

IN THE MATTER OF *THE LEGAL PROFESSIONS ACT*, 1990
AND AN APPLICATION FOR REINSTATEMENT
BY MICHAEL NOLIN

BETWEEN:

MICHAEL DEAN NOLIN

(APPLICANT)

AND

THE LAW SOCIETY OF SASKATCHEWAN

(RESPONDENT)

**REASONS FOR THE RECOMMENDATION OF THE
ADMISSIONS AND EDUCATION COMMITTEE**

A. INTRODUCTION

1. Michael Nolin was disbarred by the Benchers on October 3, 2008. The Benchers further ordered that Mr. Nolin not be eligible to apply for reinstatement (readmission) until one year after the date of his disbarment. He applied for reinstatement by written application dated October 20, 2009. The application for reinstatement was referred to the Admission and Education Committee (the Committee) by the Executive Director. The Committee determined that a hearing under Rule 230 of the Rules of The Law Society of Saskatchewan (the Rules) should be held. The hearing was held on February 26, 2010 with closing arguments on March 16, 2010. The Committee now provides its written reasons for its recommendation to the Benchers regarding the application for reinstatement.

B. THE STATUTORY AND RULES CONTEXT

2. *The Legal Professions Act, 1990* (the Act) contains the following relevant provisions:

Section 29(1) A person who has been disbarred may apply for reinstatement in accordance with the Rules after any period fixed by the Hearing Committee or Discipline Committee has expired.

Section 55(2) . . . The Discipline Committee may make any one or more of the following orders:

- (a) assessing any penalties or imposing any requirements that it considers appropriate, including but not limited to:
 - (i) directing that the member be disbarred and setting the period, not exceeding five years, during which the person is not eligible to apply for reinstatement

. . .

3. The Rules, with respect to applications for reinstatement by a disbarred member, provide in Rule 211 that after the Executive Director has referred such an application to the Committee and the Committee determines, in its discretion, to conduct a hearing under 230, the Committee will then recommend to the Benchers whether the applicant should be reinstated. Pursuant to Rule 230(13), at the Committee hearing the onus is on the applicant to satisfy the Committee that he or she has met the requirements of the Act or the Rules.

4. By Rule 211, the Committee, in providing its recommendation to the Benchers, should address the criteria that the Benchers are to apply, such criteria being:

Rule 211(5) No person shall be reinstated without first satisfying the Benchers that . . .

(b) the applicant is of good character and repute and is otherwise fit to become a member of the Society; . . .

(e) the reinstatement is not inimical to the best interests to the public or the members or would harm the standing of the legal profession generally.

5. Considering the recommendation of the Committee, the Benchers may then approve an application for reinstatement by a two-thirds majority in the case of a former member who has been disbarred, or refuse the application. Where the Benchers reinstate a member they may impose terms and conditions that will apply to the member upon reinstatement and they may vary or remove those terms and conditions [Rule 211(3) and (4)].

6. Thus the issue, pursuant to the Act and the Rules, for both the Committee and the Benchers is to a large part a determination as to whether the Applicant has satisfied both the Committee and the Benchers that, among other things, the applicant is of good character and reputation and is otherwise fit to become a member of the Society and that his reinstatement is not inimical (harmful) to the best interests of the public or the members or would not harm the standing of the legal profession generally.

C. THE “COMMON LAW” CRITERIA

7. In addition to the statutory and Rules based criteria outlined above, there appears to be common ground between the Applicant and the Respondent that there are further considerations for reinstatement after disbarment based upon the jurisprudence developed from other law societies in Canada faced with similar applications. The Committee finds that the “common law” criteria that has developed elsewhere should apply to applications to the Law Society of Saskatchewan in similar situations, for a number of reasons.

8. Firstly, the consideration by other committees from other Law Societies of the common law criteria has been the subject of review and analysis to the extent that it can be said that the development of the criteria is mature, well reasoned and understandable both to an applicant and to the responding law society. Secondly,

the criteria fulfills the overriding principle of protecting the public interest or, to paraphrase the words of our Rules, is not harmful to the best interests of the public. Thirdly, the Applicant in the present case has accepted, for the most part, the applicability of this criteria. Fourthly, as law societies across the country strive for some uniformity in admissions practice and protocol to help foster mobility and standardization, it is important that the Law Society of Saskatchewan be consistent with the reinstatement/readmission standards established elsewhere in this country. Fifthly, the criteria has generally been endorsed by academics including Gavin MacKenzie in *Lawyers and Ethics* and in *Lawyers, Ethics and Professional Regulation*, Alice Wooley, Richard Devlin, Brent Cotter and John M. Law.

9. In this context, the Respondent has offered the decision in *Bates v. Law Society of Upper Canada*, 2007 ONLSHP 124 which attempts to summarize and somewhat codify previous decisions of the Law Society of Upper Canada and other law societies on reinstatement applications and in turn states ten principles, eight considerations and then, finally, six elements for the consideration of applications from disbarred members. Based on the numerous decisions from other jurisdictions, primarily Ontario, many of which were referred to in the brief of the Applicant, the Committee accepts that the decision in *Bates* is an appropriate summary of earlier decisions.

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:

1. 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.

2. 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.

3. 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.

4. 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.

5. 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.

6. 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.

D. THE DISPUTE ON THE COMMON LAW CRITERIA

11. At the hearing, the Applicant took issue with two aspects of the principles, considerations and elements cited above. These are: 1) the standard to be met by the Applicant, recognizing his onus of proof, and 2) the question of whether Section 55(2)(a)(i) of the Act affects the presumption of the “semi-permanence” of disbarment in the context of the commentary referring to a ten year period of time. In *Bates*, it was held that the assumed permanence of disbarment is no longer part of the test but is a general rule or prediction given the high standard to be met by an applicant.

1. The Standard of Proof

12. Regarding the first issue, the Applicant refers to recent case law in the Supreme Court of Canada that establishes that in civil cases the universal standard of proof should be based on “the balance of probabilities” with respect to meeting an onus of proof. For the purposes of this set of recommendations, the Committee is prepared to accept that the balance of probability test is appropriate. In *McDougall v. F. H.* (2008) 3 S.C.R. 41 the Supreme Court of Canada indicated that there is but one standard of proof in civil cases and that is the balance of probability test. However, evidence must always be “clear, convincing and cogent” in order to satisfy the balance of probabilities test. Though there is

language in the considerations (#9), and elements (#5) to be considered that calls for a higher standard, we are prepared to recommend that the balance of probabilities standard of proof should apply to all decisions made with respect to the Applicant. We accept the fairness of applying a standard to the Applicant that the Respondent would have in meeting its onus in proving conduct unbecoming a lawyer in other proceedings.

13. Further, in *Levenson v. Law Society of Upper Canada*, 2009 ONLSHP 98, *Law Society of Upper Canada v. Evans*, 2008 CAN LII 34276, *Wickham v. Law Society of Upper Canada*, 2008 ONLSHP 1 and *Saini v. Law Society of Upper Canada*, 2010 ONLSHP 5, the use of the balance of probabilities standard was approved to overlay and modify, as necessary, the burden of the test placed on an applicant.

2. The Effect of Section 55(2)(a)(i)

14. On the other issue, the Applicant argues that Section 55(2)(a)(i) of the Act abrogates or influences the application of any principle regarding any presumption of semi-permanence of disbarment. This provision states that the Benchers, through its Discipline Committee, may order that a member be disbarred and set a period, not exceeding five years, during which the person is not eligible to apply for reinstatement. In essence, the Applicant argues that because Saskatchewan, apparently uniquely among the provinces, has recently passed legislation that prohibits a penalty of disbarment with an accompanying order of no ability to apply for reinstatement, the Legislature must have intended to remove this common law presumption. The Applicant argues that the legislature must have known of the common law context in passing the legislation and thereby was expressly or impliedly attempting to change the common law as it relates to a presumption of semi-permanency or the passing of a very long period of time prior

to any successful reinstatement application. The Applicant argues that the legislative changes are similar to minimum sentencing law.

15. The Applicant also suggests that as the Benchers chose a one year bar for an application for reinstatement in the Applicant's case, this is further suggestive of an abrogation or ease of any firm requirement of a long period of time passing before a reinstatement application.

16. The Respondent challenges this analysis and states that the legislative amendment has not changed the common law. The Respondent refers to an excerpt of Hansard of November 22, 2005 wherein the Minister of Justice is quoted, referring to the proposed amendment. The reference in Hansard is as follows:

At present, members who are disbarred may apply for reinstatement virtually immediately. This Bill provides, as part of a sentencing when a lawyer is disbarred, the discipline committee may fix a period not exceeding five years that the former member must wait before he or she may apply for reinstatement.

The Respondent argues that the reference in Hansard indicates that the intent of the amendment was to remove the ability of a disbarred member to apply immediately after disbarment, perhaps to prevent applicants with no chance of success from wasting Law Society resources. The Respondent also points out that the ability to apply for reinstatement is a different matter than being reinstated. The temporal bar on reapplication is simply a further measure that can be imposed on a disbarred member. It further argues that disbarment may still be permanent despite any minimum or maximum time placed on a disbarred member's ability to reapply and that the imposition of a one year restriction for reapplication may be considered more severe than a disbarment with no restriction on the timing of reapplication.

17. The Committee concludes that it is unable to read into the amendment anything other than what it states on its face. Though we see merit in the position of both the Applicant and the Respondent regarding the possible effect of the amendment, we are not prepared to find that it signals a legislative intent either way. We thus find that the common law criteria is still to be applied and that the presumption of some permanence to disbarment should be maintained. Further, the examination of a reinstatement application is to be made at the time of the application, based on the facts and circumstances at that time. A shorter reapplication bar than the maximum imposed at the time of sentencing should not create an expectation of a favourable application at the immediate expiry of the bar. In short, the temporal bar is nothing more than a prohibition on reapplication.

E. THE APPLICANT'S PREVIOUS PRACTICE

18. The Applicant was first admitted as a lawyer in September, 2000. Despite the fact that he had a criminal record involving criminal offences between 1991 and 1994 regarding obstruction of justice, obstruction of a police officer and possession of stolen property over \$5000.00, he was admitted to the Law Society of Saskatchewan. Until the events began leading to his disbarment, the Applicant appears to have had a discipline free record though there were frequent referrals to the Professionals Standards Committee of the Law Society. He was the subject of a fairly scathing decision of the British Columbia Labour Relations Board regarding his attempts to influence labour relations processes and proceedings in that province. This resulted in an insurance claim on his record. At the time of his misconduct leading to disbarment he was practicing with the firm of Cuelenaere, Kendall and Katzman, practicing primarily in the area of civil and criminal litigation.

F. THE APPLICANT'S DISBARMENT

19. The facts leading up to the Applicant's disbarment on October 3, 2008, are fully set out in the sentencing decision dated April 1, 2009. Before referring to the charges to which the Applicant pled guilty to, and an analysis of the written decision, in some ways it is suffice to say that the Applicant, if not at the time of sentencing, certainly at the time of the reinstatement application hearing was fully content to call the matters leading to his disbarment as "theft". The Committee therefore finds that there is no lingering question with respect to reinstatement as to whether the original actions leading to disbarment, and the decision to disbar itself, did or did not involve clear integrity offences. It was theft and the Applicant expressly concedes that it was. In that regard the particulars of the offences become less important for the purpose of this Committee's work.

20. The offences for which the Applicant was disbarred, and to which he pled guilty to at his sentencing hearing, were:

1. Guilty of conduct unbecoming a lawyer in that he did misappropriate certain funds held in trust on behalf of clients and in particular in three separate instances.
2. Guilty of conduct unbecoming a lawyer in that he prepared, or cause to be prepared, documents including accounting records, cheques, trust statements, each of which contained information which was false.

21. The sentencing decision, at paragraphs 69 and 101, characterized the Applicant's misconduct as involving theft, concealed by fraud. There was a theft of funds from the Applicant's firm and employer to whom he was in a position of trust and owed a fiduciary duty. The theft "was accomplished through the use of and misappropriation of trust funds held for the benefit of the firm's client".

22. The thirty-one page sentencing decision speaks for itself. However there are two aspects of the decision that we believe are worth referencing for consideration by this Committee. The first is with respect to the issue of the causative effect of the Applicant's mental health on his misconduct and the other is with respect to comments made in the sentencing decision relative to the prospect of the Applicant's rehabilitation. For the former, the issue was revisited in the hearing before us and is the subject of a separate analysis below. For the latter, though unable to bind us or a future Bencher decision on reinstatement, it should we think be properly the subject of some consideration.

23. On the causation issue the sentencing decision in summary says the following at paragraphs 85, 86, 93, 96 and 106. The Benchers, in providing their reasons for sentencing, indicated that they were not satisfied that there was a causal connection between the potentially mitigating factor of mental health issues and the Applicant's misconduct. They went further to say that there was no suggestion in the evidence that the Applicant lacked the clarity of thought and good judgment to appreciate that his actions were wrong and incompatible with the public's expectation of integrity and good character. There was no evidence found of a diagnosis of depression that, of itself, mitigated his moral conscience and ability to know that fraud and theft was wrong. The sentencing decision found that there was no expert or other evidence that indicated that his depression would have compromised the Applicant's ability to understand his actions as fraudulent and incompatible with his duty of integrity as a lawyer.

24. The second aspect of the sentencing decision, regarding the future potential of the Applicant, will be quoted:

107. Mr. Nolin does present some potential for reform. He has insight into his personal problems. He has the support of his family, peers and his

counselor. He still enjoys the high regard of colleagues who spoke well of him in their letters of support.

109. In this case, the prospects for reform are such that a lengthy bar against an application for readmission is not required to protect the public interest.

110. It is therefore the decision of this Discipline Committee that Mr. Nolin be disbarred without eligibility to reapply for readmission until 1 year from the date of this decision.

111. There is no order as to costs.

G. THE EVIDENCE AT THE REINSTATEMENT HEARING

25. At the reinstatement hearing, the Applicant acknowledged and accepted the jurisdiction of the Committee and that it was properly constituted.

26. The Applicant called four witnesses including himself. The Applicant indicated that he is attending therapy, with Mr. Coates, every five weeks. He is on anti-anxiety and anti-depressant medication as prescribed by his family physician for the Applicant's diagnosed depression and anxiety. He stated that his mood has improved. In his view, his prior, apparently untreated, depression had manifested itself as anger, that he would hold grudges and that such an attitude was a defensive mechanism. Over time, his law firm became "the enemy" and he felt he became "delusional" with respect to his feeling that he had the right to the money that he misappropriated. A sense of entitlement developed. He blamed some or all of this on an abusive background and environment during his childhood and thereafter. He stated that he has learned to ask for help and learned that the problem was him and not the firm or other factors. He stated that he understands the need to continue his medication. He particularly stated that he now has insight as to his health and his need to monitor same and to be open with his community.

He further testified that he does feel shame and remorsefulness and knew that what he did was wrong both then and now.

27. Before the Committee, the Applicant was adamant that he would never repeat the misconduct and would never put himself in a position again where it might happen.

28. Since his disbarment, he has found employment with Saskatoon Community Mediation Services as a case worker. In that capacity, his duties include low level criminal matters, interacting with Crown Prosecutors, defence counsel and other lawyers. It appears that he finds the work meaningful. He has engaged in courses in mediation and taken other steps to remain current in the law. His long term goals are to seek a position with Legal Aid or to work in private practice with his brother, though he did indicate that he does not like the stressful nature of private practice.

29. With respect to the disbarment decision and the reasons therefore, the Applicant takes issue with the finding of a lack of causation between his underlying mental health issues and his misconduct. To that end he references the evidence of his therapist. He also takes some issue with the reasons of the sentencing decision which indicated that he appeared to be functioning well as a lawyer. The Applicant points to a Law Office Practice Review which he believes shows that he was not functioning as a fully competent lawyer around the time of the misconduct in 2007 which led to the disbarment. This practice review was not in evidence at the sentencing hearing (and for this Committee is not of any consequence). The peculiar matter of amassing thousands of dollars in parking tickets around the time of his misconduct was also argued to be related to his causative dysfunction.

30. The Applicant then testified that, as evidence that he could be trusted, the Law Society, upon learning of his misconduct, did not choose to seek an immediate suspension. Rather it imposed practice conditions on him, pending the discipline hearing and sentencing, that continued in effect until he stopped practicing law due to his loss of employment with the Cuelenaere law firm.

31. In further support of his application, the Applicant filed numerous letters of reference which included thirteen from currently practicing lawyers, one from a provincial court judge, ten from non-lawyers and one from his brother, which can be added to the list of references from currently practicing lawyers. As to the letters from currently practicing lawyers, with the obvious exception of his brother, the Committee acknowledges an impressive array of independent endorsements from the Bar including some quite experienced criminal defence lawyers and, as stated, one member of the judiciary.

32. In addition to his oral testimony, the Applicant, as part of his written application, further outlined his personal turmoil and his “undiagnosed mental health issues” and reiterated in further detail his remorsefulness, his subsequent employment, his efforts at remaining current with the law and other matters.

33. The Applicant’s witnesses included his wife and his brother. Both testified to the Applicant’s change in behaviour since the events that led to his disbarment. This was described as alternatively, a lack of anger, more involvement with family matters, being calmer, more rational and more content with life. In particular, the Applicant’s wife talked about his suicidal nature in the fall of 2007 and his improvement since.

34. The Applicant further called as a witness Dennis Coates, a Registered Psychologist, whose report of October 1, 2009 was also filed at the hearing. Mr.

Coates outlined his initial interactions with the Applicant which took place in the context of marriage counseling. He indicated that he first met the husband and wife in June of 2007 and described them as being “in crisis”. He described his initial observations of the Applicant as being quite negative. However, he noted that in attendances in November, 2007 (after the discovery of the misconduct) sessions with the Applicant revealed “a completely different man. Gone were the pretences, the image and the rough exterior. The superiority was gone as was the blame”.

35. At this point, the counseling/therapy sessions focused on the Applicant and certain modalities of therapy were engaged. Mr. Coates’ skepticism was stated to continue however until July 2008. In his report of October 1, 2009 and at the hearing, Mr. Coates was prepared to say that he was satisfied the Applicant has now made a “fundamental” and not just an “adjustive” shift. In his report he stated “I have little doubt that the depth of this change, already more profound than most, attest (sic) to the significant level of his changes”. His report ends in stating that in spite of his strong, miserable, first impression, the “quantity, quality and consistency of this shift is remarkable”.

36. In cross-examination, Mr. Coates was confronted with the sentencing decision’s finding of no evidence of causation between the misconduct and his diagnosis. Mr. Coates believes that there was some relationship though he candidly admitted his inability to provide specific clinical evidence. His report stated that in his view, the Applicant’s previous behavior was not the result of a character flaw as much as a de-evolution of his thinking. “This cognitive impairment drove his judgment.”

37. Finally, Mr. Coates indicated that ongoing therapy was indicated and that if ordered and consented to he would establish an ongoing reporting relationship with the Law Society.

H. THE CAUSATION ISSUE

38. As indicated above, there is a disconnection between the Benchers' findings of fact in the sentencing decision as to causation and the Applicant's view. Both at the sentencing hearing and more particularly at the reinstatement hearing, the Applicant maintained that there was some causative effect between his misconduct and his mental health diagnosis. However, as a Committee, we find that the apparent conflict is not determinative. We state this for a number of reasons. Firstly, the Committee had the benefit of the Applicant's hindsight and attempts to heal himself since the sentencing hearing. Secondly, the evidence of Mr. Coates at the reinstatement hearing, if not definitive, is at least worthy of consideration. Thirdly, the reinstatement hearing process is distinct from the sentencing decision. Fourthly, in applying common sense, the undisputed diagnosis was likely to have some effect on the Applicant and his behaviour. Though it may not excuse, it may well, and likely does, explain.

39. Therefore this Committee accepts that the causation determination in the sentencing decision should not preclude its consideration in this subsequent reinstatement decision. We accept that the Applicant's underlying mental health issues be considered in the context of his misconduct, but more importantly, in the context of his present health.

I. THE APPLICATION OF THE TEST TO THE APPLICANT

40. The Committee finds that the Applicant, in his testimony and written submissions, was sincere and truthful. We accept the evidence that he has come a long way in his treatment of underlying mental health issues and that significant improvements have been shown in that regard. We accept that he has insight into his past and current condition and behaviours. We accept that his remorse is genuine. It is with this basis that we then consider the application of the common law, statutory and Rules tests to be met by the Applicant. We will begin with the common law criteria, as applicable, as this will go a long way to address the criteria found in Rule 211(5).

41. For the purpose of the application of the common law test, the Respondent chose to assert and address three of the six elements outlined above, specifically elements 1, 3 and 5. We assume by this that, if not admitted, the Respondent is not opposed to the conclusion on elements 2, 4 and 6 that:

2. The Applicant has shown his conduct to be unimpeached and unimpeachable and established by the evidence of trustworthy persons, especially members of the profession and persons with whom the Applicant has been associated with since disbarment. We take it, and agree, that the letters of reference address to a large degree this element.
4. The Applicant has entirely purged his guilt.
6. The Applicant has shown that he has remained current in the law.

42. We agree we are then left with the three remaining elements of the common law test.

1. A Demonstrated Long Course of Conduct

43. The Applicant must show by a long course of conduct that he is a person to be trusted and in every way fit to be a lawyer. We have earlier indicated that we do not believe that Section 55(2)(a)(i) removes or significantly mitigates against this principle. Although we are not prepared to recommend the ten year rule referenced in the commentary on this element, we do accept that where the misconduct leading to disbarment is based on dishonesty and even where the misconduct arose out of a medical or psychiatric disorder since successfully treated, the scrutiny on whether the Applicant has proved his trustworthiness and fitness to be a member of the Law Society is more focused where an application is made early. The Respondent argues that it has only been eighteen months since the disbarment. While it acknowledges that Mr. Nolin has made progress since his disbarment it argues eighteen months does not amount to a “long course of conduct”.

44. Placed against the requirement of a long course of conduct is the sentencing decision of the Benchers to allow an application for reinstatement after one year. The Committee feels that this is not a valid consideration, as mentioned above, in ameliorating the common law criteria in this regard. We do note that the sentencing decision acknowledged that the Applicant’s prospects for reform were such that a lengthy bar against an application for readmission was not required to protect the public interest. Of course, the ability to apply for reinstatement is different than the granting of same, and the assessment of the Rules based and common law criteria must be made at the time of the application.

45. The Applicant argues that in fact it has been twenty-seven months that have elapsed if the “long course of conduct” is to be considered from the date of the

misconduct, being September, 2007. He further argues that the one year proscription against reapplying should mean one year before reinstatement.

2. Whether a Sufficient Period of Time has Elapsed

46. We accept that elements 1 and 3 are connected. However the commentary to this element contrasts a disbarment with a long suspension. The Respondent points out that there have been suspensions ordered by past Benchers in excess of two years (*D. Hagen*, June 11, 2003 and *R. LaPorte*, February 23, 2006). It argues that the principles of general deterrence and public perception must be kept in mind with respect to the distinction between suspension and disbarment and in that regard states that maintaining public confidence in the legal profession is more important than the fortunes of any one lawyer. Further, this element requires that the Applicant has “long since” removed himself from the circumstances that led to his disbarment. A long lapse of time is designed to ensure that any decision to reinstate is fully supportable, will not rebound harmfully on the Law Society and is in the long term interests of the public and the profession. The Respondent goes on to state that reinstatement after a brief period of time has the potential of putting the profession and the public at risk should there be a relapse. The Respondent acknowledges that no amount of time will ever be sufficient to allow for certainty in this regard but it submits that eighteen months does not reach the appropriate minimum time that must pass before reinstatement after disbarment should be considered, except for perhaps the most “extreme” cases.

47. The Applicant, at least in his written brief to the Committee, did not specifically comment on this third element other than to indicate that it overlaps with element 1.

3. Likelihood of Future Misconduct

48. Element 5 requires the Applicant to show by substantial and satisfactory evidence that it is “extremely” unlikely that he will misconduct himself again if permitted to resume practice. On this element again the first duty of the Law Society, which is to protect the public, becomes the primary focus. This includes maintaining the public confidence in every member of the Law Society. Though as we have earlier indicated, the standard of proof on the Applicant is the balance of probabilities test (still requiring clear and cogent evidence), the commentary is instructive by also referencing the need for convincing evidence in this regard, including independent corroborating evidence.

49. The Respondent points to the lack of conclusive evidence of causation, as discussed above. However, as also indicated above, we are not prepared to dismiss the possibility, or even the likelihood, of a causal connection. The Respondent also points to the Applicant’s previous criminal record and the matter of the British Columbia Labour Relations Board, as well the issue of amassing parking tickets, to show other examples of poor judgment that were argued to be unrelated to the Applicant’s mental health.

50. The Applicant argues obviously that he has shown by substantial and satisfactory evidence that it is extremely unlikely that he will misconduct himself if permitted to resume practice and it is his strong insight into his past behaviour which sets him apart. He further argues that the Law Society’s decision to not immediately suspend him in the fall of 2007, but rather impose practice conditions, indicated an acknowledgement on the part of the Respondent that the public interest could be protected by such conditions. Finally, the Applicant points to the sentencing decision at paragraphs 107 and 109 to indicate that the Benchers disbarring the Applicant also foresaw at that time the potential for

reform. The evidence of Mr. Coates together with the Applicant's evidence on his changes should also be considered under this element.

4. Rule 211(5)

51. Rule 211(5) provides two overarching criteria. The first is that the Applicant be of good character and repute. The second is that reinstatement not be inimical (harmful) to the best interests of the public or the members or would harm the standing of the legal profession generally.

52. With respect to the question of good character, the Respondent did not specifically address the issue. The Applicant in his brief quoted from the *Law Society of Upper Canada v. Shore* 2008 ONLSAP 6 which adopted the following:

Good character denotes moral or ethical strength, distinguishable as an amalgam of virtuous attributes or traits which undoubtedly include, among others, integrity, candor, empathy and honesty. . . .

Because every person's character is formed over time and in response to a myriad of influences, it seems clear that no isolated act or series of acts necessarily defines or fixes one's essential nature for all time. . . .

Thus, past conduct is no automatic bar to admission, now or in the future.

An applicant's character must be assessed as fairly and as dispassionately as possible. It is also important to acknowledge that no applicant should be held to a standard of perfection. . . .

The panel needs to consider (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.

53. Elsewhere in the Applicant's brief it was noted that the passage of time since an applicant's last proven misconduct is highly relevant to whether he or she is presently of good character. But proof of good character does not simply involve showing that an applicant has not committed misconduct for an extended

period of time. Instead what must be shown is a genuine and complete change in the applicant's character for the better. The passage of time is but one factor that informs that factual analysis. (See *Levenson*, supra, at paragraph 86.)

54. The second aspect of Rule 11(5) is, for the most part, subsumed in the elements of the common law test and need not be expressly and separately analyzed.

J. THE APPLICATION OF CONDITIONS, IF ANY

55. In the event this Committee thought that reinstatement was appropriate at this time, the Applicant and the Respondent agreed to certain draft conditions if the Committee sought fit to recommend conditions. It was acknowledged that these agreed to draft conditions are similar, though not necessarily the same, as the practice conditions imposed upon the Applicant pending the outcome of the discipline proceedings against him. The draft conditions are:

1. Mr. Nolin shall only engage in the practice of law pursuant to the conditions contained herein. Should Mr. Nolin fail to meet any of the aforesaid conditions, at any time, his license to practice law shall immediately be suspended and such suspension continue until compliance has been achieved or conditions varied to remedy any default by the Chair of the Discipline Committee of the Law Society of Saskatchewan.
2. In order to return to practice, Mr. Nolin shall be subject to the following terms and conditions:
 - a) Mr. Nolin shall only practice law, as an employee of another practicing member of the Law Society of Saskatchewan approved by the Chair of Discipline.
 - b) Mr. Nolin must practice under the supervision of another practicing member of the Law Society of Saskatchewan approved by the Chair of the Discipline and under a set plan of supervision

and both the supervisor and the plan of supervision must be approved by the Chair of the Discipline Committee.

c) It would be preferable for the supervising lawyer to be the employer but may be two different persons if approved by the Chair of Discipline.

d) In the event Mr. Nolin wishes to change approved employers or supervising lawyer he must obtain the approval of the Chair of Discipline for the change. All of the preceding terms and conditions continue to apply to Mr. Nolin at the new location.

e) Mr. Nolin will not accept or receive any money, other negotiable property or consideration connected with the practice of law on behalf of clients.

f) Mr. Nolin will not directly access the books, records or accounts of his employer or firm. Any disclosure of information required by Mr. Nolin in the practice of law from the books, records or accounts of the firm will be made by a partner of the firm or such person as the partners may designate. Books, records or accounts as used herein does not include law firm client material.

g) Mr. Nolin is to continue attending with Mr. Coates or another registered psychologist, psychiatrist or registered counselor as follows:

i) The Law Society is to receive confirmation from Mr. Nolin's care provider that Mr. Nolin is attending regularly scheduled counseling sessions.

ii) Mr. Nolin shall continue to attend regularly scheduled counseling sessions with a registered psychologist, psychiatrist or registered counselor, until such time, as these regular sessions are, in the opinion of his care provider, no longer necessary.

iii) Mr. Nolin shall authorize his care provider to report to the Law Society if Mr. Nolin discontinues attending regularly scheduled counseling sessions, or misses two consecutive appointments.

iv) Mr. Nolin's care provider or his designate shall provide to the Executive Director of the Law Society quarterly reports and Mr. Nolin shall sign an Authorization

and Direction enabling the Executive Director, or his designate, to communicate with Mr. Nolin's care provider or designate, as required.

v) In the event Mr. Nolin changes his care provider to another registered psychologist, psychiatrist or registered counselor, Mr. Nolin shall forthwith advise the Law Society of the change, and provide the necessary authorizations to allow the Law Society to verify compliance with the preceding paragraphs.

h) Mr. Nolin is to continue attending with Dr. Strydom on the following basis:

i) Mr. Nolin shall continue to take any and all prescription medication prescribed by his physician, Dr. H. Strydom for the treatment of depression and/or other mood disorders, and he shall continue to take said medication until his general physician, Dr. H. Strydom opines that the medication is no longer necessary.

ii) Mr. Nolin shall attend any and all scheduled medical appointments.

iii) In the event Mr. Nolin discontinues taking the prescribed medication or fails to attend two consecutive medical appointments, Mr. Nolin authorizes his general physician, Dr. H. Strydom to report his conduct to the Law Society.

iv) In the event Mr. Nolin changes general physicians, from Dr. H. Strydom to another medical doctor, Mr. Nolin shall forthwith advise the Law Society of the change, and provide the necessary authorization to allow the Law Society to verify compliance with the preceding paragraphs.

3. These conditions shall remain in effect for a minimum of two years, after which time, Mr. Nolin may apply to the Chair of Discipline to vary or remove any or all of these terms and conditions of practice.

56. As to the consideration of draft conditions, the Respondent urges the following caution. Conditions should not be used to cure a deficient application that has not otherwise met the test for reinstatement. Quoting *Levenson*, supra, it

was asserted that terms and conditions of practice 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. The decision states that terms and conditions might be imposed where the hearing panel is satisfied that an applicant is currently of good character but that public confidence and the regulation of lawyers would be enhanced through the terms and conditions. Terms and conditions might reinforce the continuing commitment of an applicant to attend for psychiatric counseling where the prior misconduct was rooted in medical problems. In other words, and this Committee accepts, terms and conditions should not be utilized primarily to “fill the gap” of any unease or uncertainty about, or failure to find, the likelihood that an applicant otherwise meets the various aspects of the test for reinstatement. This Committee accepts however that terms and conditions may play a proper role in the overarching concern of all of the aspects of the test, that being the protection of the public.

K. CONCLUSION

57. The Committee commends the Applicant for his significant improvement in his behaviour and in addressing his mental health issues. He has gone a considerable way in addressing his issues and addressing, either by factual foundation or by logical argument, the elements to be satisfied relevant to his reinstatement application.

58. The Committee in summary acknowledges the following positive aspects of his application:

- (a) The clinically documented fundamental shift in his attitude and behaviour towards himself, others and presumably the world.

- (b) His acknowledgement of the benefit of past therapy and the need for ongoing therapy and medicinal assistance.
- (c) His insight into his past behaviour and his current need to remove himself from past stressors.
- (d) The Benchers at the time of his disbarment acknowledged his potential for reform.
- (e) The Law Society at the time of the discovery of his misconduct did not seek immediate suspension but rested on practice conditions as protecting the public interest.
- (f) He has the support and endorsement of an impressive array of lawyers and non-lawyers knowledgeable about the Applicant and his disbarment.
- (g) He has shown remorse, acknowledgement of his actions while attempting to explain same.
- (h) He has sought gainful employment in an area connected to the practice of law with apparent good results.

59. Against this list of positives is the clear direction from the criteria to be applied that the real test is the test of time.

60. The need to establish a long course of conduct and that a sufficient period of time has elapsed works against the Applicant's application at this time. The Committee believes that in order for it to be satisfied that all of the disputed elements of the test have been complied with, the Applicant needs to demonstrate ongoing compliance and growth with his therapy and his employment in a law related field. Continued employment in the community, interacting with others in the Bar and in a successful manner needs to be further demonstrated. Together with his therapy, the true nature of the rehabilitation of the Applicant will hopefully become clear. As well, his general conduct since the proven misconduct needs further time to be assessed in a favourable way, compliant with the test.

Simply put, the requirement for a demonstrated long course of conduct is incompatible with the time that has expired, whether eighteen months or twenty-seven months. Either length of time is still less than the longest suspension ordered by the Law Society. Further time simply helps to ensure that any decision to reinstate is fully supportable to meet the overarching goal of public protection. There are no “extreme” or “extenuating” circumstances to abridge the requirement for a further passage of time.

61. Based on the above, the Committee strongly encourages the Applicant to continue his indicated ongoing therapy as recommended by his therapist and to continue his present, or a related line, of employment. Building upon the record that has been presented to the Committee during this application, we do not believe that an excessively long period of time needs to elapse prior to a further reapplication. We have attempted to outline in as much detail as reasonable the present facts and circumstances relevant to the Applicant at this point in time. It therefore may be open to a subsequent committee to accept the same and review the applicable portions of the test as against the further passage of time. This may assist the Applicant in determining the evidence to lead in such a possible subsequent reapplication.

62. Any subsequent reapplication may be heard by a differently constituted Committee. It is not our intention to in any way prejudge the outcome of any future application. Such reapplication will be determined on the facts and circumstances at the time of that application. Nor is it our intention to provide false hope or false expectation that such a reapplication will be met with little resistance if the status quo is maintained or slightly improved upon. However, it is our view, based on the facts and circumstances presented at the hearing that in as little as one year’s time the Applicant may well be able to meet all of the elements of the test by that further passing of time, building on this application. However,

for the present it is the Committee's recommendation that the application be denied.

63. Rule 230 contemplates two further matters, one being the issue of publishing confidential information considered during the reinstatement hearing [Rule 230(15)] and the second being the issue of costs [Rule 230(17)]. The Committee feels that these must be addressed in turn.

1. Confidential Information

64. Though the intent of Rule 230(15) appears to allow protection of confidential information with respect to the Applicant and the evidence he may present, the Committee feels that due to the precedential nature of these reasons, it is impossible to edit out that information if one of the purposes of the reasons is to provide guidance not only to the Applicant but to future potential applicants. We therefore believe that such information is crucial to the Committee's analysis and must be contained in the publication of these reasons.

2. Costs

65. Rule 230(17) allows an order of costs be made against the Applicant regardless of the outcome of the application. However, the Respondent did not specifically argue for an order of costs and we note that no costs were ordered in the disbarment decision. Based on this, we are not prepared to order costs against the Applicant in these proceedings.

Dated the 26th day of April, 2010.

“Evert Van Olst”
Evert Van Olst, Chair

“Joel Hesje, Q.C.”
Joel Hesje, Q.C.

“Loreley Berra”
Loreley Berra