

Lawyer 10

Discipline hearing : September 18, 2008 (facts and verdict) and May 15, 2009 (penalty and application for anonymous publication)

Panel : Glen Ridgway QC, Chair, William Jackson and Richard Stewart, QC

Bench Review : December 10, 2009

Benchers : *Majority decision*: James Vilvang, QC, Chair, Carol Hickman, Ronald Tindale and Herman Van Ommen; *Minority decision*: Barbara Levesque, Peter Lloyd and David Renwick, QC

Reports issued : February 11 (2009 LSBC 06) and September 9, 2009 (2009 LSBC 27), and January 5, 2010 (2010 LSBC 02)

Counsel : Eric Wredenhagen for the Law Society and Craig Dennis for Lawyer 10 (facts and verdict, penalty and application for anonymous publication); Gerald Cuttler for the Law Society and George Macintosh, QC and Craig Dennis for Lawyer 10 (review)

Facts

In 1993, Lawyer 10's firm was retained by a client who was a shareholder involved in a foreclosure action. The mortgage proceeds in dispute were being held in trust by another law firm. The shareholders' dispute was settled in July 1993. Lawyer 10's firm was instructed by the client to review the other law firm's accounts in this matter.

In 1992, the other law firm had obtained a court order that directed the land sale proceeds in dispute be paid into its trust account. In March 1993, a second order granted the clients judgment in the amount of \$554,879.34. In July 1993, the law firm obtained a third order directing this payment plus interest to their clients. In January 1994, a fourth order directed payment of the remaining funds in the amount of \$551,858.60 into court.

In February 1994, Lawyer 10's firm, on the client's instructions, applied for payment out of the balance of funds in court. The basis of this *ex parte* application was that the former law firm had never paid the client the sum of \$554,879.34 as ordered in July 1993.

A junior lawyer, working under the guidance of another lawyer at Lawyer 10's firm, prepared the affidavit. When Lawyer 10 swore the affidavit, he was told by the client that the funds had not been paid. The lawyer in his firm who was acting for the client also stated that, after a review of the file and court orders, it appeared that the funds had not been paid to the client.

In March 1996, Lawyer 10 swore an affidavit and the statement "the funds were not paid to the Petitioners" was sworn to be on personal knowledge, not information and belief. This statement proved to be false as the funds had been paid to the client in 1993.

In 1999, some of the claimants to the lands discovered the funds they believed to be held in court, as per the first court order, had been paid out. They complained to the Law Society, and also advised of ongoing civil proceedings with respect to these funds, which had been commenced in August 1996.

In 1999, Lawyer 10's lawyer requested an abeyance of the Law Society's investigation, which was granted subject to undertakings. Between 2000 and 2006, the Law Society received updates on the status of the civil proceedings, and was advised that proceeding with a discipline investigation would risk stirring up civil proceedings. The Law Society's investigation into Lawyer 10 was reactivated on November 9, 2006.

The investigation at Lawyer 10's firm found a memo dated March 1994 from an associate to the client's lawyer, stating that the funds had been paid. There is no evidence that Lawyer 10 was ever aware of this

memo.

It was also not known whether the client's lawyer was aware that he was asking Lawyer 10 to swear a false affidavit or that he had forgotten the memo from a year earlier. This lawyer ceased to be a member of the Law Society in 2003 and was believed to be residing outside of Canada.

Decision of the Hearing Panel

Although Lawyer 10 did not draft the affidavit, this factor should have made him more diligent in ascertaining the true facts. If Lawyer 10 had made the appropriate enquiries, he would have found that the funds had been paid to the client three years earlier.

A lawyer is an officer of the court and when that lawyer is the deponent to an affidavit that will be relied on in court, the lawyer must conform to the highest standard of care, accuracy and thoroughness in ensuring the accuracy of the sworn statements that the lawyer makes.

The hearing panel found that Lawyer 10's conduct in swearing the affidavit constituted professional misconduct. Lawyer 10 was ordered to pay a fine of \$1,500 plus costs. Further, the panel dismissed his application for anonymous publication.

Lawyer 10 sought a review of the finding of professional misconduct, the penalty imposed, and the refusal to order anonymous publication.

Decision of the Benchers on Review

The initial question to be determined on the review was whether the conduct of Lawyer 10 met the professional standards required by the Law Society. The second question was, if Lawyer 10 did not meet the standard expected, was the conduct sufficiently deviant to be considered professional misconduct.

Majority (Vilvang, Hickman, Tindale and Van Ommen)

The majority noted that it was clear that the inaccurate statement was made by mistake and not with any intent to mislead. At the time Lawyer 10 swore the affidavit, he was aware of the distinction between facts and matters based on personal knowledge and facts and matters based on information and belief. That a finding of professional misconduct does not require proof of a dishonest intent is settled law in Law Society decisions. What is not settled is whether a mistake, without dishonest intent, is sufficient to find professional misconduct.

Although Lawyer 10's conduct fell short of what should be expected of a lawyer, the panel concluded that the conduct was not such a marked departure from the norm that it should be held to be professional misconduct. It would be impossible to present a comprehensive list of the features of conduct that could convert an innocent mistake into a culpable mistake, but the complete absence in this case of features such as gross neglect, recklessness, and any element of dishonesty, led the majority to conclude that this lawyer's conduct was not professional misconduct. The majority therefore dismissed the citation.

As a result of the majority's findings, it was unnecessary to deal with the application regarding anonymous publication.

Minority (Levesque, Lloyd and Renwick)

The minority found that Lawyer 10 made two mistakes; first, he provided false information to the court; and second, he failed to provide the source of his information. When Lawyer 10 chose to swear the affidavit on personal knowledge, he should have personally made all of the inquiries that were available to him in order to be able to make this statement. He should not have relied exclusively on the inquiries of, or the

information supplied by, other third parties, particularly those with a financial interest in the result of the application.

The minority was satisfied that Lawyer 10's failure to properly frame the affidavit (on information and belief), which resulted in the client getting paid twice, was culpable neglect. It was his responsibility to ensure that the court was aware of the true state of affairs, particularly in an *ex parte* application.

The minority concluded that the hearing panel did not err in finding that Lawyer 10's conduct was professional misconduct and did not err in not ordering anonymous publication.