

2012 LSBC 13

Report issued: April 26, 2012

Citation issued: June 24, 2011

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

Nathan Richard Bauder

Respondent

**Decision of the Hearing Panel
on Facts and Determination**

Hearing date: December 22, 2011

Written submissions received: January 31, 2012 and February 3, 2012

Panel: Leon Getz, QC, Chair, Jan Lindsay, QC, David Renwick, QC

Counsel for the Law Society: Jaia Rai

Counsel for the Respondent: Richard Gibbs, QC

Background

The Citation

[1] The citation in this matter was authorized by the Discipline Committee on June 9, 2011 and issued on June 24, 2011. Nathan Richard Bauder (the “Respondent”) has admitted that he was properly served with the citation.

[2] The citation sets out the nature of the conduct to be inquired into:

1. In or about April and/or May 2010, in respect of the Respondent’s purchase of real property located in Prince George, British Columbia (the “Property”), the Respondent attempted to fraudulently obtain mortgage financing from R Co. (the “Lender”) in the amount of \$350,000 by:
 - (a) improperly altering a Form C Charge in respect of the Property that was executed by the vendor on September 9, 2008, by preparing and substituting another Part 2 Terms of Instrument, which contained false statements regarding the amount of the purchase price of the Property and the initial instalment payments;
 - (b) creating and executing a Contract of Purchase and Sale in respect of the Property, which contained false statements regarding the amount of the purchase price and the deposit;
 - (c) asking the vendor of the Property to sign these two false documents and to retain the services of another lawyer than the lawyer who had initially represented the vendor when the original Form C Charge was executed;
 - (d) submitting the altered Form C Charge and the false Contract of Purchase and Sale to a mortgage broker, D Mortgages, to obtain the mortgage financing; and

(e) falsely representing in a mortgage commitment, which the Respondent signed on April 29, 2010 and certified to be true and correct, that the purchase price of the Property was \$450,000 and the down payment was \$100,000.

ADMISSIONS

[3] The Law Society and the Respondent, through counsel, filed an Agreed Statement of Facts (“ASOF”), which was marked as Exhibit 1 in these proceedings.

[4] The ASOF sets out, among other things, an admission that the Respondent’s conduct in attempting to fraudulently obtain mortgage financing contrary to Chapter 2, Rule 1 and Chapter 4, Rule 6 of the *Professional Conduct Handbook* constituted conduct unbecoming a lawyer.

ISSUE

[5] This matter came before the Panel on December 22, 2011 wherein counsel for the Law Society and for the Respondent urged the Panel to accept that the conduct amounted to conduct unbecoming rather than professional misconduct. The Panel was not satisfied that conduct in this case amounted to conduct unbecoming and asked counsel for further written submissions, which were provided to the Panel in early February, 2012. Counsel for the Respondent and the Law Society, again, in their written submissions maintained that the conduct was conduct unbecoming.

[6] Therefore, the Panel is required to determine whether, in these circumstances, the conduct complained of amounts to professional misconduct or conduct unbecoming.

[7] We are satisfied that each of the allegations set out in the citation amount to professional misconduct and not conduct unbecoming.

THE FACTS

[8] The following are the relevant facts based on the ASOF:

1. The Respondent was admitted to the Bar of the Province of British Columbia on May 8, 2002.
2. The Respondent practises primarily in the areas of criminal, family and real estate law. He initially practised in Prince George; however in July 2005 he established his law corporation and worked in Fort Nelson. In September 2008, he opened a branch office in Prince George, which he subsequently closed in September 2010. He continues to practise in Fort Nelson. In September 2008, Mr. Bauder, through his law corporation, entered into an agreement (the “Right to Purchase”) to purchase the Property from N Ltd. (the “Vendor”).
3. Mr. Bauder prepared the Form C (the “Original Form C”). The Original Form C was signed by MF on behalf of the Vendor, on September 9, 2008 and by Mr. Bauder, as authorized signatory for his law corporation and in his personal capacity as guarantor, on September 17, 2008.
4. The Original Form C provided that the purchase price for the Property was \$350,000 plus GST, with a \$10,000 deposit and provisions for monthly payments. The purchase was to be completed on September 1, 2010.
5. The Vendor was represented by David Jones, a lawyer with Hope Heinrich LLP.
6. Mr. Bauder paid the \$10,000 deposit and made monthly payments pursuant to the terms of the

Original Form C from October 1, 2008 until to April 1, 2010.

7. In April, Mr. Bauder and MF agreed that the new completion date would be May 7, 2010 and that Mr. Bauder was to purchase the Property in his own name rather than through his law corporation.

8. In April 2010, Mr. Bauder prepared the following documentation:

(a) a new Part 2 Terms of Instrument, which he attached to the executed Original Form C (the "Altered Form C");

(b) a Contract of Purchase and Sale (the "Contract"), which was backdated to September 9, 2008, and showed the purchaser as Mr. Bauder rather than his law corporation; and

(c) an Addendum to the Contract of Purchase and Sale dated April 29, 2010 showing the new completion date of May 7, 2010.

The Altered Form C and the Contract contained false statements regarding the purchase price and deposit. The purchase price was stated as \$450,000, not \$350,000, and the deposit was stated as \$100,000, not \$10,000, which had been paid by way of four monthly installments.

9. Mr. Bauder asked MF to sign the Contract and initial the Altered Form C knowing that the documents were not reviewed by Mr. Jones or any other lawyer on behalf of the Vendor. He submitted these documents to a mortgage broker to obtain mortgage financing and was approved for a mortgage in the amount of \$350,000 based on false representations made by Mr. Bauder.

Allegation 1(a) and 1(b): Creation of Altered Form C and Contract

10. As of April 2010, Mr. Bauder had only paid a \$10,000 deposit together with the monthly payments as set out in the Original Form C and not the \$100,000 as noted in the Altered Form C.

11. The Altered Form C which contained the revised Part 2 Terms of Instrument included false statements that:

(a) the purchase price was \$450,000; and

(b) he had paid four instalments of \$25,000, paid September 15, 2008, January 15, 2009, September 15, 2009 and January 15, 2010.

12. In April 2010, Mr. Bauder prepared the Contract, which was falsely dated September 9, 2008 and identified Nathan Bauder as the purchaser rather than his law corporation and falsely stated that the purchase price for the Property was \$450,000 and that the deposit of \$100,000 had been made by way of four instalment payments.

13. Mr. Bauder executed the Contract and initialed the Altered Form C.

Allegation 1(c): Asking Vendor to Sign the Contract and Altered Form C and to Retain Services of a New Lawyer

14. On April 29, 2010 Mr. Bauder asked MF to sign the Contract and initial the Altered Form C, which he did. The Addendum to the Contract of August 2010 changing the completion date from September 1 to May 7, 2010 was also signed by MF.

15. Mr. Bauder did not advise MF to seek independent legal advice from Mr. Jones or any other lawyer. Instead, he told MF that he would "take care of all of the paperwork and look after everything."

Allegation 1(d): Submission of Altered Form C and Contract to Mortgage Broker to Obtain Mortgage Financing

16. On April 28, 2010, Mr. Bauder applied for a mortgage in the amount of \$350,000, through D Mortgages to finance the purchase of the Property. In his application dated April 28, 2010, he stated the purchase price for the property was \$450,000 and that he had \$90,000 in equity in the Property. He executed a consent form confirming the information given on the application was true and correct and acknowledged that he knew the information was being used for the purposes of obtaining mortgage financing. He verbally advised the mortgage broker that he had made the four payments of \$25,000 to the Vendor represented his equity.

17. On April 29, 2010, Mr. Bauder gave D Mortgages copies of the Contract and the Altered Form C knowing that the broker would rely on these false documents in consideration of his mortgage application. He also provided the mortgage broker with a payout statement which he had obtained from the Vendor showing the balance owing as \$325,205.56.

Allegation 1(e): False Representations in the Mortgage Commitment

18. On April 28, 2010 the Lender provided a mortgage commitment to Mr. Bauder in the amount of \$350,000 based on the false representations made by Mr. Bauder in his mortgage application.

19. On April 29, 2010, Mr. Bauder executed the mortgage commitment which required him to establish that the down payment in the amount of \$100,000 was made from his accumulated savings. This condition was subsequently waived at Mr. Bauder's request.

20. By executing the mortgage commitment, Mr. Bauder accepted the terms of the mortgage and certified that the information given on his mortgage application was true and correct.

21. On May 5, 2010, Mr. Bauder retained Stephen Wing to represent him in connection with the completion of the purchase of the Property. Mr. Wing was also retained by the Lender.

22. Mr. Bauder did not disclose to Mr. Wing the existence of the Original Form C and instead provided him with a copy of the Contract and Altered Form C.

23. On May 5, 2010, Mr. Bauder advised Mr. Wing that Mr. Jones was representing the Vendor. On May 6, 2010, he advised Mr. Wing that Jason LeBlond would be acting for the Vendor.

24. On May 6, 2010, Mr. Bauder executed closing documents prepared by Mr. Wing, which included:

(a) the Property Tax Transfer Return falsely stating a gross purchase price (and fair market value) of \$450,000 with \$100,000 being paid in cash and \$350,000 in financing from the Lender;

(b) the Buyer Statement of Adjustments falsely stating the purchase price to be \$450,000 with \$124,794.33 having been paid by Mr. Bauder to the Vendor and the balance of mortgage proceeds of \$13,964.79 due to Mr. Bauder.

25. At the time Mr. Bauder signed the Property Transfer Return and Buyer Statement of Adjustments, he knew that the information was false and misleading.

26. Also on May 6, 2010, Mr. Bauder signed a Disclosure Statement that provided inter alia a form that stated there were no amendments to the purchase price or deposit after the date on which the Agreement for Purchase and Sale was signed. He also signed the Form B Mortgage in the amount of \$350,000.

27. At the time Mr. Bauder signed the Disclosure Statement and the Form B Mortgage, he knew that the

mortgage funds were being advanced by the Lender based on false and misleading statements. Based on the false information, Mr. Bauder knew that Mr. Wing would be preparing the documentation based on a purchase price of \$450,000 and a deposit of \$100,000 and that the Statements of Adjustment would falsely reflect the purchase price and amounts paid.

28. In early May, 2010, Mr. Bauder approached Jason LeBlond, a lawyer he shared office space with, and asked Mr. LeBlond to witness some documents to be signed by MF in connection with the conveyance. Mr. LeBlond is a criminal defence lawyer and does not practise in the area of real estate conveyance.

29. Neither Mr. Bauder nor MF advised Mr. LeBlond that Mr. Jones had previously represented the Vendor.

30. On May 6, 2010, Mr. LeBlond was in court and was unable to complete the documentation when Mr. Bauder and MF arrived at his office. As a result, Mr. Bauder had George Leven, another criminal defence lawyer who shared office space with Mr. LeBlond, witness MF's signatures on the documents, which he did as a favour to Mr. LeBlond.

31. As there was some concern over a payment of GST, MF subsequently contacted Mr. Jones and as a result of those discussions a complaint was made by Mr. Jones to the Law Society.

DISCUSSION

[9] Counsel have provided numerous case authorities that differentiate between professional misconduct and conduct unbecoming. The common theme in those cases suggests that conduct in a lawyer's personal or private capacity that brings discredit upon the legal community is appropriately dealt with as conduct unbecoming, whereas professional misconduct arises from conduct that occurs in a lawyer's professional capacity. We accept this distinction.

[10] Conduct unbecoming is defined in the *Legal Profession Act*, whereas professional misconduct is not. Conduct unbecoming a lawyer is defined as:

A matter, conduct or thing that is considered, in the judgment of the benchers or a panel, (a) to be contrary to the best interests of the public or of the legal profession, or (b) to harm the standing of the legal profession.

(*Legal Profession Act*, section 1).

[11] In addition, Chapter 2, Rule 1 of the *Professional Conduct Handbook* states that a lawyer:

. . . must not, in private life, extra-professional activities or professional practice, engage in dishonorable or unquestionable conduct that casts a doubt on the lawyer's professional integrity or confidence, or reflects adversely on the integrity of the legal profession or the administration of justice.

[12] In *Law Society of BC v. Lloyd*, [2003] LSDD No. 5, Mr. Margetts, QC, as a single Bencher panel, found that the respondent's conduct in failing to ensure that his client obtained independent legal advice constituted professional misconduct. He notes, at paragraph 16:

The term "professional misconduct" carries with it a more substantive element of the failure to discharge a professional, rather than a personal responsibility. In *Cordery on Solicitors*, 6th ed. at page 514, it is stated:

If it is shown that a solicitor, in pursuit of his profession, has done something with regard to it which would reasonably be regarded as disgraceful or dishonourable by his professional

brethren of good repute and competency, then it is open to the disciplinary committee to say that he has been guilty of professional misconduct.

In *Lloyd* the lawyer drafted a codicil giving himself one-half of the estate (which he ultimately gave to charity) without suggesting that his client obtain independent legal advice.

[13] Although the test stated no longer holds in British Columbia, the requirement that the conduct be taken in pursuit of his or her profession continues.

[14] In *Law Society of Upper Canada v. Grmovsek*, [2011] LSDD No. 162, the lawyer was convicted of criminal offences relating to insider trading. He had conspired with his law school classmate in benefiting from tips that had been provided to him by his classmate who was involved in the corporate transactions. The lawyer purchased shares or short sold shares depending on the situation. The panel held that, notwithstanding that the frauds perpetrated by the respondent affected his honesty, trustworthiness and fitness as a lawyer, none of the conduct was in his professional capacity.

[15] In *Law Society of BC v. Suntok*, 2005 LSBC 29, the lawyer was convicted of assaulting an ex-girlfriend, and the panel found that his conduct was conduct unbecoming a lawyer. Ms. Schmit, QC, at paragraph 14, stated:

“Conduct Unbecoming” is classically defined as conduct that occurs outside the core practice of law.

[16] In *Law Society of Prince Edward Island v. Lawyer 94-01*, [1994] LSDD No. 11, the panel considered the conduct of the lawyer who testified as a witness in the Tax Court of Canada and whose testimony was criticized by the Judge with respect to the documents he prepared. His testimony was found to be professional misconduct. The panel considered the definition in an article entitled “The Disciplinary Process of the Law Society of Upper Canada” *Advocates Quarterly*, Vol. 8, Number 1, May 1987, for professional misconduct:

In general, “professional misconduct” must consist of conduct in the context of a member’s profession and generally will involve the member in his role as a barrister and solicitor in dealing with a client, other members, the court or the Law Society. A member’s conduct in a private capacity will generally not amount to professional misconduct *unless it may reasonably be seen to be an outgrowth of his professional activities or status*, such as borrowing money from a person who is not a client but reasonably believes that a solicitor-client relationship exists.

[emphasis added]

[17] The panel went on to cite with approval examples that constitute professional misconduct as noted in *Lawyers and Ethics: Professional Responsibility and Discipline*, by Gavin McKenzie, 1993, Carswell, Toronto, at page 26-24:

- (iii) creating false documents;
- (v) destroying or concealing documents in furtherance of an unlawful scheme;
- (vi) assisting clients in an attempt to defraud creditors;
- (x) attempting to mislead clients, other lawyers, the law society, or others;
- (xi) attempting to defraud a legal aid plan;
- (xii) attempting to obtain financial benefits to which a lawyer is not entitled;

(xiv) suborning perjury or otherwise fabricating evidence.

[18] In *Cwinn and Law Society of Upper Canada*, [1980] OJ No. 3548, on appeal from an Order of Convocation disbarring the appellant solicitor for conduct unbecoming, the Divisional Court noted at Paragraph 5:

It has been the traditional view that “professional misconduct” related to conduct while actually engaged as a barrister and solicitor, and that “conduct unbecoming” relates to conduct not in the course of the practice of law.

In that case the various allegations of sexual misconduct with underage young women were the subject matter of the complaint.

[19] In *Law Society of Upper Canada v. Chodos*, [1996] LSDD No. 42, the lawyer was sued by a former client after he had an affair with the former client’s wife. The former client was successful in obtaining a judgment for breach of fiduciary duty, and the lawyer was involved in an elaborate scheme to conceal his assets. The panel, at page 19, stated:

I have already indicated that Mr. Chodos’ conduct appears to be, if not strictly in relation to his professional life, certainly in a grey area between his professional and personal life, but even where the conduct complained of is clearly and exclusively done within a lawyer’s personal sphere as opposed to his or her professional sphere, the principles underlying the rules, regulations and guidelines of the Law Society remain applicable. The determination of whether the charge is one of professional misconduct or conduct unbecoming is dependent upon the sphere in which the conduct occurs, but the immutable principle of integrity continues to govern the lawyer’s conduct regardless of the sphere.

In that case, he was not charged with professional misconduct but was charged with conduct unbecoming.

[20] This Panel must determine whether the Respondent’s actions amount to professional misconduct or conduct unbecoming a lawyer.

[21] We must determine in which sphere were the activities complained of; personal or professional.

[22] Once we have made the determination of which sphere we must then determine whether the conduct, as oft noted in the *Law Society of BC v. Martin*, 2005 LSBC 16, discloses a “marked departure from that conduct the Law Society expects of its members.”

[23] In this case, we are satisfied that the activities performed by the Respondent were in his sphere as a lawyer. The drafting of the “Form C” and subsequently fraudulently altering it, is not an activity that one would characterize to be in the private life of the Respondent.

[24] We also note, that the Respondent:

- (a) drafted the original documents as one would have expected a real estate lawyer to have completed;
- (b) fraudulently changed three legal documents including the Altered Form C;
- (c) backdated the Contract of Purchase and Sale;
- (d) used his position as a lawyer to have the Vendor initial the fraudulent changes without having those documents reviewed by Mr. Jones or any other lawyer;
- (e) submitted the false documents to obtain mortgage financing.

[25] Further, in the Mortgage Commitment Letter, the form provides that:

The applicant(s) will need to retain his or her own lawyer to meet with them to advise them on the mortgage. The applicant(s) is to provide the name of the FIRM (if applicable) and lawyer, address, phone, fax and e-mail address for the lawyer to be used for this mortgage transaction with a signed commitment letter, subject to lender approval

to which the Respondent had stamped:

Nathan R. Bauder

Barrister and Solicitor - Notary Public

NATHAN R. BAUDER LAW CORPORATION

#201 - 1085 Third Ave.

Prince George, B.C. V2L 3E3

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[26] In addition to preparing the documents, he kept the Vendor away from the Vendor's solicitor knowing that if the Vendor returned to Mr. Jones, the deception would be found out. He told MF that he "would take care of all the paperwork and look after everything."

[27] If it walks like a duck, sounds like a duck and looks like a duck then it is a duck. In this case, the conduct of the Respondent was solely within the sphere of his capacity as a lawyer and we so find.

[28] We are satisfied on the balance of probabilities that the allegations made in the citation 1(a) - (e) constitute professional misconduct. The conduct to which the Respondent has admitted leads us to find that the Respondent has committed professional misconduct.