 164, para. 12; also see *Bishop v. Alberta College of Optometrists*, 2009 ABCA 175.

45. In concluding whether the facts specifically found constitute professional misconduct, the HC must consider the context of the allegations including the intention of the member under review and the surrounding circumstances, and analyse whether and why in their totality they constitute professional misconduct under the governing legislation. *Acupuncture Committee v. Wanglin*, 2009 ABCA 166, para. 19, 26

DID MR. TERRIGNO MISLEAD OR ATTEMPT TO MISLEAD THE LAW SOCIETY OF ALBERTA?

46. The Appeal Panel undertakes this question with respect for the decision of the HC. Almost certainly it did not have a transcript of evidence, but nevertheless the Appeal Panel takes little issue with most findings of fact, but rather with the finding that Mr. Terrigno's conduct was deceitful.

47. For the reasons set forth below, we find the HC's finding that the conduct was deceitful is unreasonable and must be set aside. Accordingly, we do not find it necessary to determine the other issues raised by Mr. Rooney.

48. We do observe that we would not have found any breach of fairness in respect of the circumstance that Mr. Sara received a Mandatory Conduct Advisory (MCA) whereas Mr. Terrigno received a hearing and sanction. The MCA process is applied when a threshold case for conduct deserving of sanction is made out and alternative measures are found sufficient by a Conduct Panel to deal with the matter and protect the public interest. The MCA report is based on a meeting between a Bencher and the Member concerned, and covers such matters as whether the Member understands and acknowledges the concerns of the Conduct Panel, whether the Member displayed a positive or negative attitude, and whether the Member demonstrated a willingness to change his or her practices. The decision, following receipt of a MCA report, to press on with charges, close the file, or refer to practice review, is made by a Conduct Panel, is tailored to the individual circumstances of the Member, and is based on a specific record including allegations of misconduct, the Member's disciplinary history, and the contents of the Bencher's report. We do not consider that process or its result to be unfair. No application was made to us to obtain or consider Mr. Sara's conduct file. Leaving aside privacy considerations and whether we have the power to obtain or consider such a file, given the individual nature of Conduct Panel assessments we think it doubtful that such an application would have succeeded. We note that a major distinguishing feature is that Mr. Sara acted to help Mr Terrigno, while Mr. Terrigno acted out of self interest.

REASONS

49. Any decision concerning whether a citation is made out necessarily begins with its exact wording, reproduced here at paragraph seven. Clearly the meaning of the word "mislead" is front and centre. Webster's Dictionary defines "mislead" as:

> To lead astray; to guide into error; to deceive.

The definition of "misleading" in the Black's Law Dictionary is:

> Delusive; calculated to lead astray or lead into error

.

The definition of "attempts" in the Black's Law Dictionary is:

> Attempt ordinarily means an intent combined with an act falling short of the thing intended. It may be described as an endeavour to do an act, carried beyond mere preparation, but short of execution.

For the citation to be made out, Mr. Terrigno must have played an active role in misleading or attempting to mislead the LSA.

50. At the end of the day, the choice of wording of the citation rests with the LSA. Submissions by its counsel, Mr. Penny, in the penalty phase of the original hearing heard on June 18, 2008 leaves no doubt that deceit in the active sense of the word was at the core of the allegation. There is no notion of negligence in the wording of the citation.

51. The HC agreed. From paragraph 69 of its judgement:

> ....We have concluded that the citations have been proven on the higher degree of probability appropriate to charges of deceit or misrepresentation....

It is clear from that passage that the HC concluded that Mr. Terrigno had the requisite mental element to deceive (or attempt to deceive) the LSA. (The HC applied *Ringrose* v. *Physicians and Surgeons* [1978] 2 W.W.R. 534. We note that this may have been superseded in part by *F.H. v. McDougall*, 2008 SCC 53, but the point is that in applying the higher standard, the HC must have been convinced that the LSA's case was that Terrigno intentionally (or perhaps recklessly) misled the LSA, and that the case was made out).

52. It is important to note that the issue is not whether the LSA was misled, but rather the focus should be on the actions of Mr. Terrigno in seeking his Articles of Clerkship. Do they amount to a fraudulent misrepresentation?

53. The concept test for fraudulent misrepresentation is still *Derry* v. *Peek* (1889), 14 App. Cas. 337 (H.L.) at 374, whereby fraud is established when the false statement was made

> "(1) Knowingly, (2) without belief in its truth, or (3) reckless, careless whether it be true or false."

54. A simple analogy would be presenting a post-dated cheque which is subsequently dishonoured. If the person passing the cheque knows there is no money in the account and no prospect of any, finding fraudulent misrepresentation is easy. But what happens when there was some money in the account and prospects of more coming in?

55. These passages from paragraph 73 and 74 of the judgment of the HC represent the essence of their finding of guilt:

> [73] .....we are satisfied that Mr. Terrigno had no intention of undertaking what anyone would consider as appropriate work under supervision until at least the end of the first week of the CPLED course in January of 2007.
>
> [74] The answers of Mr. Sara and Mr. Terrigno as to what in fact took place between them in the student/principal relationship between November 17th and January 15th are so vague that we conclude that little was occurring and that the articles were not intended to commence until the New Year....

In effect, there was no money in the account, and no prospect of any coming in.

56. In contrast, the HC was not prepared to find that the articles were a sham, stating at paragraph 67:

> The Committee was not satisfied on the evidence that it could conclude that Mr. Sara and Mr. Terrigno had no intention, until the Law Society became suspicious and started making inquiries in early January of 2007, of actually undertaking meaningfully supervised articles.
>
> Returning to the bad cheque analogy, there is some money in the account, but the person passing the cheque is negligent in ascertaining the balance and prospects of more cash coming in.

57. This latter finding of the HC makes very good sense in that there was evidence of some discussions and work loosely associated with articles, however inadequate they may have been.

58. However, taking paragraphs 67, 73, 74 and 75 together, it is plain that the HC found that deceit/misrepresentation was made out because the articles (if they could be described as such) were not "appropriate" from November 17, 2006 to January 15, 2007. Thus, an inquiry into a fraudulent misrepresentation (the signing and submission of the Articles of Clerkship without intent to implement or expectation of implementing articles or recklessness in respect of implementation) has somehow transformed into an argument over what constitutes proper articles. Just as the analogy centres on the state of mind of the person passing the cheque on the day he presents it, so too the Appeal Panel must examine the evidence of the state of mind of Mr. Terrigno on the day he submitted the Articles of Clerkship and consider whether it reasonably supports a finding of deceit. The Appeal Panel concludes that the conclusion of the HC that Mr. Terrigno set out to deceive the LSA is not reasonable. We refer to the following matters:

(i) The covenants and undertakings of Mr. Terrigno and of Mr. Sara.

59. The HC reproduced excerpts from the Articles of Clerkship at paragraph 71:

> 1 The student is bound as a student at law to the Principal to the Principal continuously for the term of ONE YEAR from the date of commencement of the articling term endorsed by the Executive Director (or authorized delegate) below ("the articling term")
>
> 2 The Student covenants with the Principal as follows:
>
> (a) I will faithfully and to the best of my ability serve the Principal as a student-at-law in the profession of a barrister and solicitor throughout the articling term.

(b) I will obey and execute the lawful and reasonable requirements of the Principal and will not be absent from the service of the Principal at any time during the articling term with out the Principal's consent. I will at all times behave with diligence, honest and propriety.

4 The Principal and the Student propose that the articling term Commence on Nov. 17, 2006.

What has Mr. Terrigno misrepresented? He committed to serve his Principal for one year from November 17, 2006 and would take his Principal's direction. What little direction there was, he followed.

60. The relationship of Principal and Student is not one-sided. In order to conclude that the Student acted deceitfully in *submitting* his Articles, the HC must have believed the Student had no expectation (or was reckless as to any expectation) that the Principal would abide by his formal undertakings and covenants.

61. Covenants and undertakings by active members of the LSA are important commitments on which the public, including the Student, have the right to reasonably rely. Of equal importance is the ordinary practice in Alberta that, as Mr. Rooney points out, a Student is normally entitled to look to his or her Principal for guidance as to the manner of discharging the obligations in the Articles of Clerkship.

62. The Principal's undertakings are not mere formalities. The Articles of Clerkship [Exhibit 17] obliged the Principal to the best of his ability and knowledge to teach the Student or cause the Student to be taught the profession of Barrister and Solicitor, and to observe and carry out the Principal's obligations under the Education Plan. The Education Plan (also signed November 17, 2006) [Exhibit 18] included an undertaking on the part of the Principal to ensure the Student will be provided with a reasonable opportunity to obtain instruction and training in the general practice and profession of a Barrister and Solicitor during the articling term.

63. Notwithstanding that the HC must have considered the Student's breach of covenants 1 and 2 in the Articles of Clerkship as the primary evidence of deceit [Reasons, para. 70-71], it made no mention of the Principal's covenants in the Articles of Clerkship or his formal undertakings in the Education Plan.

64. In our view, the HC ought to have explained why the Student did not expect that his Principal would comply with these important undertakings.

65. This is of particular concern when one considers the HC's findings that the parties did discuss the ordinary sorts of subjects that would be expected between a Student and Principal. The HC found [Reasons, para. 46] that the Principal and the Student did discuss, after the first meeting about Articles and before January 15, 2007, terms and

expectations about the Articles, legal ethics, a development in Olds, Alberta that requiring financing, the Student's defence of a relative, A.B., in a provincial court proceeding, and some work that the Student was doing on a criminal file for Mr. Zinner. The HC found [Reasons, para. 63] that during the period of time before mid-January the Student would call the Principal for advice on matters. The HC found that Mr. Terrigno's actions regarding the Olds Development were more from the business side [Reasons, para. 561], there was "little supervision" on the Provincial Court file [Reasons, para. 56], and that Mr. Terrigno and Mr. Sara discussed, among other things, legal ethics, Mr. Terrigno's defence on the Provincial Court file, and some work Mr. Terrigno was doing on a Zinner file. Leaving aside the Olds financing, we question why inadequate supervision or little supervision has been equated by the HC to no supervision and no intention to commence Articles in November 2006.

66. It is difficult to understand how the HC could have reasonably concluded that the Student intended to deceive the LSA with respect to the existence of Articles during that time, in light of the findings about the discussions between Student and Principal on legal matters.

67. As noted above, the HC also observed that working on a file for another lawyer, Mr. Zinner, did not qualify as supervision by the Principal [Reasons, para. 57]. Mr. Zinner and the Principal practiced in association [Reasons, para. 17], and as the HC finds, the Zinner file was discussed between Mr. Terrigno and Mr. Sara. Students commonly work on files of another lawyer in the same office as part of their articling experience, and even secondments and other educational arrangements are sometimes implemented to provide Students with a varied and rewarding articling experience. Working on other lawyers' files within a law office environment is an acceptable and desirable practice in Alberta. While the LSA refused to approve articles with Mr. Zinner, there was no prohibition on working on his files provided Mr. Terrigno was appropriately supervised by Mr. Sara. If the HC considered that working on Mr. Zinner's files did not qualify, and was part of the evidence of deceit, as it appears to have found, it ought to have explained why Mr. Terrigno ought to have understood that working for Mr. Zinner did not qualify as part of the articling work. This is especially true in light of the HC's findings that before January 15, 2007 Mr. Sara and Mr. Terrigno spoke on the telephone on several occasions and that these contracts involved discussions, inter alia, of some work Mr. Terrigno was doing on a Zinner criminal file.

68. While the relationship was unusual, and perhaps neglectful, the factors advanced by Mr. Penny to show that usual indicia of Articles were not present do not dispel the concerns over the finding of deceit. Neglect and incompetence do not point to deceit, and lack of reasonable grounds may not point to deceit though at some point the excuses could become so preposterous as to compel a conclusion of deceit. As noted, the HC rejected that Mr. Terrigno had no intention of undertaking meaningfully supervised Articles at all. Mr. Terrigno's entitlement to look to Mr. Sara for guidance, Mr. Sara's formal undertakings in the Articles of Clerkship, and the HC's findings on the Student/Principal discussion on the practice of law during the period in which the HC found there was no intention to carry on articles, all create serious doubt that the finding of deceit was

reasonably founded on the evidence. The HC decision does not meet the standard of being transparent, justifiable and intelligible.

(ii) Mr. Sara's consent to absence

69. The Appeal Panel was further concerned with the HC's treatment of the evidence that Mr. Sara did not really expect to see Mr. Terrigno much before the end of the first week of the CPLED course. We note that Mr. Terrigno was further obliged under his Articles of Clerkship not to be "absent from the services of the Principal at any time during the articling term without the Principal's consent". The HC found, in effect, that Mr. Sara did consent. Paragraph 53 reads:

> [53] Mr. Terrigno told Mr. Sara he had work that he needed to clear up first before they got started on their working relationship. The impression that the Committee gained from all of the evidence is that Mr. Sara really did not expect to see Mr. Terrigno at his office much before the completion of the first week of the CPLED course and, as Mr. Sara said, he wasn't really pressing Mr. Terrigno to get started.

While the Appeal Panel may not see it as a breach of natural justice, it is a fair comment for Mr. Rooney, counsel for Mr. Terrigno, to point out that Mr. Sara did not face a citation for the period that the articles were not "appropriate". He gave the same covenant (number 4) to the LSA as Mr. Terrigno did. On the totality of the evidence Mr. Sara was fine with the arrangement, at least until the LSA began its inquiry.

70. The relationship of Principal and Articling Student is not one of equals. The Principal has the ability to refuse to present the Student for admission to the Bar. The Student is entitled to rely upon the advice and experience of the Principal as to the expectations of the LSA.

71. Mr. Rooney argued that the period in question was 5 weeks long, despite running from November 17, 2006 to January 15, 2007. In fact, it was less. Mr. Sara agreed to give Mr. Terrigno one day a week off for CPLED [transcript of evidence page 65 – lines 2-5]. The office was basically closed for the Christmas holidays starting December 18, 2006 [transcript page 81, lines 25-25]. Mr. Terrigno attended his Bar Admission Courses for the week of January 8, 2007 [transcript page 113, lines 5-10]. This leaves the equivalent of 20 working days between November 17, 2006 and the date, according to the HC, when articles effectively began, being January 15, 2007.

72. Students are permitted and encouraged to look to their Principals for guidance as to the discharge of their articling obligations. The Student may have assumed that he was acting with the permission of the Principal. The HC does not explain why absence with leniency should be equated with deceit.

(iii) Services were being performed

73. The sworn evidence is not contradicted that while Mr. Terrigno was not performing a lot of work of a legal nature during the relevant period, he was performing some. Mr. Rooney argued that the period in question was five weeks long, despite running from November 17, 2006 to January 15, 2007. As stated at para. 71 above, in fact it was less.

74. The 20 working days and the number of meetings may demonstrate inadequate Articles. The Appeal Panel finds that this likely inadequacy does not reasonably equate to a fraudulent misrepresentation made by Mr. Terrigno on November 20, 2006.

(iv) The office space shortage

75. The HC appeared to be to be influenced by the fact that there was a space shortage at the Principal's office and it was "unclear" how he proposed to have the Student receive effective Articles and supervision given the physical space restraints. [Reasons, para. 48-49] Significantly, the HC stated that Mr. Terrigno's evidence was that the process for obtaining files from the Member's office and taking them away and performing the assignments off site, was discussed "during the first meeting *before* the articles were signed". [Reasons, para. 49. Emphasis added.]

76. If that matter were in fact discussed *before* articles were signed, then Mr. Terrigno must have known of the physical space limitation, and this may have lent considerable weight to the theory that he was not clear on how Mr. Sara proposed to provide effective Articles and supervision.

77. However, as Mr. Rooney points out, Mr. Terrigno's evidence was that the discussion occurred *after* the LSA advised that the Articles were approved, not before. [Transcript, 110-111][1]

78. Of course, there were ways to address the space limitation other than deceitfully misrepresenting the existence of Articles. One such option was to visit back and forth between offices. The HC neither accepted nor rejected the existence of this arrangement, saying it was unable to decide whether the arrangement with respect to the Student visiting back and forth between offices was in fact finalized prior to January 15, 2007 [Reasons, para. 50]. Mr. Rooney submits the HC should have concluded the arrangement was made in early December 2006, presumably because there was no evidence contradicting that. The HC does not explain why it was unable to come to a conclusion on this evidence. No contradictory evidence appears from the transcript, and the proposition itself is not incredible.

[1] In cross-examination, Mr. Zinner gave evidence to like effect [Transcript, 34-35] Mr. Sara testified that there was a meeting to discuss the articling situation before the Christmas holidays, he did not recall the details, and it would be a possibility that one of the things they discussed was the office space problem. [Transcript, 77-78] In cross-examination, Terrigno said that when he signed the Articles of Clerkship with Sara, he did not know the extent of the office issues; he had never visited the office, but he did soon after he received his articles and it [the problem] was very apparent. [Transcript, 158]. This evidence is not discussed in the Reasons.

(v) Over-reliance on demeanour

79. The Appeal Panel also finds that an apparent over-reliance on the demeanour of Mr. Terrigno renders the original decision unreasonable. Objectively speaking, the effort put into the relevant period of articles, by Student and Principal alike, was wanting. This finding comes from the testimony of Mr. Terrigno and Mr. Sara. There is little or no necessity to dwell on credibility. Yet, at a minimum, paragraphs 38, 41, 42, 43, 89, 90, 93, 94, and especially 75 touch upon the attitude of Mr. Terrigno.

80. Mr. Terrigno was called to give evidence before the Appeal Panel. In terms of substance, little if anything was added to the case. Appearance was a different matter. Undoubtedly Mr. Terrigno has a lot invested in the outcome of these proceedings. We can expect him to be on his best behaviour. And yet the most generous descriptor the Appeal Panel can find to capture his demeanour is "dismissive". His body language and the tone of his answers conveyed impatience and disdain for the entire LSA process, entirely consistent with the findings of the HC. But comportment of a witness is to be judged with caution. The potential danger is described in *Faryna* v. *Chorny* [1952] 2 D.L.R. 254 at page 356:

> If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box.

The Appeal Panel observed that Mr. Terrigno is no actor.

81. As alluded to in *Faryna*, the demeanour of a witness can distract the trier of fact away from the true issue of the case. Here it is the alleged fraudulent misrepresentation of Mr. Terrigno, in effect his state of mind. It would be very easy for his comportment to taint the issue of his intention at the time he forwarded the Articles of Clerkship. Therefore, it is the view of the Appeal Panel that the failure of the HC to distance itself in a meaningful fashion from Mr. Terrigno's demeanour also renders the finding of guilt unreasonable.

82. In coming to the conclusion that there was a deceitful state of mind, the HC pointed to the lack of structure for the supposed articles, at paragraph 58:

> [58] The Committee also notes that Mr. Sara did not pay any of Mr. Terrigno's fees as an articling student, he did not pay Mr. Terrigno a salary, and there was no agreement on hours of work, holidays and the like. This is highly unusual if articles are in place.

It went on to state at paragraph 88 that "....He has an MBA and a business background. He had an agenda for his articles and was not prepared to obtain traditional articles that his background and experience would have made readily available."

83. Thus, the HC concluded that there was some sort of sinister intent on behalf of Mr. Terrigno in taking Articles with Mr. Sara. It appears to have overlooked the more obvious and more compelling explanation, namely, that Mr. Terrigno got shabby Articles because that was all he could find with a Principal approved by the LSA.

84. The LSA investigator, the HC, and the Appeal Panel have all made observations about Mr. Terrigno's demeanour. None were favourable. Is it not logical that this would have affected his marketability as an Articling Student?

85. He sought Articles with Mr. Zinner, who was ultimately found to be an unsuitable Principal by the LSA. Mr. Sara was then drafted into action as a stopgap measure. Why would the Articles Mr. Terrigno received be any less muddled than the Zinner/Sara "association", its "offices", its letterhead, and even its e-mail addresses?

86. It is a sad reality that too many students receive sub-standard Articles across Canada. In the present case, the sloppiness of Mr. Terrigno's Articling arrangement muddied the waters, and very possibly the LSA's own reasonable assumption that Principals impose meaningful guidelines on their Students. For that Mr. Terrigno has paid a high but appropriate price – a lengthy delay in his admission to the Bar. But that does not mean he actively set out on November 20, 2006 to mislead the LSA.

CONCLUSION

87. The LSA has chosen to frame its citation in language akin to an allegation of fraudulent misrepresentation. Taken as a whole, the evidence of sloppiness, carelessness and even negligence does not reasonably make out the citation as framed and this, coupled with the sometimes unexplained findings in the HC's reasons, lead us to conclude that the reasons do not meet the reasonableness standard.

88. The Appeal is allowed. The finding of guilt of the HC is set aside.

89. We must consider whether to direct a new hearing. If the facts as found do not support the charges or the ultimate conclusion of professional misconduct, the Appeal Panel has discretion to quash the decision. It is preferable that the Appeal Panel set out its reasons for choice of remedy. *Wanglin, supra*, para. 27.

90. Both counsel asked us to decide the matter and not to remit. Because the charge was deceit, and the evidence does not rise to that level, we decide to dismiss the citation.

91. It follows that we need not consider whether the conduct deserved sanction, nor whether the sanction decision was tainted by error or unfairness.

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John P. Higgerty, Q.C., Bencher, Chair

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Rose M. Carter, Q.C., Bencher

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James Eamon, Q.C., Bencher

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James Glass, Q.C., Bencher

_____
Roy Nickerson, Q.C., Bencher

DISSENTING REASON FOR DECISION

92. We agree that the standard of review is reasonableness. There was ample evidence before the HC to support the finding of guilt, and it should not be interfered with.

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Peter Michalyshyn Q.C., Bencher (dissenting)
(Continuing pursuant to section 76(3)
of the Legal Profession Act)

_____
Scott Watson Q.C., Bencher
(dissenting)

Dated this 22nd day of March, 2010