

Lawyer T

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North Vancouver, B.C.
Called to the Bar: May 10, 1977

Hearing dates: June 14-16, 1999 and January 13, 2000

Discipline hearing panel: Robert W. McDiarmid, Q.C., Chair, Donald A. Silversides, Q.C. and Dennis J. Mitchell, Q.C.

Counsel:

Kim Campbell, for the Law Society
David Lunny, for Mr. T

Discipline hearing report: October 19, 1999 and March 27, 2000
Indexed as [1999] LSBC 31

Summary

Mr. T incompetently carried out his duties as a lawyer by assisting his client purportedly to carry out certain corporate procedures and transactions using the proxy of an unrepresented shareholder. The use of the proxy was done without the knowledge of the unrepresented shareholder, without notifying the unrepresented shareholder and without ensuring that the shareholder and the company had opportunity to obtain independent legal advice. The unrepresented shareholder later wrote to Mr. T to express his view that his proxy could only be used upon a written agreement between him and Mr. T's client. Mr. T failed to respond to these letters to tell the unrepresented shareholder that he was mistaken even though a misunderstanding could result in serious prejudice to him. In the circumstances, Mr. T's failure to alert the unrepresented party was sharp practice amounting to professional misconduct. Mr. T was reprimanded, ordered to complete a remedial studies program and to submit to conditions on his practice.

Facts

In 1995 Mr. T represented Mr. A who had entered into an agreement with SQ Ltd. to operate two cruise boats owned by the company. With the assistance of Mr. W (a 50% shareholder of SQ Ltd.), Mr. A began negotiating to purchase the company shares of Mr. P and Mr. M who together held 40% of the shares. (The remaining 10% of the shares were in the name of Mr. M and Mr. P, but beneficially owned by Mr. W's mother.)

Mr. A decided not to go through with this share purchase.

Without the knowledge of Mr. M and Mr. P, there were negotiations ongoing for Mr. W to provide Mr. A with controlling interest in SQ Ltd. In August, 1995 Mr. A and Mr. W went to Mr. T's office and Mr. A instructed him to prepare a proxy and appoint Mr. A as proxy holder to vote Mr. W's shares. Mr. T prepared a form of proxy, but gave no advice on its use and was unaware of any restrictions with respect to its use.

In September, Mr. A and Mr. W met again with Mr. T with the intention of having him finalize an agreement they had prepared to transfer Mr. W's shares in SQ Ltd. to Mr. A. Mr. W signed the back of his share certificate and provided it to Mr. T in trust, pending an acceptable written agreement. It was Mr. W's understanding that he had an agreement with Mr. A. However, on October 2, 1995 Mr. A told Mr. W that he was withdrawing his offer and that he was "no longer a player."

By the Fall of 1995, Mr. W's relationship with Mr. P and Mr. M was strained. They were not speaking to each other.

On October 17, 1995 there was a meeting in Mr. T's office between Mr. A and certain associates on one side and Mr. P and Mr. M on the other. At the instruction of Mr. A, Mr. T prepared an offer for Mr. A and his associates to purchase from SQ Ltd. one of the two cruise boats for \$300,000. Mr. A and associates were to satisfy the purchase price by assuming SQ Ltd.'s existing debt of approximately \$300,000 to the Business Development Bank of Canada. Both Mr. P and Mr. M had significant personal liability with respect to this debt. If the bank would not agree to the debt being assumed, Mr. A and associates were to provide indemnities to SQ Ltd., Mr. W, Mr. M and Mr. P.

At the October 17 meeting Mr. T prepared documentation that purported to allow Mr. M, Mr. P and Mr. A (as proxy holder for Mr. W) to do the following:

- remove Mr. W as a director of SQ Ltd., by special resolution of the members;
- appoint Mr. A as a director, by resolution of the members; and
- approve the sale of one of SQ Ltd.'s two cruise ships.

Mr. M and Mr. P were aware that Mr. T was not protecting their interests in these transactions and knew they could have their own lawyer, but they chose not to be represented.

Mr. T knew that Mr. W would not have agreed to these transactions and knew that neither Mr. W nor his mother were aware of them. At the meeting, he gave his opinion that these transactions might be subject to a challenge, but that a challenge would be unsuccessful in his view. He was wrong in that advice.

Between October 27 and November 15, Mr. T prepared a bill of sale for the cruise boat and submitted it to the ships registry. Mr. A purported to sign the bill of sale on behalf of SQ Ltd.

On November 6 Mr. W faxed a letter to Mr. T instructing him not to transfer his shares in SQ Ltd. without a written agreement. Mr. W reminded Mr. T that he (Mr. W) had signed the share certificate pending such an agreement, but Mr. A had said he was no longer interested. Registration of the bill of sale had not been completed at this point. Mr. W wrote again on November 22 to say he wished to revoke his proxy.

Mr. Tashuk did not respond to either of these letters from Mr. W. Although Mr. T knew that Mr. W was mistaken in his belief of the facts and that this mistake could seriously prejudice his interests (including his ability to prevent registration of the bill of sale in the ships registry), Mr. T failed to correct the misunderstanding.

Decision

The panel found that Mr. T had incompetently carried out duties undertaken by him in his capacity as a lawyer. In particular, he had failed to:

- review SQ Ltd.'s records to determine who were the shareholders of the company and who were officers and directors, rather than relying on the advice of Mr. A, Mr. M and Mr. P;
- review the *Company Act* or the articles of SQ Ltd. to determine what was an appropriate use of proxies (*use of Mr. W's proxy was not in compliance with the company's articles*) and to determine other issues with respect to these transactions;
- appreciate that he might have a duty to Mr. W with respect to his proxy or, by using the proxy in the way he did, might breach that duty;
- decline to participate in these transactions unless notice of the meeting was given to Mr. W and unless Mr. W, Mr. M, Mr. P and SQ Ltd. each had opportunity to obtain independent legal advice;
- consider the issue of security for the indemnity granted by Mr. A and his associates;
- consider the possibility of conflict of interest between Mr. A and his associates; or
- consider the possibility of conflict between the interests of Mr. A on one hand and Mr. M and Mr. P on the other.

The panel further found that, in failing to respond to Mr. W's letters and failing to alert him to his misunderstanding of the facts concerning the proxy, Mr. T engaged in sharp practice, which amounted to professional misconduct. The panel noted that a lawyer has an obligation to other lawyers and to certain other persons, such as an unrepresented party with whom the lawyer is dealing, to correct any mistaken belief those people hold as to a relevant fact, providing that doing so will not breach the lawyer's obligation to maintain confidentiality and privilege.

Penalty

The panel noted that, if Mr. T's sharp practice had occurred following his other disciplinary matters (*Discipline Case Digests* 99/04 and 99/05), a lengthy suspension would have been appropriate to demonstrate that such conduct would not be tolerated. However, the citations in those cases were issued after the conduct in the current case had already occurred. Mr. T is now practising using his management company to provide services to a group of clients, essentially as in-house counsel.

Having identified a range of aggravating and mitigating factors with respect to assessing penalty, the hearing panel ordered that Mr. Tashuck:

1. be reprimanded;
2. complete a remedial studies program to the satisfaction of the Practice Standards Committee, at his own cost;
3. comply with the following conditions on his practice:
 - (a) He must provide to the Executive Director of the Law Society, not later than June 30, 2000, confirmation that his arrangement with his management company conforms to the *Legal Profession Act* and the Law Society Rules.
 - (b) He must transfer the registered and records offices of each company for which he is the corporate solicitor and which are located at the address of his former law office to either his current law practice address or such other location as the respective companies may instruct him. All instructions to change the registered and records offices of a company must be in writing, or confirmed in writing by Mr. T.*
 - * *The panel drew Mr. T's attention to section 40(4) of the Company Act RSBC 1996, c. 62.*
 - (c) He must attend at least two courses in corporate or commercial law presented by the CLE Society of B.C. before December 31, 2000 and provide proof of attendance to the Executive Director of the Law Society before January 31, 2001.

There was no order as to costs.

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On April 6, 2000 the Discipline Committee resolved to refer the panel decision to the Benchers pursuant to section 47 of the *Legal Profession Act* for a review of penalty.