2016 LSBC 28
Decision issued: July 19, 2016
Citation issued: October 9, 2014

THE LAW SOCIETY OF BRITISH COLUMBIA

In the matter of the *Legal Profession Act*, SBC 1998, c. 9

and a hearing concerning

LAWYER 15

RESPONDENT

DECISION OF THE HEARING PANEL
ON FACTS AND DETERMINATION

Hearing dates:	September 21, 22, 2015, December 11, 2015 and April 30, 2016
Panel:	Pinder K. Cheema, QC, Chair Bruce LeRose, QC, Lawyer Lance Ollenberger, Public representative
Discipline Counsel:	Carolyn Gulabsingh
Counsel for the Respondent:	Joven Narwal

BACKGROUND

[1] The Respondent was called and admitted in British Columbia on March 23, 2011.

[2] The citation issued on October 9, 2014, addressing the Respondent, alleges that:

1. On or about March 28, 2011, while in your capacity as a shareholder and director of a company, [number] Alberta Ltd., you represented to Peace Officer B during the course of his investigation of a complaint against the company, that you were unaware that KY had complained to the Alberta Health Authority prior to the company issuing an eviction notice to him, when you knew or ought to have known

the representation was not true, contrary to Chapter 1, Rule 2(3) or Chapter 2, Rule 1 of the *Professional Conduct Handbook* then in force.

This conduct constitutes professional misconduct or conduct unbecoming a lawyer, pursuant to s. 38(4) of the *Legal Profession Act*.

2. On or about February 28, 2012, while testifying in a court hearing in your capacity as a shareholder and director of a company, [number] Alberta Ltd., you gave false testimony contrary to Chapter 1, Rule 2(3) or Chapter 2, Rule 1 of the *Professional Conduct Handbook*, when you testified to the effect that you were unaware that KY had complained to the Alberta Health Authority prior to the company issuing an eviction notice to him.

This conduct constitutes professional misconduct or conduct unbecoming a lawyer, pursuant to s. 38(4) of the *Legal Profession Act.*

HEARING BACKGROUND

[3] The hearing took place before us on September 21, 22 and December 11, 2015. The Law Society called DB, ("Peace Officer B") KY (the "Tenant") and the Respondent to testify. Counsel for the Respondent cross-examined both Peace Officer B and the Tenant.

[4] Final submissions were made on April 30, 2016, and the Panel reserved its decision.

[5] For the reasons that follow, we find that the allegations are not made out and we dismiss the citation.

FACTS

Background

[6] The Respondent was co-owner and a director of a numbered company incorporated in Alberta in 2004. After incorporation, both the Respondent and a Mr. C were equal shareholders in and directors of the company.

[7] The company owned an apartment building (the "Building") located in Innisfail, Alberta.

[8] In October 2009, the Tenant and his wife became tenants in the Building.

[9] By 2011, CM and NM were investors in the Building and helped to manage it. There was also a building manager, FG.

[10] The Respondent resigned as a director of the company in 2013.

[11] On Friday, February 18, 2011, the Tenant, who was residing in unit number 12, contacted Alberta Health Services to request an inspection of the Building to determine if his concerns as to the state of the building were justified.

[12] He then called FG, to notify her that the inspection would take place the following Tuesday, February 22, 2011.

[13] That evening CM emailed the Respondent her version of what the Tenant had said to FG. She mentioned the Tenant's angry treatment of the manager, his concerns about mould and his actions, including the filing of a complaint pursuant to the *Residential Tenancies Act* and setting up an inspection with a health inspector, BM, the following Tuesday, February 22. She asked the Respondent to call the Tenant as soon as possible and to let her know of the results of that conversation. The Respondent did not reply.

[14] The next day, February 19, 2011, CM again emailed the Respondent wondering if the Respondent had called the Tenant. The Respondent did not reply.

[15] On February 21, NM emailed the Respondent his version of what the Tenant had said to FG on Friday February 18, 2011. He too mentioned the Tenant's angry attitude towards the building manager, the Tenant's statements about having hired a lawyer, his demands for a copy of his lease agreement, and his action in arranging for a health inspector to attend. He recommended that the Tenant be evicted, and he asked the Respondent to reply to his email. The Respondent did not reply until, as we see below, February 22, at 11:38 am, after the inspection by the health inspector.

[16] On February 22, at approximately 11 am, the health inspector attended and completed his inspection. It took approximately half an hour. Shortly after the inspector left the Building, the Tenant left a voice mail for FG that deficiencies had been identified and that he would proceed with the complaints he had commenced.

[17] At 11:38 am, the Respondent replied to NM's email of February 21, stating "No worry about health inspector. He can do nothing other than complain or move out."

[18] After sending the email, the Respondent telephoned the Tenant. The conversation lasted seven minutes. Both parties testified that it was a heated exchange.

[19] At 11:53 am, the Respondent replied to CM's email of February 18, reporting to her the results of the seven-minute conversation with the Tenant. In his email, he described the Tenant as rude and "all talk" and directed CM to serve a notice (of eviction) immediately.

[20] The Respondent had no further discussion with anyone until after the notice of eviction was served the next day, February 23, when the Tenant emailed the Respondent.

[21] On March 8, 2011 the Respondent received documentation from BM, the health inspector, of the results of his inspection of February 22, 2011.

[22] On March 28, 2011, Peace Officer B telephoned the Respondent in the course of investigating the complaint filed by the Tenant with that agency, pursuant to the *Residential Tenancies Act*. (The Notice to Admit states the investigation concerned the complaint to the Alberta Health Authority, para. 52)

[23] The company was ultimately charged with breaches of the *Residential Tenancies Act*.

[24] On February 28, 2012 the Respondent testified at the trial in Red Deer, Alberta in his self-described role as the "operating mind" of the company about the events leading to the service of the notice of eviction on February 23, 2011.

[25] On March 27, 2012 the company was convicted of the breaches.

[26] Ultimately, the matter came to the attention of the Law Society, and this citation issued.

THE EVIDENCE

[27] The Tenant testified that, on February 18, 2011 he telephoned Alberta Health Services to request that an environmental inspector attend the Building to investigate his concerns about mould and maintenance defects. He spoke to inspector BM during the early afternoon hours and an inspection was arranged for Tuesday, February 22, 2011.

[28] After he spoke to BM he completed a document entitled "Request to Alberta Health Services to Inspect" (the "Request"). He described the purpose of the Request was to provide Alberta Health Services Inspector BM the same information in writing rather than just the oral conversation that they had.

[29] Later that day, between 5 and 8 pm, he completed and filed an online complaint with Service Alberta, pursuant to the *Residential Tenancies Act*. That document was entitled "Consumer Complaints," and it was marked as Exhibit 5 in this hearing.

[30] The Tenant also called FG to advise her of the actions he had taken. He admitted that he was frustrated when he spoke with FG and that he swore at her because she ignored his concerns and she was argumentative with him. (FG was not called to testify.)

[31] However, the Tenant's evidence at the hearing conflicts as to when he called FG and what he told her. He testified that he phoned FG:

> A. ... and told her I filed a complaint with the environmental inspector for Alberta Health Services, in addition to completing *this form* (the "Consumer Complaints") and submitting it to Service Alberta under the *Landlord Tenancies Act* [sic].
>
> Q. To be clear, when you spoke to FG on February 18, you had already filled out *this form*? ("Consumer Complaints")
>
> A. Yes.

[emphasis added]

[32] Later, in response to a question about the order in which he completed the two documents, he contradicted himself when he stated:

> A. ... the one I am looking at now on tab 4, is the primary complaint to Alberta Health Services ("Request to Alberta Health Services to Inspect"). The second document titled Consumer Complaints was done a little later on in the evening, and that was submitted to Service Alberta which governs and overlooks the Landlord Tenancy Act [sic]. So there were two separate complaints drawn on the same day.
>
> Q. To be clear, when you spoke to FG on February 18, which of these two documents had you completed?
>
> A. I had only completed the tab 4 ("Request to Alberta Health Services") document. That was done shortly after my conversation with BM during the early afternoon hours, so I prepared this one first to make sure I had all the correct information down and then later on in the evening I did the Service Alberta.

[33] Later, in cross-examination, he specified that he called FG during business hours at 4:30.

[34] He describes his actions alternately as telling FG that he made a *request* of Alberta Health Services to have an environmental inspector attend to telling her that he *filed a complaint* with Alberta Health Services.

[35] In cross-examination the Tenant agreed that, when he called FG on February 18, he yelled and swore at FG. But he disagreed that he screamed at her as this would connote a loss of control, which, in his view, did not happen. When he told her that the inspector was

coming, she was argumentative, and she did not think his concerns about the building were justified. He later left her a voice mail apology.

[36] He agreed that, between February 18 and 22, he did not provide any further information to anyone. However, that is at odds with his email to the Respondent, (Exhibit 7) where he makes reference to a conversation that took place on February 19 at 4:20 pm with FG:

> I told her ... that because of the information I just received about the mold [sic] situation next door, a building inspection was going to be done Tuesday morning and to advise the owners that once the findings were in, I would be proceeding with legal action.

[37] On February 18 at 6:01 pm, CM emailed the Respondent as follows:

> Hi [Respondent],
>
> Please call the Tenant, unit #12 at [telephone number] ASAP.
>
> He has filed a *complaint* with the Landlord and Tenancy Act on Thursday.
>
> He called FG today and informed her that he has mold [sic] in his apartment. This is the first time FG or I have ever heard of mold [sic] in his apartment.
>
> *He is getting a BM in from Health Inspection on Tuesday to look at the mold* [sic] that is causing his health issues.
>
> ...
>
> The Tenant swore at FG.
>
> The Tenant apologized for his language in a followup voicemail to FG.
>
> ...
>
> The Tenant is expecting you to call him ASAP.
>
> I need you to let me know the result of the conversation so I can communicate with FG about what has been decided.
>
> ...
>
> Thanks,
>
> CM

[emphasis added]

[38] On February 19, 2011 at 12:43 pm, CM emailed the Respondent again, this time to tell the Respondent that her husband, NM, wanted to know if the Respondent had "*phoned the Tenant and straightened him out*." The Respondent did not reply.

[39] On Monday, February 21, 2011, 10:36 pm, NM emailed the Respondent as follows:

> ... the Tenant tore a strip off FG on Friday. He was swearing, threatening her, said he had a lawyer, demanded a copy of his lease agreement, and said *he has arranged to have a health inspector* by (on Tuesday morning) *to investigate* the mold [sic] in his suite. He's been there 16 months and has never complained before. I personally think we should proceed with an eviction on this guy because I think he is bad news. Anyway, I have a copy of his lease agreement, there is no mention of mold [sic]. Therefore, he is liable for the damages — funny how this may backfire on him. Jack had a hunch that this guy has likely seen the renoed units and now he wants to be moved into one of those nice units. The health inspector could cause us a lot of trouble on this one. We need to tread this one carefully and by the book. **Let me know your thoughts here as well.**
>
> [italic emphasis added; bold emphasis in original]

[40] On Tuesday February 22, at 11:38 am the Respondent emailed NM as follows:

> No not [sic] worry about health inspector. He can do nothing other than complain or move out.

[41] The Respondent testified that the three CM and NM emails were sent to his account and were received in his email account.

[42] However, he testified that he had no recollection of reviewing them on February 18, or 19, 2011 and was unsure of when he reviewed them. He testified he probably reads his emails within a day or two of receipt but he did not otherwise contest the authenticity of the documents.

[43] Under cross-examination before the Hearing Panel, when asked if his email to NM (at 11:38 am) appeared to indicate that the Respondent was aware there was an issue with the health inspector, the Respondent replied that he didn't believe the Tenant had complained to anyone and that his comment could have been a general comment about health inspectors in general. He testified that he sent the email moments before he telephoned the Tenant on February 22, 2011.

[44] The Tenant testified that, on Feb 22, 2011, shortly after BM left, he left a voice mail for FG, advising her that the inspection had been completed, and that there were health and safety concerns. He advised her to tell the management that he was going to proceed with "legal recourse to ask for rent back due to the building not meeting public health and safety concerns."

[45] There was no evidence as to whether FG received and acted on that voice mail. The Tenant did not hear back from FG.

[46] Shortly after he left that voice mail, he got a call from the Respondent who identified himself as the landlord. Both agreed that the call lasted seven minutes and that it quickly became a heated, angry discussion.

[47] The Tenant was at a medical appointment in a hospital and the Respondent's reply to his request to call him back in a couple of hours was "I do not care where you are, I am evicting you. I could give you a 48 hours eviction notice." The Tenant testified that within the first four or five sentences of the conversation, the Respondent told him that he was going to evict him and explained the two options as to eviction.

[48] The Tenant testified that he told the Respondent that he could not evict him when he had already registered and delivered a complaint to Service Alberta as well as a *Public Health Act* complaint. He told him he could not evict someone who had made complaints under either the *Public Health Act* (to Alberta Health Services) or under the *Residential Tenancies Act* (to Service Alberta). He testified that the Respondent was dismissive of his complaints and told him it did not matter.

[49] The Tenant agreed that he probably lost some emotional control as it was extremely frustrating.

[50] At some point, the Tenant told the Respondent to get a lawyer. The Respondent replied that he was a lawyer and he was adamant he would begin the eviction process, irrespective of any actions taken by the Tenant and, in the event that he couldn't evict him, he would impose a $1,000 rent increase; in response, the Tenant called the Respondent an idiot and told him that a health inspector named BM had already inspected the Building. He told the Respondent that BM was with Alberta Health Services but that the Respondent never asked him for BM's contact information.

[51] The Tenant swore at the Respondent, and described him as arrogant and condescending. When it was suggested to him in cross-examination that he was evicted due to his aggressive tone, he replied that there was no reason stated (in the Notice) for the eviction.

[52] The Tenant testified that he expected the landlord to call him to fix matters and that was not how the conversation went. Instead, the landlord threatened him with eviction. In his view, there was no opportunity for a discussion.

[53] The Respondent testified at the hearing on December 11, 2015, that he could not recall the specific content of his conversation with the Tenant, but did recall the Tenant talking about BM and the "Health Board." He provided little detail of the conversation, stating that it "was a long time ago" and that he "really didn't recall much now."

[54] However, minutes after the telephone conversation on February 22, 2011 at 11:53 am, in reply to CM's email of February 18, 2011, the Respondent emailed her, setting out a summary of what had taken place:

> I have spoken to the Tenant. He called me many names including asshole, fucker, stupid mutherfucker [sic] etc. I advised he was threatening me and FG and that we would be serving notice for eviction.
>
> He says he has a lawyer to sue but would not tell me who it is. This means he is all talk. I provoked him as much as I could so he should be having a stroke right now.
>
> Please have FG serve a 14 day notice right away.… Today if possible.

[55] Minutes later, at 12:10 pm, the Respondent emailed CM and NM an eviction notice to be provided to the Tenant, and asked that one of them sign it on his behalf. It stated in part:

> This tenancy is being terminated because of **ONE OR MORE** of the following breaches of your obligations under the Residential Tenancies Act:
>
> ...
>
> -YOU HAVE **THREATENED AND INTIMIDATED** THE PROPERTY OWNER AND HIS AGENTS;

[56] On February 23, 2011, the Tenant was served with a Termination of Month to Month Residential Tenancy for Substantial Breach, (the "Eviction Notice"), and a Notice of Rent increase of $1,000 per month. It varied from the Notice that the Respondent sent in that it did not specify a reason for the eviction.

[57] On or about March 9, 2011, BM called the Respondent about his inspection.

[58] Peace Officer B, lead investigator and Alberta peace officer for Service Alberta, testified that he was investigating a complaint under the *Residential Tenancies Act*. The first step would have been to review the complaint filed by the Tenant.

[59] Peace Officer B was investigating two issues – whether the company was aware that the Tenant had made a complaint and whether the complaint was the only reason the Tenant was evicted. During the telephone conversation with the Respondent on March 28, 2011, the Respondent told Peace Officer B that the company was not aware of an Alberta Health Services complaint filed by the Tenant before the company issued an eviction notice. Peace Officer B specifically asked the Respondent if he was aware of the Tenant's complaint before the issuance of the Eviction Notice and the Respondent stated no, that he was not aware.

[60] Peace Officer B could not testify as to the exact words exchanged with the Respondent and the specific questions he asked about this issue. He concluded from that conversation that, before the issuance of the Eviction Notice, the Respondent as an individual was not aware of the complaint made by the Tenant.

[61] In cross-examination, Peace Officer B testified that the Respondent told him that the reason the Tenant was evicted was because the Tenant was aggressive with the building manager and with the Respondent, and because he had created disputes with other tenants. He testified that the Respondent told him that the reason for the eviction was not the mould issue or the complaint but rather these other issues. Peace Officer B agreed it was an informal conversation. He testified that he personally confirmed with BM that BM had contacted the Respondent on March 8, 2011.

[62] As to the Respondent's state of knowledge of the complaint before issuance of the Eviction Notice, the following exchange took place during the cross-examination of Peace Officer B:

> Q. So I suggest to you that the Respondent said to you was that he didn't believe that a real complaint had been made until he had received contact from AHS directly, correct?
>
> A. Yes, he was unaware ... I believe the Respondent made a representation to me during that phone call that he became aware of the Alberta Health Services complaint after. He would have been aware of the Alberta Health Services complaint after serving the eviction and rental increase notices.

[63] However, he did not recall the Respondent stating that he did not believe that a real complaint had been made to the Alberta Health Services until after the company had received formal notice through BM and letter notification from Alberta Health Services.

[64] He agreed it was unlikely but possible that the Respondent said that he did not believe a complaint had been made until the Alberta Health Services complaint came in. He agreed that he did not recall the part of the conversation where the Respondent expressed his views of the complainant. He disagreed with the suggestion that it was likely that the Respondent told him that he did not believe the Tenant was actually going to complain but was only threatening to complain. He admitted he could not recall specifically what had been said and he could not recall what the Respondent specifically said to him.

[65] Peace Officer B made notes of his conversation that reflected the Respondent's statement. Peace Officer B testified he made the notes concurrently with the conversation with the Respondent.

[66] In cross-examination, Peace Officer B did not waiver from his testimony that his notes accurately recorded the representations the Respondent made to him during their conversation but conceded that his notes were not a verbatim transcript of the specific words exchanged. The notes were not entered as evidence, nor did Peace Officer B ask to refer to them during his testimony.

[67] The Respondent was called to testify by the Law Society, pursuant to Rule 4-42. He testified that he had attended the trial in Red Deer, Alberta on February 28, 2012 in his capacity as the operating mind of the company. His testimony from the trial was marked as Exhibit 3, by way of the Notice to Admit, in this hearing.

[68] He told the court that he was asked to call the Tenant, either on the 18th or the 19th of February 2011, when he received a communication "from Calgary" asking him to deal with a tenant who had been aggressive by swearing at FG. He did not know much about the Tenant other than he had been a tenant for 16 months or so. He testified that he found out that the Tenant had actually apologized but was not certain when the Tenant had done so but believed that he knew of the apology when he telephoned the Tenant on February 22, 2011.

[69] He told the court that the conversation was brief, that the Tenant became aggressive very quickly. He described the conversation as one where "I didn't get a lot of opportunity to – to speak with him … it was basically him ripping a strip off of me and swearing at me", and "him chastising me and yelling at me and swearing at me … ." He described the Tenant's tone as threatening. The Tenant mentioned the name of BM to him, but the Respondent could not understand who that person was and what the situation was, although he tried to get information out of the Tenant who was " just losing it on the phone" as demonstrated by the following exchange at trial:

Q. Yeah, the problem was that he [the Tenant] called up the Public Health and made a complaint, that was the problem, wasn't it?

A. And I didn't — no, I didn't know that, and frankly I wasn't able even to get that out of this guy, I — I asked him, I tried to get information out of him and I couldn't, this guy was just yelling and — and his tone is just — he's just losing it on the phone.

Q. Were you trying to get information about him about what government agencies he phoned?

A. Well, I asked him, he — he complained about mould and the health inspector is what he's complaining about and — and I — I'm like, what, who's the guy, who is —

...

Q. And he mentioned — how do you know that was a health inspector?

A. That's what he said, so I asked him — I asked him for information about BM and — and how I can get a hold of this guy. I frankly didn't believe that he had called anybody. I'll be honest, this guy is yelling at me, he's swearing at me, this is — I honestly didn't believe that he'd done anything, he was threatening to do stuff.

Q. What was he threatening to do?

A. Well, he's threatening, I suppose, to call agencies or — or to —he's threatening to sue me, I don't know, he's just making threats, he was just yelling at me ...

[70] He testified that it was only when he got the Tenant's lengthy emails after February 22 that he became aware the Tenant had called an inspector named BM.

[71] He did not intend to evict the Tenant for anything other than being very aggressive with the building manager and him. The Respondent testified that he said very little during the seven-minute conversation and that he issued the Eviction Notice the same day. He reiterated that, at the time that he issued the eviction, he was not aware that the Tenant was actually following up on these complaints to these agencies, that the Tenant did not effectively communicate it to him, and that he did not hear about it until March 8 or 9, 2011.

[72] Later he agreed that he sent out an email expressing his frustration on February 24, 2011 to the Tenant (those emails are marked as Exhibit 7 and 8 in this hearing). On March 8, BM called him about the results of the inspection.

[73] However, later, in his trial testimony, he described his intention as "not to evict him for anything other than the fact that he was just simply very aggressive ... was aggressive with FG … was aggressive with me ... I said very little." As to his actions he stated:

> I couldn't sort it out, I authorized the eviction. I tried to be very calm and to deal with him in a very calm way, to determine what the circumstances were.

[74] He told the court that he had telephoned to speak with the Tenant and described his attitude as follows:

> ... I'm quite cautious when I speak to people on the phone, I mean, as – as lawyers do, we have to exercise restraint and … and I tried to be very calm and to deal with him in a very calm way, to try to determine what the circumstances were.

[75] His testimony that he tried to be calm is at odds with and unsupported by his email to CM on February 22, 2011, at 11:53 am, minutes after the seven-minute conversation with the Tenant:

> I have spoken to the Tenant. … I provoked him as much as I could so he should be having a stroke right now.

[76] He testified that he did not normally get involved in any of the dealings with the tenants. That was the role of the building manager. He would deal with the "more difficult tenants." He testified that this particular situation was unusual in that it was the first time he had had to evict anybody from that building.

[77] And, he testified that it was a "fairly unique conversation, I haven't had a conversation like that with a tenant probably ever, I mean, I've had tenants yell at me, but it was, just a very quick — he snapped, right, and that's the unfortunate part of the conversation." At trial, the Respondent could offer no explanation as to why the Tenant became angry.

[78] He was asked about the three emails sent between February 18 and February 21, 2011 from CM and NM to him, which set out the Tenant's concerns and his actions in requesting a health inspector attend the Building and in filing a complaint pursuant to the *Residential Tenancies Act*.

[79] He testified that he had no recollection of either receiving or reading any of the emails but agreed that he probably read them, not on the day, but within a day or two of receipt. His view was "the email didn't twig anything for me."

[80] He agreed they were sent to his personal email and that no one else checked it. As to his email to NM on February 22, at 11:38 am about the "health inspector" he stated that he did not believe that the Tenant had complained to a health inspector, but was aware that the Tenant was talking of a complaint. He defended his email statement of "no not worry about health inspector" as a general statement about health inspectors, and it was sent minutes before he called the Tenant.

[81] He knew he was dealing with an angry tenant who was bothering the building manager — that was his focus at that time.

[82] He called the Tenant with the intent to see if he could fix the situation, figure out why he was having problems with FG and calm him down. His intention was not to evict him.

[83] He testified that, during the seven-minute conversation with the Tenant, he asked him about the Health Board and BM. He described the Tenant's response as aggressive, including calling the Respondent abusive names, such that the Respondent decided to evict him; he did that immediately after the telephone discussion.

[84] He was asked if, when he spoke to the Tenant on February 22, he knew of his complaint to Alberta Health Services. He replied that he asked the Tenant about the Health Board and BM but did not think that the Tenant had actually made the complaints. He testified that he had no specific recollection of the Tenant saying that he complained and that he did not recall what the Tenant told him.

[85] In response to whether he was aware of the Tenant's complaints, given the CM and NM emails, the Respondent stated that he did not believe the Tenant had complained and figured he was "all talk."

[86] He testified that he did not take seriously that the Tenant had made a complaint, until March 9, when BM called him.

[87] He testified as to his conversation with Peace Officer B.

[88] He recalled speaking with an investigator but did not recall what he discussed. In his view, it was a brief discussion, a casual, informal conversation. He had no specific knowledge of the conversation, its contents or its length. He called it a "benign conversation." He was adamant that he had no further recollection whatsoever.

[89] As to whether he had told Peace Officer B that he was not aware of the complaints having been made, the Respondent testified he did not now recall what he said to Peace Officer B. When asked if he told Peace Officer B that he did not know of the complaint, he said he could not recall. He reiterated that he did not take seriously the threats made by the Tenant and that the timing of the eviction was "coincidental."

[90] The Respondent testified and confirmed that, when he was interviewed by the Law Society on April 22, 2014, he told the Law Society truthfully that he had no reason to believe Peace Officer B's notes were inaccurate and that he speculated they were probably accurate. (However, the notes did not become an Exhibit in this hearing.)

POSITION OF THE PARTIES

The Law Society

[91] The Law Society's position is that there is evidence to support a finding that the Respondent was aware of the Alberta Health Authority complaint when the Eviction Notice was issued on February 23, 2011, as:

(a) The Tenant testified that he called FG on February 18 and told her he had registered a complaint with the Alberta Health Authority;

(b) CM emailed the Respondent on February 18 about the Tenant's complaint and that BM from "Health Inspection" was coming to inspect the Tenant's apartment;

(c) CM again emailed the Respondent on February 19 asking if he had spoken to the Tenant;

(d) NM emailed the Respondent on February 21, advising that the Tenant had arranged for a health inspector to attend on February 22;

(e) The Respondent replied to NM's email of February 21, stating "no worry about health inspector. He can do nothing other than complain or move out.";

(f) On February 22, shortly after the health inspection was completed, the Tenant called the building manager and left her a voice mail advising of the findings of the investigation and that he would be following up with recourse;

(g) On February 22, in the seven-minute conversation, the Tenant told the Respondent that he had made a complaint and that a health inspection was completed;

(h) On February 22, the Respondent emailed CM asking her to serve the enclosed draft notice of eviction on the Tenant as soon as possible;

(i) On February 28, 2012, at the Red Deer trial, the Respondent admitted that the Tenant complained about mould to the health inspector;

(j) At the hearing on December 11, 2015, in cross-examination, the Respondent admitted that the Tenant told him that BM was a health inspector;

(k) The Respondent also testified that he could not recall what the Tenant said during the seven-minute conversation, but he would *not* have sent the emails of February 24 (Exhibits 7 and 8), if the Tenant had told him about BM during that conversation.

[92] The Law Society urges the Panel to assess the Respondent's testimony according to the test in *Faryna v. Chorny*, [1952] 2 DLR 354 (BCCA) and submits that his testimony was not internally consistent when assessed in the context of the Red Deer trial or the Law Society hearing, or when taken together with other evidence.

[93] The Law Society urges this Panel to find that because the Respondent "did not *believe* the Tenant had complained," he had to have been aware that the Tenant had complained and then formed a belief about the validity of the complaint.

[94] The Law Society also submits that the Respondent's testimony also conflicts with other testimony available to this Panel, including the emails between CM and NM and the Respondent between February 18 and 22, 2011.

[95] The Law Society submits that Peace Officer B testified that the Respondent told him that he was unaware of the complaint before he instructed the eviction notice to be issued.

[96] The Law Society further submits that the Respondent has a duty as a lawyer and as an officer of the court to be truthful when providing information to others in the justice system, such as a peace officer who is performing an investigation.

[97] As for whether the Respondent's testimony (at the Red Deer trial) was to the effect that he was unaware of the Tenant's complaints when the Eviction Notice was issued, the Law Society submits that the trial evidence clearly illustrates that the Respondent testified that

he was unaware that the Tenant was actually following up on the complaints to the agencies.

[98] Finally, the Law Society submits that there are a number of factors that support a finding of conduct unbecoming. However, given that the representations were made within the context of an investigation that led to a court hearing, this Panel could make a finding of professional misconduct with respect to both allegations.

The Respondent

[99] The Respondent submits that there is insufficient evidence to prove the alleged conduct, and specifically, no "clear, cogent or convincing evidence on which this Panel could find him guilty of allegation 1."

[100] Peace Officer B agreed that he had no recollection or notation of the specific statements or questions that comprised the brief telephone conversation between the parties. He agreed that the Respondent told him that the reason the Tenant was evicted was because he was aggressive to the building manager and to himself.

[101] The Respondent submits that "context is all important," that this was a brief, casual conversation.

[102] He argues that the Law Society's attempt to cross-examine the Respondent on his view of the veracity of the Peace Officer B's notes was improper.

[103] He argues that the officer was unable to specifically recall what the Respondent had said during the brief conversation.

[104] The Respondent submits that the allegation as framed does not allege a breach of a duty of candour in the context of a police investigation and the Law Society cannot now use this route to liability.

[105] Finally, the Respondent submits that the impugned conduct in allegation 1 would not meet the test of either conduct unbecoming or professional misconduct.

[106] As to allegation 2, the Respondent argues that the *mens rea* of offering false testimony is identical to that of the criminal offence of perjury. However, he agrees that the burden of proof is not the criminal standard of proof beyond a reasonable doubt.

[107] The Respondent submits that he did not actually believe that a complaint had been made.

[108] The Respondent submits that the testimony of the Tenant supports the Respondent's position that the Tenant was evicted because he was aggressive with the building manager and with himself.

[109] The Respondent submits that any prior consistent statement made by the Tenant, whether under oath or not, is not admissible for the truth of its contents. The Respondent also points to his own testimony before this Panel that, at all times, he did not believe the Tenant had actually made a complaint.

[110] The Respondent submits that the Law Society must prove that the Respondent's testimony as to his belief was false, and, further, that any such testimony was not the product of confusion, mistake or faulty memory.

[111] The Respondent also submits that the Law Society failed to put his trial testimony to him, and thereby demonstrate an inconsistency that gives rise to the falsehood. Finally, the Respondent submits that the Panel may not simply choose between two theories, but must be alive to "irreconcilable views" that give rise to the Law Society being unable to meet the onus on it.

ONUS AND STANDARD OF PROOF

[112] The onus is on the Law Society to prove the allegations on a balance of probabilities.

[113] In *Law Society of BC v. Schauble,* 2009 LSBC 11, the hearing panel summarized the onus and standard of proof as follows at para. 43:

> The onus of proof is on the Law Society, and the standard of proof is a balance of probabilities: "... evidence must be scrutinized with care" and "must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But … there is no objective standard to measure sufficiency." (*FH v. McDougall*, 2008 SCC 53, 297 DLR (4th) 193).

TEST FOR PROFESSIONAL MISCONDUCT

[114] The Law Society seeks a finding of professional misconduct or conduct unbecoming with respect to both allegations contained in the citation.

[115] "Professional misconduct" is not a defined term in the *Legal Profession Act,* the Law Society Rules or the *Code.* The test for whether conduct constitutes professional misconduct was established in *Law Society of BC v. Martin,* 2005 LSBC 16, at para. 171

as: ... "whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members; if so, it is professional misconduct."

[116] In *Martin*, the panel also commented at para. 154:

> The real question to be determined is essentially whether the Respondent's behaviour displays culpability which is grounded in a fundamental degree of fault, that is whether it displays gross culpable neglect of his duties as a lawyer.

[117] The review decision in *Re: Lawyer 12*, 2011 LSBC 35, is the leading pronouncement concerning the test for professional misconduct from a review panel. In the facts and determination decision of *Re: Lawyer 12,* the single bencher hearing panel held at para. 14 (quoted in para. 7 of the review decision):

> In my view, the pith and substance of these various decisions displays a consistent application of a clear principle. The focus must be on the circumstances of the Respondent's conduct and whether that conduct falls markedly below the standard expected of its members.

[118] Both the majority and the minority of the Bencher review panel confirmed the marked departure test set out in *Martin* and adopted the above formulation of that test expressed by the single bencher hearing panel.

PROFESSIONAL MISCONDUCT VS. CONDUCT UNBECOMING

[119] " Conduct unbecoming" is defined in the *Legal Profession Act* as conduct that is contrary to the best interest of the public or legal profession or harms the standing of the legal profession. The definition has been considered in several cases, and the Benchers have adopted as a "useful working distinction" that professional misconduct refers to conduct occurring in the course of a lawyer's practice, while conduct unbecoming refers to conduct in the lawyer's private life (see *Law Society of BC v. Berge*, 2005 LSBC 28 (upheld on review 2007 LSBC 7) and *Law Society of BC v. Watt*, 2001 LSBC 16.)

[120] It is alleged that the Respondent engaged in professional misconduct or conduct unbecoming when he represented to Peace Officer B, on March 28, 2011, during the course of his investigation of a complaint against the company that the Respondent was unaware that the Tenant had complained to the Alberta Health Authority prior to the company issuing an eviction notice to him when the Respondent knew or ought to have known the representation was not true, contrary to Chapter 1, Rule 2(3), or Chapter 2, Rule 1 of the *Professional Conduct Handbook*.

[121] The Law Society seeks an adverse determination of professional misconduct or conduct unbecoming as that action reflects adversely on his own professional integrity and that of the legal profession.

ISSUES

[122] We frame the issues as follows:

1. Has the Law Society proven, on a balance of probabilities, that the Respondent represented to Peace Officer B, on March 28, 2011, that the Respondent was unaware that the Tenant had complained to the Alberta Health Authority prior to the company issuing an eviction notice to him?

2. If so, did the Respondent know, or ought he to have known, that such representation was not true?

3. If so, is it a breach of Chapter 1, Rule 2(3) or Chapter 2, Rule 1 of the *Professional Conduct Handbook* then in force, and does that conduct rise to the level of professional misconduct or conduct unbecoming a lawyer?

4. Has the Law Society proven, on a balance of probabilities that the Respondent testified before the Alberta Provincial Court, on February 28, 2012, that the Respondent was unaware that the Tenant had complained to the Alberta Health Authority prior to the company issuing an eviction notice to him?

5. If so, did the Respondent give false testimony?

6. If so, is it a breach of Chapter 1, Rule 2(3) or Chapter 2, Rule 1 of the *Professional Conduct Handbook* then in force, and does that conduct rise to the level of professional misconduct or conduct unbecoming a lawyer?

[123] Chapter 1, Rule 2 (3) states:

> A lawyer should not attempt to deceive a court or tribunal by offering false evidence or by misstating facts or law and should not, either in argument to the judge or in address to the jury, assert a personal belief in an accused's guilt or innocence, in the justice or merits of the client's cause or in the evidence tendered before the court.

[124] Chapter 2, Rule 1 states:

> A lawyer must not, in private life, extra-professional activities or professional practice, engage in dishonourable or questionable conduct that casts doubt on the lawyer's professional integrity or competence, or reflects adversely on the integrity of the legal profession or the administration of justice.

DISCUSSION AND ANALYSIS

[125] We find that the Law Society has proven that the Respondent represented to Peace Officer B on March 28, 2011 that the Respondent was unaware that the Tenant had complained to the Alberta Health Authority prior to the company issuing an Eviction Notice to the Tenant.

[126] Peace Officer B was clear that he asked the Respondent if the Respondent or any persons of the company were aware of an Alberta Health Services complaint filed by the Tenant before the company issued an eviction notice. The Respondent told Peace Officer B that he was not aware of an Alberta Health Services complaint.

[127] In cross-examination, Peace Officer B elaborated that the parties also discussed the Respondent's numerous reasons why the Tenant was evicted, including his aggressive attitude to the building manager and to the Respondent. The Tenant had created disputes with other tenants by calling the RCMP and the Child Welfare Authorities. They discussed whether the complaint to the Alberta Health Services about mould was ultimately baseless.

[128] We find that, while Peace Officer B did not recall the specific words used or questions posed as to whether the Respondent was aware that the Tenant had complained to the Alberta Health Authority prior to the company issuing an eviction notice to him, there is sufficient context, particularly given the elaboration in cross-examination, of the discussion between the parties. We find that the question was posed and that the Respondent responded to Peace Officer B that he was unaware of the Tenant's complaint to the Alberta Health Services before the company issued an Eviction Notice.

[129] The next question is did the Respondent know, or ought he to have known, that such representation was not true?

[130] We approach this question as follows:

(a) Did the Respondent know about the complaint before the Eviction Notice was delivered?

(b) If so, did he know or ought he to have known that his representation (that he was unaware) was not true?

[131] The Tenant testified that he called FG on February 18, 2011 and told her of actions he had taken with respect to his concerns about his apartment. In his testimony, he alternated between describing his actions as a "request" of Alberta Health Services, to a "filing of a complaint" with Alberta Health Services. He also testified as to two forms he completed — "Request to Alberta Health Services to Inspect" and the "Consumer Complaints" document. His evidence conflicted as to when and which of the two forms he had completed when he called her.

[132] The Tenant's lack of recollection of whether he told FG he had completed a "Request for inspection" or filed a "complaint with Alberta Health" and which forms he had completed when he spoke to her is fundamental to our assessment of whether the allegation is made out.

[133] The Tenant also testified that, between February 18 and 22, he did not provide any further information to anyone. However, that assertion conflicts with his email to the Respondent of February 23, 2011 (Exhibit 7), in which he described a conversation that took place on February 19 at 4:20 pm with FG:

> ... I told her … that because of the information I just received about the mold [sic] situation next door, a building inspection was going to be done Tuesday morning and to advise the owners that once the findings were in, I would be proceeding with legal action.

[134] The Tenant sent this email on February 23, the day following the seven-minute conversation with the Respondent and the receipt of the notice of eviction, when his memory was fresh. It details the actions he had taken and was planning to take; once again, there is no reference to the complaints he had filed, only that "he told FG that a building inspection was going to be done, and he would be proceeding to take legal action" once the findings were in.

[135] The Tenant's evidence is not clear as to what he told FG on February 18 — whether he filed a request with Alberta Health Services, and a complaint with Service Alberta or, complaints with both Alberta Health Services and Service Alberta. This allegation rests solely on his memory of the events. His recall of what he did and said to FG and the Respondent is critical, not only because the Tenant originated the complaint, but also because everything that anyone understood about his complaint was based on and flowed from what he had said to them.

[136] We accept that he completed both documents that day and that he filed the "Consumer Complaint" form online on February 18, 2011.

[137] The latter document, marked as Exhibit 5, outlines the Tenant's specific grievances and seeks redress, consistent with a complaint.

[138] The former document is a summary of the Tenant's concerns about mould in the building that, in his opinion, were contributing to his health issues; he concluded this document by stating:

> We are asking that inspectors consider these facts, along with the presented facts as seen during their on-site inspection, and file a report reflecting the findings and a directive on a course of action to be taken. ...

[139] We note this document asks that his concerns be investigated and then a course of action be recommended. It does not seek redress.

[140] We infer that FG informed CM of what the Tenant had told her.

[141] CM in turn emailed the Respondent on February 18, 2011, asking him to call the Tenant, who had "filed a complaint with the *Landlord Tenancy Act* [sic] on Thursday," "called FG to complain of mould" and "arranged for a BM from Health Inspection to look at the mould."

[142] In her email to the Respondent, CM clearly set out the three actions taken by the Tenant: he filed a *complaint* pursuant to the *Residential Tenancies Act* with Service Alberta, on Thursday (February 17); he *complained* to FG of mould, and he *communicated* with a Health Inspection employee to attend, to determine if his concerns were founded.

[143] We find that there is no reference in this email to a *complaint* having been made, either to the Alberta Health Authority as alleged in the citation, or to Alberta Health Services. If the Tenant told FG of having filed a complaint with Alberta Health Services, it does not appear to have been communicated to the Respondent in this email. The email only references a complaint made pursuant to the *Residential Tenancies Act*.

[144] We note this email is consistent with the Tenant's testimony that he told FG that he had made a "Request of Alberta Health Services" rather than his testimony that he made a complaint to Alberta Health Services.

[145] We now turn to NM's email of February 21, 2011 to the Respondent, in which NM reiterated that the Tenant had "arranged to have a health inspector investigate the mold [sic] in his suite (on Tuesday morning) … and that the health inspector could cause a lot of trouble on this one." He recommended evicting the Tenant.

[146] This email also makes no reference to a *complaint* having been made to the Health Authority — either to Alberta Health Services or to the Alberta Health Authority.

[147] The Tenant did not provide any copies of either the "Request to Alberta Health Services" or the "Consumer Complaints" form to FG or anyone else, before the Eviction Notice was delivered to him.

[148] We turn to the seven-minute telephone discussion on February 22, 2011 at 11:53 am. On both accounts, the conversation quickly degenerated into a heated, angry, brief exchange.

[149] We find that the Tenant mentioned the name of BM to the Respondent but that the Respondent did not request any further information.

[150] The Tenant candidly described his response to the Respondent as "an expletive filled diatribe" when advised he would be evicted.

[151] In his trial testimony the Respondent characterized his response during the seven-minute conversation as one in which he "said very little, tried to be calm and to deal with him (the Tenant) in a calm way." He also said, "I'm quite cautious when I speak to people on the phone, I mean, as — as lawyers, do, we have to exercise restraint and ... I tried to be very calm and to deal with him in a very calm way. …"

[152] This assertion is completely at odds with his email to CM, moments following the seven-minute conversation:

> I have spoken to the Tenant ... I provoked him as much as I could, so that he should be having a stroke right now.

[153] We place reliance on this email, as it was sent out minutes after the seven-minute conversation when the Respondent's memory was fresh, he had no reason to be circumspect, and no need to dilute his words.

[154] This email, when taken together with the Tenant's description of the seven-minute conversation, gives some indication of the level of mistrust, anger and animosity between them. It is difficult to conclude that either party understood or believed anything the other party may have tried to communicate. (We note that the issues of the appropriateness of the Respondent's conduct as described in his email and his subsequent characterization of it at trial are not before us.)

[155] We find that the totality of the evidence from February 18 to 22, 2011, including the testimony of the Tenant as to his actions in completing the "Request to Inspect," the three CM and NM emails and the seven-minute conversation, falls short of demonstrating that

the Tenant had in fact complained to the Alberta Health Services, (as opposed to the Alberta Health Authority) before the company issued the Eviction Notice. It does not meet the test of "clear, convincing and cogent" evidence.

[156] We further find that the totality of the evidence from February 18 to 22, 2011, including the testimony of the Tenant, the three CM and NM emails and the seven-minute conversation, and the testimony of the Respondent, falls short of demonstrating that the purported complaint (which was in fact a Request to Inspect to Alberta Health Services) had been communicated to the Respondent, such that he knew or ought to have known that, when he later told Peace Officer B that he was unaware of a complaint having been made, his statement was untrue.

[157] Allegation 1 is dismissed.

[158] As to allegation 2, has the Law Society proven, on a balance of probabilities, that the Respondent testified before the Alberta Provincial Court on February 28, 2012, that the Respondent was unaware that the Tenant had complained to the Alberta Health Authority prior to the company issuing an eviction notice to him, and that that amounted to false testimony?

[159] We find that there is sufficient evidence that the Respondent testified on February 28, 2012, that he was unaware that the Tenant had complained to the Alberta Health Authority, prior to the company issuing an eviction notice to him.

[160] Having so found, did the Respondent give false testimony?

[161] We use the same analysis as we did above:

(a) Did the Respondent know about the complaint before the eviction notice was delivered?

(b) If so, did he give false testimony?

[162] As we have noted above, we find that the totality of the evidence from February 18 to 22, 2011, including the testimony of the Tenant, the three CM and NM emails and the seven-minute conversation, falls short of demonstrating that the Tenant had in fact complained to the Alberta Health Services (as opposed to the Alberta Health Authority), before the company issued the eviction notice.

[163] We further find that the totality of the evidence from February 18 to 22, 2011, including the testimony of the Tenant as to his actions in completing the "Request to Inspect," the three CM and NM emails, the seven-minute conversation, and the testimony of the

Respondent, falls short of demonstrating that the purported complaint (which was in fact a Request to Inspect to Alberta Health Services) had been communicated to the Respondent. Therefore, it is not proven that the Respondent gave false testimony when he testified on February 28, 2012 in Red Deer that he was unaware that the Tenant had complained to the Alberta Health Services before the company issued an eviction notice to him.

[164] Given our findings above, we are not satisfied that the Law Society has proven on a balance of probabilities that the Respondent's conduct breached either Chapter 1, Rule 2(3) or Chapter 2, Rule 1 of the *Professional Conduct Handbook* then in force as alleged in allegation 1 or 2 of the citation. Accordingly, it is not necessary to determine whether the conduct meets the test of professional misconduct or conduct unbecoming a member of the Law Society of British Columbia.

[165] The citation is dismissed.

[166] If the parties cannot agree as to costs, submissions may be made up to 30 days from the date that this decision is issued.