



WILLIAM T. JOHNSTON

November 22, 2011

Law Society of Saskatchewan v. William T. Johnston, 2011 LSS 7

C A N A D A)
PROVINCE OF SASKATCHEWAN)
T O W I T)

**IN THE MATTER OF *THE LEGAL PROFESSION ACT, 1990*
AND IN THE MATTER OF WILLIAM T. JOHNSTON,
A LAWYER OF REGINA, SASKATCHEWAN**

**DECISION OF THE HEARING COMMITTEE FOR
THE LAW SOCIETY OF SASKATCHEWAN**

REASONS FOR DECISION OF THE HEARING COMMITTEE

1. The Hearing Committee in this matter was composed of Beth Bilson, Q.C., Bill Davern and Laura Lacoursiere. The hearing took place by telephone on November 22, 2011. Timothy Huber acted as counsel for the Investigation Committee of the Law Society, and the member was represented by Michael Tochor. The member was present by telephone for the hearing.

2. Neither counsel raised any objection to the jurisdiction of the Hearing Committee, and neither made any preliminary applications to the Committee.

3. The Formal Complaint dated November 23, 2010, indicated that there were two charges against the member:

1) that he did act for both a builder or developer, 101002490 Saskatchewan Ltd., and a purchaser, A.M., in a real estate transaction resulting from the construction of a new home (condominium); and

2) that he did, through his associate, 101002490 Saskatchewan Ltd., enter into or continue a business transaction with his client, A.M., when his interests or

the interest of his associate and the interest of A.M. were in conflict; more particularly, he did:

- a. Fail to disclose his financial interest in 101002490 Saskatchewan Ltd., while acting for A.M. in the purchase of a new condominium unit from 101002490 Saskatchewan Ltd.;
- b. Fail to obtain the consent of A.M. in relation to his conflicting interest; and
- c. Fail to provide A.M. with a reasonable opportunity to seek independent legal advice in relation to the transaction.

4. Counsel submitted an Agreed Statement of Facts and Admissions. Mr. Tochor indicated, and Mr. Johnston confirmed, that on the basis of this Agreed Statement of Facts and Admissions, he was entering a plea of guilty to both of the charges.

5. The following evidence was admitted by consent:

- P-1 Notice of Hearing and Proof of Service
- P-2 Agreed Statement of Facts and Admissions
- P-3 Statement with respect to Costs

6. Counsel made a joint submission on the issue of penalty, and had agreed that the member should be reprimanded and assessed costs in the amount of \$1955.00. Mr. Huber pointed out that the penalty of reprimand lies within the jurisdiction of a Hearing Committee and that it would not be necessary to refer the question to the Benchers in the event the joint submission is accepted.

FACTS

7. The facts as laid out in the Agreed Statement of Facts and Submissions were fairly straightforward. Mr. Johnston was a director and shareholder, and also acted as legal counsel, to 101002490 Saskatchewan Ltd., a company which had invested in the construction of a condominium complex at Regina Beach, Saskatchewan. In June of 2000, the complainant, A.M., signed an agreement to purchase a condominium unit in the development, and approached Mr. Johnston to represent her in the purchase of the property.

8. Mr. Johnston did not disclose to A.M. that he had a financial interest in the development. He continued to represent 101002490 Saskatchewan Ltd., and to be a director and shareholder of that company. He did not take any steps to conceal his role in the company, nor did he initiate the relationship with A.M.

9. Because Mr. Johnston failed to disclose to A.M. the fact that he had a financial interest in the condominium development, she did not have an opportunity to obtain independent legal advice with respect to any risks to which she would be exposed by purchasing the property.

10. A.M. and others subsequently brought legal action against Mr. Johnston and other members of 101002490 Saskatchewan Ltd. This litigation was not directly related to Mr. Johnston's conflict of interest, but was connected with other aspects of the development. This litigation was settled in 2006. The member self-reported the conflict of interest to the Law Society and SLIA at the time the litigation commenced, and prior to the complaint from A.M.

SUBMISSIONS OF COUNSEL

11. Mr. Huber referred the Hearing Committee to Chapter V, Commentary 11 of the *Code of Professional Conduct*. This provision in the Code makes it clear that a member of the Law Society should not represent both the builder or developer and the purchaser in a real estate transaction. This provision was put in place following a disciplinary decision involving facts similar in some respects to those in the current case (*Keith Chow* decision, 94-4).

12. Mr. Huber described the purpose of disciplinary penalties as the protection of the public and the maintenance of high professional standards. Members should always be mindful of the need to maintain public confidence. If a conflict of interest arises, a member should deal with it openly and as early as possible.

13. Mr. Huber referred us to two previous disciplinary decisions illustrating the possible consequences of a failure on the part of a member to disclose a conflict of interest in a timely and transparent fashion. In *Chow*, the failure to disclose the conflict led to what Mr. Huber described as the "worst case scenario." The member was found not only to have failed to disclose the conflict, but to have given preferential treatment to the developer with whom he was associated, resulting in loss to the complainant.

14. In the other case, *Dwayne Braun* decision 09-01, the member became involved in a business association with the complainant which ultimately led to a significant loss of rights for the complainant.

15. Mr. Huber said that, though there are some similarities between the situations in *Chow* and *Braun* and the facts on which the complaint against Mr. Johnston was based, there are also significant differences which have led to the joint submission on penalty. There was no loss to A.M. in this case, as she was in due course able to sell the condominium unit she had purchased without incurring a loss as part of the settlement of the litigation. Mr. Johnston self-reported even before the complaint was made or the outcome of the litigation was clear.

14. Mr. Tochor also pointed to the mitigating factors in this case. He said there was never any suggestion that Mr. Johnston would do other than plead guilty. Mr. Johnston acknowledged his responsibility and felt a huge sense of embarrassment at failing to disclose his conflict of interest.

15. Mr. Tochor also noted that Mr. Johnston had gained no benefit from the failure to disclose his conflict of interest to A.M., and that he had purchased the condominium unit back at a fair price.

16. Mr. Tochor confirmed that he supported the joint submission with regard to penalty, and asked that Mr. Johnston be allowed a period of fourteen days to pay the costs.

17. Mr. Johnston acknowledged that he had made a huge mistake, which was highly embarrassing for him with his family and his peers, and stated that he was prepared to take responsibility for it.

ANALYSIS

18. The Agreed Statement of Facts and Admissions, as well as the submissions of the parties, leave no room for doubt that there was a clear conflict of interest between the role of Mr. Johnston as director, shareholder and counsel of 101002490 Saskatchewan Ltd. and his role as lawyer for A.M. Mr. Johnston admitted that he should have brought this conflict to the attention of A.M. so that she would have an opportunity to obtain independent legal advice about the possible risks associated with the condominium purchase. Mr. Johnston should have been able to perceive this conflict from the outset, in our view, but we acknowledge that he did self-report without waiting for a complaint to be made to the Law Society.

19. The only issue for this Committee to consider is whether the penalty of reprimand and costs jointly recommended by the parties is a suitable sanction for the conduct of the member. In this connection, we recognize that the case law suggests that joint submissions should carry a heavy weight, and that they should not be rejected unless “the joint submission fails to properly recognize the paramountcy of the objective of general deterrence to protect the public” (*Law Society of Manitoba v. MacIver*, [2003] LSDD No. 29 at 8).

20. We do not entirely accept the differentiation made by Mr. Huber as to the seriousness of the consequences in *Chow* and *Braun* and those in this case. While it is true that A.M. was ultimately compensated for the condominium unit, and suffered no loss in that respect, this came about as a result of litigation she and others initiated. Given what appears to have been a somewhat troubled history for the condominium development, it is perhaps a matter of good fortune that Mr. Johnston was ultimately able to ensure that there was no financial loss to A.M. The degree to which that would have been attributable to the failure to disclose the conflict and the degree to which it might

have been the result of the matters addressed in the litigation is not, of course, before us.

21. It is also somewhat difficult to assess the submission put forward by Mr. Tochor that Mr. Johnston gained no benefit from the failure to disclose the conflict of interest, and that this should be seen as a mitigating factor. Presumably Mr. Johnston became associated with 101002490 Saskatchewan Ltd. with the hope of some financial reward, and this was in part dependent on appealing to purchasers for the condominium units. It is impossible to say what advice A.M. might have received had she been directed to an independent lawyer, and what the financial outcome of the project might have been without the litigation.

22. Overall, however, we do not think there is any compelling justification for rejecting the joint submission. It is clear that Mr. Johnston took steps early on to make amends to his error, and we are satisfied that his experience since 2000 has impressed upon him the importance of transparency concerning possible conflicts.

CONCLUSION

22. We therefore accept the joint submission of counsel that the appropriate penalty in this case is that Mr. Johnston be reprimanded, and ordered to pay costs for the disciplinary process in the amount of \$1955.00. This penalty was communicated to counsel and to Mr. Johnston following the deliberations of the Hearing Committee, and Mr. Johnston was given 14 days to pay the costs.

DATED the 22nd day of December, 2011.

Beth Bilson, Q.C., Chair
Bill Davern
Laura Lacoursiere

AGREED STATEMENT OF FACTS AND ADMISSIONS **BETWEEN WILLIAM T. JOHNSTON AND** **THE LAW SOCIETY OF SASKATCHEWAN**

In relation to the Formal Complaint dated November 23, 2010, alleging that:

- 1. he did act for both a builder or developer, 101002490 Saskatchewan Ltd., and a purchaser, A.M., in a real estate transaction resulting from the construction of a new home (condominium); and**

Reference *Code of Professional Conduct*, Chapter V, Commentary 11

2. he did, through his associate, 101002490 Saskatchewan Ltd., enter into or continue a business transaction with his client, A.M., when his interests or the interests of his associate and the interests of A.M. were in conflict, more particularly, he did,
 - a. Fail to disclose his financial interest in 101002490 Saskatchewan Ltd., while acting for A.M. in the purchase of a new condominium unit from 101002490 Saskatchewan Ltd.;
 - b. Fail to obtain the consent of A.M. in relation to his conflicting interest; and
 - c. Fail to provide A.M. with a reasonable opportunity to seek independent legal advice in relation to the transaction.

Reference *Code of Professional Conduct*, Chapter VII

Jurisdiction

1. William Johnston (hereinafter “the Member”) is, and was at all times material to this proceeding, a practicing member of the Law Society of Saskatchewan (hereinafter the “Law Society”), and accordingly is subject to the provisions of *The Legal Profession Act*, 1990 (herein after the “Act”) as well as the *Rules of the Law Society of Saskatchewan* (the “Rules”). Attached at **Tab 1** is a Certificate of the Executive Director of the Law Society of Saskatchewan pursuant to section 83 of the Act confirming the Member’s practicing status.
2. The Member is currently the subject of a Formal Complaint initiated by the Law Society dated November 23, 2010. The Formal Complaint is comprised of the two allegations noted above. The Formal Complaint was served upon the Member on December 2, 2010. Attached at **Tab 2** is a copy of the original Formal Complaint along with proof of service in the form of an Acknowledgement of Service.

Particulars of Conduct

3. The Law Society received a complaint in relation to this Member from A.M. dated August 5, 2009. A copy of the Complaint for A.M. is attached hereto at **Tab 3**.
4. The complaint originated from the Member’s conduct in the year 2000. In June of that year, A.M. signed an agreement to purchase a new condominium unit at

- Regina Beach. The condominium complex was under development by a numbered company, 101002490 Saskatchewan Ltd. The Member was a director and shareholder of the numbered company. The Member was also legal counsel for the numbered company.
5. After signing the agreement to purchase the condominium unit, A.M. approached the Member and retained him to represent her in the purchase of her condominium unit from the numbered company as he had an office in Regina Beach. The Member was also representing the numbered company developer in relation to the transaction. The Member did not disclose his financial interest in the numbered company to A.M. while representing her on the purchase of her condominium unit. The Member did not take any deliberate steps to conceal his involvement in the development or to lure A.M. into the transaction.
 6. The Member's non-disclosure by of his personal interest in the developer company meant that A.M. had no opportunity to consent to the conflict of interest, nor did she have any opportunity to seek independent legal advice in relation to any risks associated with purchasing a condominium unit.
 7. The Member's conduct was also contrary to the Chapter V commentary 11 of the *Code of Professional Conduct* which prohibits a lawyer from representing both the builder or developer and the purchaser in a real estate transaction pertaining to the sale of a new home or condominium. The Member states that he was not aware of this prohibition, or if he was, he did not turn his mind to it at the time.
 8. Litigation ultimately arose in connection with the condominium development. A.M. and others sued the Member and the other owners of the numbered company developer. The litigation that ensued was not directly related to the Member's conflict of interest, but rather to unrelated problems with the Member's legal work in connection with the condominium development itself. This litigation settled in 2006. The Member self-reported the conflict of interest issue to the Law Society and SLIA when the litigation arose, prior to the receipt of the official complaint from A.M.
 9. Apart from the fees associated with the real estate transaction, the Member did not obtain a direct personal benefit in connection with the conflict of interest.

Prior Record

10. The Member has no prior findings of conduct unbecoming a lawyer on his record.