

The Society of Notaries Public of British Columbia
DISCIPLINE DIGEST

November 2006

The summaries in this issue involve the following BC Notaries.

- Shinil Park
- Garry Gracey

The Member: Shinil Park
Commissioned: June 2001

Facts

- In early 2006, our member acted for a seller of a small business.
- At the time of the transaction, the corporate seller was not in good standing. He had been struck by the Registrar of Companies and was in the process of being restored by the company's lawyers.
- The Contract of Purchase and Sale anticipated that the above restoration would not be completed by closing and provided for a variation of an escrow closing to take effect, if that was the case.
- The complainant J is a lawyer who was acting for the buyer.

J, in his letter of February 2, 2006, sent documents to the member, asking that they be signed by the seller and returned to J. He further states that when the sale proceeds were to be released, they would be provided on the member's undertakings, as set out in the letter. The undertaking under dispute says:

Not to release the same to your client or make use of the same in any manner but to hold the same in your trust until the occurrences of the following:

- a) your client's company, YI Ltd., has been fully restored, pursuant to *Business Corporation Act...*);
- b) you provide us with proof of restoration; and
- c) you receive from us a written confirmation of our satisfactory review of the status of your client's company and that the sale proceeds may, therefore, be released.

The undertaking went on to allow the member to release certain portions of the sale proceeds to the seller, notwithstanding that the company was not yet restored.

J says that on March 3, 2006, at about 1:30 in the afternoon, the member faxed a letter to him stating that the company had been restored and that if the member did not hear anything further from J by 3:30 that day, he would release the sale proceeds to his client. J became aware of that fax around 2:00 PM; he says he tried to fax his response to the member from 2:20 onward, but the member's fax line was busy. The fax finally went through at 3:34 PM, at which time the member informed J that the sale proceeds had already been released to the seller. J complained that this imposed deadline constitutes a breach of undertaking.

The member responded to the complaint. He stated that J “unilaterally put [him] on the undertaking,” but the member made no attempt to clarify the undertaking or change it in any way.

In his letter of February 8, 2006, wherein he returned the seller’s documents to J, the member merely says “the net sale proceeds will be provided to me on my undertaking imposed on your letter February 2, 2006,” then mentions a change to the cash amount the buyer was allowing to be released. The member had an opportunity to revise or alter the undertaking at that time and did not.

The member’s response to the complaint indicates the transaction was fraught with difficulties in communication and action on the part of J, none of which are relevant to the matter of the undertaking.

The member says that on March 3, at 10:00 AM, he received confirmation from the corporate seller’s lawyer that the company restoration was complete. He says his client insisted on the time deadline because he needed the money that day (Friday, March 3) to make a promised payment.

The member says his experience with J led him to believe he had to impose a deadline or J would not respond in a timely manner. The member further says he was in his office from 1:00 PM onward on Friday; J should have called him with his concerns over the release of the sale proceeds.

The member condones his release of the sale proceeds on the grounds that the company was restored on March 2, 2006, at 8:38 AM, and that J failed to express any concerns to the release of the sale proceeds before his deadline of 3:30.

Admission

The panel asked the member when he had released the funds; the member admitted he probably released the funds even prior to his own imposed 3:30 deadline. He knew the company had been restored and did not believe there would be any problems.

The member admitted he did release the holdback funds contrary to the undertaking. The member stated he had never had any problems with J before, but this was a difficult transaction. All parties were nervous due to the restoration issue and the fact that the money was tied up.

The member admitted his client was pressuring him for the money and that he took instructions from his client without regard for the terms of the undertaking.

Findings

The inquiry panel accepted the member's admission of the breach and did not find any mitigating circumstances. The undertaking required that J have an opportunity to review the restoration documents and advise the member that the funds could be released. Accordingly, the member was found in breach of Rule 10.01, contrary to the best interests of the public.

The ability for a Notary to give and receive undertakings is fundamental to our profession. The member's failure to honour his undertaking, regardless of the circumstances, harms the standing of the notarial profession.

Upon receiving the Inquiry Panel's report, the member entered into an Agreed Statement of Admission and a suggested penalty. In that admission, the member:

1. accepted the findings of the Inquiry Panel;
2. admitted he accepted the undertaking, then failed to fulfill it;
3. admitted he knows an undertaking is an absolute guarantee that he will comply;
4. admitted that a breach of undertaking is viewed as a serious breach by the Notary and Legal professions; and
5. commits that he will strive to be more diligent in reviewing undertakings and complying with them to the letter.

The Society is satisfied that the member has learned through this experience the importance of all undertakings and will be more diligent when dealing with such matters.

Penalty

The Penalty Panel accepted the findings of the Inquiry Panel. The Panel further accepts the member's Statement of Admission and agrees that the following penalty is appropriate.

1. A reprimand be placed on the member's file
2. A fine of \$2500 be paid by the member
3. Costs of \$650 be paid by the member

The Member: Garry Gracey
Commissioned: May 1975

Facts

- The member was contacted by First Canadian Title Insurance Company (FCT) and asked to act on its behalf to officer certify mortgages pursuant to the *Land Title Act* for its lender customers in Whistler (“the Lenders”).
- The member is commissioned as a Notary Public for the District of New Westminister, BC; Whistler is not within that Notarial District.
- The member did not prepare the documents in his New Westminister office, nor did he meet with any of the parties there. He agreed to provide the service requested and travelled on more than one occasion to the Resort Municipality of Whistler at the request of FCT and/or various lenders.
- The member attended at the local branches of the Lenders in Whistler to officer certify mortgage documents for specified borrowers of the Lenders. The documents were prepared by the Lenders or FCT, not by the member. The member was paid by FCT for the service provided to its Lenders.

The member was not retained to, and did not provide, any legal advice to any borrower with respect to any mortgage transaction, a mortgage document, the Form B, or the officer certification of any document.

The inquiry into the member’s activities was initiated on the complaints of a lawyer who alleged that the member was practising outside his Notarial District of New Westminister. The member was charged with breaches of certain provisions of The Society’s governing documents.

Admission and Findings

The member agreed with the facts as set out and admitted that his conduct is a breach of the following.

1. Section 48(1)(c) of the *Notaries Act*, by practising outside the Notarial District or area to which his practice is limited
2. Oath of Office, by failing to adhere to the specific provision of the *Notaries Act* limiting his practice to his specified Notarial District

3. His Candidate's Covenant, by failing to restrict his practice to within his Notarial District
4. Section 10 of the Code of Ethics, by appearing to practise in a manner contrary to the authority conferred upon him by the *Notaries Act* and inviting controversy with other members

Penalty

As part of the joint submission, The Society and the member proposed penalty. At the hearing of the Board of Directors, the joint submission was accepted by the Board and the proposed penalty adopted.

Accordingly, the Board of Directors found the member in breach as agreed and imposed the following penalty.

1. The member will be reprimanded by The Society.
2. The member will sign a covenant and undertaking.
3. The member will pay the sum of \$2500 to The Society as penalty for his breaches.
4. The member will pay costs in the amount of \$1000.