

The Law Society of
Upper Canada | Barreau
du Haut-Canada

LAW SOCIETY HEARING PANEL

Citation: *Eric Bornmann v. Law Society of Upper Canada*, 2011ONLSHP0130

Date: August 19, 2011

Docket: 2006-00117

File No.: AD05/06

BETWEEN:

Eric Bornmann, Applicant
of the City of Toronto

v.

The Law Society of Upper Canada, Respondent

Before: Thomas G. Conway (chair)
Mary Louise Dickson, Q.C.
Andrew Oliver (dissenting)

Heard: March 28, 29 and April 26, 2011, in Toronto, Ontario

Counsel: Bryan Finlay Q.C. and Richard Ogden, for the applicant
Lisa Freeman, for the respondent

REASONS FOR DECISION

INTRODUCTION

- [1] Thomas G. Conway (for the majority):— Can a person who falls from a place of privilege through his deliberate breach of the public trust be redeemed, or is that person destined to repeat his misdeeds because of an innate character flaw? Reasonable people may differ in their answer to this question depending on their view of human nature, but our jurisprudence on good character applications starts from the premise that an individual can change for the good, even an individual who has in the past admitted to reprehensible conduct involving breach of the public trust. If such an individual establishes on the evidence that, more likely than not, she or he is presently a person of good character, our jurisprudence compels the hearing panel to grant her or his application for a Class L1 licence.
- [2] While an applicant’s past conduct is an important consideration, it is but one of several equally important factors that a hearing panel must apply in its overall consideration of the evidence of the applicant’s present character. Our jurisprudence does not permit us to dwell exclusively on the applicant’s past conduct, nor does it allow us to speculate about what the person might do in the future if the application is granted. While a hearing panel may hope that a successful applicant will stay true to his avowed path, our jurisprudence directs us to concern ourselves with the “present.”
- [3] For the reasons that follow, the majority of the hearing panel is satisfied that the applicant, Erik Bornmann (“Bornmann”), has discharged his burden of proof and that the preponderance of evidence establishes that he is presently of good character. His application for a Class L1 licence is granted.

THE APPLICATION

- [4] In an application sworn on December 2, 2005, Bornmann applied for admission to the Law Society. On September 6, 2006, the Law Society issued a notice of hearing with respect to Bornmann’s application for admission. The Law Society issued the notice of hearing because Bornmann’s ability to meet the Law Society’s requirement of good character came into question as a result of the events described below. The Law Society and Bornmann agreed to adjourn the hearing of the application on several occasions. The hearing panel heard Bornmann’s application on March 28, 29 and April 26, 2011, nearly five years and four months after Bornmann’s initial application. The lengthy delay between the date of the initial application and the hearing is highly unusual, but has worked in Bornmann’s favour.

THE FACTS

Agreed Statement of Facts and Joint Document Book

- [5] The parties agreed on the facts. Their agreement on the facts was committed to writing in

an agreed statement of facts, which was filed on consent as exhibit “1”. They also agreed to enter into evidence documents reproduced in a joint document book, which was marked as exhibit “2”. The agreed statement of facts and the joint document book were supplemented by the testimony of several witnesses and the entry into evidence of additional documents, some of which are referred to later in these reasons.

- [6] We reproduce in substance, in paragraphs 7 to 50 below, the facts on which the parties have agreed.

Basis for Admission Hearing

- [7] Bornmann applied for admission to the Law Society by submitting his Application for Admission to the Bar Admission Course (“Application”). The Law Society received the Application on December 5, 2005.¹
- [8] On August 28, 2006, the Proceedings Authorization Committee authorized that an Admission Hearing be held pursuant to s. 27 of the *Law Society Act* (“Act”) to determine whether Bornmann is of good character within the meaning of s. 27(2) of the Act and may be called to the bar and admitted as a member of the Law Society. Since the Application, the Act has been amended. The amended Act applies. Consequently, Bornmann is now applying for a Class L1 licence pursuant to ss. 1 and 2 of By-Law 4.
- [9] Pursuant to s. 27(2) of the Act, an applicant for admission to the Law Society shall be of good character. Bornmann bears the onus of establishing on a balance of probabilities that he is of good character.

Background

- [10] Bornmann was born on May 20, 1976. He received his Bachelor of Commerce (International Business) from the University of Victoria in 2005, although he attended the University from 1994 to 2000. In 2005 he also received his LL.B. from the University of British Columbia, Faculty of Law, which he attended from 2002-2005.
- [11] Bornmann commenced his articles with McCarthy Tétrault in January 2006. At the outset, he received permission to split his articles so that he might attend the Bar Admission Course part way through his articles. He attended the Bar Admission Course from May to July 2006. For reasons discussed below, he did not complete his articles with McCarthy Tétrault. However, in January 2007, Bornmann recommenced his articles, with the Community Legal Clinic Simcoe, Haliburton, Kawartha Lakes (“Clinic”). On June 30, 2007, Bornmann completed his articles at the Clinic.
- [12] Since June 30, 2007, Bornmann, with the full approval and concurrence of the Law Society, has been working at the Clinic in his capacity as student-at-law under the supervision of the Clinic director.

¹ Licensing Process Application, Received December 5, 2005, exhibit “2”, Tab 1.

Conduct Placing Character in Issue

Establishment of Pilothouse and Pacific

- [13] Bornmann worked on a summer research project in 2000 for the Council of Forest Industries (“COFI”), the trade association for the forest project companies in British Columbia. There he met Brian Kieran (“Kieran”) who was acting as the senior communications advisor to COFI.
- [14] At the time, Kieran, a former newspaper columnist, was a well-known communications consultant in British Columbia. Kieran asked Bornmann to work on a number of other projects for his communications company, Kieran Consulting Ltd.
- [15] In 2001, Bornmann and Kieran formed Pilothouse Public Affairs Group (“Pilothouse”), a government relations and communications consulting company. Bornmann also formed his own company in May 2001, Pacific Public Affairs Corp. (“Pacific”), which operated in association with Pilothouse.

Relationship between Bornmann, Basi and Virk

- [16] Bornmann met David Basi (“Basi”), a well-known organizer in the Liberal party, in 1999, when Bornmann was still an undergraduate. Bornmann had been involved in the Liberal party as a youth member throughout his time as an undergraduate. Basi led an informally organized, but influential group of politically active youth.
- [17] Between 1999 and 2001, the relationship between Basi and Bornmann developed, as both were involved in a number of joint political pursuits pertaining to provincial and federal politics. Both were active on the campaign to elect Paul Martin as leader of the Liberal party. By 2001, Bornmann and Basi were communicating almost daily on their respective political activities.
- [18] In 2001, Basi and Bornmann discussed setting up a communications company together, but by May, this idea had been abandoned. Instead, Basi became a senior Ministerial Assistant to the provincial Minister of Finance, Gary Collins. Basi’s was a political appointment.
- [19] Bornmann also met Bobby Singh Virk (“Virk”) in 1999, around the same time as when he had met Basi. Virk and Basi are brothers-in-law.
- [20] In 2001, Virk became a Ministerial Assistant to the then provincial Minister of Transportation, Judith Reid. Virk’s was also a political appointment.

The Political Influence

- [21] One of Pilothouse’s clients was OmniTRAX, Inc. (“OmniTRAX”), a transportation affiliate of The Broe Companies, Inc. Both companies were based in Denver, Colorado.

- [22] In 2002, the Government of British Columbia made a decision to privatize the BC Rail Corporation, a corporation owned and operated by the Province. The Government made a decision to retain ownership of the railway land, rail bed and tracks, but lease out BC Rail operations.
- [23] OmniTRAX retained Pilothouse to assist it with its bid to obtain the BC Rail lease. Bornmann was registered as a consultant lobbyist in British Columbia. He disclosed on the registry that he represented The Broe Companies on the issues of economic development and trade relating to investment opportunities, and OmniTRAX on the issue of provincial rail transportation.
- [24] In late 2001 or early 2002, Bornmann paid a total of approximately \$1,500 in small cash disbursements to Basi.
- [25] From March 2002 to December 2003, Bornmann made larger, intermittent payments to Basi. Bornmann would write cheques on Pacific's account payable to Aneal Basi, a cousin of David Basi's. Bornmann believed that Aneal Basi deposited the cheques in his own account and then made arrangements for the money to be transferred to his cousin David. These cheque payments totalled \$25,695. Bornmann understood these cheques were for Basi's personal benefit.
- [26] During this period (March 2002 - December 2003), Bornmann and Kieran would regularly take Basi and Virk to dinner in upscale restaurants, generally at the request of Basi. These meals were expensed to OmniTRAX.
- [27] In November 2002, Basi, Virk and their respective wives flew to Denver to watch a football game and meet with OmniTRAX executives. OmniTRAX purchased the tickets to the football game, and an OmniTRAX executive attended the game with Virk and Basi (and their spouses). Virk and Basi initially paid for the travel expenses out of their own pockets. Upon returning to Victoria, they pressed Bornmann to reimburse them. Bornmann communicated that request to Kieran. Kieran has stated that he advised OmniTRAX not to pay for this trip but that, under direction from OmniTRAX, Kieran reimbursed Basi and Virk \$3,000 for their travel expenses. Kieran then recovered that sum from OmniTRAX.
- [28] Both Basi and Virk expressed their interest in working for federal politicians, and believed that Bornmann, with his knowledge and contacts in the Paul Martin Leadership campaign, could assist them. As such, Bornmann communicated Basi's and Virk's interest to another Liberal volunteer along with other names, as good candidates for positions as ministerial aides.
- [29] In return for the monies, dinners, trip and introductions described above, Basi and Virk supplied confidential information to Pilothouse that assisted its client, OmniTRAX, in its bid for the BC Rail Lease. The confidential information about BC Rail that Basi and Virk disclosed to Bornmann included information about the financial affairs of BC Rail, information protected by solicitor-client privilege, information about other bidders and

their bids, information shared at Evaluation Committee meetings, advisory reports prepared by investment bankers and information obtained in meetings with government officials.

- [30] Specific examples of confidential information provided to Bornmann by Basi and Virk in exchange for the above-noted benefits included:
- (a) a communications note marked “Confidential” and “Contains Information which if Released may be Harmful to the Economic Interests of BC Rail”, dated October 7, 2002, relating to the Fort Nelson Short Line;
 - (b) the information contained in a briefing note, dated July 5, 2003, containing the first round indicative bid numbers of three of the bidders for the Freight Division of BC Rail; and
 - (c) a document marked “for presentation to Cabinet for decision” called Round Two Evaluation Criteria, dated July 23, 2003, containing confidential economic valuations of the Freight Division of BC Rail that would be the benchmark figures against which the second round bids would be considered.

[31] Basi and Virk also provided Pilothouse with second-hand accounts of cabinet discussions and first-hand accounts of informal conversations inside government. Basi assured Bornmann that he would advocate on behalf of OmniTRAX in internal government discussions.

[32] As a result of providing these benefits to Basi, Bornmann also received the collateral benefit of Basi’s loyalty in political matters. Further, the relationship encouraged Basi to refer clients to Pilothouse, although this may only have occurred on three occasions.

The Criminal Investigation

[33] Basi and Virk were under surveillance by the RCMP for other, unrelated, suspected criminal activity. It was as a result of this surveillance that the RCMP discovered that Basi and Virk were handing over confidential information to Bornmann and Pilothouse.

[34] On December 28, 2003, the RCMP searched premises belonging to many individuals, including the office of Bornmann, which was in his home.

[35] On January 6, 2004, Bornmann’s counsel, George Macintosh, Q.C., wrote to the Crown “primarily to request that before you reach any conclusions or even preliminary conclusions with respect to Mr. Bornmann’s position, [he] be given the opportunity to make submissions to [the Crown] on Mr. Bornmann’s behalf.”

[36] On April 6, 2004, the Crown wrote to George Macintosh, Q.C. indicating that the RCMP was prepared to treat Bornmann as a witness provided that he agreed: (1) to be

interviewed by the RCMP so as to provide “a full, true and accurate picture of all matters ... reasonably relevant to this investigation;” (2) that the RCMP would keep records of all interviews, including video recordings; and (3) that, in the event he failed to provide all relevant information, he would be treated as a suspect.

- [37] By letter, dated April 7, 2004, Bornmann accepted the Crown’s offer. The RCMP asked Bornmann not to discuss the case or his testimony with other individuals.
- [38] As a result, in part, of the information provided by Bornmann, the RCMP obtained four further search warrants in the summer and fall of 2004. These search warrants, and the Informations to Obtain on which they were based, were subject to a sealing order.
- [39] Eight media outlets collectively brought an application to vacate or vary the sealing orders. The judge hearing the application allowed the application in part. She ordered that the public could obtain access to the search warrants and Informations to Obtain, subject to certain information remaining confidential.
- [40] In particular, the judge ordered that the material relating to the evidence of potential witnesses remain confidential so that it might be “preserved for the trial itself.” Specifically, with respect to the summer and fall 2004 Informations to Obtain, the judge noted that once Bornmann has testified, the Media will be relieved of their undertaking to maintain the information concerning his proposed testimony confidential.
- [41] Basi, Aneal Basi and Virk were charged with respect to their involvement in the above activities. The Indictment, dated January 28, 2005, cites 12 counts under s. 121 and 122 of the *Criminal Code*.²
- [42] Bornmann throughout assisted the RCMP and special prosecutor. He gave the police interviews when requested and in 2009 appeared as a Crown witness in a preliminary inquiry in the criminal proceedings. George Macintosh, Q.C. advises that “Erik co-operated fully with the police and the prosecutor throughout. To the best of my knowledge, his veracity and willingness to co-operate were never questioned.”
- [43] On October 18, 2010, after several years of pre-trial motions, Basi and Virk pleaded guilty to four of the twelve counts.³

Non-Disclosure to McCarthy Tétrault

- [44] At the time of Bornmann’s interview for an articling position with McCarthy Tétrault in the fall of 2005, he disclosed only that he expected to be a Crown witness at a trial in British Columbia. Bornmann did not disclose that he had originally been the subject of investigation in a criminal case, and that he had agreed in that case to co-operate fully with the RCMP in exchange for immunity from criminal charges.

² Indictment in Court File No. 23299, dated January 28, 2005, exhibit “2”, Tab 2.

³ Signed Agreed Statement of Facts in Court File No. 23299, exhibit “2”, Tab 3.

- [45] Bornmann commenced his articles in January 2006. Bornmann's involvement with the above events came to McCarthy Tétrault's attention by way of an anonymous e-mail in April 2006. McCarthy Tétrault viewed this as a serious failure to disclose and asked for his resignation. On May 11, 2006, through counsel, Bornmann contacted the Law Society to report the events that had transpired. Following negotiations with the firm, Bornmann resigned effective July 2006.
- [46] In his application to the Bar Admission Course, Bornmann did not disclose the fact that he had been investigated in relation to breach of trust allegations and that he had cooperated with the RCMP in exchange for immunity from prosecution. Bornmann answered accurately the 12 questions concerning "good character" on the application form. None of these questions asked if Bornmann had been investigated in a criminal matter.⁴

July 2006 to the Present

- [47] Bornmann was ready to proceed with a good character hearing in late 2006. However, the Law Society and Bornmann agreed that the Application should not proceed further until after the conclusion of the criminal proceedings in British Columbia.
- [48] For the past four years Bornmann, with the full knowledge and concurrence of the Law Society, has worked at the Clinic under the supervision of Clinic directors who knew of his prior wrongdoing. Bornmann's employers trust him with considerable responsibility, including the interviewing of new clients, supervision of volunteers and staff, presentation of cases in tribunals, inter-clinic and outreach representation, and the management of important clinic projects.
- [49] Bornmann regularly assists disadvantaged and vulnerable people to navigate the legal system and to exercise their rights within it.

Publicity of Bornmann's Involvement in the Basi and Virk Case

- [50] Since January 1, 2003, there have been 191 newspaper articles published in Canada about the Basi and Virk case, specifically naming Bornmann. Seventeen of these articles referred to Bornmann's admission hearing. Five of the seventeen articles were published between the dates of October 22, 2010 and January 11, 2011.

Facts in the Agreed Statement of Facts Accepted as Proven

- [51] The hearing panel did not receive any evidence that would suggest that the facts set out in exhibit "1" were inaccurate and the hearing panel accepts these facts as proven.

⁴ Licensing Process Application, Received December 5, 2005, exhibit "2", Tab 1.

Additional Facts

- [52] The agreed statement of facts and the joint document book were supplemented by evidence in the form of additional documents and the testimony of several witnesses. With one exception, the witnesses gave evidence in support of Bornmann's application.

Evidence of Bornmann

- [53] Bornmann testified that by the time he was in his mid-20s, he had become a "power broker" within the Liberal party in British Columbia. He had fallen into a pattern of "exchanging favours" in his role as power broker and lobbyist. He described how he had become incredibly arrogant, amoral and then immoral in his business dealings. He admitted to paying bribes to Basi, stealing government secrets, having unprincipled business relationships and being dishonest with his business partner. By 2002, however, he was making an annual income in excess of \$100,000 from his business activities and was a first-year law student at the University British Columbia.
- [54] Bornmann's fast-paced, high-octane lifestyle left little or no time for self-reflection, but this all changed on December 23, 2003 when his office was searched by the RCMP pursuant to a search warrant. His life, he testified, became a "nightmare."
- [55] As described in the agreed statement of facts, Bornmann quickly negotiated an agreement with the Crown prosecutor in British Columbia: in exchange for his complete cooperation in the investigation and prosecution of Basi and Virk, Bornmann would be spared from possible criminal prosecution. This was Bornmann's first fortunate break.
- [56] From his testimony and demeanour before the hearing panel, it is apparent that Bornmann is an intelligent and highly motivated individual, who clearly recognized the fortunate break he had been given, or perhaps more accurately, created for himself. He used his first fortunate break to good advantage. All of the evidence shows that he lived up to his bargain with the Crown, cooperated fully and disclosed his full knowledge and involvement in the criminal activities that came to be known as the "BC Rail Scandal." There can be little doubt that his role as the main witness for the Crown played a part in the plea agreement that was made between the Crown and Basi and Virk.
- [57] As part of his training to become a lawyer licensed to practise, Bornmann was obliged to complete articles of clerkship. He first applied to a British Columbia law firm, Alexander Holborn Beaudin & Lange, LLP. He was given an interview. Bornmann testified that the firm was or became aware of his involvement in the BC Rail Scandal. The firm did not offer him an articling position.
- [58] Bornmann also obtained an articling interview with Stikeman Elliott LLP. The interview went well, but when Bornmann informed the student recruiter that he would be a Crown witness in a criminal prosecution and when the student recruiter asked for more information, Stikeman Elliott also passed him over for an articling position.

- [59] Bornmann had a third interview for an articling position with McCarthy Tétrault , in McCarthy Tétrault’s Toronto office. This time, Bornmann was more circumspect in what he disclosed to the student recruiter at McCarthy Tétrault. Bornmann testified that his strategy for obtaining an articling position was to “get through the first round” of interviews, and if there was further interest from the law firm, to disclose his involvement as a Crown witness in the BC Rail Scandal.
- [60] Again, the interview with McCarthy Tétrault went well. As he was leaving the interview, he mentioned to the student recruiter that he was going to be a Crown witness at an upcoming trial. He testified that McCarthy Tétrault’s student recruiter did not, however, apparently appreciate the significance of what he had told her and she asked no further questions.
- [61] Bornmann admitted in his testimony that he had walked away from two other interviews, having disclosed as much information as he thought was necessary, and in both instances he was denied an articling position. Determined not to let the McCarthy Tétrault opportunity slip through his fingers for the same apparent reason, he did not disclose enough information to McCarthy Tétrault for that firm to appreciate that he was implicated in bribery and breach of trust allegations in a criminal proceeding in British Columbia. He wanted a career in the law, he testified, and he did not think about anyone else, or about the damage to the reputation of any potential employer who might offer him an articling position.
- [62] As the agreed statement of facts discloses, Bornmann’s ambitions to become a lawyer in a prominent law firm were dashed when McCarthy Tétrault discovered the truth about his past and Bornmann and the firm agreed that he should resign from his employment.
- [63] Following his resignation from McCarthy Tétrault, Bornmann disclosed through his lawyer the extent of his involvement in the BC Rail Scandal to the Law Society. The disclosure triggered this good character hearing.
- [64] As he had not completed his articles of clerkship at McCarthy Tétrault, Bornmann was obliged to look elsewhere for an opportunity to complete the articling prerequisites for a Class L1 licence. The record does not disclose precisely how or why Bornmann obtained an articling position with the Clinic, but obtaining an articling position there was Bornmann’s second fortunate break.
- [65] As the agreed statements of facts discloses, Bornmann recommenced his articles of clerkship in January 2007 and completed them on June 30, 2007. Since June 2007, Bornmann has continued to work at the Clinic as a student-at-law with the approval and concurrence of the Law Society and under the supervision of the Clinic director.
- [66] By his account, Bornmann’s work at the Clinic has been truly transformative. Since January 2007 to the commencement of the good character hearing, a period of approximately four years and three months, Bornmann has compiled an impressive record of accomplishments serving the poor and vulnerable clients of the Clinic. In

addition to the usual work in which one would expect a student-at-law to become engaged, Bornmann has also been instrumental in several important initiatives of broader significance.

Justice@work

- [67] Since November 2008, approximately half of Bornmann's time has been spent in the service of Justice@work, the Clinic's employment law practice group. This program is funded by a Law Foundation of Ontario grant, private donations, and costs awards obtained through settlements and court orders. The program serves low-income and disadvantaged workers with employment problems. Justice@work, launched in 2007, has involved Bornmann in public legal education programming and legal assistance activities. He represented the Justice@work program on the Ontario Bar Association's task force on wrongful dismissal. In addition to these activities, he designed and manages Justice@work's website.

Portal to Justice

- [68] The Portal to Justice website is a joint venture project of the Clinic and Legal Aid Ontario. It is an interactive website that allows unrepresented litigants and non-legal service providers to complete legal forms on-line with the assistance of an animated interviewer. This website tool has been designed to serve clients whom the Clinic cannot presently serve because of limited resources. It permits clients who use the service to identify and pinpoint the legal issues they face and to direct those clients to leading public legal education materials. In developing this tool, Bornmann was involved in the project's planning, co-ordinating the work flow, supervising volunteers and suppliers, and organizing material for review by Clinic lawyers. Bornmann demonstrated the website during his testimony. It is an impressive accomplishment.

Connecting Region

- [69] Bornmann proposed to the Clinic that it apply to become a candidate for the Connecting Region, a Law Foundation of Ontario initiative to improve access to justice in rural and remote communities through the development of a consortium of legal and non-legal service providers.
- [70] Bornmann developed a detailed application to the Law Foundation about the challenges that the rural poor face in obtaining access to justice. He organized and attended meetings of the Executive Directors, project consultants and one of his supervisors, Lisa Loader. In March 2010, the Clinic learned that its region was one of three Candidates for the Connecting Region to be selected from 11 applications received by the Law Foundation of Ontario. Bornmann sits on the project's administrative committee, which coordinates the implementation of the Clinic's plan.
- [71] The Connecting Region initiative and the website are strategies that the Clinic is using to increase access to services for people living in rural and remote communities.

The Impact on Bornmann of His Work at the Clinic

[72] When asked how the events of the last four years have affected his character, Bornmann testified:

I would like to think I'm a person of good character. I have worked very hard at the clinic for the last four years. I have [a] lot of friends that work there. It has been my entire being; my entire existence has been based around that place for the last four years.

When I look back at the time I was working as a lobbyist, for part of that, I was also going to school. I was active in politics. I was doing many different things. For the last four years, this is all I have done. I do feel very passionate about it. I think I have something to contribute. I hope that I demonstrated that there is something to contribute.

.....

It has been absolutely cathartic. If I had to use a single word for my time at the Clinic, I would say it has been saving. I mean there are so many layers of regret and shame to my conduct, conduct that has led me here today.

I get sick thinking about it. It's as if what I did set off a chain reaction. Things just kept exploding for six years, seven years, eight years, leaving this gigantic mess. It has hurt a lot of people. It has hurt a lot of people close to me, good people.

In the midst of all this as well, my mom passed away. My mom was an incredibly good person. She came from a very good accomplished family. I never got the impression through it all that she didn't support me and love me. I know it must have been killing her on the inside that this is what I had done. She never ever let that on. She died [in] the middle of it. This is something I'm going to have to live with for the rest of my life.

It's publicly documented. It's very well documented. It's a part of my story. Apart from the opportunity to make a contribution and an opportunity to work with some amazing people that have been very good to me over these past four years and giving me the opportunity to do something positive, I feel like these last four years have allowed me to sort of start a new narrative.

I recognize that these events are not going anywhere. I have a choice. In some small ways, I was already aware of this in 2004 that this was such a huge event. I have a choice as to how I'm going to live my life.

I love my work at the Clinic. I want to stay in the community legal system. I just hope that my actions of the last four years have demonstrated enough to balance the ledger for what I did before.⁵

Evidence of Other Witnesses

Lisa Loader

[73] Ms. Loader testified that she has known Bornmann since she started working at the Clinic in October 2009. She has supervised Bornmann and been involved in the projects which he has undertaken on behalf of the Clinic. She has worked with him and had the opportunity to observe his work and his commitment to the Clinic and its work. She believes he is committed to the Clinic and doubts that he would have remained involved for as long as he has if he did not think the work was important and gratifying. She has been impressed by the level of his commitment, stating that he always works more than “9 to 5.”

[74] Although she has difficulty reconciling the press reports and the description of Bornmann’s involvement in the BC Rail Scandal, she believes that Bornmann has been extremely humbled about what occurred to him and that his experience has given him a heightened sense of his professional obligations as a lawyer. For as long as she has known him, Bornmann has been diligent and careful in his work. Even though she found his omissions on his applications to McCarthy Tétrault and to the Law Society to be troubling and problematic, she is nonetheless confident that he is today a “person of integrity.”

[75] In addition to her testimony, Ms. Loader wrote a letter in support of Bornmann’s application.⁶ She writes:

I have worked almost daily with Erik for over seventeen months. I can confirm that he is a person of good character. He embodies all the personal characteristics that a new lawyer must possess to uphold the integrity and public confidence of the profession. I trust him with responsibility and rely upon his reports.

His interest and dedication to poverty law and the mission of the Clinic is overwhelmingly evident. I have never been given the impression that he simply treats his work at the Clinic as a job. His ideas have helped the defence the Clinic’s poverty law of mandate. His project work has contributed to the growth and development of the Clinic and he has made a positive impression with the members of the community.

⁵ Transcripts, pp. 73-75.

⁶ Letter, March 17, 2011, Exhibit 2, Tab A.

Lucas Lung

- [76] Mr. Lung was an articling student with Bornmann when they were both employed at McCarthy Tétrault. They met in January 2006, after Bornmann joined the firm. They were no more than passing acquaintances when they rotated into the business law group in March 2006 and shared an office. Between March 2006, when they started sharing an office, and Bornmann's departure in May 2006, Bornmann and Mr. Lung became friends. At some point during that time, Bornmann told Mr. Lung about his past and that he had "done some not nice things" that still continued to unravel in British Columbia.
- [77] After Bornmann's departure, Mr. Lung continued at McCarthy Tétrault, completing his articles of clerkship in July 2004 and returning as a litigation associate in the fall. Mr. Lung worked as a litigation associate at McCarthy Tétrault until September 2008 when he moved to Orillia, Ontario and started working at the Clinic.
- [78] Mr. Lung went to work at the Clinic because of his long-time interest in *pro bono* legal work. While at McCarthy Tétrault, Mr. Lung was active in McCarthy Tétrault's *pro bono* program, which encourages associates of the firm to participate in *pro bono* activities, representing disadvantaged and poor clients in need of legal representation. His interest continued when he applied for and received a fellowship from the Dickson Circle, an association of senior litigators dedicated to acting as *pro bono* counsel in significant cases of public interest on behalf of clients with disabilities. The fellowship permitted Mr. Lung to continue his interest in representing the poor and disadvantaged as a lawyer employed by the Clinic. It was through his work at the Clinic that he grew to know Bornmann better and they became close friends, so close that Bornmann was the master of ceremonies at Mr. Lung's wedding in the summer of 2010. During the time that Mr. Lung worked at the Clinic, they shared a house in Orillia. Meeting and befriending Mr. Lung was Bornmann's third fortunate break.
- [79] After completing his fellowship at the Clinic, Mr. Lung joined Lerner LLP as a litigation associate where he continues to work on *pro bono* cases.
- [80] As is the case with the other lawyers who work at the Clinic, Mr. Lung has a demonstrated commitment to social justice issues, to improving access to justice and to providing legal services to Ontario citizens who would not otherwise have legal representation. In addition, he has worked and lived with Bornmann for a time. These attributes give his testimony as a character witness particular and somewhat unusual significance in this good character hearing. Good character evidence in good character hearings often comes from individuals or witnesses who have some knowledge of the applicant and the applicant's character, but it is rare to receive the evidence of a witness who himself demonstrates a commitment to the highest ideals of the legal profession and who at the same time has had the opportunity to observe the applicant closely over several years.
- [81] Mr. Lung impressed the hearing panel as an individual who would not warrant

Bornmann's good character if he was not himself convinced that Bornmann is genuinely committed to the same ideals as Mr. Lung or if he doubted the veracity of Bornmann's claim that he is presently of good character. For these reasons, the hearing panel gives considerable weight to Mr. Lung's evidence.

- [82] In a letter, dated March 17, 2011,⁷ written in support of Bornmann's application, Mr. Lung stated in part:

Through my personal and professional dealings with Erik, I have found him to be a person of great integrity and responsibility.

In preparing this letter, I have had an opportunity to review the Agreed Statement of Facts which, among other things, tells the sordid story of a lobbyist who paid public officials to obtain confidential information for his client. I know that Erik committed these acts and that there is no excuse for what he did. In the five years that I have known him, Erik has never offered any excuses or tried to minimize his role in these unfortunate events. He has always readily admitted to me that what he did was wrong.

But as I read the Agreed Statement of Facts, and as much as I know that the words in that document are true, I cannot help but think that the person described in that document bears no resemblance to the person I have known over the last five years.

- [83] Mr. Lung's opinion that Bornmann is a person of integrity and responsibility is based on his close association with Bornmann while they both worked at the Clinic. Mr. Lung testified about several cases in which they were both involved at the Clinic, Mr. Lung's descriptions of which support his opinion.
- [84] One example is the "Cottrell matter." This case involved an application for judicial review to the Federal Court of Canada. The application was made by one of the Clinic's clients, a severely disabled First Nation's band member. The client sought judicial review of a decision by the Band Council to evict him from his home on a native reserve.
- [85] The client was severely physically disabled and had a history of alcoholism. Bornmann became the principal point of contact between the Clinic and its client. Bornmann built a positive rapport with the client. On occasion, Bornmann was forced to call police stations, hospitals and homeless shelters in an attempt to locate the client. He was involved in the client's case when he started his work at the Clinic, when the case was dismissed by the Federal Court at first instance and when the client appealed to the Federal Court of Appeal. Bornmann remained the main point of contact with the client when settlement negotiations ensued.

⁷ Applicant's Document Book, exhibit "5", tab "B", p. 5.

- [86] Mr. Lung also testified about a case involving a low-income housing co-operative in Collingwood, Ontario. Bornmann assisted Mr. Lung in representing the elected resident board of the co-op. A receiver had been appointed over the property of the co-op and the receiver was attempting to sell its assets. Bornmann, Mr. Lung stated, provided invaluable assistance, including interviewing board members and drafting written statements for the administrative proceedings before the County Council.
- [87] These cases Mr. Lung described in his testimony involve vulnerable clients, difficult facts and desperate circumstances. Lawyers committed to such cases are surely not motivated by money, prestige or power. They are motivated by a sense of commitment to the public good. They emulate the core values of the legal professions. These cases are challenging. It is difficult to accept the proposition that Bornmann could continue with this work for over five years if he were simply “putting it on” solely to be admitted as a member of the Law Society. Common sense would suggest that there would have been easier ways for him to have spent his time if he had not been changed by his experience at the Clinic.
- [88] Mr. Lung testified that he has known Bornmann for approximately five years and lived with him for 1 ½ years. When the question was put to him that Bornmann was simply doing all of this work at the Clinic to obtain his Class L1 licence, Mr. Lung stated that if that were the case, it would be an “incredible ruse.” We agree.

Ernest Robertson

- [89] Just days before Bornmann’s application was to be heard, Ernest Robertson’s evidence came to light when he sent a letter to the Law Society. As a result of this communication, the Law Society’s counsel arranged to have Mr. Robertson testify before the hearing panel by telephone conference call.
- [90] Mr. Robertson testified that he is a city councillor in Victoria, having served in this position for the last 15 years. He too has been active in the Liberal party in British Columbia for some time and it was through his involvement with the Party that he became acquainted with Bornmann.
- [91] Mr. Robertson testified that he attended a federal Liberal party convention in Ottawa in March 2005. At a social event associated with the convention, Mr. Robertson had a “brief conversation” with Bornmann. The conversation occurred in the midst of a “martini party” involving a “crowd” of people.
- [92] How long Mr. Robertson engaged Bornmann in conversation is not clear from his testimony, but the evidence suggests that they briefly discussed three matters. First, Mr. Robertson joked with Bornmann about Bornmann’s nickname of “Spiderman.” Rumours had circulated among Liberal party activists that Bornmann had gained access to the Liberal party headquarters by rather unconventional means. The question of whether Bornmann gained access to those offices legally was very much disputed by Bornmann in his cross-examination, and we are not asked to make any finding on that point, nor could we, since there is no admissible evidence to support a conclusion that Bornmann’s

nickname was born out of illegal activity.

- [93] Second, they discussed Bornmann's enrolment in law school and Bornmann told Mr. Robertson that he was doing well financially. Finally, they discussed briefly the BC Rail Scandal. Mr. Robertson stated that Bornmann "essentially confirmed to me that he had been involved on behalf of clients in essentially bribing government officials and basically successfully accomplishing what he was involved in." What disturbed Mr. Robertson were Bornmann's demeanour and the manner in which he described his involvement in the scandal. Mr. Robertson's impression was that Bornmann did not seem to be "too concerned" about what had happened, that he was "very nonchalant" about the incident and seemed to be doing very well financially and professionally notwithstanding the scandal.
- [94] Mr. Robertson also testified about Bornmann's reputation within Liberal party circles from 1996 to December 2003. Not surprisingly, in light of the agreed statement of facts, Bornmann's reputation, according to Mr. Robertson, was not favourable. Bornmann, Mr. Robertson testified, "was known as a very good... backroom political organizer. He was also known as being equally unscrupulous and ruthless in his dealings with other people in various political contexts within the party."
- [95] Mr. Robertson's testimony is consistent with the facts set out in the agreed statement of facts and with Bornmann's own evidence. Bornmann's understanding and appreciation of the immorality and the illegality of his activities in the BC Rail Scandal did not occur in an instant. The evidence suggests that he was unbowed in the immediate aftermath of the criminal investigation into his activities and the execution of a search warrant of his premises. He may well have thought that he had cleverly sidestepped a criminal conviction and incarceration and may well have felt emboldened by not only avoiding prosecution, but finishing his law degree and later obtaining an articling position in one of Canada's most prestigious law firms.
- [96] Mr. Robertson and Bornmann had their conversation in March 2005. Bornmann's unceremonious departure from McCarthy Tétrault did not occur until July 2006. He was not successful in obtaining new articles of clerkship until January 2007. The process of reflection, self-examination and ultimate transformation did not occur overnight. It occurred over years, starting first with the criminal investigation and the realization that his fast-paced life as a lobbyist was over. It continued when he left McCarthy Tétrault and found himself in the wilderness, without a job and without immediate prospects of completing his articles of clerkship. It was shaped by his new life at the Clinic and the support he has received from his family, friends and colleagues. The man that Mr. Robertson met in March 2005 may well have had the same or similar attitudes as the Bornmann of 2003, but the evidence of the other witnesses strongly suggests that the Bornmann of 2011 has learned bitter lessons from his mistakes and has been transformed.

Letters of Reference in Support of the Application

- [97] Numerous letters of reference were entered into the record as part of the applicant's document book.⁸ The letters are written by co-workers, family and friends. Although each of the letters is written from the unique perspective of the author, each of them is written by an individual who is by circumstances well-acquainted with Bornmann and his work since 2006. Each describes Bornmann as an individual who has accepted responsibility for his past misdeeds, who has tried to make amends and who has now devoted his considerable energy and talent to serving the legal needs of vulnerable and disadvantaged clients of the Clinic.

Michael Hefferon

- [98] Michael Hefferon is the executive director of the Clinic. He was called to the bar in 1985 and has practised at the Clinic since 1993. In a letter, dated March 11, 2011, Mr. Hefferon writes:

Notwithstanding the grave mistakes to which he has admitted, I have observed Erik demonstrate that he is of good character during the four-plus years he has served the Clinic as a Student-at-Law. I rely upon a considerable record of his activity in making this assessment. I have known Erik since he began work at the Clinic in December 2006. As a Staff Lawyer, then Supervisor of Legal Services, and now Executive Director, I have directly supervised a significant amount of his work. In his work he has demonstrated integrity, honesty, empathy and reliability.

Erik has been entrusted with many responsibilities at the Clinic. He has helped and represented many of the Clinic's clients, most of whom are disadvantaged and many of whom are difficult to serve. He has presented cases to tribunals and the Small Claims Court. He has also been relied upon as an effective and talented resource person for many challenging projects. Finally, he has represented the Clinic in relation to other community legal clinics, agencies, Legal Aid Ontario and the public.

...

Erik demonstrates a clear understanding of the Rules of Professional Conduct, which he diligently observes. An ongoing example is his conduct as intake supervisor. Erik assumed the role of intake supervisor on a weekly basis from 2006 to early 2010, and periodically thereafter. As intake supervisor he has always ensured that any advice or instruction he provides to clients is reviewed by his supervising lawyer. He does this without reminder. In many instances, the supervising lawyer has been a

⁸ Exhibit "5".

recent call with less clinical law experience than Erik. Regardless of the disparity in experience, Erik has always complied with his obligation in good faith and without complaint.

A review of the Clinic's case records system shows that Erik has provided summary legal advice in over 1400 instances since 2006. In addition to his client intake work, Erik has had responsibility for the day-to-day carriage of some 25 client case files. In this role, he has drafted legal documents, assembled evidence, corresponded with relevant parties, and researched legal questions. Additionally, he presented cases to the Social Benefits Tribunal, Canada Pension Plan Review Tribunal, Landlord and Tenant Board, Ontario Human Rights Tribunal (as it then was), and Small Claims Court. He has also made many public legal education presentations, primarily on criminal records, youth records, housing law and workers' rights.

Erik's significant casework has provided me with a broad perspective on his good character. Though many of the clients he has helped were difficult to serve, he has never had any complaint made against him in his four years of service. In fact, grateful clients have sent him cards or notes of appreciation, and several former clients have made donations to Clinic. Similarly, a youth-at-risk program to which the Clinic has made public legal education presentation for many years has, in recent years, specifically requested Erik to be their presenter.

...

As a community legal clinic, our organization is governed by a Board of Directors comprised of members of the community. Recently, the Board of Directors asked me to solicit from [Erik] a commitment to remain at the Clinic for at least one year, as a condition for the Clinic to embark on new activities. Erik responded by making this commitment and stating that it is his wish to remain at the Clinic indefinitely to practice as a lawyer.

Margo Ayers

[99] Margo Ayers was employed for 25 years at the Clinic as a Community Legal Worker. In her letter of March 17, 2011, she writes:

I first met Erik in December of 2006. He had arrived at the Clinic in Orillia as a student-at-law seeking to complete his articles. He was a stranger in a small town. He still had not found a place to live in Orillia and had rented a room in a hotel where many of our clients live. I offered him to stay and board in my home until he found a place to live. Upon

getting to know him, I found him to be a warm and genuine person. At my invitation, he continued to board at my home for almost three years.

Erik became part of my household. We would eat together and I invited him to participate in family functions at home, such as birthday celebrations, Thanksgiving dinners, and Christmas parties. We shared all of the common areas in my house, sometimes with another boarder or one of my two adult sons. Erik contributed to the maintenance of the house, including feeding and walking my dog.

Prior to meeting Erik, I learned that he had been implicated in some very serious misconduct. This was discussed at a Clinic staff meeting before he was hired. I learned further detail from media reports on the Internet. Erik has never tried to minimize his implication in these events. Nevertheless the Erik I know is a very different person than the Erik described online.

The Erik that I have known since 2006 is a good person. He has developed an interest in and commitment to social justice.Through his long hours, voluntarily provided over many evenings and weekends, Erik demonstrated a dedication to helping those less fortunate and empathy for their circumstances. He worked tirelessly in support of the Clinic's projects and he did so on his own volition. I believe his conduct over the past three years exemplifies the qualities of a community legal clinic advocate.

At home, I knew Erik to be a trustworthy and dependable person. I trusted him with my home for almost three years. He proved to be a dependable roommate and he has become a good friend.

I believe that Erik has completed a very difficult and rich personal journey. This journey had already begun when he moved into my home in 2006 with the hope of discharging his duties as a witness in BC and completing his articles within six months. Although the trial in BC was repeatedly delayed, he continued to persevere as a student-at-law at the Clinic for over four years, in good spirit and accomplishing much good in the process. He has paid, and continues to pay, a very high penalty for his past mistakes. Despite this burden, Erik has demonstrated integrity and dedication to the Clinic's work. He has learned a great deal about lives and problems faced by the Clinic's clients. He has also learned a lot about the importance of good character.

The very serious nature of Erik's mistakes in BC is a matter of public record. That was the case in 2006 when he joined the Clinic and it remains that way today. The manner in which Erik has chosen to deal with this burden, through hard work at the Clinic, is a testament to his character. There is no doubt in my mind that he knows the difference between right

and wrong and will in the future choose right. I believe he will build on his powerful experience to become a strong and productive member of the legal profession who contributes to the public good. I am certain that Erik will be, as a lawyer, a principled and effective advocate, and will practice *[sic]* with the utmost integrity and to the benefit of the legal profession.

Lisa Wyndels

[100] Lisa Wyndels is a staff lawyer at Neighbourhood Legal Services, a community legal clinic in downtown Toronto. She has worked in community legal clinics as a lawyer for 16 years. She met Bornmann through their work on behalf of the Provincial Learning Community on Knowledge Management and Transfer (Knowledge NOW). In her letter of March 18, 2011, she writes in part:

My early impressions of Erik include his high level of interest in the topic of knowledge management and sharing in the poverty law sector. He presented as well-prepared during committee meetings and contributed frequently and thoughtfully. On one occasion, I asked him how he balanced Knowledge NOW with his clinic responsibilities. He replied that he contributed to Knowledge NOW on his own time, over and above his other duties at the Clinic. I was impressed with his dedication to the project. In other discussions, it was also clear that he was very dedicated to poverty law and the community legal clinic model.

...

Late last year, I asked Erik why he remained a Student-at-Law. He candidly described the reason for his status, told me about his upcoming law society hearing and described his journey over the past six years. He did not try to minimize his culpability recounting these events and his account was consistent with what I read in the Agreed Statement of Facts signed on March 10, 2011. I offered to write him this letter of reference.

I consider his past errors in judgment to be very serious, but I don't think these errors reflect the person he is today. Despite the serious past wrongs admitted by Erik, I believe him to be presently of good character. He is dedicated to the practice of poverty law and has made a valuable contribution to the community legal clinic system. I think Erik's admission as a lawyer will be a credit to the profession.

THE LAW

[101] Bornmann has the onus of demonstrating his good character on the balance of probabilities.⁹

[102] Our jurisprudence has accepted the following definition of good character:

⁹ *Claude Hyman Armstrong v. Law Society of Upper Canada*, 2009 ONLSHP 29, paras. 27-28 (“*Armstrong*”).

[Character is] that combination of qualities or features distinguishing one person from another. Good character connotes moral or ethical strength, distinguishable as an amalgam of virtuous attributes or traits which undoubtedly include, among others, integrity, candour, empathy and honesty.¹⁰

[103] Mary F. Southin’s oft-quoted definition of good character is also strongly entrenched in our jurisprudence:

“Good character” means those qualities which might reasonably be considered in the eyes of reasonable men and women to be relevant to the practice of law... Character... comprises... at least these qualities:

1. An appreciation of the difference between right and wrong;
2. The moral fibre to do that which is right, no matter how uncomfortable the doing may be and not to do that which is wrong no matter what the consequences may be to oneself;
3. A belief that the law at least so far as it forbids things which are *malum in se* must be upheld and the courage to see that it is upheld.¹¹

[104] The objectives of the good character requirement are the same objectives as those of professional discipline. The objectives are:

[...] to protect the public, to maintain high ethical standards, to maintain public confidence in the legal profession and its ability to regulate itself, and to deal fairly with persons whose livelihood and reputation are affected.¹²

[105] Finally, this hearing panel must consider five key factors in determining good character:

- (a) the nature and duration of the misconduct;
- (b) whether the applicant is remorseful;
- (c) what rehabilitative efforts, if any, have been taken, and the success of such efforts;
- (d) the applicant’s conduct since the proven misconduct; and
- (e) the passage of time since the misconduct.

¹⁰ *Re Spicer*, Reasons of Convocation, dated May 1, 1994, at para. 15, quoted in *Armstrong* at para. 23.

¹¹ Mary F. Southin, Q.C. “What Is ‘Good Character’” (1987), 35 *The Advocate* 129, at p. 129, quoted in *Armstrong* at para. 24. See also, for example, *Howard Steven Levenson v. Law Society of Upper Canada*, 2009 ONLSHP 98, para. 13; *Peter Paul Vincent v. Law Society of Upper Canada*, 2010 ONLSHP 51, para. 60.

¹² Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline* (Scarborough: Carswell, 1993) at p. 23-2.

[106] In considering these principles and the five key factors, the hearing panel has been aided in the task of assessing the evidence in this hearing by the analysis of Prof. Krishna, Q.C. in *John Blackburn v. The Law Society of Upper Canada*:¹³

[47] The Southin definitions of “good character” are eloquent, but not easy to apply. Character is how an individual behaves when no one is watching. Reputation is what others consider to be the person’s character. Thus, in a sense, the Applicant is required to establish a negative proposition. If he has not done anything to attract attention and complaint, he will have a good reputation.

[107] In referring to the “five key factors,” Prof. Krishna stated:

[49] The above factors are not all of equal weight. The weight to be attached to a factor depends upon the circumstances of the particular application. For example, we must assess the nature of the misconduct against the passage of time since the conduct. A serious offence may require a longer period for rehabilitation than a trivial and impetuous indiscretion. There is no absolute time line for rehabilitation. Each case must proceed on its own facts and evidence of rehabilitation submitted to the Hearing Panel...

[50] A person must be remorseful for his or her misconduct and its effect on others and not merely remorseful for having been caught. There should be objective evidence of remorse sufficient to satisfy the hearing panel.

[51] In assessing the reputation and character of an applicant for admission to the Law Society, the Panel must weigh both the quality and the quantity of character testimony to assess its weight. Quantity, by itself, is not sufficient. An applicant will usually invite only those who will make laudatory comments on his character. The Panel must assess the quality of the comments, the relationship of the parties, their opportunity for meaningful evaluation of the person, and the consistency of the opinions from diverse sources.

[52] To be sure, the deeper the hole that an applicant has dug for himself, the more difficult it is to climb out of. The evidence of “good character” must be examined critically, both in terms of source and content. The task is to take a measure of the individual and determine whether he/she has climbed out of the hole of his/her prior misdeeds.¹⁴

¹³ 2010 ONLSHP 112, at para. 47.

¹⁴ Blackburn, paras. 49-52.

ANALYSIS

The Nature and Duration of the Misconduct

[108] Bornmann's misconduct was serious and, apparently, long-standing. He admits to bribing public officials for personal gain. By the combination of his wits and a good lawyer, he avoided criminal prosecution. Admittedly, he aided in the prosecution of the public officials he bribed, for which he deserves some credit. Nevertheless, the hearing panel cannot underestimate or undervalue the very serious nature of his misconduct, involving as it did a breach of the public trust.

The Applicant's Remorse

[109] With the exception of Mr. Robertson's testimony, all of the witnesses described an individual who has been chastened by his past misdeeds. Perhaps at first, Bornmann's regret may have been directed more at having his illegal activities discovered than it was at recognizing the immorality and criminality of his deeds, but over time, the evidence shows, he was not able to run away from his past and was forced to confront the disgrace he had brought upon himself and his family. He testified about the devastating impact his behaviour had on his parents, particularly his mother, who died recently and unexpectedly. He testified that he will never have the opportunity to show her that he has changed, and when he testified to this fact, it appeared to the majority of the hearing panel that his remorse was genuine and profound.

Rehabilitative Efforts and the Success of Those Efforts

[110] It was not until he lost his articling position at McCarthy Tétrault that Bornmann was cast into the wilderness. He had no choice, but to face the consequences of what he had done in his headlong quest for fame and fortune. He came to the veritable fork in the road. He could leave behind his ambition of becoming a lawyer and pursue a different line of work, or, he could persist, which at that time was clearly the harder path to take. The evidence does not disclose whether he appreciated at the time that the opportunity to start afresh his articles of clerkship at the Clinic would be, as he described it, a catharsis. The evidence does suggest, however, that the experience has profoundly changed his outlook on life and has caused him to rethink his priorities and, as he testified, write a new narrative for himself.

[111] The majority of the hearing panel accepts Bornmann's evidence and the evidence of the other witnesses that he has been rehabilitated and that he wishes to continue his work in the Clinic, which has given his life new meaning and purpose.

The Applicant's Conduct since the Proven Misconduct

[112] The majority of the hearing panel cannot conclude that Bornmann's conduct since December 2003 has been without blemish. On the contrary, Bornmann was not forthright

in his dealings with McCarthy Tétrault. However, as the majority of the hearing panel has noted earlier in these reasons, Bornmann's transformation did not occur overnight. Nor would one have expected an overnight transformation. His overzealous quest for fame and fortune caused him to relapse into his old ways at times, as one might expect.

- [113] Since July 2006, however, the evidence from all of the witnesses and from the letters of reference is clear, convincing and mainly uncontradicted: Bornmann has been an exemplary student-at-law, employee, partner, friend, brother and son. The witnesses who testified on his behalf and those who wrote letters of reference were unanimous in their opinion of Bornmann. Some of the witnesses and referees, including Mr. Lung, Ms. Loader, Mr. Hefferon and Ms. Ayers, described in detail their close interaction with him for over four years. It is unusual in these hearings to have witnesses who have interacted with an applicant for as long as they have, and the majority of the hearing panel gives their testimony considerable weight.

The Passage of Time

- [114] Bornmann has continued patiently to serve the Clinic as a student-at-law for much longer than anyone expected as the criminal proceedings in British Columbia slowly wound their way to a conclusion earlier this year. His perseverance and his determination in circumstances, disheartening at times, are admirable. He has continued to serve as a student-at-law with the hope, but not the promise or prospect, that he might someday be able to demonstrate his good character and be admitted to the Law Society as a lawyer in good standing. That day, at long last, has come. After more than four years of a consistent history of hard work, ethical conduct and a commitment to professional service to vulnerable and disadvantaged clients, Bornmann has earned the privilege of being admitted as a lawyer in good standing of the Law Society.

The Question of Bornmann's Licensing Application

- [115] Although the Law Society did not press the issue at the conduct hearing, Bornmann's counsel addressed the issue of the requirement of full, frank and truthful disclosure in the application process in the factum filed in support of Bornmann's position.
- [116] Bornmann's counsel correctly submits that there is conflicting jurisprudence on the question of whether an applicant who makes a false or misleading representation or declaration on a material matter necessarily satisfies s. 8 (2) of Law Society By-Law 4 and thereby fails to meet the good character standard, even if the applicant did not intend to mislead. The hearing panel in *Peter Paul Vincent v. Law Society of Upper Canada*, 2010 ONLSHP 51, held that a material misrepresentation precludes a finding of good character. By contrast, the hearing panel in *Howard Steven Levenson v. Law Society of Upper Canada*, 2009 ONLSHP 98, the position that "false and misleading" answers on the application form did not necessarily preclude a successful application because the false answers were not given deliberately by the applicant.
- [117] On appeal, the appeal panel in *Vincent* noted the conflicting interpretations of s. 8 (2) of

By-Law 4, but decided that it did not need to resolve the conflict on the facts before it. Vincent had deliberately misled the Law Society on a material matter. The appeal panel left the conflict for a case in which the issue arises directly.¹⁵

- [118] Although the decision in *Vincent* clearly requires an applicant to provide full, frank and truthful disclosure on the application form, it is also clear from the appeal panel's decision in *Claude Hyman Armstrong v. Law Society the Upper Canada*, 2011 ONLSAP 1, that failure by an applicant to disclose a fact that the application form does not directly ask an applicant to disclose will not necessarily preclude a finding of good character.
- [119] In *Vincent*, the applicant disclosed a 1969 conviction for a “youthful sexual indiscretion,” which he described as a “borderline consensual case,” and which he claimed to have all but forgotten. He continued to describe the conviction in this manner even when pressed directly by the Law Society investigator. When it was revealed on further investigation that the applicant had been convicted for the sexual assault of a minor and that the incident had a profound impact on the applicant, the applicant admitted in cross-examination at his good character hearing that he had deliberately misled the Law Society in the application process.
- [120] Reviewing the questions in Bornmann's Licensing Application Form, which he completed on December 2, 2005, Bornmann accurately answered the specific questions set out in the application form.¹⁶ Undoubtedly, Bornmann's involvement in the BC Rail Scandal was information that would have been of interest to the Law Society in assessing Bornmann's good character. Indeed, when Bornmann ultimately disclosed this information to the Law Society, it triggered a good character hearing. Nevertheless, none of the questions in the application form was designed to elicit this information. The requirement of full, frank and truthful disclosure does not require an applicant to speculate above and beyond the questions set out in the application form as to what additional information might be of interest to the Law Society.
- [121] In contrast to Vincent, Bornmann never deliberately misled the Law Society in the information he provided to the Law Society in response to the questions in the application form. Likewise, he made no material misrepresentation or omission on his application form in his responses to the specific questions. Later in the application process, his lawyer disclosed additional information about his involvement in the BC Rail Scandal.
- [122] Bornmann's disclosure of his involvement in the BC Rail Scandal was part of the application process, as was Bornmann's completion of the application form in December 2005. In assessing good character and the question of misrepresentations or omissions in the application form, the hearing panel is obliged to examine the applicant's conduct throughout the application process in considering whether the applicant has met the test of being “presently” of good character.

¹⁵ *Peter Paul Vincent v. Law Society of Upper Canada*, 2010 ONLSAP 26, paras. 17-23.

¹⁶ The parties have also agreed that the information disclosed in the application form is accurate.

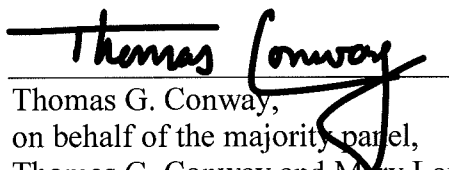
[123] In *Mario Giangio* v. *Law Society of Upper Canada*, 2011 ONLSAP 11 at para. 22, the appeal panel stated:

The need to consider an applicant's present character is sometimes described in terms of the applicant's character "at the time of the hearing." (See, for example, *Re Preyra*, 2000 CanLII 14383 (ONLSHP), at p. 6) In our view, it is perhaps preferable to refer, instead, to the applicant's present character to avoid an artificial distinction between character when the application is brought and when the hearing actually takes place. Birman captures this point in considering the applicant's character "when the application...is brought or considered." Although there are circumstances in which an applicant will positively address issues surrounding his character in the interval between the commencement of his/her application and the hearing itself, the applicant's character during the entire application process, evidenced in part by the candour or lack thereof shown in the written application and in the interview conducted thereafter must figure prominently in whether an applicant is presently of good character. Indeed, s. 8(2) of By-Law 4 provides that "[a]n applicant who makes any false or misleading representation or declaration on or in connection with an application for a licence, by commission or omission, is deemed thereafter not to meet, and not to have met, the requirements for the issuance of any licence under the Act." This is a reflection of the importance of the application process in evaluating an applicant's present good character.¹⁷

[124] In the view of the majority of the hearing panel, Bornmann positively addressed issues surrounding his good character by disclosing the additional information that triggered his good character hearing and by taking positive steps in the lengthy period between the date of his application and the ultimate hearing of his good character application to demonstrate that he is presently of good character.

CONCLUSION

[125] The majority of the hearing panel hereby allows the application of Erik Bornmann and orders that a Class L1 licence be issued to him in accordance with the Law Society's usual administrative procedures.


Thomas G. Conway,
on behalf of the majority panel,

Thomas G. Conway and Mary Louise Dickson

¹⁷ *Mario Giangio* v. *Law Society of Upper Canada*, 2011 ONLSAP 11, at para. 22.