The Law Society of Saskatchewan

WILLIAM KEVIN ROGERS
HEARING DATE: March 22, 2016
DECISION DATE: August 10, 2016
***Law Society of Saskatchewan v. Rogers*, 2016 SKLSS 11**

IN THE MATTER OF *THE LEGAL PROFESSION ACT, 1990*
AND IN THE MATTER OF WILLIAM KEVIN ROGERS,
A LAWYER OF SASKATOON, SASKATCHEWAN

DECISION OF THE ADMISSIONS AND EDUCATION COMMITTEE FOR THE LAW SOCIETY OF SASKATCHEWAN

INTRODUCTION

1. This matter has come before a Hearing Panel of the Admissions and Education Committee (the "A & E Committee") of the Law Society of Saskatchewan ("LSS") pursuant to Rule 176 of *The Rules of the Law Society of Saskatchewan* ("Rules"). Mr. Rogers has applied for reinstatement to the LSS after having Resigned in the Face of Discipline in 2011. This Hearing Panel of the A & E Committee must determine whether Mr. Rogers meets the suitability requirements of the Rules and whether his reinstatement is inimical to the best interests of the public, the members or would harm the standing of the legal profession generally, as set out in Rule 176 of the *Rules*.

2. The parties in this matter filed a joint book of exhibits. In addition to those exhibits, the Hearing Panel heard from three witnesses on behalf of Mr. Rogers:

(a) Cheryl Kimpinski, a friend and former lawyer who worked with Mr. Rogers;

(b) Larry Larsen, a psychologist who has assisted Mr. Rogers;

(c) Amanda Sawlor, Mr. Rogers' supervisor at the University of Saskatchewan; and

(d) Mr. Rogers who spoke on his own behalf.

FACTS

3. By way of a decision dated April 11, 2011, a discipline committee of the LSS accepted Mr. Rogers' application to Resign in the Face of Discipline. The decision on that matter is published

on the website of the LSS along with the Agreed Statement of Facts that outline the conduct of Mr. Rogers that led to his resignation. The decision of the discipline committee acknowledges that Resignation in the Face of Discipline is the equivalent of disbarment.

4. A brief outline of the conduct that led to Mr. Rogers' Resignation in the Face of Discipline is found in his legal counsel's submissions. The conduct in question included:

(a) Failure to respond to clients and the Law Society;

(b) Misappropriation of funds from his law firm's general account in relation to:

(i) $6,000.00 of misplaced savings bonds;
(ii) $17,000.00 to satisfy a portion of a claim by a third party;

(c) Falsified documents and providing them to clients and opposing counsel in relation to three matters;

(d) Misleading clients with respect to the status of:

(i) A foreclosure proceeding, including the existence of an action and the status of the file;
(ii) The service of a statement of claim and the status of a file regarding chamber applications and other steps in litigation;
(iii) An application to strike a Statement of Defense which he had fabricated.

5. The conduct in question took place between 2006 and 2009.

6. On November 1, 2009, Mr. Rogers signed an undertaking to not practice law. As noted, the discipline committee of the LSS accepted Mr. Rogers' request to Resign in the Face of Discipline on April 11, 2011.

7. As a result, Mr. Rogers has been out of the practice of law for over six years.

8. Mr. Rogers had been a member of the LSS from 1991 until he undertook to not practice law in 2009. Prior to the misconduct that led to Mr. Rogers resigning in the face of discipline, he did not have a discipline record with the LSS. By all accounts, Mr. Rogers was well regarded as a lawyer prior to his misconduct.

9. Matters started to unravel for Mr. Rogers when he became significantly depressed in 2006. Mr. Rogers indicates, as part of this hearing process, that:

(a) He has accepted responsibility for the actions that led him to resign from the profession. There is an outstanding civil claim related to his conduct where punitive damages remain at issue;

(b) He has personally apologized to lawyers and clients that were involved in the files that he mismanaged;

(c) His misconduct was the product of his depression. There was no specific triggering event for his conduct. However, Mr. Rogers' evidence was that he would avoid working on files and withdrew in and outside of the office. He started concealing his problems which led to his misconduct.

11. In October, 2009, Mr. Rogers contacted Lawyers Concerned for Lawyers. He was referred to Larry Larsen, a psychologist. Mr. Larsen described Mr. Rogers as having severe depression during his initial visits. He was confused, depressed, agonizing and suffering from suicidal ideations.

12. Mr. Rogers was prescribed anti-depressants and continued using this medication until 2012.

13. Mr. Larsen has continued treating Mr. Rogers, although the extent of his involvement lessened significant over time. He indicated that Mr. Rogers currently sees him on an "as needed" basis. Mr. Larsen indicated that Mr. Rogers has not suffered the symptoms that led to his misconduct for a significant period of time.

14. Since 2010, Mr. Rogers has worked at the University of Saskatchewan. He initially worked as a "contract specialist". In the summer of 2015, Mr. Rogers was promoted to the position of Associate Director, Research Services and Ethics Office. He manages 11 individuals in this role. Ms. Sawlor testified that Mr. Rogers has done very well in his positions at the university. He has undertaken a position with a high volume and significant stress and handled the position with aplomb.

15. Mr. Rogers indicated that his plan is to initially be readmitted as a non-practicing member of the LSS. He wants to be readmitted to allow future flexibility should opportunities arise which would require that he be a member of the LSS. Should Mr. Rogers seek to become an actively practicing member of the LSS, he agreed that conditions may be placed on his practice. Counsel for the LSS did not take a position as to whether Mr. Rogers should be readmitted. Rather, he sought to ensure that all of the pertinent information was before the Hearing Panel and that the panel has a full appreciation of the legal tests for re-admission after disbarment or Resignation in the Face of Discipline.

THE APPLICATION FOR READMISSION

A. The Applicable Rules and Interpretation of those Rules

The portions of the Rules applicable to the case at bar state:

> "176. (1) This section applies to the following applications in this Part of the Rules:
>
> …

(f) reinstatement of a Former Member who was disbarred, resigned in the face of discipline pursuant to Rule 400(4) or resigned instead of continued proceedings pursuant to Rule 400.1; and

…
(2) In any application under this Part, applicants have the onus of proving that:
(a) they are Suitable to Practise;
(b) they are competent to perform the required duties, as applicable; and
(c) granting the application would not be inimical to the public interest or the members and would not harm the standing of the legal profession generally.

187. (1) The Hearing Panel may:
(a) approve the application with or without conditions; or
(b) deny the application.

(2) The Hearing Panel decision shall be by majority vote.

(3) The Hearing Panel shall provide written reasons for its decision and advise the applicant of a right to apply to the Admissions Panel under section 23(4) and 24(3) of the Act where applicable.

(4) When the Hearing Panel gives written reasons for its decision, it shall take reasonable precautions to avoid including information that is subject to solicitor-client privilege.

(5) The Society may cause to be published any order or decision of a Hearing Panel in any or all of the following:

(a) a newspaper of general circulation in each community in which the member maintained an office;

(b) the Law Society of Saskatchewan website;

(c) CanLII or any other decision publishing entity approved by the Benchers."

18. The term "Suitable to Practice", as set out in Rule 176, is defined in Rule 149, which states:

"Suitability to Practise" means honesty, governability, financial responsibility and respect for the rule of law and the administration of justice and "suitable to practice" has a corresponding meaning."

19. As set out above, the Applicant has the onus of establishing that he meets the requirements of Rule 176(2)(a) to (c). The primary issues in this particular case are:

"a. Honesty;
b. Governability; and

c. Whether granting the application would be inimical to the public interest or the members and would harm the standing of the legal profession generally."

20. In assessing whether a member should be reinstated after disbarment or a Resignation in the Face of Discipline, there is a common law test that has been employed to consider such an application. In *Nolin v. Law Society of Saskatchewan,* (2010), the panel described this test as follows:

> "10. In *Bates*, at paragraphs 13 to 17, the following is stated:
>
> A readmission panel should take into account ten principles and eight considerations when determining whether an applicant has met all six elements of the test for readmission. There is some overlap among the concepts.
>
> The ten principles are:
>
> 1. The Society regulates the legal profession in the public interest.
>
> 2. Public confidence in the legal profession is more important than the fortunes of any one lawyer.
>
> 3. The ability to practice law is not a right but a privilege.
>
> 4. Once the privilege is lost, it is hard to regain.
>
> 5. The privilege may be regained no matter how egregious the conduct that led to its loss provided sufficiently compelling evidence of rehabilitation is presented. This will be hard to do.
>
> 6. The privilege may be regained where . . . the misconduct was committed as a result of a psychiatric or medical disorder that is very unlikely to reoccur because the disorder has been successfully treated.
>
> 7. The privilege may be regained where . . . the misconduct did not have its origins in a medical or psychiatric disorder, but the applicant has established genuine and enduring rehabilitation.
>
> 8. The legal profession of all professions has a special responsibility to recognize cases of true rehabilitation; however, as rehabilitation will be claimed by virtually all applicants, independent corroborating evidence is required to establish that the rehabilitation is genuine and enduring.
>
> 9. The burden of proof on readmission is close to, but is not as high as, the criminal law burden of beyond a reasonable doubt. The burden of proof on an applicant seeking readmission is at least as high as the burden on the Society when it seeks to disbar a lawyer.

10. The reinstatement must not be detrimental to the integrity and standing of the bar, the judicial system, or the administration of justice, or be contrary to the public interest.

The eight considerations . . . are:

(a) The applicant's character, standing and professional reputation in the community in which he resided and practiced prior to disbarment;

(b) The ethical standards which he observed in the practice of law;

(c) The nature and character of the charge for which he was disbarred;

(d) The sufficiency of the punishment undergone in connection therewith, and of the making or failure to make restitution where required;

(e) His attitude, conduct, and reformation since disbarment;

(f) The time that has elapsed since disbarment;

(g) His current proficiency in the law;

(h) The sincerity, frankness, and truthfulness of the applicant in presenting and discussing the factors relating to his disbarment and reinstatement.

The six elements of the test for readmission following disbarment . . . that applicants must meet, to a very high standard, are as follows:

Applicants must show by a long course of conduct that they are persons to be trusted, who are in every way fit to be lawyers.

This "long course" will rarely if ever be less than ten years, often reaching permanence, in cases of serious professional misconduct such as dishonesty, even where the misconduct arose out of a medical or psychiatric disorder since successfully treated. The earlier the application, the more careful the panel should be in deciding whether the applicant has proved his or her trustworthiness and fitness to be once again a member of the Society.

Applicants must show that their conduct is unimpeached and unimpeachable, and this can only be established by evidence of trustworthy persons, especially members of the profession and persons with whom applicants have been associated since disbarment.

Such evidence should demonstrate that the witnesses are sufficiently aware of the salient features of the disbarment as to be able to give informed and relevant

evidence concerning the applicant. Otherwise, the weight given to their evidence will be reduced.

Applicants must show that a sufficient period of time has elapsed before an application for readmission will be granted.

Disbarment is the most serious penalty a Law Society tribunal can impose. It must last considerably longer than the longest suspensions Law Society tribunals tend to impose.

Applicants must show that they have long since removed themselves from the circumstances that led to their disbarment and from any unsettled or unresolved tentacles of the aftermath. The requirement that sufficient time must elapse is designed partly to ensure that an applicant is clear of the brambles that arose from the thorny ground of his disbarment, and partly to ensure as much as possible that the decision to readmit is supportable, will not redound (*sic*) harmfully to the Society, and is in the long-term interests of the public and the profession. For example, if, at the time of the application for readmission, an applicant is still engaged in litigation arising out of the subject matter that led to the disbarment, even if the litigation is an effort to clear his name, then, absent compelling reasons to the contrary, the panel is likely to regard the application as premature. The applicant may well clear his name, but until then, the Society, having disbarred him for the conduct for which he now seeks absolution in the courts, is entitled to wait until the absolution is obtained before considering readmission.

Applicants must show that they have entirely purged their guilt.

In most cases, where they have expressed both a sincere admission of guilt and genuine remorse, this means showing that they have fully extricated and distanced themselves from the conduct and circumstances that led to disbarment. In cases where they sincerely believe they were not guilty, it means showing that the issue of their guilt is sufficiently removed from their current circumstances as to be nearly moot when the panel considers their fitness for readmission. We adopt the reasoning in *HISS*:

> Simple fairness and fundamental justice demand that the person who believes he is innocent though convicted should not be required to confess guilt to a criminal act he honestly believes he did not commit. For him, a rule requiring admission of guilt and repentance creates a cruel quandary: he may stand mute and lose his opportunity; or he may cast aside his hard-retained scruples and, paradoxically, commit what he regards as perjury to prove his worthiness to practice law... Honest men would suffer permanent disbarment under such a rule. Others, less sure of their moral positions, would be tempted to commit perjury by admitting to a non-existent offence (or to an offence they believe is non-existent) to secure reinstatement. So regarded, this rule, intended to

> maintain the integrity of the bar would encourage corruption in these latter petitioners for reinstatement and, again paradoxically, might permit reinstatement of those least fit to serve...Accordingly, we refuse to disqualify a petitioner's reinstatement solely because he continues to protest his innocence of the crime for which he was convicted. Repentance or lack of repentance is evidence, like any other, to be considered in the evaluation of a petitioner's character and of the likely repercussion of his requested reinstatement.

In determining whether guilt has been purged, a panel may also take into account other factors as appropriate such as (1) how much the applicant has suffered as a result of the disbarment, and (2) what, if any, restitution has or could have been made.

Applicants must show by substantial and satisfactory evidence that it is extremely unlikely that they will misconduct themselves if permitted to resume practice.
The first duty of the Law Society is to protect the public interest, especially public confidence in every member of the Society. Nothing is more corrosive to that confidence than the spectre of a group of lawyers readmitting a lawyer who was expelled for dishonesty only to have the lawyer commit another act of dishonesty. A readmission panel must be convinced to very close to beyond a reasonable doubt, including by independent corroborating evidence, that the lawyer will not re-offend.

Applicants must show that they have remained current in the law through participating in continuing legal education since the termination of their membership in the Society, or that they have a plan acceptable to the Society that will enable them prior to readmission to become sufficiently current in the law to fulfill their responsibilities as lawyers.

An applicant must meet all six elements of the test; otherwise, the application should be denied."

21. With respect to the six elements of the test outlined above, the panel in *Nolin, supra* modified two portions of the *Bates* test.

22. Firstly, with respect to the fifth element and ninth consideration of the *Bates* test, the panel acknowledged that, in keeping with the Supreme Court's direction in *McDougall v. F.H.* (2008) 3 S.C.R. 41, the standard of proof to apply is the civil standard which is the balance of probability test, not the "close to beyond a reasonable doubt" standard referred to in *Bates, supra*. However, evidence must always be "clear, convincing and cogent" in order to satisfy the balance of probabilities test.

23. Secondly, the panel in *Nolin* did not accept that a "demonstrated long course of conduct" as identified in the first element of the test must necessarily last ten years. However, if the

application is made soon after disbarment, the scrutiny of the applicant's evidence is more focused.

24. The Hearing Panel accepts that it is within the framework above that we are to consider Mr. Rogers' application for readmission.

B. Application of the Test to the Applicant

25. Prior to applying the six elements of the *Bates* test, it is worth noting that the evidence in this case demonstrated that Mr. Rogers' misconduct was connected to his mental health issues that commenced in or around 2006. As a result of his depression, Mr. Rogers had significant issues in handling and making progress on files. In order to conceal his inactivity, Mr. Rogers lied about his lack of progress on files, fabricated documents and took funds from his firm to compensate clients. His misconduct was serious and significantly detrimental to several clients.

26. However, the evidence further demonstrates that Mr. Rogers has made significant progress since 2006. Mr. Larsen discussed Mr. Rogers' treatment and the improvements that he has seen in Mr. Rogers since 2009. Mr. Rogers has been gainfully employed in a non-legal position, although tangentially related to some elements of legal work, for several years since his resignation. Ms. Sawlor, his supervisor, spoke positively about Mr. Rogers' work, his trustworthiness and his dependability. Mr. Rogers appears to have taken responsibility for his actions and indicates that he has apologized to those that he has harmed by his conduct.

27. Against that backdrop, the Hearing Panel considers the six elements of the *Bates* test.

(a) Applicants must show by a long course of conduct that they are persons to be trusted, who are fit to be lawyers;

28. In applying this element of the test, the "long course of conduct" to be considered is the period of time since the misconduct took place. In this case, the Applicant resigned in the face of discipline in 2009. He has been out of the practice of law for approximately 6 ½ years.

29. Over the past 6 ½ years, the evidence demonstrates that the Applicant has maintained and excelled at a position described as high stress and with a high workload. All of the evidence, particularly from Ms. Sawlor, suggests that Mr. Rogers has been trustworthy and dependable.

30. Mr. Rogers sought and obtained appropriate counselling services to address his mental health concerns.

31. Given the foregoing, Mr. Rogers has shown that he is a person to be trusted over a long course of time.

(b) Applicants must show that their conduct is unimpeached and unimpeachable, and this can only be established by evidence of trustworthy persons, especially members of the profession and persons with whom applicants have been associated since disbarment;

32. In the context of this case, this was the most significant concern of the Hearing Panel. The evidence from the member consisted of testimony from Ms. Kimpinski, Ms. Sawlor and Mr. Larsen.

33. Ms. Kimpinski testified that she believed that Mr. Rogers was of good moral character, that he was trustworthy and that she believed that Mr. Rogers would not be a danger to the public if re-admitted. From the perspective of this element of the *Bates* test though, Ms. Kimpinski did not appear to know the details of Mr. Rogers' misconduct. She indicated that it was her view that any misconduct that Mr. Rogers may have engaged in would have been caused by his mental health issues.

34. Likewise, Ms. Sawlor saw Mr. Rogers as being trustworthy and was supportive of his application of re-admission. She too though did not appear to know the details of Mr. Rogers' misconduct. She indicated that, as being a practicing member of the LSS was not required for Mr. Rogers' position at the university, she did not seek out information related to his discipline history.

35. Mr. Larsen was aware of Mr. Rogers' misconduct. He was of the opinion that general advertising of one's misconduct to the world at large would not generally be expected and that the same should not be considered a lack of trustworthiness or transparency. As noted by counsel for the LSS in his written submissions, the Applicant "is not expected to carry a placard detailing his prior misconduct to one and all". Mr. Larsen, like the other witnesses, was supportive of Mr. Rogers' application and viewed him as being trustworthy.

36. There is no doubt that Mr. Rogers' evidence would have been significantly more persuasive had all of his witnesses been aware of the precise nature of his prior misconduct. All of them though appeared to be aware that Mr. Rogers had engaged in conduct that led to him not being a member of the LSS.

37. Thus, while the weight to be given to the witnesses' testimony on this element of the test is somewhat reduced given that several witnesses did not know the precise nature of the misconduct, on balance the Hearing Panel believes that Mr. Rogers has met the requirements of this element of the test. Witnesses have spoken positively of Mr. Rogers' conduct over a prolonged period of time. Mr. Rogers has taken serious steps to address his depression issues which led to the misconduct. Although the evidence was not perfect, the Hearing Panel believes that Mr. Rogers has demonstrated, through the testimony of trustworthy individuals that he is of good moral character and unlikely to re-offend.

38. The Hearing Panel further takes comfort in Mr. Rogers' understanding of the issues that led to his misconduct. Mr. Rogers testified that, where he has had issues with delay and procrastination, he has put in place reporting mechanisms with his supervisor and reaches out to Mr. Larsen.

(c) Applicants must show that a sufficient period of time has elapsed before an application for readmission will be granted;

39. In this case, Mr. Rogers has been out of the practice of law for over six years. Under Section 53(3)(a)(i) of *The Legal Profession Act, 1990*, a Hearing Panel can require that a member be disbarred and not allow for a period of re-admission for a period not exceeding five years. In this case, Mr. Rogers' time has exceeded the five-year period. Thus, the period of time appears to be sufficiently long.

40. The issue raised by counsel for the LSS is that Mr. Rogers has outstanding civil matters related to his misconduct. As counsel for the LSS notes, the commentary to the third element of the *Bates* test says that an applicant should be "clear of the brambles that arose from the thorny ground of his disbarment." It is further noted in *Bates* that "…, if, at the time of the application for readmission, an applicant is still engaged in litigation arising out of the subject matter that led to the disbarment, even if the litigation is an effort to clear his name, then, absent compelling reasons to the contrary, the panel is likely to regard the application as premature."

41. According to the testimony at the hearing of this matter, the civil claim (Q.B. No. 1325 of 2010) remains extant. However, liability has been admitted. There is an outstanding claim for punitive damages. Given that the conduct has been admitted and general damages paid, the Hearing Panel determines that this constitutes "compelling reasons" to deviate from the general rule that all litigation related to the applicant's conduct must be concluded prior to considering an application for re-admission.

(d) **Applicants must show that they have entirely purged their guilt;**

42. As noted earlier, the Hearing Panel accepts that Mr. Rogers' misconduct related to his mental health issues. Since 2009, Mr. Rogers has taken sincere and appropriate steps to address his issues.

43. His misconduct has been acknowledged to the LSS and efforts have been made to apologize to victims.

44. It appears to be common ground that Mr. Rogers has met the requirements of this element of the test.

(e) Applicants must show by substantial and satisfactory evidence that it is extremely unlikely that they will misconduct themselves if permitted to resume practice; and

45. Given that the misconduct in this case is attributable to mental health issues, the real and significant progress made by Mr. Rogers since that time suggests that it is unlikely that Mr. Rogers would engage in further misconduct if permitted to return to practice.

46. Mr. Rogers testified to having some issues in 2014 with procrastination with his new employment. Importantly, Mr. Rogers was able to self-identify his issues and obtain appropriate assistance.

47. Given Mr. Rogers' lack of difficulties in his work environment since 2010, the haring panel believes that it is unlikely that there would be future misconduct if Mr. Rogers is permitted

to resume practice. The Hearing Panel further takes comfort in the approximately 15 years of practice without discipline issues engaged in by the member prior to his depression in or around 2006.

(f) Applicants must show that they have remained current in the law, or that they have a plan that will enable them to become sufficiently current in the law.

48. Mr. Rogers is a member of the Canadian Association of Research Administrators, has followed a number of webinars related to law and attended and presented at both regional and national conferences for university employees. He also attended the full session of the 2016 Canadian Bar Association's Mid-Winter Meeting.

49. In addition to the foregoing, the parties have agreed that, should Mr. Rogers be successful in his application, he will attend such educational programming as determined appropriate by the Executive Director of the LSS if he seeks to become an Active Member of the LSS.

50. Given the foregoing, the Hearing Panel believes that Mr. Rogers has a plan to become sufficiently current in the law to meet the requirements of this element of the test.

CONCLUSION

51. The Hearing Panel, after considering the factors outlined above, determines that Mr. Rogers has met the test to be re-admitted to the LSS.

52. However, given the prior conduct, it is appropriate to put conditions in place with respect to Mr. Rogers' re-admission if he seeks to change his status to an Active Member. The parties appear to be in agreement, and the Hearing Panel accepts, the following conditions:

> In the event of Mr. Rogers' application to return to Active Member status, he is required to, pursuant to Law Society of Saskatchewan Rule 175(3), provide relevant information to the Executive Director of the Law Society to rebut the presumption of incompetency associated with his absence from Active Member status for a period in excess of 5 years. Mr. Rogers may be required to fulfill certain educational requirements as determined by the Executive Director depending on how much time Mr. Rogers has been away from Active Member status.
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> In the event Mr. Rogers applies for a return to Active Member status, he shall only be permitted to return to Active Member status subject to the following conditions:
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> 1. Mr. Rogers shall not engage in the practice of law in a private practice environment;
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> 2. Mr. Rogers shall not operate or have signing authority on a trust account or any other bank account belonging to his employer; and

3. Mr. Rogers shall continue to attend periodically with a psychologist or counselor, at least 2 times per calendar year and shall provide proof of his attendances with that service provider to the Law Society of Saskatchewan.

In the event of Mr. Rogers' return to Active Member status and the activation of the above noted conditions, the Member may, after the expiry of 5 years from the date of his resumption of Active Member status, apply with appropriate supporting materials to the Executive Director for a determination as to whether or not some or all of the conditions should continue, be amended, or be removed.

There shall be no order as to costs.

Dated at the City of Saskatoon, in the Province of Saskatchewan, this 10th day of August, 2016.

Sean M. Sinclair, Chair

Dated at the City of Prince Albert, in the Province of Saskatchewan, this 5th day of August, 2016.

Ronald G. Parchomchuk

Dated at the City of Moose Jaw, in the Province of Saskatchewan, this 4th day of August, 2016.

David M. Chow