2013 LSBC 07
Report issued: February 13, 2013
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 Disciplinary Action

Hearing date: November 8, 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

[1] The Hearing Panel, in its decision on Facts and Determination issued April 26, 2012 (indexed as 2012 LSBC 13), found that Nathan Richard Bauder (the "Respondent") had committed professional misconduct in fraudulently attempting to obtain mortgage financing by falsely altering the purchase and mortgage application documentation.

[2] The facts are set out in the Agreed Statement of Facts, marked as Exhibit 1. They are succinctly summarized in the decision on Facts and Determination, and will not be repeated here.

ISSUES

[3] The issues to be determined are:

(a) whether or not the Respondent should be suspended; and

(b) what costs should be paid.

[4] Counsel for the Law Society suggests that the Respondent should be suspended for six to nine months and pay costs in the amount of $10,000.

[5] Counsel for the Respondent suggests that the duty of the Law Society under s.3(1) of the *Legal Profession Act*, to uphold and protect the public interest, does not require a suspension, and, moreover, that a suspension would disserve the community in Fort Nelson where the Respondent is the sole practising lawyer. The Respondent accordingly submits that a fine would be a sufficient sanction and is entirely appropriate. Further, he suggests that his client should only pay costs in the amount of $5,000.

EVIDENCE

[6] Counsel for the Law Society filed two affidavits from Sherelle Goodwin, manager of the custodianship department of the Law Society, sworn December 14 and 23, 2011. In those affidavits Ms. Goodwin set out examples of cases in which the Law Society had appointed custodians for practitioners in the northern part of the Province. She also identified two lawyers to whom she had spoken, one practising in Fort St. John and the other in Dawson Creek. Both had indicated that, should it be required, they would be willing to act as custodians of the Respondent's practice between them, providing coverage for criminal and family matters. We note these affidavits are somewhat dated.

[7] Counsel for the Respondent filed a number of letters of support attesting to the Respondent's professionalism. They also provided some insight into the lack of legal representation in the North, particularly in Fort Nelson, where the Respondent is the only practitioner. In addition, there was a letter filed from a lending institution who advised that they would no longer allow the Respondent to handle their mortgage transactions.

[8] A comprehensive schedule of the Respondent's hearings and trial matters for the balance of 2012 and up to May 2013 was also filed.

[9] Further, a number of certificates were filed showing the Respondent's involvement with the Canadian Bar Association ("CBA") as well as his appointment to a number of Provincial bodies. Notwithstanding these allegations, the CBA reappointed him to the Advisory Committee to the Judicial Council of BC for a term expiring August 2013.

[10] The Respondent testified. The following is a summary of his evidence:

(a) He is 38 years old, born July 30, 1974. He went to high school in Quesnel and upon graduation worked as a part-time chainsaw salesman while attending Capilano College. He was unable to continue with his studies due to financial issues and moved to Fort Nelson where he lived and worked from 1996 to 1998. He then attended Northern Lights College Satellite Campus in Fort Nelson and attended UBC Law School from 1998 to 2001.

(b) He is a member of the Okanagan First Nation.

(c) He worked as a summer and articled student at Hope Heinrich in Prince George and, after being called to the Bar in May 2002, became an associate with the firm, handling primarily family and criminal matters.

(d) In 2004, he left Hope Heinrich and became an associate with Richard Tao, focusing on family law and aboriginal law.

(e) He started his practice in Fort Nelson in approximately 2005.

(f) As soon as he set up his practice in Fort Nelson, he was "shell shocked" by the number of referrals for criminal and matrimonial matters, as well as real estate transactions. He felt that he had a good grounding as counsel, but limited knowledge about real estate and corporate transactions. Over time, however, he developed some skill and knowledge in those areas.

(g) Between 2005 and 2008 he handled 20 to 40 residential conveyances per month, as well as numerous commercial transactions. He now has a number of corporate clients, including companies owned by the Mayor of Fort Nelson, who provided a glowing recommendation and indicated that, notwithstanding the allegations against the Respondent, he would continue to retain him in the future.

(h) He described the millions of dollars that flowed through his trust account on an annual basis.

(i) Although there is a Provincial and Supreme Court Registry in Fort Nelson and limited Provincial

Court sittings, his chambers and assize work is in Fort St. John, approximately four hours away, or Dawson Creek, approximately five hours away. His court practice consists primarily of criminal defence and family disputes. He also does some criminal legal aid work.

(j) He married in 2004; but the marriage broke down in 2008 due primarily to stress, pressures, anxiety and financial issues.

(k) He sold the family home in Fort Nelson and rented a basement suite. He felt that it would be a prudent business move to purchase a home in Prince George, where he thought of relocating his practice.

(l) In September 2008, he entered into the Agreement for Sale that is the subject matter of this citation. Under the Agreement for Sale, he made a $10,000 deposit and continued with the monthly payments until the spring of 2010 when he was approached by the vendor, MF, who wanted to advance the completion date to May 2010 instead of the originally agreed date in September.

(m) The Agreement for Sale was unregistered, and he was unable to find lenders willing to provide funding on an unregistered Agreement for Sale.

(n) As the property had increased in value, he prepared the false contract of purchase and sale with an increased purchase price and had MF initial and sign the false document. He also explained the various steps he took to try to keep the original solicitor from becoming aware of the fraudulent scheme.

(o) He could not provide any explanation for preparing the false documents, but he acknowledged that he knew that it was “dishonest” to do so. He offered no excuse for his actions.

(p) Since this matter came to light he has continued to practise and serve his clients in the community.

(q) He remarried in 2010, and is renting property in Fort Nelson. His family plans are currently on hold pending the resolution of this matter.

(r) He candidly acknowledged that “he was the author of his own misfortune” and that he is responsible for the consequences that flow from his “dishonest actions”. In addition to the financial institution that had terminated his services, he described one other chartered bank that is no longer allowing him to do their work.

(s) He explained his fairly extensive trial practice. As he is the only lawyer in Fort Nelson, the lawyers referred to in the affidavit of Ms. Goodwin would likely not be able to assist as their practice is now restricted and they practise hundreds of kilometres away.

(t) In cross-examination, he agreed that he knew that he was being dishonest and that it was a conscious decision that he made at the time. He also recognized that, notwithstanding the property had increased in value, it did not have the value stated in the false documents and therefore there was a risk of loss to the lending institution.

THE LAW SOCIETY’S POSITION ON SANCTION

[11] Although there are a number of factors to be considered by a Panel in deciding on sanctions, as noted in *Law Society of BC v. Ogilvie*, [1999] LSBC 17, the key considerations here are deterrence, denunciation and maintaining the public’s confidence in the integrity of the profession, particularly when dealing with misconduct that displays a lack of integrity. Dishonest conduct by a lawyer undermines the trust that society places in lawyers and therefore warrants serious sanctions.

[12] Counsel for the Law Society recognized that the Respondent has accepted that his conduct was dishonest and that it was serious misconduct. She acknowledged, however, that on the evidence as a whole, it cannot be said that disbarment is the only way of ensuring the effective protection of the public.

[13] She also contended, however, that a fine is not an appropriate disposition and referred to *Law Society of BC v. Martin*, 2007 LSBC 20, where the Benchers on Review substituted a fine of $20,000 for the six-month suspension imposed by the hearing panel, based on the fact that Mr. Martin's conduct involved no element of dishonesty and was not intentional. Neither consideration is present in this case.

THE RESPONDENT'S POSITION ON SANCTION

[14] Counsel for the Respondent submitted that, if fitness were in issue, the Law Society would have sought an immediate suspension once it became aware of the circumstances. It did not, and the Respondent has continued to serve hundreds of people since 2010. Though the conduct of the Respondent in preparing and tendering false documentation was both deliberate and dishonest, it was an isolated lapse, and there is no evidence to suggest that he is likely to do it, or anything like it, again.

[15] The letters of support filed attest to the Respondent's ongoing integrity. Counsel for the Respondent notes that a local realtor who handles a majority of the sales in Fort Nelson describes the Respondent as a "hardworking and extremely conscientious lawyer." The realtor states that, "Nathan has been a pillar in our community outside of his practice as well. In most professions, mistakes are made and disciplines are handed down. I hope and ask that you allow Nathan to continue to practise as our community very much needs him."

[16] There is no question that Fort Nelson needs a lawyer, and that community will suffer if it loses their resident lawyer. Furthermore, he suggests that the recommended locums or custodians would not be able to handle the Respondent's practice due to distance and their restricted practice.

[17] Counsel for the Respondent suggests that the consequences of his actions have already been felt. The Respondent has lost friends, has been shunned by the legal community, has lost his esteem within the profession, is no longer able to pursue a political career and has absented himself from community and from Provincial boards, and his family plans have been placed on hold.

[18] Counsel for the Respondent suggests that the objectives of s. 3 of the *Legal Profession Act* can be met by imposing a fine, and if he continues his practice, he will be in a position to pay for his transgression. He submits that there is no useful purpose to be gained from a six- to nine-month suspension other than a period of penance.

DISCUSSION

[19] The overriding sanctioning principles in cases involving dishonesty are specific deterrence, general deterrence and public confidence in the Law Society's ability to regulate the profession in the public interest. Although hearing panels have given some weight to the impact a suspension may have on a sole practitioner and his family, they have still imposed significant periods of suspension on sole practitioners where the facts otherwise warrant this (cf. *Law Society of BC v. Tak*, 2011 LSBC 05 – four months, and *Law Society of BC v. Basi*, 2005 LSBC 01 – four months). A suspension is not, by definition, more serious for a sole practitioner than for a lawyer who practises in a large law firm. Cf. *Law Society of Upper Canada v. Lachappelle*, [1999] LSDD No. 90.

[20] We are satisfied that, although no personal deterrence is required in this case, general deterrence is a key consideration. The Respondent deliberately engaged in dishonest and fraudulent conduct for personal

gain, and any sanction imposed must send a message that this type of behaviour will attract significant disciplinary consequences, sufficient, to paraphrase the hearing panel in *McGuire v. Law Society of BC*, 2007 BCCA 442, to send a message to the bar that they should not even think about doing what the Respondent did in this case.

[21] We are satisfied that, notwithstanding that the Respondent has no prior discipline history and that this was a single transaction that occurred over a very short period of time, the seriousness of the misconduct and the need for general deterrence require a significant suspension.

[22] Accordingly, we impose a four-month suspension. Even though the Respondent is the only practitioner in Fort Nelson, the public, including the citizens of Fort Nelson, need to be assured that they are protected from unscrupulous conduct, even if this results in the loss to them, temporarily, of their only local legal representation.

[23] Given the Respondent's unique circumstances in practising in Fort Nelson, we are prepared to give some limited latitude by delaying the start date of his suspension. Hopefully the start date can be resolved between counsel, but failing that, this matter can be brought back to us for our final determination.

COSTS

[24] Prior to the introduction of the Tariff for Hearing and Review Costs, Schedule 4 to the Law Society Rules, which was introduced on April 13, 2012, the Law Society sought costs in the nature of 30-40 per cent of the actual counsel time. Even with the introduction of the Tariff, the matter of costs is still discretionary. Counsel for the Law Society has submitted two bills of costs; one is calculated under the new Tariff in the amount of $11,172 and one is calculated under the old Rule in the amount of $9,547.

[25] As this case covers time pre- and post-Tariff, we are satisfied that costs in the amount of $10,000 are reasonable in the circumstances. Given the period of suspension, we are prepared to order that the costs be paid nine months after the Respondent has completed his period of suspension.

[26] Counsel for the Respondent submits that, when this matter was scheduled to be dealt with in December 2011, counsel had agreed that the conduct in question was conduct unbecoming as opposed to professional misconduct and were prepared to proceed on that basis. However, as the Hearing Panel had a different view of the circumstances and, but for that finding, this matter would not have taken the time that it has taken. Therefore, he is suggesting that the costs should be cut in half. We do not accept that logic.

RULING

[27] The Respondent will be suspended for four months. The start date of the suspension may be determined between the parties. Failing agreement by the parties, both may make written submissions on or before April 1, 2013, with any reply to be submitted by April 15, and this Hearing Panel will make a determination.

[28] The Respondent must pay costs in the amount of $10,000 within nine months after the return to practice or by July 15, 2014, whichever comes first.