



The Law Society of Saskatchewan
Law Society of Saskatchewan v. Borden, 2016 SKLSS 10

IN THE MATTER OF *THE LEGAL PROFESSION ACT, 1990*
AND A REQUEST FOR RESIGNATION IN THE FACE OF DISCIPLINE
EQUIVALENT TO DISBARMENT BY ROBERT LAIRD BORDEN,
REASONS FOR THE DECISION OF THE CONDUCT INVESTIGATION
COMMITTEE FOR THE LAW SOCIETY OF SASKATCHEWAN

1. By correspondence dated April 11, 2014 directed to Timothy F. Huber at the Law Society of Saskatchewan (the Law Society), Robert Laird Borden (the Member), applied to the Conduct Investigation Committee of the Law Society of Saskatchewan (the Committee) to resign his membership in the Law Society in the face of discipline which is the equivalent to disbarment. The application by the Member to resign in the face of discipline was made pursuant to Rule 400(4) of *The Law Society Rules*.

2. Rule 400(4) of *The Law Society Rules* provides as follows:

400(4) A member may apply to the Conduct Investigation Committee to resign in the face of discipline deemed equivalent to disbarment

- a) With consent of Counsel for the Conduct Investigation Committee;
- b) At any stage of the investigation by a Conduct Investigation Committee prior to formal charges; or
- c) At any time after the formal charges, prior to the commencement of the Hearing.

3. The application to resign in the face of discipline was heard by the Committee by telephone conference call on June 15, 2016. Present on the telephone call was the Committee consisting of Lorraine St. Cyr as well as counsel to the Committee, Timothy F. Huber and the Member.

4. The Committee had available to it, the Member's application dated April 11, 2014 and an Agreed Statement of Facts and Admissions (the Agreed Statement) of Robert Laird Borden executed by Counsel on behalf of the Member on April 11, 2016 and also signed by Mr. Huber on behalf of the Law Society. The Agreed Statement is incorporated by reference to this decision and consisted of 6 pages and 1 tab for a total of 7 pages. For the purposes of this report, the Agreed Statement meets the requirements of Rule 400(5)(a) of *The Law Society Rules*.

5. In accordance with Rule 400(4)(a) of *The Law Society Rules*, counsel for the Committee, Timothy F. Huber, consented to the Member's application to resign in the face of discipline deemed equivalent to a disbarment.

6. As all pre-requisites to the application have been fulfilled, the Committee considered whether to grant the application to resign in the face of discipline being the equivalent to disbarment. Subject to Rule 400(5)(d) and undertakings in accordance with Rule 400(5)(e), the application by the Member is granted, subject to conditions.

7. In accordance with Rule 400(5)(d), the Committee can impose conditions on the application which include a time period of up to five (5) years during which the Member would not be entitled to reapply for admission and further include that upon any application for re-admission, the Agreed Statement would be considered.

8. In considering the time period in which the Member will not be entitled to re-apply for admission, the Committee considered that the Member entered into a voluntary undertaking to cease practice on November 9, 2011 and has not practiced since that date.

9. The Committee looked to both aggravating and mitigating circumstances surrounding the conduct of the Member which has been admitted to in the Agreed Statement. In determining the length of time as a bar against an application for re-admission, it is to be remembered that that determination is an administrative barrier to an application for re-admission and does not, in any way, represent a pre-determination of the Member's suitability for re-admission at that time.

10. The Committee considered the decision in *Rault v. The Law Society of Saskatchewan* 2009 SKCA 81. In *Rault*, the Saskatchewan Court of Appeal fixed a period of 3 years from the date of a Discipline Committee decision before that member could apply for re-admission. The Court took into account the length of time that the member had voluntarily withdrew from practice.

11. Taking into account the Agreed Statement of the Member, and the decision of the Saskatchewan Court of Appeal in *Rault*, the Committee is of the view that the time period before which the Member may re-apply for admission to the Law Society has been served given his voluntary undertaking to cease practice as of November 9, 2011 and the fact that he has not practiced since that time.

12. The Committee makes it a condition of the acceptance of the Member's resignation that the Agreed Statement will be considered by the Law Society of Saskatchewan on any application for re-admission by the Member. The Member took no exception to this at the application hearing.

13. In accordance with Rule 400(5)(e), the Committee may also require the Member to provide particular Undertakings which shall remain on the Member's file and be reviewed and considered upon any future application for re-admission. It is the view of the Committee that as a condition of the granting of the Member's application for resignation in the face of discipline,

two Undertakings shall apply in relation to any future application for re-admission. These Undertakings were agreed to by the Member at the telephone conference call of June 16, 2016 and are as follows: that prior to any consideration of his application for re-admission to the Law Society of Saskatchewan, the Member must first make full restitution of any Special Fund payments made on his behalf as a result of the actions referred to in the Agreed Statement; and that he provide a current medical assessment from an appropriate medical practitioner regarding the root causes of the personal issues that led to the misconduct. This assessment is to be included and will be considered in any future application for re-admission. These Undertakings are not binding upon the Law Society should the Member apply for re-admission, but the Law Society clearly has the ability to take these Undertakings into account in accordance with Rule 400(5)(e).

14. In conclusion, the Committee grants the Member's application to resign in the face of discipline which is equivalent to disbarment on the following Undertakings and conditions:

- a) that prior to any consideration of his application for re-admission to the Law Society of Saskatchewan, the Member must first make full restitution of any Special Fund payments made on his behalf as a result of the actions referred to in the Agreed Statement;
- b) that in conjunction with any future application for re-admission to the Law Society, the Member must provide a current medical assessment from an appropriate medical practitioner regarding the root causes of the personal issues that led to the misconduct. This assessment is to be included and will be considered in any future application for re-admission; and
- c) that the Agreed Statement of the Member signed by Counsel on behalf of the Member on April 11, 2016 (with all attachments) will remain on the Member's file and be considered by the Law Society of Saskatchewan in any future applications by the Member for re-admission and, in accordance with Rule 400(5)(g), the Agreed Statement shall be published in the same manner and to the same persons as the Notice required by Rule 495.

DATED at the City of Saskatoon, in the Province of Saskatchewan, this 18TH day of July 2016.

"Lorraine St. Cyr"

AGREED STATEMENT OF FACTS AND ADMISSIONS

In relation to the Application to Resign in the Face of Discipline (Equivalent to Disbarment) Pursuant to Law Society of Saskatchewan Rule 400(4):

Jurisdiction

15. Robert Laird Borden (hereinafter "the Member") is, and was at all times material to this proceeding, a practicing Member of the Law Society of Saskatchewan (hereinafter the "Law

Society”), and accordingly is subject to the provisions of *The Legal Profession Act*, 1990 (hereinafter the “Act”) as well as the *Rules of the Law Society of Saskatchewan* (the “Rules”).

16. On April 11, 2014, the Member, through his legal counsel, made an application to Resign in the Face of Discipline (Equivalent to Disbarment) pursuant to Law Society of Saskatchewan Rule 400(4) (the “Application”). Rule 400(5)(a) required the Member to provide admissions in relation to the conduct giving rise to the pending discipline proceedings. These are those admissions.

Particulars of Conduct

Misappropriation by Interception of Trust Money

17. John Allen, Inspector/Auditor for the Law Society attended at the Member’s office on November 4, 2011 in response to a call from the Member indicating that he had misplaced his trust deposit book. The meeting revealed two shortfalls in the Member’s trust account. In one instance the Member prepared a handwritten trust cheque in the amount of \$3,000.00, payable to himself, that appeared to be unrelated to any work completed on a particular file. The cheque was deposited to his general account, then transferred to the Member’s personal account. In another instance the Member had a certified cheque issued on his trust account in the amount of \$4,200.00, payable to a client, when that client had no funds in the Member’s trust account to draw from. The Member had already received payment from trust in relation to accounts he had rendered. The \$4,200.00 cheque was intended to be a refund to the client, however the Member never refunded the amount to trust that he has previously received. The Member had planned to remedy the shortfall with proceeds he was expecting to receive in payment of a large outstanding account on another file. He did not get the opportunity to replenish the trust account as the Law Society intervened before he could do so.

18. John Allen, Inspector/Auditor for the Law Society discussed these matters with the Member. As a result of this discussion, the Member entered into a voluntary undertaking to cease practice on November 9, 2011. The Member has not practiced since that date. His practice was taken over and wound down by a trustee.

19. During the subsequent investigation into the Member’s practice it became apparent that the Member had diverted trust funds belonging to clients, to his firm’s chequing account and then to his personal use, in breach of the trust accounting rules and in breach of the Code of Professional Conduct.

20. The Member’s trust account entered a state of deficiency because the Member had, on occasion, failed to deposit funds into trust after the amounts were recorded by his administrative staff. On occasion the Member took cheques that were intended for trust (and recorded as being deposited), and cashed them instead of placing them into trust. The Member’s misappropriation of trust funds from the mixed trust account, created a scenario where one person’s trust funds were covering another person’s trust shortfall. When the issue was discovered by the Law Society, the Member’s misappropriations manifested as a shortfall in the Member’s trust account totaling \$17,075.00.

21. At the time of the Member's suspension insufficient funds remained to satisfy all of the Member's trust liabilities. The impact of the deficiency was visited upon two estate matters (D.Z. and G.S.) being handled by the Member. Those two estates made successful special fund claims and were paid out despite the fact that the Member had not acted inappropriately in relation to those specific matters.

Misappropriation by Pre-Taking Trust Money

22. In relation to several matters the Member engaged in a practice of taking trust funds given to him in the form of retainers prior to those funds being earned. The retainers were provided by clients with the intention that specific work would be completed in connection with the retainer. The Member would either place the retainers into trust, and bill them on or about the same day they were received, or he would take the money (often cash) without first depositing it into trust. In some cases the Member started work on the client's legal matter but failed to earn an amount equivalent to the retainer taken. In other cases virtually none of the retainer amount was earned.

23. The interim suspension of the Member on November 9, 2011 rendered him incapable of earning any unearned portions of the retainers he had taken in advance of completing the intended legal work. Because the Member had taken the retainers in advance of earning any of the funds there was nothing in trust to refund to the clients in relation to the unearned portion of the fees.

24. The Member's taking of retainers prior to earning any portion of it represents a breach of the Law Society Rules. In circumstances where the Member was required to provide specific legal services in relation to the retainers received, he should have deposited the funds into his trust account pursuant to Rule 910. He did not. Had the funds been deposited into the Member's trust account in accordance with Rule 910, the Member would have only been entitled to withdraw the amounts after having earned them, pursuant to Rule 940. The retainers accepted and taken by the Member do not qualify as non-refundable "general retainers".

25. The Member did not provide the services for which the retainers were provided. Nor did the Member earn the retainers paid. Because the Member took the retainers before completing any work, then became incapable of completing the work, many clients received nothing for their money. In other cases, only a portion of the retainers were earned. Because the retainers were gone, refunds were impossible.

26. At **Tab 1** is a list of 8 clients who suffered a loss as a result of the Member's pre-taking of retainers. Each of these clients made successful special fund claims. The total special fund payout in relation to pre-taking of retainers was \$31,120.53.

Misappropriation by Billing for Unincurred Fees and Disbursements

B.W.

27. In relation to the B.W. matter, the Member represented his client in connection with a family law matter between August of 2010 and November 2011. In the context of this matter, the Member was to pay \$1,500.00 from money held in trust on B.W.'s behalf, to Lynn Greenhorn, former counsel to B.W.'s spouse. A letter dated July 15, 2011 was located on the Member's file, addressed to Ms. Greenhorn purporting to enclose a \$1,500.00 firm cheque. The cheque, while issued by the Member, never arrived at Ms. Greenhorn's office. The Member billed B.W. for the \$1,500.00 payment that was never actually conveyed to Ms. Greenhorn.

28. B.W. was subsequently required to make a separate payment of \$1,500.00 to Ms. Greenhorn's office via his new counsel.

29. In relation to the same family law matter, the Member billed B.W. \$200.00 for a disbursement for the filing of an Answer and Counter-Petition when the document had never been filed.

30. B.W. made a successful special fund claim in the amount of \$1,650.00.

M.J.

31. The Member represented M.J. in connection with a complex litigation matter lasting several years. In August of 2011, M.J. paid \$3,000.00 to the Member in relation to an Appeal of an earlier (and lengthy) civil trial. A short time later, the Member rendered a legal account to M.J. in the amount of \$1,650.00 in relation to the review of six weeks of trial transcripts. This charge was completely illegitimate as the transcripts had not yet been prepared by transcript services. \$1,417.00 was paid to the Member from trust in relation to that account. M.J. made a successful special fund claim in the amount of \$1,417.00.

Breach of Undertaking

B.B. and T.B.

32. The Member represented a vendor in a real estate deal. The property in question had various interests registered against it by his client. The interests were registered in connection with a prior civil fraud judgment on which the Member had acted for his clients as plaintiffs. New purchasers, B.B. and T.B. offered to purchase the property in question from the Member's client. As part of the transaction, counsel for the purchasers forwarded purchase monies to the Member on September 6, 2011 subject to trust conditions that the Member obtain a Release from the interest holders and that he cause the various interests registered on title by his clients to be discharged.

33. The Member accepted the payment, deposited it and, shortly thereafter, on October 5, 2011, disbursed it to his clients (after paying his legal account). He released this payment to his clients prior to securing from them the documents necessary to discharge the interests and prior to obtaining a release. He ceased practice on November 9, 2011, prior to securing the discharge of the interests. The interests remained registered against the new title belonging to B.B. and T.B. for an extended period of time before a discharge could be obtained.

Prior History

34. The Member has no prior discipline history.