Law Society Tribunal
Tribunal du Barreau

LAW SOCIETY TRIBUNAL
APPEAL DIVISION

Citation: *Singh v. Law Society of Ontario*, 2023 ONLSTA 7
Date: May 8, 2023
Tribunal File No.: 22A-013

BETWEEN:

Alka Singh

Appellant

- and -

Law Society of Ontario

Respondent in appeal

Before: Barbara J. Murchie (chair), Jack Braithwaite, Lubomir Poliacik, Peter C. Wardle, Doug Wellman

Heard: March 10, 2023, by videoconference

Appearances:
Ryan Manilla, for the appellant
Kristina MacDonald, for the respondent in appeal

REASONS FOR DECISION

OVERVIEW

[1] Peter C. Wardle (for the panel):–This is an appeal from a decision of the hearing panel that dismissed the appellant's application to be licensed as a paralegal on the basis that she was not presently of good character.[1] The panel later awarded the Law Society its costs of the application in the amount of $8,000, inclusive of disbursements and HST.[2]

[2] The appellant raises a number of grounds of appeal. However, we find it necessary to deal with only one. The hearing panel found that by making a $200,000 loan to her employer, a securities dealer, which was deposited into a trading account for a short period of time and then returned to her, the appellant had participated in a misleading scheme. It also found that she had refused to admit that this misconduct was wrong.

[3] The appellant argues that she had no notice that the $200,000 loan could be said to have involved her participation in a misleading scheme until the chair of the panel first raised it at the completion of her evidence. As a result, she was taken by surprise and did not have an opportunity to call evidence to show that her employer's request for a loan to allow it to meet regulatory capital requirements was in fact legitimate.

[4] In conjunction with this ground of appeal, the appellant brings a fresh evidence application to admit new evidence on the appeal regarding this issue.

[5] For the reasons that follow, we conclude that the hearing panel did not give the appellant the opportunity to adequately respond to its concerns about the loan and therefore breached principles of procedural fairness. In the circumstances, we conclude that the decision of the hearing panel must be set aside and that the appellant's licensing application must be returned to a new hearing panel to be determined on its merits. Given our decision, it is unnecessary for us to deal with the fresh evidence motion.

STANDARD OF REVIEW

[6] The applicable standard of review on appeals from the Hearing Division is correctness on questions of law, and palpable and overriding error for questions of mixed fact and law.[3]

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1 *Singh v. Law Society of Ontario*, 2022 ONLSTH 115.
2 *Singh v. Law Society of Ontario*, 2022 ONLSTH 150.
3 *Law Society of Ontario v. Culliton*, 2022 ONLSTA 17 at para. 7.

[7] However, an administrative tribunal is required to adhere to principles of natural justice and procedural fairness and a failure to do so will result in the decision being set aside. Issues of deference do not arise in determining the issue.[4] As a result, the standard of review does not typically arise, unless there are findings of fact underlying the assessment of what happened and therefore whether there was a breach of procedural fairness.[5] We return to this issue later in our reasons.

THE HEARING PANEL DECISION

[8] The subject matter of the appellant's good character hearing largely involved her past regulatory misconduct, which largely involved her employment in the securities industry in Canada and the United States. For present purposes these can be summarized as follows:

a. In June 2012, the appellant settled a proceeding initiated by the Financial Industry Regulatory Authority (FINRA), a U.S. securities regulator, in which she admitted having violated a FINRA rule by attempting to procure a fee from the CEO of a public company in return for her efforts, including her research coverage of the company, and suggesting ways in which the company could conceal the payment of a fee (the FINRA Rule Violation).

b. In March 2015, the CFA Institute, a professional organization that offers the Chartered Financial Analyst designation, revoked the appellant's membership and right to use the CFA designation for her failure to disclose the FINRA Rule Violation in annual reporting made to the Institute in July 2012, shortly after her settlement with FINRA (the CFA Decision).

c. In March 2014, the Ontario Securities Commission (OSC) reprimanded the appellant and imposed a three-year trading ban and ban from the acquisition of any securities as a result of her conduct in writing research reports for mining companies in which she had an undisclosed financial interest and her receipt of payments from companies about whose securities she made positive statements (OSC 1).

d. In March 2016 the appellant was charged under the Provincial Offenses Act with two counts of breaching the settlement agreement in OSC 1, through conduct which was alleged to include trading in the shares of a gold company while employed at Jacob Securities (OSC 2). The POA offences were withdrawn in August 2018 in return for the appellant

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4 *Watson v. Law Society of Ontario*, 2023 ONSC 1154 at para. 67.

5 *Watson*, above; *Igbinosun v. Law Society of Upper Canada*, 2008 CanLII 36158 (ONSCDC) at para. 10.

entering into a peace bond in which she agreed to keep the peace and obey the rules and regulations of Ontario securities law. We return to the details of OSC 2 below.

[9] In addition to the regulatory matters outlined above, the alleged misconduct at issue in the appellant's good character hearing also included her involvement in litigation with her ex-husband, which included criminal charges commenced against the appellant in India, which were not disclosed by the appellant in her licensing application. The hearing panel ultimately determined that the merits of the Indian prosecutions, and the appellant's response to the Indian courts, were neutral factors for purposes of determining her good character.

[10] Finally, during the hearing, evidence emerged that the appellant may have not disclosed her full employment history to the LSO during its lengthy investigation process, including her continuing work as a paralegal student, and her appearances in court and at mediation on behalf of clients.

[11] In its analysis of the seriousness and duration of the appellant's past misconduct, the hearing panel made a number of findings with respect to OSC 2, including with respect to the legitimacy of the $200,000 loan.

[12] First, the hearing panel contrasted the applicant's licensing application with the evidence which had emerged at the hearing.

[13] According to the panel, in her licensing application the appellant had asserted that the OSC's concern was with respect to a trading account opened in her name listing actual trades, and that she had attended a voluntary meeting at the OSC in which she explained that the trades had in fact been conducted by another member of the firm.

[14] What in fact had occurred, according to the panel, was that the applicant had opened a trading account because Jacobs Securities needed $700,000 for a transaction. The appellant had borrowed $200,000 against the equity in her condominium and deposited it into her trading account. Her money, together with funds from the CFO and another associate, was used by Jacobs to satisfy a minimum capital requirement to enable Jacobs to back a deal. It was an "artificial transaction" and a "scheme", in the appellant's own words, because Jacobs did not in fact have the money.

[15] The hearing panel accepted the evidence of a securities law expert, Janice Wright, who had testified on behalf of the appellant at the hearing regarding the lack of merit in the criminal charges, and why the peace bond was eventually negotiated rather than a complete withdrawal of the charges. The hearing panel concluded that the peace bond itself was not very significant in terms of

assessing the appellant's character. However, it then made the following statement at para. 84 of the licensing reasons:

> What is more important, in our view, are the issues surrounding the opening of the applicant's trading account and Ms. Singh's co-operation with its use by Jacobs as part of a scheme by which the company attempted to show it had the capital to back a deal when it appears it did not. Depositing and then withdrawing the applicant's and other personal funds seems to have been a misleading "scheme," as the applicant put it, but she evidently participated in it.[6]

[16] The hearing panel then stated that it was "equally important" that the appellant had not acknowledged her involvement in a misleading scheme, or that she (as opposed to Jacobs) had done anything wrong. It then pointed out that the appellant had not indicated in her licensing application what funds she contributed, or why she did so, or why she opened the account.[7]

[17] In considering the *Armstrong*[8] factors typically applied during good character hearings, the hearing panel concluded that the seriousness and duration of past misconduct was the most important factor, noting four separate instances involving three different professional organizations that had taken disciplinary action against the applicant: the FINRA Rule Violation, the CFA Decision, OSC 1 and OSC 2. Even in OSC 2, the underlying conduct, "which amounted to participation in a scheme to demonstrate misleading ability for a corporation to backstop a deal, was problematic."

[18] The hearing panel found that the appellant did not show remorse, as she repeatedly made excuses for, minimized, concealed and failed to take responsibility for her actions, concluding that she fell short of convincing the panel about these essential attributes. It held that her response to the licensing investigation was co-operative, but not forthcoming. Finally, it found that her non-disclosure of her employment history and other conduct during the application and hearing left the panel with significant doubts about her integrity and honesty, describing her approach to her regulator as more of a "cat and mouse" game than an exhibition of co-operation and adherence to the requirements of her intended regulator.

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6 *Singh v. Law Society of Ontario*, 2022 ONLSTH 115.

7 While this summary is accurate, the appellant did explain during her regulatory interview how and why she came to open the trading account: para. 28 below.

8 *Armstrong* v. *Law Society of Upper Canada*, 2009 ONLSHP 29.

THE ISSUES AT THE HEARING

[19] As outlined above, in its decision the hearing panel found that the appellant's involvement in OSC 2 included her participation in a misleading scheme. The scheme was carried out by her employer to allow it to show it had the capital to back a deal when it did not. According to the hearing panel, not only did the appellant participate in this scheme, but she had refused to acknowledge that her conduct was wrong.

[20] The appellant's position is that she had no notice that the misconduct arising out of OSC 2 could be said to have involved her participation in a misleading scheme until the chair of the panel first raised it at the completion of her evidence. As a result, she was taken by surprise and did not have an opportunity to call evidence to show that her employer's request for a loan to allow it to meet regulatory capital requirements was in fact legitimate. She seeks to introduce such evidence on the appeal.

[21] In order to consider the merits of this argument, it is important to determine what exactly was and was not at issue at the hearing regarding OSC 2.

The Appellant's Representations During the Licensing Process

[22] A good character hearing is governed by s. 27 of the *Law Society Act*, RSO 1990, c. L.8, which makes it a requirement for the issuance of every licence that the applicant be of good character. An application for a licence may be refused on this basis only after a hearing on referral of the matter by the Society to the Tribunal.

[23] A good character hearing is the culmination of a process that typically begins with the applicant's completion of a licensing application and often involves written representations by the applicant and a formal interview.

[24] In this case, the appellant completed a licensing application dated October 20, 2019. She made written representations to the Law Society on March 11, 2020 and September 28, 2020. She was interviewed by the Law Society on September 17, 2020.

[25] In her licensing application, in connection with OSC 2 the appellant disclosed that in March 2016 she had been charged with breaches of the *Securities Act* which included one count of trading without registration and one count of trading in securities during a period of time where she was prohibited from trading as a result of OSC 1. She also attached the Information providing the particulars of the charges. Finally, she provided a copy of the peace bond by which the charges had been resolved in August 2018.

[26] In her cover letter the appellant explained the charges as relating to promotional work she was doing for Jacobs in an unregistered capacity, as well as the use by another person of a trading account opened in her name to conduct trades. She explained that "another member of the firm was using an account in my name to make those trades. The other work I was doing, based on advice from securities counsel, was sound in law."

[27] In her March 2020 letter the appellant identified the individual she alleged had traded in the account. In her September 28, 2020 letter the appellant advised the Law Society that her second interaction with the OSC involved her work at Jacobs as an employee working for a registered advisor. She stated that whether she had contravened the *Securities Act* was never tested by the court as the charges were withdrawn and she had agreed to a peace bond to avoid the cost and risk of a trial.

[28] During her interview on September 17, 2020, the appellant explained how she had come to open a trading account at Jacobs. The CEO of Jacobs had asked her to put $200,000 into a Jacobs account to help the company survive and "get a deal done."[9] She offered to provide the funds by way of cheque but the CEO insisted that she had to open a trading account into which the funds would be deposited. The appellant put the money into this account for a period of two weeks, and the funds were then returned to her. However, the trading account remained open and later was used by someone else to conduct trades in a gold mining stock. It was the fact of these trades and other work that she was involved in at Jacobs (her solicitation of new business from various funds by e-mail) that eventually led to the charges against her.

[29] During the appellant's interview the Law Society never suggested to her that putting the $200,000 into the Jacobs trading account involved her participation in an unlawful scheme. The entire focus of the interview was on the *Securities Act* charges and their resolution.

The Evidence at the Hearing

[30] In her evidence-in-chief the appellant was asked what the events were that led the OSC to charge her for violation of the settlement agreement she had entered into for OSC 1. She explained that there were two events that had led to the charges. The first was that she had opened a trading account and deposited $200,000 in the account. This was done "so that my firm could have enough capital to get a deal done."[10] She was loaning the funds to her company as requested by the Chief Financial Officer (CFO). This was being done to satisfy a minimum capital requirement. Two weeks later the funds were returned

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9 Interview transcript, page 96.
10 Transcript, March 22, 2022, page 150.

to her and she should have closed the account. Instead, the CFO had purchased shares in a penny stock (the gold company) and directed a trader to put 50,000 shares in her account. Before she could have the trades reversed she had to leave for a trip to India. When she came back she found the shares had been sold.[11] It was the trades in her account that had led to one of the charges in OSC 2.

[31] In cross-examination the appellant reiterated that the trading account was opened to hold the loan proceeds which she described as needed to meet a minimum capital requirement that the company needed to show to regulators. Law Society counsel did not pursue this issue and at no time suggested that this was part of a misleading or artificial scheme.[12]

[32] Following the completion of the appellant's evidence, the panel chair asked whether the appellant admitted or denied the allegations made in OSC 2. In response, the appellant explained that there was nothing wrong with her opening a trading account; it was the trades a colleague had put into the account which were the issue. The chair then asked whether it was appropriate for someone to have put money into the account and taken it out (apparently referring to the $200,000 loan).

[33] The appellant responded, "No, it was … it was wrong," and elaborated that it was "artificial" because the company did not have the money to do a transaction. The money was not used to trade but just to sit in the bank so that the minimum capital requirement was met. She then reiterated that within two weeks she was given back the $200,000 so that the only thing that was inappropriate was the CFO buying shares in a penny stock and putting some of those shares in her account.

[34] The chair clearly found this explanation confusing, as it certainly was. In order to clarify her evidence he then asked this question:

> If I've understood you correctly, you're saying that it was wrong for the company because it was artificial to have these funds put into these trading accounts, but it wasn't inappropriate – well, you didn't do anything wrong because you weren't the one who asked for it. But weren't you part of the scheme, if I can call it that?[13]

[35] The appellant responded that no, she was not told what would be done with the money, and she was just trying to help her employer.

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[11] Transcript, March 22, 2022, page 152.
[12] Transcript, March 24, page 45, 47.
[13] Transcript, March 24, page 90.

[36] At this point the panel gave counsel the right to ask further questions. Law Society counsel then suggested to the appellant that the chair had said she was part of the scheme and asked her, “Was it not unethical to provide money so this deal could simply go through?” The appellant responded that it was a loan to the company, not done in a scheme and she didn’t know whether it was a wrong thing for the company to do or not. “So if it was a scheme, I was not a part of that scheme. I just loaned the money to my employer because they asked me to….”[14]

[37] The appellant also called Janice Wright, a securities lawyer who acted for the appellant in resolving OSC 2 and later employed her in her office, as a witness. She did not recall the opening of the trading account to be a violation of the settlement or even having been raised as an issue by OSC staff in connection with OSC 2.[15] In his questions of Ms. Wright the chair asked, “what relevance, if any, do the fact that the $200,000 loan was put into the account by Ms. Singh have for these charges?” Ms. Wright responded that it was “a complete non-issue,” although she suggested that the investigator would have considered the source of the funds during the investigation.

[38] Neither the appellant nor the Law Society raised the propriety of the $200,000 loan in their written closing arguments. This supports the conclusion that the characterization of the $200,000 loan as a misleading or artificial scheme was not part of the Law Society’s case at the hearing. It also suggests that even after the chair’s intervention the appellant did not appreciate that the hearing panel was considering making a finding of misconduct against her in relation to the loan.

Summary

[39] To summarize, prior to the hearing the appellant had disclosed the $200,000 loan to Jacobs as part of her evidence of the background leading up to OSC 2, which involved an allegation that she had traded in gold mining shares in an account opened in her name at Jacobs. At the hearing she gave evidence as to the reason she opened the account, again to provide the context for her evidence that another person had used the account to trade in securities. The Law Society never suggested that the $200,000 loan was part of an artificial or misleading scheme until the chair raised the issue himself, and then did not pursue it in its closing submission. The appellant initially responded to the chair’s suggestion by acknowledging that the loan was wrong and artificial but then denied that she had done anything wrong and testified that she did not know whether it was a wrong thing for the company to do, repeating that she had simply lent the money because her employer had asked her to. Aside from

[14] Transcript, March 24, page 93.
[15] Transcript, March 24, 2022, page 138.

the chair's questions, no notice was given to the appellant that the panel was considering making a finding of misconduct on this issue.

ANALYSIS – WAS THERE A BREACH OF PROCEDURAL FAIRNESS?

[40] It is a fundamental principle of administrative law that a person whose rights or privileges or interests are being affected by an administrative decision is entitled to administrative fairness.[16] Administrative fairness includes the maxim of *audi alteram partem* ("hear the other side"); decisions of importance cannot be made unless affected parties have had the right to respond to material evidence offered against them.[17]

[41] In *Brik v. Law Society of Upper Canada*,[18] the Appeal Panel overturned a Hearing Panel decision on good character on the basis that the Hearing Panel failed to proceed in a procedurally fair way, by making findings adverse to the appellant on points that were not raised by the Law Society or were unchallenged or conceded to be irrelevant or had not been raised in submissions. In writing the decision on appeal, the chair, Mark Sandler, made the following observations which are apposite to this case at para. 5:

> We note that a hearing panel may well find that certain evidence raises issues that invite scrutiny despite not having been raised by the parties. Of course, a hearing panel should be careful not to usurp the roles of the parties in framing the issues. That being said, there are circumstances under which a hearing panel, acting in the public interest, may feel obliged to identify for the parties an issue grounded in the evidence that is of concern. But it should do so – indeed, it must do so – in a way that ensures procedural fairness. Procedural fairness includes an opportunity for the parties to address the issue of concern.

[42] As outlined above, the allegations of misconduct in relation to OSC 2 being examined by the hearing panel did not include whether the appellant's loan to Jacobs was part of a misleading or artificial scheme. No allegation was being made by the Law Society that her involvement in the loan was improper.

[43] We accept that the chair's question about the $200,000 loan was entirely appropriate. Indeed, it fits exactly with the description in *Brit* of the circumstances in which a panel member may feel it necessary to raise in the public interest an issue grounded in the evidence which is of concern. However,

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16 *Cardinal v. Director of Kent Institution*, 1985 CanLII 23 (SCC) at para. 14..

17 *Sexsmith v. Canada (Attorney General)*, 2021 FCA 111. Also *Nicholson v. Haldimand-Norfolk Regional Police Commissioners*, 1978 CanLII 24 (SCC), and *Ridge v. Baldwin*, [1963] UKHL 2.

18 2011 ONLSAP 20.

having raised a new issue of potential misconduct, the panel needed to give the appellant an opportunity to address it before making a finding adverse to her.

[44] With respect, it was not sufficient for the chair to ask the appellant and Ms. Wright to address the issue on the spot. Before the panel made a finding that the appellant had participated in an artificial or unlawful scheme that had not been part of the original allegations of misconduct leading to the good character hearing, the panel should have given her the opportunity to call further evidence on the issue. Failure to do so was a breach of procedural fairness, as she was not given the opportunity to address the issue of concern.[19]

THE APPROPRIATE REMEDY

[45] The position of the appellant is that if there was a breach of procedural fairness the decision must be set aside, regardless of whether a fair hearing would have resulted in a different outcome.[20]

[46] Recently the Divisional Court in *Watson v. Law Society of Ontario*[21] at para. 67 commented that the Supreme Court of Canada's decision in *Vavilov* had not changed the standard of review for issues of procedural fairness and natural justice:

> An administrative tribunal of the nature involved here is required to adhere to principles of natural justice and procedural fairness and a failure to do so will result in the decisions being set aside. Issues of deference do not arise in determining the issue. What the reviewing court must decide is whether there was an appropriate level of procedural fairness having regard to the principles established in *Baker v. Canada (Minister of Citizenship and Immigration)* [1999 CanLII 699 (SCC)]. However, there may be findings of fact underlying the assessment of what happened and, therefore, whether there was a breach of fairness. If those facts are extricable issues from the law to be applied, the standard of review would be palpable and overriding error.

[47] The court in *Watson* commented that given the implications for lawyers subject to the discipline process, a high level of procedural fairness and natural justice is required in the Tribunal's processes. We believe these comments are equally applicable to a good character hearing.

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[19] Indeed, a fair reading of her evidence is that she was taken by surprise by the Chair's suggestion.

[20] *Cardinal v. Kent Institution*, above at para. 23; *Igbinosun v. Law Society of Upper Canada*, above at para. 10.

[21] 2023 ONSC 1154.

[48] In *Mountainstar Gold Inc. v. British Columbia Securities Commission*,[22] the British Columbia Court of Appeal noted that there are several exceptions to the general rule that a breach of procedural fairness generally renders a decision invalid, regardless of whether a fair hearing would likely have resulted in a different hearing. These exceptions include when the outcome on the merits is legally inevitable or hopeless or the appellate proceeding has cured the procedural unfairness: *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*,[23] and *Taiga Works Wilderness Equipment Ltd. v. British Columbia (Director of Employment Standards)*.[24]

[49] A further exception appears to be where the breach of procedural fairness is minor and has no impact on the final decision. For example, in *Al-Kazely v. College of Physicians and Surgeons*,[25] the fact that a rebuttal submission was not provided to the adjudicators was held to have had no impact on the decision and as a result the matter need not be returned to the original decisionmakers for reconsideration.

[50] For the following reasons, none of these exceptions appear to apply here.

[51] First, it cannot be said that the appellant's position at her good character hearing was legally inevitable or hopeless.

[52] Second, the exception for when the appellate proceeding has cured the procedural unfairness appears to involve appellate proceedings which are in the nature of a trial *de novo* (new trial) and where new findings of fact can be made; *Taiga*, above at para. 47; *Harelkin v. University of Regina*.[26] That is not the situation here. While we have the jurisdiction to accept fresh evidence provided the test for its admissibility is met we cannot hold a new hearing and make new findings of fact.

[53] Third, this cannot be described as a minor breach. The appellant participated in the good character hearing on the assumption that her past misconduct in relation to OSC 2 involved only the matters which were the subject of the *Securities Act* charges. It was the panel chair who first raised the issue of the propriety of her involvement in the $200,000 loan in his questioning of the appellant. The panel then made a finding on that issue without notifying the appellant that it was considering doing so or giving the appellant an opportunity to call further evidence. Not only that, the panel also contrasted the resolution of OSC 2 by way of peace bond with what it called the more important issues

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22 2022 BCCA 406 at para. 56.
23 1994 CanLII 114 (SCC).
24 2010 BCCA 97 at para. 37.
25 2022 ONSC 44.
26 1979 CanLII 18 (SCC).

regarding the appellant's participation in a misleading scheme instigated by her employer.

[54] Finally, the finding of the hearing panel that the appellant had participated in a misleading scheme was part of its analysis of two of the good character factors outlined in *Armstrong*: (a) the seriousness and duration of the misconduct and (b) whether the appellant showed remorse and insight into her misconduct. The panel specifically commented that the appellant's failure to acknowledge her wrongdoing was as important as her involvement in the scheme.

[55] In our view, none of the exceptions to the general rule apply. We therefore conclude that as a result of the breach of procedural fairness the decision of the hearing panel must be set aside.

THE FRESH EVIDENCE MOTION

[56] The fresh evidence motion consists of an affidavit of the appellant in which she outlines various efforts she made after the release of the hearing panel's decision to obtain information about whether her $200,000 loan violated any regulatory requirement. Those inquiries included e-mail communications with the Investment Industry Regulatory Organization of Canada (IIROC), and communications with several securities lawyers.

[57] Notably, in response to an e-mail from the appellant, a lawyer at Bennett Jones LLP opined that it is lawful and permitted for a registered investment dealer and IIROC member to borrow money from employees of the member in order to include the loaned amount as part of the risk adjusted capital of the firm, as long as the dealer member and the lender enter into a prescribed form of subordination agreement that in effect prevents the loan from being repaid in whole or in part without the consent of IIROC. A second lawyer at Fogler Rubinoff LLP also confirmed that a loan can be used to address IIROC regulatory capital requirements, provided it is in the form of an IIROC subordinated loan agreement and is approved by IIROC in advance of the transaction.

[58] In her affidavit the appellant attests that when she provided the loan she entered into a loan agreement with Jacobs but never received a copy of the loan agreement. She has made inquiries of IIROC but it has been unable to assist.

[59] Two different tests have been applied in determining whether fresh evidence is admissible on appeal. The *Varette* test[27] generally held applicable to civil proceedings requires the appellant to demonstrate that the new evidence

[27] *Varette v. Sainsbury*, 1927 CanLII 11 (SCC).

proposed to be adduced could not have been obtained by reasonable diligence before the trial and is such that if adduced would be "practically conclusive." In contrast, the *Palmer* test[28] arises from the criminal law context, and has sometimes been applied in Tribunal jurisprudence, includes four elements:

1. the evidence could not have been obtained by due diligence at trial;
2. the evidence must be relevant and bear upon a decisive or potentially decisive issue;
3. the evidence must be credible in the sense that it is reasonably capable of belief; and
4. the evidence must be such that, if believed, it could reasonably have affected the result.

[60] In *Law Society of Upper Canada v. Kesavan*,[29] the appeal panel outlined the two tests and did not finally resolve the issue of which is more appropriate in the context of Tribunal proceedings. Instead, it observed that both tests require consideration of whether the evidence could have been obtained by due diligence at trial. Likewise, both require at a minimum that the purported fresh evidence could reasonably be expected to have affected the result.

[61] Given our findings, it is unnecessary for us to deal with the fresh evidence motion. However, we note that the fresh evidence meets the requirements of the *Palmer* test. The fresh evidence could not have been obtained at trial, since the appellant had no advance notice that the legitimacy of the $200,000 loan was at issue in the good character hearing. The evidence is relevant and bears on a potentially decisive issue (whether the appellant participated in a misleading and artificial scheme). The evidence is credible. Finally, the evidence could reasonably be expected to affect the result, in the sense that we cannot say with certainty that the decision of the hearing panel would have been the same had the fresh evidence been admitted before them.

CONCLUSION

[62] For the reasons set out above, we order as follows:

1. The decision of the hearing panel dismissing the licensing application is set aside.
2. The appellant's good character application is remitted to be heard by a new hearing panel.

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[28] *Palmer v. The Queen*, 1979 CanLII 8 (SCC).
[29] 2014 ONLSTA 17 at paras. 80-84.

3. The parties are invited to make written submissions with respect to the costs of this appeal and of the first hearing on the following schedule:

    a. the appellant will file brief written submissions within 14 days of the date of these reasons;

    b. the Law Society will have 28 days from the date of these reasons to file response submissions.

Peter C. Wardle,
for the panel