

## DISCIPLINE DIGEST

The Society of Notaries Public of British Columbia

January 2012

Chad (Chi An) Kwon  
Commissioned: June 2002

This is a review by the directors pursuant to sections 34 and 35 of the *Notaries Act* to review the report of the inquiry panel in this matter and to determine whether the member is guilty of any of the conduct described in s. 28(1) as professional misconduct or a breach of a provision of the *Act* or a regulation or rule made under it or of a bylaw of the society, or conduct that in the opinion of the directors is contrary to the best interests of the public or the profession or tends to harm the standing of the notarial profession.

The inquiry into this matter was conducted June 2, 2011; at that time the member and the Society provided to the inquiry panel a proposed resolution of the complaint which was recorded as an agreed statement of fact and penalty. The member was present at the inquiry. The inquiry panel report dated June 22, 2011 was reviewed by the directors on October 3, 2011.

Counsel was present to assist the panel members at the hearing and the directors on review and in writing this report.

The Notice of Inquiry sent to the member by the Society informed the Member that the Society was reviewing the Member's conduct in the following matter:

*When you acted for YSL in his purchase from SGK you breached your undertaking to JJ by registering the Transfer from the seller and withholding certain funds from the amount approved by the seller on the Statement of Adjustments without the consent of JJ or the Seller.*

*Thereby committing a breach of Rules 10.01, 10.02, and 10.04 of the Rules of The Society of Notaries Public of British Columbia, constituting professional misconduct as set out in s. 28(1)(c) of the Notaries Act, [RSBC 1996] Chapter 334 In Breach of Rule 8.02 and contrary to Principle 11-P1 and 11-G.*

### **Member's history**

1. The member has been a member since 2002.

### **The Agreed Statement of Fact and Penalty and findings of the Inquiry**

2. By way of agreement between the member and the Society of Notaries Public, the member admits the facts that follow, which were found by the panel to be the facts of the Board:

3. The Member acted for a buyer and the complainant for the seller. The Member prepared documents in the usual manner for closing on January 27, 2011. The seller was a non-resident seller and there was no dispute about that fact. In his letter to the complainant for the seller, the Member put the complainant on the usual undertaking to holdback funds pursuant to the Income Tax Act and to provide a Clearance Certificate. The letter stated “if the property is a personal use property, to hold in trust 25% of the gross purchase price...” That letter was dated January 24, 2011 and was faxed to the complainant just before 3:00 on January 24, 2011. On or about January 25, 2011, the Member delivered a revised Statement of Adjustments to the complainant. The Statement did not provide for a holdback and the sale proceeds due to the complainant in trust on that statement was \$417,432.39. The undertaking to holdback was still imposed in the January 24th letter.
4. By letter dated January 26, 2011, the complainant returned the required documents, including the Statement of Adjustments, to the Member and stated: “The documents are forwarded to you on the undertakings as stated in your previous letter.”
5. On January 27, 2011, the complainant wrote to the Member asking that the Member agree to waive the non-resident holdback amount, or in the alternative, agree to a fixed amount of \$10,000. This letter was apparently received by the Member because by his letter of January 27, 2011, faxed at 1:08 p.m., he advised the complainant that his client would not agree to a revised amount for the non-resident holdback. In that letter, the Member imposed an undertaking to hold in trust “25% of the gross purchase price, i.e. \$108,750.00”. This dollar figure had not appeared in the January 24<sup>th</sup> undertaking. The January 27<sup>th</sup> letter from the Member went on to state that if the complainant could not accept the undertaking, he would remit the Holdback amount directly to Canada Revenue Agency.
6. The Member wrote another letter on January 27, 2011 to the complainant, faxed at 2:57 p.m., asking for a response to the 1:08 letter.
7. Beginning at 3:13 p.m. on January 27, 2011, there were several email communications back and forth between the Member and the complainant, each putting forth opinions on whether or not the holdback amount could be negotiated. There were three emails: The complainant to the Member at 3:13; complainant to the Member at 4:28; and the Member to the complainant at 4:47, none of them resolving the issue. As set out below, the Member registered the documents at 2:52, before he asked for a response in his fax sent at 2:57
8. At 2:52 p.m. on January 27, 2011, the Member registered the seller’s Freehold Transfer in the Land Title Office. By letter of January 27, 2011, faxed at 4:57 p.m., the Member advised the complainant that he had registered and enclosed his trust cheque for \$308,682.39. Although he did not say so in his letter, the Member had apparently held back \$108,750. He imposed the undertaking to pay non-resident tax and provide him with the Certificate. He stated that he “may release any excess

Holdback funds to the seller upon [my] receipt of the Purchaser's copy of the Certificate". The Member also asked that the complainant provide written acceptance of the undertakings prior to releasing any funds to his client or acceptance of the trust cheque "shall constitute [your] acceptance of all the above undertakings". The Member then wrote the other closing letters required in the file.

9. At 11:06 a.m. on January 28, 2011, the email communications between the two took up again. Complainant to the Member at 11:06 a.m.; Member to the complainant at 12:18 p.m.; complainant to the Member at 12:44 p.m.; Member to the complainant at 1:44 p.m.; complainant to the Member at 2:34 p.m.; Member to the complainant at 3:17 p.m.; complainant to the Member at 3:55; Member to the complainant at 4:44; complainant to the Member at 5:24 p.m.; Member to the complainant at 5:42 p.m.; complainant to the Member at 6:05 p.m. In all emails, the two put forth arguments about the holdback matter with the complainant taking the position that the Member had no right to hold back any of the funds and the Member taking the position that he had no choice but to holdback given that the complainant refused to confirm his undertaking.
10. During the discussions on January 28<sup>th</sup> between the Member and the complainant, the seller refused to release the keys to the buyer. The realtors and their managing brokers got involved and there are conflicting opinions from the complainant and the Member about what their positions were.
11. On January 28, 2011 at 6: 16 p.m., the Member faxed his January 27<sup>th</sup>, 2011 letter to the complainant (now showing net sale proceeds of \$417,432.39). The new letter imposed the same undertaking upon the complainant as had been in the January 24<sup>th</sup> letter save that this one now stated the 25% amount of \$108,750. The Member says that his cheque for \$417,432.39 had been direct deposited to the complainant's trust account on January 28<sup>th</sup>, 2011 at 6:03 p.m. There is a copy of a deposit slip in the file that confirms this.
12. The Member admits that his actions constitute professional misconduct within the meaning of s. 28(1)(c) of the *Notaries Act* RSBC 1996, c. 334 as they were in breach of Rules 10.01, 10.02 and 10.04 and contrary to Principles 11-P1 and 11-G.
13. In its report the panel gave its view that there appeared to be some history between the Member and the other practitioner that led to a lack of trust. The panel also described the uncertainty that seemed to exist regarding the parties' positions on what was to be held back. The panel went on to say that despite those issues "It is the panel's conclusion in not paying out according to the original undertaking, the Member failed to act according to his professional obligations and breached the Rule as alleged in the Notice"
14. The board understands that the history of these professionals played a significant role in leading the Member to take the action he did. That action created a breach of his

undertaking and was not appropriate under the circumstances. In its report the panel said:

*While it may at times seem desirable to attempt to require some extra certainty in dealing with professionals when there is a history such as in this case, it is the panel's view that the best approach is to be particularly vigilant in those circumstances that the terms of a closing (in this case the undertakings) are properly described at the outset and then to rely most stringently on the original conditions throughout. Had that course been followed this unfortunate series of events would have been avoided.*

15. Members must be vigilant to not let their biases cause them to depart from their professional obligations. Undertakings, as have been stated on many occasions by the board in the past, are of fundamental importance to the practice of notaries public and must be complied with. If members have concerns regarding particular practitioners or a difficult history with those practitioners, those issues must be dealt with earlier in the process. Undertakings have to be settled prior to registration and registration relies upon compliance with the settled terms of the undertakings.

### **Penalty**

16. The Member appeared at the hearing. The board heard from the Member and the Society on the issue of penalty.
17. The Member was disciplined in 2008 on a matter unrelated to undertakings. At the time he was assessed a fine of \$500.
18. In view of the Agreed Statement of Fact and on the particular facts of this matter, it is the board's belief, based in part on the Member's assurance that this is the case, that given another party on the other side of this transaction or even the same party in future, the Member would and will not enter into a similar course of action, the board has assessed the following penalty in this matter:
  - a. The Member be reprimanded;
  - b. The Member pay a fine of \$2,000, inclusive of costs.