Law Society Tribunal
Tribunal du Barreau

LAW SOCIETY TRIBUNAL
HEARING DIVISION

Citation: *Law Society of Upper Canada v. Davidovic,* 2017 ONLSTH 47
Date: March 17, 2017
Tribunal File No.: LLC89/16

BETWEEN:

Ronald Ori Davidovic

Applicant

- and -

The Law Society of Upper Canada

Respondent

Before:	Raj Anand (chair) Paul M. Cooper (dissenting) Jan Richardson
Heard:	December 5, 2016, in Toronto, Ontario
Appearances:	Applicant, self-represented Amanda Worley, for the Respondent

Summary:
DAVIDOVIC – Licensing – Criminal Convictions – Receiving material containing child pornography – Joint Submissions – The panel reviewed recent SCC jurisprudence relevant to joint submissions – Applicant now of good character – Application for licensing as a lawyer allowed.

REASONS FOR DECISION

INTRODUCTION AND OVERVIEW

[1] Raj Anand and Jan Richardson:– The issue before us is whether the applicant, Ronald Ori Davidovic, is of good character and should receive a licence to practise as a lawyer in Ontario. He was called to the Florida Bar in 1996 and practised there for eight years. He pleaded guilty in November 2004 to one count of receiving material containing the visual depiction of minors engaging in sexually explicit conduct. He spent over two years in federal prison and was registered as a sex offender in Florida.

[2] In December 2004, the applicant petitioned the Florida Supreme Court for a disciplinary resignation. Effective February 1, 2005, he was granted permission to resign from the Florida Bar, with leave to reapply after five years.

[3] Mr. Davidovic did not reapply to the Florida Bar. In 2015, he applied for licensing as a Lawyer to the Law Society of Upper Canada, and he intends to move to Toronto, where several of his close relatives live.

[4] His application proceeded to a hearing, where the parties presented an Agreed Statement of Facts, a corresponding Book of Documents, the applicant's Book of Character References, and a Joint Book of Authorities, all on consent.

[5] The only evidence that was not presented jointly was the testimony of the applicant. When asked for the Law Society's position at the outset of the hearing, Law Society counsel, Amanda Worley, said she would hear the applicant's evidence and then would advise the panel of the Law Society's final position. In closing submissions, Ms. Worley did not oppose this application and she gave the Law Society's basis for reaching this conclusion.

[6] We have reviewed the dissenting reasons of Mr. Cooper.

[7] For reasons that follow, we allow the application.

LEGAL PRINCIPLES

[8] Pursuant to s.27(2) of the *Law Society Act*, R.S.O. 1990, c. L.8 it is a requirement for the issuance of a licence under this Act that the applicant be of good character,

and that a hearing be held before any licence is refused: s. 27(4).

[9] Both parties rely on the principles in admission applications that have been established by the Tribunal in *Armstrong v. Law Society of Upper Canada*, 2009 ONLSHP 29, *Armstrong v. Law Society of Upper Canada*, 2011 ONLSAP 1; *Levenson v. Law Society of Upper Canada*, 2009 ONLSHP 98 and *Law Society of Upper Canada v. Shore*, 2008 ONLSAP 6.

[10] In *Armstrong*, the hearing panel stated, in passages that were adopted on appeal by the appeal panel, at paras. 12-13:

> [23] Character has been defined as:
>
> > 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.
>
> [24] Madam Justice Mary Southin of the British Columbia Court of Appeal also elaborated on the term:
>
> > "[G]ood 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.
>
> [25] In his book, *Lawyers and Ethics: Professional Responsibility and Discipline*, Gavin MacKenzie states that the objectives of the good character requirement are the same as the principles of discipline, namely 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.

…

[28] Counsel agreed that Mr. Armstrong's obligation is succinctly set out in *Re Preyra*:

> The onus is on the applicant to prove that he is of good character at the time of the hearing of the application. The standard of proof is the balance of probabilities. The relevant test is not whether there is too great a risk of future abuse by the applicant of the public trust, but whether the applicant has established his good character at the time of the hearing on a balance of probabilities. The test does not require perfection of (*sic*) certainty. The applicant need not provide a warranty or assurance that he will never again breach the public trust. The issue is his character today, not the risk of his re-offending.

FACTORS DETERMINING GOOD CHARACTER

[29] In determining whether Mr. Armstrong is of good character today, we considered the following factors, which have generally been considered in admission cases:

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.[1]

[11] In this case, the first, fourth and fifth *Armstrong* factors are fairly straightforward. They are largely covered by the objective facts set out in the Agreed Statement of Facts ("ASF") and related documents.

[12] The second and third factors – remorse and rehabilitation – require consideration of not only the written documents, but also the content and manner of the applicant's testimony.

[1] *Armstrong v. Law Society of Upper Canada*, 2009 ONLSHP 29 at paras. 23-25 and 28-29.

[13] In their joint authorities, the parties also submitted several recent cases. One illustrated the Tribunal's approach where the Law Society, as here, did not oppose the granting of the licensing application (*Yeager v. Law Society of Upper Canada*, 2016 ONLSTH 42). Another case involved the Hearing Division's decision to restrict but not suspend a licensee's right to practise where the underlying conduct, like the applicant's here, involved the possession of child pornography.

PERSONAL BACKGROUND

[14] The applicant moved to Miami at the age of six because his father secured a job there. After his college and law school education, the applicant was admitted to the Florida Bar, where he practised primarily in estate and financial planning for the first four years, and then acted as general counsel for a large telecommunications company.

[15] In January 2004, the police executed a search warrant and seized the computers at his home. After his guilty plea in November 2014, he was sentenced in February 2005 to a 60-month prison term. He was also granted a disciplinary resignation from the Bar by the Florida Supreme Court.

[16] The applicant spent over two years in federal prison and satisfied all probation conditions, including counselling and treatment. He was registered as a sex offender in Florida, and he remains on that list.

THE EVIDENCE

[17] We will first summarize the chronology that was provided in the ASF. After that we will focus on the applicant's oral evidence.

[18] In January 2004, the police executed a search warrant at his home. At the time of the arrest the applicant was married with a three year old child, and his wife was pregnant. In the ensuing period, the applicant confessed to his wife, to the police authorities, and ultimately to the Florida Court, that he had been viewing adult, teen and child pornography for the previous several years. There is no evidence that the applicant participated in any distribution of pornography, and there is no evidence of his involvement in any improper sexual contact with any children.

[19] On October 1, 2004, the applicant was charged with one count of possession of underage pornography, and one count of receiving images containing a visual depiction of minors engaging in sexually explicit conduct. On November 19, 2004, he pleaded guilty to the second count, and the first was withdrawn.

[20] The investigation report by the U.S. Probation Officer that was prepared before his sentencing hearing on February 2, 2005 refers to the applicant's "…recognition and affirmative and timely acceptance of personal responsibility," his agreement to co-operate with the government, his forfeiture of his interest in the computers, the

waiver of his right to appeal any sentence that fell within the statutory guidelines, and the applicant's compliance with the conditions of his bond.

[21] The Probation Officer reported that the applicant had attended counselling on a weekly basis since January 2004 with Rev. Fred W. Fleischer, who indicated that the applicant was co-operative and understood his situation. The applicant was also under the care of a psychiatrist, whom he saw once a month for counselling and medication. The pre-sentence report traced the applicant's employment history up to that point, including his work as vice-president of business development for an internet marketing company since April 2004.

[22] Under the heading "Adjustment for Acceptance of Responsibility," the probation officer quoted the applicant's acceptance of responsibility statement at the time:

> In December, 2003, my life could not have been going better. I had not one, but two very promising careers, one as general counsel of a telecom company about to complete a reverse merger with a public company and I continued to supervise an equity-trading firm I had started years before. Most exciting was that my wife and I learned she was pregnant with our second child. The following month my life crumbled.
>
> This past January began a nightmare that continues as I face sentencing for downloading child pornography onto my computer. Not only is this a serious crime that I acknowledge I had committed and take responsibility for, but a problem which has been so private and personal to me is now public to my friends, family and co-workers.
>
> I am so greatly remorseful and ashamed for having done what I did. I recognize and accept that what I did was wrong and while there is unfortunately no way to take things back, I am changing my life in an effort to hopefully produce a positive outcome from this experience.
>
> For the past twelve months since the exposure of my acts I have been in counseling. The work that I have done with my therapist to date has helped me confront and deal with issues from my past that I have been encapsulating. I am confident that the weekly sessions we have had and intend to continue have and will be productive. Also, in the months since, recognizing and accepting that I would lose my bar admission, I left both my positions and started my own business. While it is not the career I had worked for so many years to build, it is a means to support my family and for that I am grateful.
>
> I pray that despite the mistake I made, I will be given the opportunity to take action that will help bring my family out of this nightmare and salvage a life which was otherwise so promising.

[23] The pre-sentence investigation report recommended the minimum sentence available under the guidelines.

[24] At the sentencing hearing, the U.S. Attorney agreed with the report and recommended "…the five year minimum mandatory as the appropriate sentence." The judge strongly suggested that he would have imposed a shorter sentence, "…but in this case my hands are tied."

[25] The applicant surrendered to the U.S. Marshall on March 14, 2005. He was ordered to co-operate with the collection of his DNA sample. He was subject to supervised release, and was required to participate in an approved inpatient/outpatient mental health treatment program or programs as directed by U.S. Probation.

[26] The judgment was amended on August 17, 2006 to reduce the term of imprisonment from 60 to 36 months. He was released from prison on July 30, 2007, and was on probation until October 29, 2011.

Resignation from the Florida Bar

[27] In December 2004, the applicant petitioned the Florida Supreme Court for a disciplinary resignation, citing his guilty plea the previous month. He was granted permission to resign from the Florida Bar, with leave to reapply after five years. The applicant's resignation was effective February 1, 2005, one day before his sentencing hearing.

Sex Registry

[28] The applicant's name appears on the Florida sex offender registry, and will remain there permanently. He is subject to several restrictions, including limitations on where he can live, due to proximity to schools, parks and day cares.

Post-release Psychosexual Evaluation and Treatment

[29] Following his release from prison, the applicant was directed by the United States Probation Service to participate in a sex offender treatment program, which involved a clinical interview, mental status examination and a risk assessment.

[30] In October of 2007, the applicant started a court-ordered treatment program with therapist Josefina Perez-Castro, who has a master in social work designation. The initial evaluations occurred on December 2, 2007 and May 31, 2008.

[31] Ms. Perez-Castro recommended the following:

- the applicant attend individual sessions weekly, work with his treatment plan, and continue with his therapeutic process for at least three months;

- the applicant attend sex offender group sessions weekly to commence in three months' time using psycho-educational materials regarding sex offences/disorders for discussion and using relapse prevention strategies to minimize the risk of re-offending; and
- a polygraph examination be conducted within six months to include both a sexual history polygraph and a maintenance polygraph to ensure compliance.

[32] In her December 2, 2007, report, following a psychosexual evaluation four days earlier, Ms. Perez-Castro wrote:

> Mr. Davidovic is a 35 year-old man, who was just released from Federal Prison where he served 3 years. He took responsibility for his offence and has good insight. He was fully cooperative and seemed honest about his feelings. It was evident that he was exposed to therapy to help him deal with his situation. He seemed more preoccupied about not being with his children and having to make them suffer because of his actions. He was affected by his wife divorcing him while he was in prison. He seems to have good family support and also friends that have known him for a long time and they are part of his support system.

[33] In her final report dated June 6, 2010, Ms. Perez-Castro wrote:

> Mr. Davidovic maintained a good attendance record and his participation was always active. He completed all his assignments. He met all the treatment goals. He took full responsibility for his actions and did not make any excuses for his behavior and acknowledged the negative impact it had on his family. He turned in a good relapse prevention plan that denoted insight and hard work. He described his behaviors and attitude prior to his offence and acknowledged that he was arrogant and self centered stating that although he loved his family very much he had neglected them. He accepted how his expectations and personal plans had to change because of his offense. He embraced alternatives with a positive attitude. He shared often that this experience has made a better person out of him. He has worked hard in maintaining his relationship with his daughters in spite of many obstacles.
>
> Mr. Davidovic is pursuing an early termination from his probation. His prognosis is good based on his participation and therapeutic process in the three and a half years he has been in our program.

[34] Ms. Perez-Castro was interviewed by the Law Society's Investigator on March 4, 2016. Ms. Perez-Castro provided the following opinions:

- The applicant was humbled through his experiences in jail. He worked very hard to understand his disorder. Although he lost everything, he took complete responsibility and is accepting of that fact. He is not bitter or angry.
- The applicant has three or four sexual history polygraphs with the Bureau of Probations, which were ordered as part of his probation. They belong to the government and it will not release them. However, she can say that he passed each one, as all were truthful.
- His chance of recidivism is very small or put another way the chance of relapse is very low. He showed a lot of remorse, with no excuses.
- He no longer attends therapy with her but they do stay in touch.
- Probation allowed him to use his computer and that shows he was low risk.

Forensic Psychological Evidence Received in Family Court

[35] At least initially, the applicant's marriage and his relationship with his daughters survived his arrest and incarceration. His wife and children visited him in prison several times. The applicant's wife later brought a divorce proceeding, and his marriage ended in 2007. His relationship with his daughters is strained.

[36] The applicant presented the expert evidence of forensic psychologist Dr. Eric Imhof to Family Court in an ultimately unsuccessful attempt to obtain unsupervised access to his children. Dr. Imhof's risk assessment report provided a significant piece of evidence regarding the risk that the applicant presents to the public, and particularly to vulnerable persons.

[37] Dr. Imhof's 2013 evaluation surveyed a number of studies focusing on individuals like the applicant: those who have accessed pornography depicting minors via the internet, but where there is no evidence of a "contact" or "non-contact" sexual offence. Dr. Imhof arrayed this information alongside a series of mitigating factors that he observed in the applicant's case:

> In summary, while a diagnosis of a Paraphilic (sexual deviance) Disorder was considered based on the underlying charges, this diagnosis was ultimately ruled out due to lack of evidence to suggest an enduring pattern of deviant sexual interests or behaviors involving prepubescent minors. … Assessment of risk factors and comparison to known samples of recidivists with similar characteristic indicates a low risk to commit a future sexual offence, either a contact or child pornography offense. This low risk will be further mitigated by lack of antisocial orientation, lack of problems with general self-regulation or sexual self-management, completion of an intensive “sex offender specific” treatment program, lack of substance abuse history or intoxication at the time of the offense, successful completion of a period of community supervision, and an extensive positive social support system. It is further noted that those individuals who

> complete a comprehensive treatment program are up to 37% percent (*sic*) less likely to commit a sexual offense in the future. Finally, it is noted that there has been a substantial time in the community "at risk" (approximately six and a half years) since the index offense without further interaction with the criminal justice system which suggests a further reduction in risk. It is noted that research has shown risk is reduced by approximately half between seven and eight years offense free in the community.
>
> Given the low base risk for future sexual offenses, presence of a number of mitigating risk factors which will further reduce risk, and having been in the community without any involvement with the criminal justice system for approximately six and a half years, the risk for future sexual offenses against family members or other members of the community is considered to be negligible.

A comment about the expert evidence and the parties' evidentiary agreements in licensing applications

[38] It is appropriate to say a word about the challenges that a hearing panel faces in a good character application where most of the evidence – including all of the expert evidence on the crucial questions of remorse and rehabilitation – consists of information that the applicant and the Law Society choose to submit on consent.

[39] We are acutely aware of the sensitivities that arise when detailed questioning is carried out not only by counsel, but by panel members. There are limits to the inquiries that a hearing panel may properly make when faced with a largely agreed upon set of facts on which it must make its judgment of good character.

[40] We note that Ms. Josefina Perez-Castro's social work report was written nine years ago, and Dr. Imhof's was issued more than three years ago. Since the issue is present good character, these reports afford important evidence about the applicant's journey since early 2004, including his conduct and his co-operation in treatment since then. They do not provide this information in the form of a recent report, which would have been ideal. We do have, however, the transcripts of their 2016 interviews with the Law Society Investigator, which are entirely consistent with their written reports. We also note that Dr. Imhof's reasoning relied to some extent on the passage of "offence free" time in the community, which increased by more than three years by the date of our hearing.

[41] We recognize that agreements about what will be included or excluded in ASFs, and how those agreements will be expressed, are the product of discussion and negotiation by the parties. For a variety of procedural, strategic and substantive reasons, ASFs and joint submissions as to finding and penalty should not lightly be disturbed or altered in any significant way.

[42] In conduct applications, the Tribunal has often said that interference is justified only

when a joint submission is outside the range of reasonable penalties in the circumstances.[2] This test is closely analogous to the threshold that has consistently been applied in criminal sentencing, most recently explained by the Supreme Court in *R. v. Anthony-Cook*, 2016 SCC 43: the proposed sentence "would bring the administration of justice into disrepute or would otherwise be contrary to the public interest."[3]

[43] How do these principles apply to licensing applications in which there is a substantial measure of agreement between the applicant and the Law Society on the facts or indeed on the outcome of the hearing?

[44] The objectives that underlie the respect given to the parties' agreements in conduct applications, echoed in the criminal law context in *Anthony-Cook*, are relevant in many respects to a licensing hearing. The Supreme Court explained the meaning of the "public interest" test in terms that appear to apply to a licensing proceeding as well:

> Rejection denotes a submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down.
>
> …
>
> Finally, I note that a high threshold for departing from joint submissions is not only necessary to obtain all the benefits of joint submissions, it is appropriate. Crown and defence counsel are well placed to arrive at a joint submission that reflects the interests of both the public and the accused. As a rule, they will be highly knowledgeable about the circumstances of the offender and the offence and the strengths and weaknesses of their respective positions. The Crown is charged with representing the community's interest in seeing that justice is done… And both counsel are bound professionally and ethically not to mislead the court. In short, they are entirely capable of arriving at resolutions that are fair and consistent with the public interest.[4]

[45] The Law Society, in a good character proceeding, is duty bound to protect the public interest. In upholding the reputation of the legal professions and confidence

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[2] *Law Society of Upper Canada v. Cooper*, 2009 ONLSAP 7 at paras. 13-23.

[3] *Anthony-Cook* has been applied in professional regulatory discipline cases, for example, in *Ontario (College of Physicians and Surgeons of Ontario) v. Pilarski*, 2016 ONCPSD 41. It has recently been applied by the Hearing Division in *Law Society of Upper Canada v. Poulson*, 2017 ONLSTH 9, and *Law Society of Upper Canada v. Christie*, 2017 ONLSTH 4.

[4] *R. v. Anthony-Cook*, 2016 SCC 43 at paras. 34 and 44 (citations omitted).

in self-regulation, it will adopt positions to achieve “acceptance [by] reasonable and informed persons, aware of all the relevant circumstances”: *Anthony-Cook*, above at para. 34. In doing so, after investigation of a licensing application, the Law Society will be “highly knowledgeable” of the totality of the circumstances, placing it in the best position to decide “professionally and ethically” the facts that should be put before the hearing panel.

[46] In short, there appear to be good reasons for a hearing panel to refrain from going substantially behind agreed facts. It may also be salutary for the panel to take note where the Law Society’s chooses (as here) not to oppose a licensing application.

[47] For present purposes, it is sufficient to mention how we applied the general principles discussed above. The facts that we relate in these reasons are largely derived from the ASF, and the panel exercised its right to go further without testing the limits of proper intervention.

[48] Faced with the evidence presented by the parties about the applicant's interactions with the Florida sentencing and probation systems, we are not in a position to consider whether other forensic or psychological tests or procedures would have been employed elsewhere (such as in Ontario), or whether other tests would have elicited the identical results.

[49] At the same time, the applicant testified and provided information beyond the ASF. The panel had an opportunity to ask questions that went beyond the printed pages of the agreed documents.

[50] We have relied on two of the expert reports, in addition to the Florida pre-sentencing assessment, and have not relied on other "expert" evidence that the parties brought forward. While the timing, duration and content of the applicant's counselling sessions with Rev. Fred Fleischer provided important evidence of the applicant's rehabilitation efforts since 2004, we did not find Rev. Fleischer's opinions sufficiently precise to be of assistance to us in making this decision. We have of course considered Ms. Worley’s helpful closing submissions, which were supportive of the applicant’s position on several issues.

ANALYSIS OF THE AGREED FACTS AND DOCUMENTS

[51] In assessing whether the applicant has demonstrated his good character as of today, a review of the agreed facts and documents provides information that addresses three of the factors that *Armstrong* asks us to consider.

[52] The applicant's misconduct was very serious, and justified elevated concern from a public protection standpoint. Although there is a reference in one of the Florida court documents to a "victimless" crime, we view it as anything but that. The underage victims were nameless, vulnerable and perhaps distant from the computer screen, but they suffered exploitation and incalculable harm to satisfy the

sexual urges of viewers such as the applicant. As a lawyer, occupying a crucial role in upholding the rule of law, the applicant's offence constituted a breach of trust.

[53] The duration of the misconduct also speaks against the applicant. The agreed evidence indicates that he began viewing child pornography in 1998, and although it may have lessened somewhat after his marriage at the end of that year, he continued to access this material, along with other pornographic images, until late in 2003, shortly before the police search on January 5, 2004 There is a duration of at least five years. This information comes from prompt and full disclosure by the applicant to U.S. authorities, the Law Society of Upper Canada and this Tribunal. The applicant admitted viewing hundreds or thousands of images, even though his conviction cites a much more circumscribed list of images.

[54] The passage of time since the last evidence of misconduct is lengthy, about 14 years. The applicant has had a great deal of time to reflect on his misconduct and rehabilitate his good character.

[55] During that period, there is no evidence of any improper conduct, of a criminal nature or otherwise, on his part. He has maintained friendships and family relationships; he has carried on business; and he has given back to the South Florida community. Details of these activities are found below, related to the important question of rehabilitation.

ANALYSIS OF THE APPLICANT'S TESTIMONY

[56] The applicant prepared and read a written statement, which comprised most of his evidence-in-chief at the hearing. In a methodical way, he dealt with burdens of proof, which are not contentious, and he then addressed the five *Armstrong* factors, three of which we have discussed above.

[57] We gave particular attention to the applicant's testimony as it relates to the second and third *Armstrong* factors: remorse and rehabilitation. These objectives are intertwined in the applicant's history since his conduct was discovered.

[58] In the last 14 years, the applicant has served all sanctions imposed on him: a custodial sentence of over two years, probation of over four years, over 300 hours of mandated therapy, over 500 hours of additional therapy. He began seeing Rev. Fleischer weekly from January 2004 to March 2005, and then since August 2007, following his release from prison.

[59] Upon his release, he received mandatory psychosexual evaluation and treatment at the Anaga Psychotherapy Centre for about three and a half years, where he participated in individual therapy and group sessions with Ms. Perez-Castro, a social worker with 35 years' experience working with sex offenders in the U.S. Federal prison system. Earlier in these reasons, we outlined her opinions as of 2007, 2010 and 2016.

[60] The excerpt from Ms. Perez-Castro's final report in 2010 mentioned the applicant's relapse prevention plan, which he was required to prepare before completing the program at Anaga Psychotherapy Center. This involved self-reflection on a series of issues that were relevant to the American criminal law authorities. The issues he covered are also important to an assessment of his insight into what he did, why he did it, who was responsible for his actions, and what he has done to prevent it from happening again.

[61] The applicant portrayed "…an internal race towards accomplishment" through his high school, undergraduate and law school education, followed by marriage, house ownership, and children. "I was living a life full of 'things' but at the same time very unfulfilled." He was not satisfied with his marriage, and devoted time instead to work and pornography as "an escape and a release."

[62] The applicant recognized that his identification of contributing causes could be seen as attributing his serious criminal conduct to personal stresses and his wife's conduct. He was at pains to demonstrate to us, as he did in his relapse prevention plan and throughout the Florida court documents, that no other person had responsibility for "…the behaviour that led to so much destruction and turmoil in so many lives that I care about."

[63] A similar issue arose in relation to the change that occurred in the applicant's relationship with his wife and children while he was in prison. There was a reference in Rev. Fleischer's note, written the day before the hearing, to "…his relationship with his children [having] been contaminated by the prejudice of his former wife..." The applicant could not speak for his counsellor, but spent some time recounting how his former wife was supportive until she formed another relationship. He also described the absence of a relationship with his two teenage daughters, and expressed his wish to restore his parental role over time. In both respects, his testimony was not surprising, given the criminal offence he had committed, combined with the alienation toward one parent that children sometimes experience in a marriage breakup.

[64] The details underlying the applicant's evolving relationships with his former wife and children are not significant for our decision. From the standpoint of remorse and rehabilitation, however, we are satisfied that his understanding and explanation of these issues is credible. They are consistent with his overriding theme of recognizing where blame lies for his behaviour and its consequences, and moving forward with a strategy to prevent such conduct and restore his career.

[65] The evidence is clear that the applicant admitted his criminal conduct almost immediately, when he met with his lawyer and the police a few days after the FBI search in January 2004. His acknowledgement of responsibility is reflected consistently in the documentation, the agreed statement of facts and in his testimony before us. The first category includes:

- his commencement of counselling in April 2004, and its continuation to date;
- the guilty plea and co-operation in 2004 and following;
- the pre-sentence report quoted above;
- the post-release evaluation report of 2007 and the final report of 2010; and
- his relapse prevention report of 2010.

[66] In his testimony, the applicant stated that the children he viewed on the internet were victimized when the films were taken, and his actions had re-victimized the children each time he viewed them. He accepted that while his conviction related to a limited set of images he had viewed, in fact he had seen many more than that; it is likely there would have been thousands of images in a single folder that he accessed.

[67] The applicant acknowledged that the public would have a valid concern that his actions affected his integrity, and volunteered that he had been selfish and arrogant. But he defined himself as a different person today: he said that he had gained greater empathy for vulnerable individuals, and an understanding of victimization, as a result of going through the criminal justice system. He had different priorities now – working out, meditation, maintaining support systems, helping others, rather than only material success through his work. He was candid about what he had done, and has never hidden this from others.

[68] Returning to his relapse prevention report, we note that he devoted a section to "An Acceptance that I am Solely Responsible for This Situation." In that section he repeats this point several times, as he did during his testimony. In addition, however, he anticipates an obvious concern that the Law Society, the Tribunal and indeed the public would have despite his ability to identify the origins of his misconduct: that "There will always be people, jobs, situations and a world of other variables that can contribute to a bad situation." In other words, a licensee will always have to deal with a stressful occupation, in which things can and will go wrong for reasons beyond one's control. What assurances could he give that difficult circumstances will not culminate in another debacle?

[69] The applicant responds that he has learned how to assess "what is going wrong" and how to employ a strategy to handle such eventualities. With assistance, he explored various external factors such as his family history and the Holocaust and as well as internal factors such as his own sexuality. He attended offence-specific group sessions and learned relapse prevention techniques. In prison, he took meditation, stress relief and anger management classes.

[70] In his 2010 report, the applicant recognized that he had a tendency toward a particular improper behaviour and set out several strategies to prevent it from recurring. He outlined the details of multi-faceted strategies that he would follow:

avoidance, escape, support systems, coping, adaptation, reminders and change in the lifestyle that contributed to the behaviour. He expressed a strong motivation, there and in his testimony, to establish himself as an asset to the community.

[71] The applicant's attempts to rehabilitate himself have gone beyond steps that might be regarded as inward-looking: treatment, counselling and self-assessment. He has leveraged his experience and knowledge of the criminal justice system in different ways, and he has worked in the business sector.

[72] During his experience of the last 13 years, the applicant began contributing as a volunteer to advocacy and assistance on behalf of others who have committed similar crimes.

[73] While he was in prison and after his release, the applicant taught other inmates, assisting them in achieving their high school diplomas. He also tutored inmates to help them become certified as personal trainers, and thereby gain employment upon their release.

[74] For over eight years, the applicant has done volunteer work for the Aleph Institute, a non-profit organization in Florida that provides support and advocacy services for Jews who are separated from their communities and their families as a result of incarceration or service in the military.

[75] Since 2012, the applicant has served on the board of directors and acted as legal chair for the Florida Action Committee (“FAC”), a non-profit organization that educates the media, legislators and the public about issues relating to sex offenders. He characterized it as an advocacy group for registered sex offenders.

[76] We received impressive reference letters from two senior Florida attorneys about the applicant's work with FAC. The first spoke of the applicant's involvement with a constitutional challenge to the sex offender registration statute, "…one of the most onerous and irrational of its kind in this country." She said of the applicant:

> Due to his obvious intelligence and education, Mr. Davidovic has been one of the few fortunate registered people with good employment and housing, and a supportive social network. Nevertheless, he gives himself unstintingly to others, spearheading potentially ground-breaking litigation, identifying resources and networking opportunities, writing for and about registrants, tirelessly attending to those on the streets. He has great people and organizational skills to complement his brains and heart.

[77] The second attorney, a specialist in civil rights litigation since 1973, noted that the applicant served as a plaintiff in one of the American Civil Liberties Union of Florida's challenges to the sex offender laws. She wrote that he was honoured in 2014 by ACLU-FL's Miami chapter "…for his courage in working to enable former sex offenders to become productive members of society."

[78] We also received reference letters from his business associate with LeadCreations.com, where he has worked for several years, and from the principal of a financial institution for which the applicant provided legal services. Both had known the applicant since prior to the criminal proceedings and both spoke highly of the applicant's integrity, skill, commitment and work ethic.

[79] The applicant informed us that he wishes to practise criminal law if he is licensed in Ontario. He believes that his experience will enable him to assist others. He indicated that he was willing to restrict his practice to adult clients, if the panel regarded that as necessary.

[80] The applicant wants to move to Toronto because he has an uncle, two cousins, and his mother and grandmother there. All of them have been supportive; his mother spoke of a "…strong network of family and friends and community which stood by him...through good and hard times, and is there fully supporting him now." The applicant also saw a better future in Canada, because his experience and advocacy led him to the conclusion that the Florida laws that he violated were more restrictive and stigmatizing than the laws in Canada.

[81] Asked if he had taken measures in terms of education or treatment to become a member of the Canadian community, he said that he had not, although he intended to continue his counselling with Rev. Fleischer via Skype. The applicant, like any other foreign-trained lawyer or former lawyer seeking licensing in Ontario, was completing his educational requirements and examinations.

CONCLUSION

[82] We conclude that based on this Tribunal's jurisprudence and the evidence before us, the application will be granted.

[83] The following summarizes the conclusions of the panel by reference to the five *Armstrong* factors.

1. Nature and Duration of the Misconduct

[84] The applicant's misconduct was serious and morally reprehensible to the legal professions, the Law Society and the Ontario public, and it occurred over an extensive time period.

[85] All lawyers have a high degree of social responsibility in dealing with the public, especially the most vulnerable members of society. They are expected to uphold, not violate, laws intended to prevent the exploitation of children. The applicant's actions raise significant issues of trust and integrity.

2. Remorse

[86] Remorse and rehabilitation are interrelated, particularly in this case. The applicant made this point, in a different context, when he drafted his Relapse Prevention Plan. He saw full acknowledgment and recognition that he had gone badly wrong as the first step in a progression that included understanding of why this had happened, and the construction of a foundation to prevent it from happening again – in other words, as a rehabilitation plan.

[87] The applicant's recognition of his serious misconduct began almost the day the police attended at his home and told his wife they had a warrant to seize the family's computers. From that point onward, Mr. Davidovic made repeated statements of his remorse, which appear in a variety of places: his written and oral evidence, various court and Florida Bar documents, expert reports and interviews with the Law Society investigators.

[88] We list the breadth of consistent evidence because it is important not to be too fixated on the appearance and manner of the applicant's testimony at our hearing. An applicant in a good character hearing who must "overcome" the impact of prior misconduct is in a difficult position. Mr. Davidovic has had a very long time to think about what he did. He is also an intelligent man who is able to formulate a legal argument in his favour. In this regard, he has known for years what parole and professional regulatory authorities must be persuaded of if he is to be given a chance to realize his ambition of carrying on as a lawyer. At the risk of oversimplification, his focus must be on remorse and rehabilitation.

[89] Nothing in this scenario is unique to Mr. Davidovic. The trouble is that, in these circumstances, the same answers to crucial questions about what he did, why he did it, and what assurance he can provide about his future conduct, can be interpreted by a hearing panel as either rehearsed or convenient, at one extreme, or careful and consistent reflections of a high level of insight, at the other.

[90] Ms. Worley addressed this point in response to a question from the panel about the applicant's demeanour. She submitted that the panel had to decide whether the applicant is remorseful: whether he is just giving us the words; whether he really understands what he did wrong. She said he should not be faulted for reading a statement to us, even though it might sound rehearsed and wooden. She submitted that the applicant had the demeanour of an individual who was answering genuinely. Ms. Worley submitted that under questioning, the applicant was candid in his responses, did not shy away from answering difficult questions, and repeatedly took responsibility as someone who has been rehabilitated.

[91] Similar issues arise in making credibility assessments more generally, but the task of proving one's good character heightens the stakes and can lead to unpredictability of results. In our view, wherever possible, issues of recognition and

understanding that are central to licensing hearings should rely on more objective indications in the evidence than one's appearance or demeanour.

[92] We have that breadth and depth of evidence of remorse in the long history of proceedings since 2004, and there was nothing inconsistent in the applicant's evidence before us to cause us to question what appears in the written record and the ASF.

3. Rehabilitation

[93] The standard that the applicant must meet is not one of perfection. The issuance of a licence in any case cannot constitute a warranty or assurance that the licensee will never breach the public trust and will never commit a serious criminal offence.

[94] In other words, the applicant is not obliged to prove with 100% certainty that he will never reoffend. While under *Armstrong*, the risk of recidivism figures prominently in the good character analysis, there is no percentage threshold that qualifies as acceptable risk (*Levenson*, above, at paras. 84-85).

[95] The evidence before us indicates that the risk of recidivism is very low. Dr. Imhof stated that the risk of sex offences by the applicant against his family, or anyone else, is negligible. He has served his jail time; he has undergone court-ordered and voluntary treatment; and he received credit for his co-operation and behaviour in the penal system.

[96] From a qualitative and expert perspective, there is strong, objective evidence from Ms. Perez-Castro, the polygraph tests she refers to, and the court filings we described earlier, that the applicant understands the root causes of what he did. The magnetic attraction is no longer there. The applicant is a person who will never leave the root causes of his misconduct entirely behind him, but he has addressed those precipitating factors with insight, hard work, and continued treatment. He is determined to stay the course. He understands victimization in a way he did not earlier and he has changed his thinking.

[97] The applicant's reference letters support these findings and the applicant's own evidence about his rehabilitation and his will to succeed as a changed person. The letters also demonstrate the network of family and friends who are committed to support him in his quest.

4. Conduct Since the Proven Misconduct

[98] There is no evidence of recurrence, and no evidence of subsequent bad character. The applicant has no criminal record in Canada. In addition, he has donated a great deal of volunteer time to advocacy on behalf of persons who have committed similar offences and the reference letters speak to a sojourn in the business world where his work was regarded as trusted, reliable and competent.

5. Passage of Time

[99] It has been over 13 years since the commission of the offences, and nine years since the applicant completed his sentence. He has tried to reinvent himself, with a significant measure of success thus far, to make a new life.

ORDER

[100] The applicant's conduct in the years preceding 2004 was reprehensible, but it is not an automatic or permanent bar to his admission, given the evidence and positions of the parties, and in light of the applicant’s determination to be an ethical and productive lawyer.

[101] There are many Tribunal decisions in which the facts of the individual case weighed in favour of licensing or reinstatement, despite the earlier commission of serious criminal offences. In the recent decision in *Yeager*, it was narcotics trafficking and theft under. In *Baker*, the applicant committed criminal harassment relating to a family dispute. The applicant has thoroughly understood what he has done. He has worked very hard since then to reach this point in terms of rehabilitation.

[102] We therefore find that the applicant is of good character and grant his application for licensing as a Lawyer in Ontario.

[103] We assume that neither party is seeking costs, but if we are mistaken in this assumption, either party shall so advise the Tribunal Office within one week of the release of the Order.

[104] We wish to thank Ms. Worley and Mr. Davidovic for bringing this matter to a conclusion in an expeditious and co-operative way.

DISSENTING REASONS FOR DECISION

INTRODUCTION

[105] Paul M. Cooper (dissenting):– In 2015 the applicant applied to the Law Society of Upper Canada for an L1 licence to practise Law in Ontario. The responsibility of this panel is to determine whether the applicant is presently of good character.

[106] I have had the opportunity to review the decision of my fellow panel members and, respectfully, I disagree with their reasoning and conclusion.

[107] In my review of the evidence, I adopt the facts as set out by the majority (unless stated otherwise). I found the following evidence pertinent to my review of the totality of the record.

AGREED STATEMENT OF FACTS

The Applicant/Former U.S. Lawyer

[108] Mr. Davidovic was born in Montreal and is in his mid-forties. He is the son of immigrants, whose parents were survivors of the Holocaust. At the age of five, his family moved to the United States and settled in South Florida. He reports that he has lived a somewhat privileged lifestyle. He is a naturalized citizen of the United States.

[109] The applicant completed high school in 1990. He attended the University of Miami and graduated with his Bachelor Degree in Business Administration in 1993.

[110] The applicant later attended Saint Thomas University School of Law, completing his Juris Doctor Degree in May 1996 and was admitted to the Florida Bar on September 26, 1996.

[111] Additionally, the applicant became licensed as a financial securities dealer and continued, over the next six years, obtaining varying grades of principle licences through the National Association of Securities Dealers in the United States.

[112] The applicant was first married in 1998 and had two children. This marriage ended in 2007. He is now remarried.

Conviction

[113] On November 19, 2004, Mr. Davidovic appeared before The Honorable Paul C. Huck, a Judge of the United States District Court (Southern District of Florida, Miami Division) to enter a plea of guilty to the allegation of possession of child pornography. The Judge had the applicant/defendant sworn, and conducted a thorough and detailed plea inquiry. Mr. Davidovic pled guilty that he did knowingly receive/possess child pornography. Two downloaded file names were particularized and included the age and names of the child victims.

Consumer of Child Pornography

[114] On October 9, 2003 the Orange County California Sheriff's office had executed a search warrant at a third party residence in Irvine California and discovered evidence of child pornography from a file-sharing computer.

[115] On January 5, 2004, local police and the Miami Electronic Task Force executed a search warrant on the applicant's residence seizing two computers, hidden computer CD-ROMs, and floppy disks. Within days of the seizures, the applicant admitted sole ownership of the computer and storage devices and admitted he viewed pornography, including "some child pornography."

[116] The applicant stated that he had begun accessing child pornography in 1998. In the early years of the Internet he used both I-mesh and Mirc type bit torrent sharing software to search “pre-teen sex pics” and “teen sex pics.” He viewed, downloaded and saved child pornography.

[117] The downloaded images were hidden and secreted. There were in excess of 1,000 videos and photos of children between the ages of 5 and 17 engaged in sex. The forensic examination positively identified some of the images as known child sexual exploitation victims.

[118] The applicant disclosed to investigators that he knew he had a problem and was seeking help. In therapy he disclosed that his viewing of child pornography was a magnetic draw and almost a compulsion. The pursuit of child pornography was sexually motivated for him and it contributed to his sexual fantasies about children.

Sentence

[119] The applicant was initially sentenced on February 25, 2005 to 60 months in prison to be followed by a period of supervised release for three years, which included standard and special conditions for the applicant.

[120] At the time of sentencing the Court was aware of an anticipated motion to reduce the sentence below the five-year mandatory minimum. Mr. Davidovic had already completed “co-operation” by assisting the government in an identity fraud sting by posing “undercover.” There was no further co-operation required, however, the arrests had not yet been made. Judge Huck indicated his hands “were tied” in reference to the motion pending and the need for Mr. Davidovic to enter custody. The Judge never indicated his hands were tied in relation to the minimum mandatory sentence or its appropriateness in the case before him. In fact he stated:

> And in the absence of a minimum mandatory I may have - I don’t know what the guidelines would have been - I may well have gone under 60 months in exchange for some other set-offs because I do consider this to be a serious matter.
>
> …
>
> And I tend to agree that not every case needs to be handled with the same cookie cutter approach, but in this case my hands are tied.
>
> If you tell me there is a potential of a Rule 35 motion being filed I think it would be better to wait…

[121] As the motion date was indeterminate Mr. Davidovic was ordered to surrender on

March 14, 2005.

[122] The sentencing Judge added the following comments in respect of the possibility of this future motion:

> Hopefully there will be a basis for some kind of relief in this regard, but I would not hold out to anyone that there is going to be probation or something like that. That does not appear to be in the cards in this case.

[123] On August 17, 2006 a reduction of sentence for changed circumstances was granted. The period of incarceration was reduced from 60 months to 36 months and the supervised release was increased from three years to four years.

[124] Mr. Davidovic's sentence expired on October 29, 2011.

Surrender of Licence to Practise Law in Florida

[125] On December 20, 2004 Mr. Davidovic filed a Petition for Disciplinary Resignation with Leave to Re-apply after Three Years. On January 27, 2005 the Supreme Court of Florida granted this uncontested petition.

REPORTS

[126] Information from Frederick Fleischer, Josefina Perez-Castro, and Dr. Eric Imhof was entered on consent. Tribunal panels are often presented with medical or forensic reports to assist in their determination of a particular application. In this case, copies of certain reports were filed. These reports were all historical and not contemporaneous with the application for licensing. In addition, we received transcripts of recent interviews with the authors of the reports, one telephone interview, and a one-page e-mail from the applicant's therapist.

(i) Rev. Frederick Fleischer

[127] Rev. Fleischer is an Anglican Priest and also a "union psychoanalyst." He carries on a practice in "analytical psychology" in Miami and the Bahamas. He graduated in 1981 from the C.G. Jung Institute in Zurich as a diplomat in "analytical psychology." The applicant was first referred to Rev. Fleischer in 2003 and has participated in therapy since that time.

[128] Rev. Fleischer reported the applicant was referred to him after a "nationwide sting." The applicant disclosed that he had occasionally watched porn involving under aged children and that he "…found himself drawn to the subject, he just came upon it casually but then found that he had almost a compulsion to see it and so he saw quite a bit of it..."

[129] Rev. Fleischer further stated in his telephone interview of March 14, 2016:

> …we worked together for well over a year before we began to understand exactly what the problem was and it came to him through dream work. He dreamt a series of dreams that lead us to understand what had happened to him and why this porn had such a magnetic drawn on him.
>
> …
>
> …both of his parents are children of Holocaust survivors and his father particular was never connected with his parents, they just couldn't reconnect to another set of children after having lost the first set in the Holocaust. And the father always felt he wasn't good enough and wasn't important enough and his first son, Ron, had the burden of being his redeemer, so to speak. So he was literally robbed of his childhood and you might say experienced a kind of psychological rape.
>
> …
>
> …the symbolic meaning of an underage child having sex forced on him, or her, by an adult. And the symbolic meaning of that was that he had to carry his father's acceptability and respectability from the time he was an infant almost, so he was literally raped of his childhood.

[130] Additionally, Rev. Fleischer sent an e-mail to the attention of Law Society counsel dated November 29, 2016 in which he stated:

> …I find him [the applicant] to be strongly motivated to re-build his life in Canada. He wishes to do this, not only for his own sake, but for the sake of his relationship with his children, which has been contaminated by the prejudice of his former wife…

[131] Rev. Fleischer's interview discloses valuable information imparted to him by the applicant, otherwise (like the majority) I do not find his opinion of any evidentiary value.

[132] In my view, Rev. Fleischer's views are anecdotal at best. His description of his opinion of Mr. Davidovic, without comment of this as a "science," is callous, insensitive, and rejects any acceptance of the applicant's culpability for his own behaviour. It is outrageous for Rev. Fleischer to suggest the applicant's upbringing was akin to having his mind raped with the backdrop of children aged 5 to 17 who were in fact exploited, abused, and raped.

(ii) Josefina Perez-Castro

[133] The applicant was ordered, as part of his supervised release, to participate in a sex offence treatment program. Ms. Perez-Castro is a clinical social worker with Anaga

Psychotherapy Center who provided this service for the courts. The following were filed:

i. Anaga Psychotherapy Center Psychosexual Evaluation dated December 2, 2007

ii. Anaga Psychotherapy Center Addendum to Evaluation dated May 31, 2008

iii. Anaga Psychotherapy Center Termination Report dated June 6, 2010

iv. Transcript of Law Society Investigator Interview with Ms. Perez-Castro recorded March 4, 2016.

[134] The current mental status of the applicant, as described in the initial 2007 Anaga Psychosexual Evaluation, was that he was fully co-operative and honest about his feelings. He had tested low on the risk of recidivism. This was based on information available at the time of the interview. That information included the applicant's admission of guilt and "…that he became addicted to the computer and watching pornography. He started by downloading music and seeing "pop-ups" that made him curious and he went to those sites becoming more interested on hard core [pornography]. In that process he was given the option to look at child pornography and he became interested in it. He believes that there were very few images." (Emphasis added)

[135] An addendum to the evaluation of November 28, 2007 was reported to U.S. probation by letter dated May 31, 2008 subsequent to receiving the full court file. The addendum stated that the previous diagnosis was wrong and that the axis I diagnosis tested as Paraphilia, not otherwise specified. It further indicated "… his behavior with child pornography was sexually motivated."

[136] The July 6, 2010 Termination Report indicated that "His prognosis is good based on his participation and therapeutic process in the three and a half years he has been in our program." The report lacks any clarification on his condition as being diagnosed with Paraphilia.

[137] Additionally, during the interview with the Law Society's investigator, Ms. Perez-Castro acknowledged that she was not a doctor but a clinical social worker and that termination did not equate to recovery. The following is an excerpt from that recorded conversation:

> NI [investigator]: Okay. So as far as his recovery then, he was fully recovered because he would never been able to be terminated?

JPC: Ah, What do you mean – he was terminated from the program because they [*sic*] program felt, or I felt he got everything he needed, I mean he met his treatment plan.

[138] Ms. Perez-Castro went on to indicate that she had not seen nor obtained any of the results of the mandated polygraph. She also did not know how long he had viewed child pornography.

[139] Respectfully, Ms. Perez-Castro's views on risk of recidivism as reviewed in the March 4, 2016 conversation are anecdotal, not scientific nor did they address the outstanding and unresolved diagnosis of Paraphilia.

(iii) Dr. Eric Imhof

[140] Dr. Imhof conducted a psychological evaluation and risk assessment of the applicant on May 28, 2013. The report was intended for and produced on an unsuccessful application to permit Mr. Davidovic unsupervised access to his children. Dr. Imhof wrote in his letter dated June 16, 2013:

> In summary, while a diagnosis of Paraphilic (sexual deviance) Disorder was considered based on the underlying charges, this diagnosis was ultimately ruled out due to lack of evidence to suggest an enduring pattern of deviant sexual interest or behaviors involving prepubescent minors.

[141] However, in respect of testing, he stated:

> i. The applicant illustrated a mildly guarded and defensive approach to the MMP1-2.
>
> ii. The Abel Assessment of sexual Interest – 3 (AASI-3) indicated that the applicant's (sexual) interest in Caucasian adolescent and adult females.

[142] The report stated that some adult heterosexual males demonstrate this same type of sexual interest, however, with respect to Dr. Imhof's suggestion that this is in the normal range, it is difficult to accept that without Dr. Imhof's reconciliation of Mr. Davidovic's diagnosis in 2008 of Paraphilia, and the doctor's admission that he was not in possession of the applicant's complete file.

[143] Dr. Imhof reviewed the varying meta-analytic data/research available. The relevant data suggests:

(i) the risk to commit a further child pornography offence is approximately 2.3% to 4.4%;

(ii) the risk to commit a non-contact sexual offence is 1.5% to 5.3%; and

(iii) the risk to commit a contact sexual offence is 1.3% to 3.6%.

[144] The value of this data illustrates the overall or aggregate risk to the public of the applicant committing a further sexual offence is between 5.1% and 13.3%. The risk to the public may further be reduced by 27% for those who have attended specialized treatment, and are without incident over a long period of time. In this case, the best-case scenario for the applicant's risk of committing a further sexual crime is between 3.213% and 8.379%.

LETTERS IN SUPPORT

[145] The applicant filed, on consent, a book of character references.

TESTIMONY OF RONALD ORI DAVIDOVIC

[146] The applicant gave evidence. He testified in-chief by initially reading from a pre-written statement then, after an objection, he used this statement to refresh his memory. He testified that he recognized the behaviour was sexually motivated and abhorrent. Mr. Davidovic also stated the following under oath:

- I looked at child pornography on my home computer.
- I thought what I did in the privacy of my own home behind a close [*sic*] door wouldn't be known to anybody.
- For a few years prior, I looked at online pornography. I did not view pornography compulsively, and of the pornography I viewed, illegal pornography represented only a very small percentage of that.
- The majority of my - the pornography I looked at was conventional pornography, and of the illegal, the majority was teenage. It wasn't the age of my children at the time.
- The majority was adult pornography, but I had seen 15-, 16-, 17-year-olds, which are clearly under 18 and illegal.
- My viewing, I had seen everything. I had seen everything. What I sought out was teenagers, but in seeking out things, I found things that I wasn't in – I wasn't remotely even interested in.

[147] In addition, Mr. Davidovic testified that the Pre-Sentence Report, contained within the Book of Documents to the ASF, was incorrect.

DEMEANOUR EVIDENCE

[148] In this case, I put no weight on the manner in which the applicant testified.

PANEL QUESTIONING

[149] There are limits to inquiries that a hearing panel can properly make when faced with an agreed set of facts. Notwithstanding those limits, a panel has an obligation to consider and review all of the evidence and, should that evidence be deficient, the panel should dismiss the application. This obligation is rooted in the independence of the Tribunal.

[150] Additionally, there are limits to the inquiries that a hearing panel can properly make of witnesses who testify. The panel must refrain from undertaking the role of a party to the application, however the panel is entitled to seek clarification of evidence presented before it.

NOT A JOINT SUBMISSION

[151] At the commencement of the hearing, counsel for the Law Society informed the panel that the Law Society was contesting Mr. Davidovic's application. She also indicated that she may be persuaded to change her position once the evidentiary portion of the hearing was completed. In fact, after the applicant testified, the Law Society advised that it was not opposing the licensing application.

[152] Simply put, this is not a joint submission. The use of language by the majority, equating an Agreed Statement of Facts and documents filed on consent as being the same as a joint position confuses the role of the Tribunal. We must not abrogate our independent role.

[153] In *Law Society of Upper Canada v. Yungwirth*, 2004 ONLSAP 1, the appeal panel was of the opinion that the hearing panel was justified in making the findings it did with respect to the Agreed Statement of Facts:

> [35] We are of the opinion that the Hearing Panel was fully justified in making the findings it did with respect to the Agreed Statement of Facts. While the member may have stated that he had no dishonest intent and that he was an unwitting dupe, and the Law Society accepted that, the Panel was under an obligation to look at all of the Agreed Statement of Facts in coming up with its decision.

[154] A thorough review of the evidence in this case is required to ensure the burden of proof is met. In *F.H. v. McDougall*, 2008 SCC 53, Rothstein J., speaking for a unanimous court regarding the burden of proof stated:

> [45] To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with great care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.

BURDEN OF PROOF – MISCONDUCT/GOOD CHARACTER

[155] The burden of proof rests on the applicant to show on the balance of probabilities that he presently is of good character, despite any prior misconduct. In this case the prior misconduct was undisputed and proven on the balance of probabilities.

[156] Mr. Davidovic's activity involved the use of sophisticated software, in the early years of the internet, to troll for, view and download numerous images of child pornography. The secreted files included videos of children, as young as five years of age, engaged in sexual acts. For years the applicant targeted his search for preteen and teen pornography.

[157] In *R. v. Sharpe*, 2001 SCC 2 at para. 158, Chief Justice McLachlin describes these kinds of offences and the inherent harm:

> The very existence of child pornography, as it is defined by s. 163.1(1) of the *Criminal Code*, is inherently harmful to children and to society. This harm exists independently of dissemination or any risk of dissemination and flows directly from the existence of the pornographic representations, which on their own violate the dignity and equality rights of children. The harm of child pornography is inherent because degrading, dehumanizing and objectifying depictions of children, by their very existence, undermine the *Charter* rights of children and other members of society. Child pornography eroticizes the inferior social, economic and sexual status of children. It preys on pre-existing inequalities.

[158] Possession of child pornography is an abhorrent and serious crime. It is not minimized by the absence of aggravating conduct such as production or distribution.

[159] In this case, the reports filed had included statements that Mr. Davidovic did not engage in any "hands-on" sexual exploitation of children; however this is irrelevant. To suggest otherwise violates our community's rejection of sexual myths and its opposition to the minimization of this type of abhorrent conduct. Possession of child pornography is a serious crime that causes endless victimization. The absence of aggravating circumstances, such as participating in the production of child pornography or the distribution of child pornography, is not in any way mitigating to

the seriousness of this misconduct.

[160] The applicant was a licensed lawyer at the time of his misconduct, however, there is no greater burden of proof placed on him. Mark Sandler, writing for the panel in *Levenson v. Law Society of Upper Canada*, 2009 ONLSHP 98, articulated this point and reaffirmed that the burden of proof on the applicant in a good character hearing is the balance of probabilities:

> [71] In our view, the fact that all applications for licensing are now addressed under s.27 compels the conclusion that the same burden of proof applies to them all, namely proof on a balance of probabilities. To that extent, any suggestions to the contrary contained in the jurisprudence can no longer be sustained. While it may be difficult for a disbarred lawyer to prove that he or she should be licensed as either a lawyer or a paralegal, that is not a reflection of a heightened or different burden of proof, but of the seriousness of the prior misconduct that must be overcome in order to demonstrate, on a balance of probabilities, that he or she is now of good character.

[161] The seriousness of Mr. Davidovic's misconduct cannot be bootstrapped by conditions when residual concerns linger about his present good character. The Law Society, as the regulator, has an obligation to maintain high ethical standards in the public interest and to maintain the public's confidence in the legal profession and its ability to self-govern and regulate. The practice of Law in Ontario is a privilege, not a right.

[162] In *Levenson*, above , Mark Sandler writing for the panel cautioned as follows:

> [82] Although it is our view that the statute and jurisprudence compel this conclusion, it also brings with it a danger, namely that the burden of proof upon an applicant to demonstrate good character will be effectively "watered down" by hearing panels who might be tempted to address their concerns about good character through the imposition of terms and conditions. We cannot emphasize strongly enough that terms and conditions should never be utilized to permit applicants to be licensed who have failed to prove, on a balance of probabilities, that they are currently of good character. That would erode this precondition for licensing in an unacceptable way. Put another way, if a hearing panel remains unsatisfied that an applicant is currently a person of good character because of residual concerns about, for example, his or her integrity or the likelihood that he will respond to the pressures of practice by reverting to misconduct, his or her application should be refused...

ANALYSIS

Lack of Credibility

[163] In assessing this application to determine whether Mr. Davidovic is presently of good character, we must review and consider the totality of the evidence. The record on this application is lacking, and at times inconsistent. Mr. Davidovic is a poor historian and his testimony lacks reliability. The applicant was often inconsistent with the Agreed Statement of Facts, including:

i. The Agreed Statement of Facts indicated a five-year period of conduct culminating in the applicant's eventual indictment, arrest, and plea of guilty. Mr. Davidovic admitted to the search and access of both preteen and teenage child pornography. Yet, in his oral testimony, he minimized his conduct to occasionally viewing child porn of 15-17 year olds.

ii. The applicant disclosed to Ms. Perez-Castro that he viewed very few images. However, he agreed under oath at his guilty plea to over 1,000 downloads of child pornography of children between the ages of 5-17.

iii. Mr. Davidovic testified he did not view pornography compulsively but earlier disclosed to Rev. Fleischer his compulsive magnetic attraction to child pornography.

iv. Mr. Davidovic was a practising and a licensed lawyer at the relevant time of his misconduct yet he testified unbelievably that he thought what he did in the privacy of his own home would not be known.

The Armstrong Test

(a) Nature and Duration of Conduct

[164] The nature and duration of his conduct involved the viewing of materials that involve a severe exploitation of children. His misconduct started in 1998 and ended in 2003. This activity illustrates a habitual pattern.

(b) Remorse

[165] Remorse is an explanation of deep regret following an act that is considered wrongful. Remorse must not just be articulated but must be a real expression that underlies one's acknowledgment of one's own shameful act and its consequences. In this case, the applicant's statements of regret at the hearing focused on the nightmare he suffers or the shame he suffers and as he describes in his testimony the "handicap" of him being labeled as a consumer of child pornography by the community. Mr. Davidovic failed to recognize what he has done and only provides lip service to any victim empathy.

(c) Rehabilitation

[166] There is insufficient evidence that the applicant is rehabilitated. The misconduct was sexually motivated and he possessed a magnetic attraction. He has been diagnosed with non-specified paraphilia and this diagnosis remains unresolved.

[167] Mr. Davidovic need not provide any warranty that he will never breach the public trust. The test is not perfection, but one of present good character. The lack of proper diagnosis together with the risk of re-offending in this case illustrates the applicants' failure to satisfy his burden. He chose to provide dated reports, none of which addressed the simple and present context needed to explain whether paraphilia remains a concern. We have insufficient evidence to indicate his present state, diagnosis or prognosis.

(d) Conduct Since the Proven Misconduct

[168] The applicant has made good efforts to move on with his life and to give back to the community, both through court-sanctioned community service and with his own volunteer work as evidenced by character letters filed on this hearing. This enures to his benefit.

(e) Passage of Time Since the Misconduct

[169] There has been a passage of four years of time from the end of the Mr. Davidovic's sentence to his application for licensing by the Law Society.

CONCLUSION

[170] Mr. Davidovic is not required to warrant perfection but he must show, on the balance of probabilities, he is presently of good character. The applicant has failed to satisfy this burden. Despite his diagnosis of paraphilia in 2008, Mr. Davidovic has failed to provide us with any information on this unresolved issue that underpins the original illegal behaviour and misconduct. I do not believe the evidence shows on a balance of probabilities that he is rehabilitated nor that he fully comprehends victim empathy or remorse. For the above reasons, I would dismiss this application.