2004 LSBC 19
Report issued: June 16, 2004
Oral Reasons: May 20, 2004
Citation issued: February 11, 2004

The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and a hearing concerning

ROBERT GORDON MILNE

Respondent

Decision of the Hearing Panel on Facts and Verdict

Hearing date: May 20, 2004

Panel: Margaret Ostrowski, Q.C., Chair, Carol Hickman, Art Vertlieb, Q.C.

Counsel for the Law Society: Todd R. Follett
Counsel for the Respondent: Jerome Ziskrout

Background

[1] On February 11, 2004 a citation was issued to the Respondent pursuant to the Legal Profession Act and Rule 4-15 of the Law Society Rules by the Executive Director of the Law Society, pursuant to the direction of the Chair of the discipline Committee. The citation directed the Hearing Panel inquire into the Respondent's conduct as follows:

> 1. That you altered a document executed on behalf of Her Majesty the Queen in the Right of the Province of British Columbia when you did not have the authority to do so, and caused the altered document to be registered in the Land Title Office.

[2] At the commencement of the hearing the Respondent acknowledged proper service of the citation.

[3] Counsel for the Law Society submitted by consent an Agreed Statement of Facts which was entered as Exhibit 2 in the proceedings.

ISSUE

[4] The panel must make a determination about the conduct or competence of the Respondent in accordance with Section 38(4) of the *Legal Profession Act.* The Respondent has admitted the fact of the alteration of the document without authorization and has asked the Panel not to find that his conduct constitutes professional misconduct but if it does, to use Section 38(4)(c) in the circumstances for disposition of the matter.

FACTS

[5] The facts agreed by counsel for the Law Society and counsel for the Respondent are attached as Exhibit A to this decision.

[6] The Respondent testified that he was born in Alberta, called to the bar in 1975 and had practiced law since that time with various firms. He is now a partner at [a law firm] with 60% of his practice comprising real estate matters and the remaining 40% corporate commercial work, securities and wills and estates. He has been active as a volunteer lecturer in company and co-op law and continues to serve on many boards in his community.

[7] The Respondent gave a lengthy description of the scope and complexity of the real estate development to which the altered Form C related and the problems that arose in the file shortly before the alteration to the document. His client was the developer and grantor of the Right of Way in the Form C. The Right of Way was necessary to allow the opportunity for the inspection and maintenance of an elevator going to penthouse units in the development and an inspection was required by the Crown before an occupancy permit could be granted.

[8] The altered Form C was a Right of Way document that contained a Statutory Right of Way in favour of the Crown and Priority Agreements to be signed by the two mortgagees. The Respondent explained that as the Priority Agreement part had not been signed by the mortgagees (through office error), the agreements couldn't be registered - that is, the Form C could not be registered with the defective priority agreements contained therein.

[9] The Respondent stated that a Statutory Right of Way only need be signed by the registered owner of the land but in this case, the Crown (Her Majesty the Queen in Right of the Province of British Columbia) who was to be granted the Right of Way for inspection purposes, provided a form of document through its counsel, Ms. F., in which execution of the document by a representative of the Crown was required.

[10] Paragraph 6 of the Agreed Statement of Facts refers to a Covenant by the Crown in the Form C. The Respondent testified that the covenant had not come to his attention until a week before this hearing and it was at that time he realized that, in fact, the Form C was a contract as opposed to a grant of a right of way.

[11] The Respondent testified that on July 4, 2003, the Form C was one of many documents that were ready in his office to be filed in the Land Title office for this development project. It was on that day that he realized that the Form C was defective as the mortgagees had not signed the document. Because there had been significant delays already, problems in this real estate development, and purchasers were waiting to buy and occupy these properties, the Respondent testified he felt very pressured and stressed to get all the documents registered at the same time - he didn't want to put the occupancy of the affected suite in jeopardy or any other suite affected by the elevator.

[12] The Respondent stated that he had two options in regards to the defective Form C:

> a) not to register the document with the consequence that the purchaser of the premises affected by the Priority Agreements could not occupy their unit until the document was corrected and filed (because no occupancy permit could be granted), or
>
> b) change the document so that it would be in registrable form by deleting the references in the Form C to the priority agreements and get appropriate priority agreements afterwards and register them as separate documents.

[13] The Respondent chose the latter as he felt that, because he had prepared the document and that there

was no prejudice to the Crown as the Crown would get exactly what it wanted - the statutory right-of-way over the suite, that it would be " the technical way of solving the problem" .

[14] The Respondent testified that it did not occur to him to contact counsel for the Crown as he thought it would not be a problem to her. He further testified that he considered it to be his document because he prepared it. He stated that his understanding was clouded and he had not given the issue the attention it deserved.

[15] He stated that he had been over-confident, over-worked, did not step back and look at the problem and, in hindsight, had shown disrespect for Counsel for the Crown in not putting his mind to the issue. He admitted through his counsel that altering a document is wrong.

[16] In regard to the August 8, 2003 letter to counsel for the Crown which enclosed a copy of the registered altered Form C to her without any explanation, the Respondent admitted that that this letter had been prepared by an assistant and he had taken very little time in reviewing it before it was signed and mailed.

ANALYSIS AND DECISION

[17] Mr. Follett submitted that the Respondent made a culpable decision to alter the Form C to avoid the consequences of a mistake in his office and that this constitutes straightforward professional misconduct. He also would not regard the Respondent as being over-confident but as arrogant. He stated that the facts in this case called for the use of what might be termed as a " bright line test" - that when a document is received, altered and used, and that the alteration is done without authority and without the knowledge of the author, that it unequivocally calls for a finding of professional misconduct.

[18] Mr. Follett referred to the case of Re: Wayne Fraser Guinn LSBC [1999], Re: Jed Maxwell Hops LSBC [1999] 29 and Re: Graham Bernard Walker [2001] as cases that are helpful in describing the standard for a determination of professional misconduct.

[19] In the Guinn case, it was reported that:

> " in no less that 45 instances have the Benchers found that failure to respond to either the Law Society or client or another lawyer has constituted professional misconduct over the period 1980 to[1999]" .

[20] In the Hops case, it was reported that:

> " the Benchers are of the opinion that the Member's contention that he acted improperly out of carelessness or ignorance can not excuse him if the action or inaction of the Member amount to Professional Misconduct. Otherwise negligence would amount to a defence to almost any allegation of professional misconduct." (p.44)

[21] In the Walker case, the Panel found that the member had committed a Handbook violation but the violation did not have the requisite degree of disgrace or dishonour. Additionally, it was not tantamount to a breach of his duty to the state or the public and therefore the violation did not constitute professional misconduct. The Benchers agreed on appeal.

[22] Mr. Follett's central point was that in a review of decisions that the Benchers have made, something less than dishonourable or disgraceful conduct can support a finding of professional misconduct. The law is not completely clear but it is a relatively low standard compared to what it has been in the past for a finding of professional misconduct.

[23] The Panel considered the submissions of Mr. Ziskrout that Section 38(4)(c) be considered as an

alternative to the finding of professional misconduct (Section 38(4)(b)(i) - that the Panel send this case back to the Discipline Committee for an appropriate disposition - perhaps a Conduct Review. He submitted that the criminal justice system has discharge provisions that allow for a finding that something went wrong, but can avoid conviction and penalty under appropriate circumstances. He further stated that it would allow for the consideration for the principle reason for discipline action - to protect the public - and that there should be a middle ground. He argued that his client exhibited candor, co-operation, agreed to the facts and gave evidence. He submitted that the facts demonstrate that there was no harm, no risk, and no motivation for harm. Mr. Ziskrout also raised the issue of publication.

[24] Both counsel were in agreement that the Respondent had no discipline record whatsoever with the Law Society.

[25] Section 38(4) of the *Legal Profession Act* reads as follows:

> (4) After a hearing, a panel must do one of the following:
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> (a) dismiss the citation;
>
> (b) determine that the respondent has committed one or more of the following:
>
> (i) professional misconduct;
>
> (ii) conduct unbecoming a lawyer;
>
> (iii) a breach of this Act or the rules;
>
> (iv) incompetent performance of duties undertaken in the capacity of a lawyer;
>
> (v) if the respondent is not a member, conduct that would, if the respondent were a member, constitute professional misconduct, conduct unbecoming a lawyer, or a breach of this Act or the rules;
>
> (c) make any other disposition of the citation that it considers proper.

[26] The case of Richard Luke Coglon [2001] LSBC was referred to us regarding the use of Section 38(4)(c) of the *Legal Profession Act*. In that case, the Hearing Panel determined that the Respondent had breached Chapter 7, Ruling 1 of the Handbook by placing himself in a conflict of interest. His conduct was characterized as foolish or even negligent but not as amounting to professional misconduct. The Panel determined that it was open to them to find a breach pursuant to Section 38(4)(c). On appeal to the Benchers, it was found that Mr. Coglon had professionally misconducted himself and therefore the Benchers did not have to deal with the proper scope of Section 38 (4)(c). The Benchers stated therein: " We are of the view that, once it had determined that Mr. Coglon had not professionally misconducted himself, all the Hearing Panel could do was to dismiss the Citation" . (p.23).

[27] This Panel found the case of Crispin Henry Lyndon Morris 2004 LSBC 09 at odds with the Benchers findings in Coglon in reference to the use of 38(4)(c). In this Morris case it was found by the Hearing Panel that the Respondent had committed a breach of the *Trustee Act* while acting as a trustee by failing to pass accounts in accordance with his statutory obligation. They did not find this to be professional misconduct or conduct unbecoming a barrister or solicitor, but found it to be an adverse finding within the meaning of 38(5) of the *Legal Profession Act* and directed the Respondent complete a remedial program to the satisfaction of the Practice Standards Committee. (We understand that this decision is now under appeal.) By implication they must have used Section 38(4)(c) even though there was no finding of professional misconduct. This

Panel does note however, that quasi-judicial tribunals are not bound in law by precedent.

[28] This Panel also reviewed the cases of Crispin Henry Lyndon Morris [1998] LSBC 9 and Barry Joseph Promislow [1997] LSBC 11, two cases where the member altered documents without authorization. In both cases, the member consented to a finding of professional misconduct.

[29] The Panel has carefully considered the facts and the submissions of counsel for the Law Society and the Respondent. It is unanimously persuaded that the bright line test described by Mr. Follett is appropriately applied in the circumstances at hand - that it must be made very clear to the members of the profession that a document cannot be altered without authority and that the integrity of a signed document is fundamental to our practice and to the preservation of the rule of law in our society. Accordingly, tampering with a document without appropriate authorization is in this case, professional misconduct. We feel that the Bencher's reasoning in the Coglon case applicable here and because we have found that the Respondent is guilty of professional misconduct, we do not need to deal with the scope of Section 38(4)(c).

Exhibit A

IN THE MATTER OF THE LEGAL PROFESSION ACT AND IN THE MATTER OF A HEARING CONCERNING

ROBERT GORDON MILNE

(a member of the Law Society of British Columbia)

AGREED STATEMENT OF FACTS

1. The Respondent was called to the bar in British Columbia on June 26, 1975 and currently practices at [a law firm].

2. The Respondent acted as counsel to [a development company] in a development known as Shoal Point.

3. The complainant, E.F., is a lawyer employed by the Legal Services Branch of the Ministry of the Attorney General.

4. The Respondent forwarded a *Land Title Act* Form C to Ms. F. for execution on behalf of Her Majesty The Queen in Right of the Province of British Columbia (the " Province") as Transferee, for the purposes of registration of a Statutory Right of Way and Priority Agreement in favour of the Province over other financial charges.

5. By letter dated June 30, 2003, Ms. F. forwarded the Form C, which had been executed on behalf of the Province, to the Respondent.

6. The following provision appears at page 5 of the Form C (Express Charge Terms - Part 2):

" 1. Statutory Right of Way

.

1.2 The Grantee covenants to give the Grantor at least 24 hours' notice (except in an emergency, when no notice is required) of the date and time when the Grantee requires access to the Strata Lot for the purposes set out in paragraph 1.1."

7. The Respondent made the following alterations to the Form C after it was executed on behalf of the Province and before it was submitted for registration in the Land Title Office:

a. The second paragraph in the description of the Nature of Interest with respect to the Province's Statutory Right of Way having priority over other charges was deleted and initialed;

b. The references to [a bank] (as to priority agreement) and [a management corporation] (as to priority agreement) were deleted and initialed; and

c. Paragraphs 5 and 6 of Part 2 - Express Charge Terms, which related to the Statutory Right of Way (dealing with the Priority Agreement and Execution), were deleted.

d. The number of pages of the Form C was reduced from eight (8) to six (6), and the phrase " END OF DOCUMENT" was inserted at the bottom of page 6 of the Form C which was submitted for registration.

8. The altered Form C was registered in the Land Title Office on July 7, 2003.

9. The Respondent did not inform Ms. F. of the alterations prior to registering the Form C at the Land Title Office.

10. The Respondent did not inform Ms. F. of the alterations after the altered Form C had been registered in the Land Title Office.

11. By letter dated August 8, 2003 the Respondent forwarded the registered Form C, which he had altered prior to registration, to Ms. F.

12. The Respondent states that he made the alterations because his client had refinanced the development project, thereby placing a new mortgage on title and paying out one of the existing mortgages. Because of his clients refinancing, the Statutory Right of Way was no longer correct with respect to the Priority Agreements. Consequently, the Respondent deleted the proposed registration of a Priority Agreement from the Form C.

11. By letter dated September 22, 2003, Ms. F. advised that on September 19, 2003 she had received confirmation from the Respondent that Priority Agreements with respect to the Statutory Right of Way in favour of the Province had been registered.