

2012 LSBC 08

Report issued: February 16, 2012

Oral Reasons: September 14, 2011

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The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and a hearing concerning

John Skapski

Respondent

Decision of the Hearing Panel

Hearing date: September 14, 2011

Panel: David Renwick, QC, Chair, Rita Andreone, Jan Lindsay, QC

Counsel for the Law Society: Carolyn Gulabsingh

Counsel for the Respondent: Richard Fernyhough

[1] In or about 2001 RM and DM attended before John Skapski to swear and execute a solemn declaration on an Application to Replace a Commercial Fishing Vessel for Fisheries and Oceans Canada. The jurat was left blank, and in or about July 2009, Mr. Skapski affixed his signature and the date and then submitted the document to Fisheries and Oceans Canada on behalf of his client L Co. This conduct is contrary to Appendix 1 of the *Professional Conduct Handbook* and constitutes professional misconduct.

Background

[2] Mr. Skapski acted for L Co. L Co. was and is the owner of a Class “C” commercial fishing licence. Such licences are vessel-based. L Co. agreed to “lease” its licence to RM and DM. The Department of Fisheries and Oceans does not permit temporary transfers of vessel-based licences, and to accommodate, therefore, that fact, a complex scheme of transfers and agreements was entered into. L Co. transferred the fishing licence to RM and DM. RM and DM transferred one of 64 shares of title to their vessel S to L Co.

[3] The fishing licence was never intended to be owned by RM and DM, nor was the share in their vessel intended to be owned or held by L Co. As security for the return of the respective licence and vessel, RM and DM executed a transfer back of the licence, and L Co. executed a transfer back of the share of title to the vessel in 2001. These documents were not dated or filed, but instead, were held in trust by Mr. Skapski.

[4] The effect of the transfer was to allow RM and DM to place the commercial fishing licence on their vessel and to fish in the 2001 season.

[5] In 2004 RM declared bankruptcy. He did not list the fishing licence as an asset in the bankruptcy. In 2009 the vessel was seized and, by extension, the licence was as well. Mr. Skapski advised the bailiffs on behalf of L Co. that L Co. continued to own the licence. Mr. Skapski located a replacement vessel for the licence and then dated and filed with the Department of Fisheries and Oceans the transfer of the licence

which had been executed (but not dated) in 2001.

[6] Mr. Skapski says that this complicated series of transactions was the only way to effect a lease of a commercial fishing licence that he was aware of at the time.

DISCUSSION

[7] The Respondent admits that his conduct in dating and affixing his signature in 2009 to a document solemnly declared before him in 2001, constitutes professional misconduct.

[8] The Respondent admitted that the citation was properly issued and served.

[9] The test for professional misconduct is well established and stated in *Law Society of BC v. Martin*, 2005 LSBC 16 at paragraph [171], as:

... whether the facts as made out disclose a marked departure from the standard expected of a competent solicitor acting in the course of his profession.

[10] In the recent review decision of *Re: Lawyer 10*, 2010 LSBC 02, the review panel further articulated the applicable test for professional misconduct established in *Martin* by stating at paragraph [31] that:

The formulation of the marked departure test developed in *Hops* and *Martin* is complete only if one adds the factor that the conduct must be culpable or blameworthy. Both decisions made findings that the conduct in question was a marked departure from the norm and that the member was culpable.

[11] The jurat on the transfer forms states, “Sworn before me at RICHMOND in the Province of British Columbia this 10th day of July, 2009.”

[12] The Respondent admits that the application to replace a commercial fishing vessel was not sworn before him at Richmond on July 10, 2009, but was executed before him some eight years earlier.

[13] Appendix 1, Rule 1 of the *Professional Conduct Handbook* states:

1. A lawyer must not swear an affidavit or take solemn declaration unless the deponent:
 - (a) is physically present before the lawyer,
 - (b) acknowledges that he or she is the deponent,
 - (c) understands or appears to understand the statement contained in the document,
 - (d) in the case of an affidavit, swears, declares or affirms that the contents of the document are true,
 - (e) in the case of a solemn declaration, orally states that the deponent makes the solemn declaration conscientiously believing it to be true and knowing that it is of the same legal force and effect as if made under oath, and
 - (f) signs the document, or if permitted by statute, swears that the signature on the document is that of the deponent.

[footnotes omitted]

[14] This Panel is satisfied that the Respondent did not comply with Appendix 1, Rule 1 of the *Professional Conduct Handbook* and that his failure to do so constitutes professional misconduct.

Disciplinary Action

[15] The Marine Agreement re: Title to Vessel and “C” Licence which formed part of the subject “complex scheme” expressly set out at paragraph 9 that a (later) date could be inserted onto the transfer forms:

Upon execution of this Agreement (L Co.) will sign a Bill of Sale transferring (L Co’s) one (1) share in the (S) back to (RM and DM). (RM and DM) will execute two “APPLICATION TO REPLACE A COMMERCIAL FISHING VESSEL” forms, for the transfer of the “C” Licence from the (S), with the details of the “Replacing Vessel” left blank. These forms and the Bill of Sale will be held in trust by John Skapski, Lawyer for use pursuant to the terms of this agreement, (RM and DM) authorizes John Skapski to conduct a search of the Ships Registry of the (S), enter the encumbrance details into the License Transfer form and date and notarize same as of the date of such search. Should the Department of Transport or D.F.O. change the above forms, then new forms will be completed and signed by the appropriate party.

[16] RM and DM had agreed to the improper execution of the jurat and suffered no harm.

[17] However, as was noted in *Law Society of BC v. Williams*:

... members of the legal professional play a key role in ensuring the integrity of transfer documents and safeguarding the system from fraud.

...

the submission of documents that are defective in their execution harms the ... system by eroding the reliability and authenticity of documents submitted for registration.

[18] As adopted by the panel in *Law Society of BC v. Walters* 2005 LSBC 39 (quoting *Re: Lawyer 3*, 2004 LSBC 27):

[23] Lawyers are put in a special position by virtue of the *Evidence Act* and by virtue of their profession. They are permitted by the *Evidence Act* to complete jurats to enable documents to be submitted into evidence that have the force of evidence under oath.

[24] Lawyers have a duty to scrupulously adhere to the formalities of swearing affidavits because to do otherwise will have grave repercussions. Deponents can escape perjury sanctions. Unreliable affidavits may cause judges and masters to worry about admissibility issues instead of dealing with facts which should be properly before them ...

[28] Allowing this conduct to go uncensored would harm the standing of the legal profession. Documentary evidence sworn before lawyers would lose its value if the public and the courts became aware that scrupulous adherence to rules of swearing such documents was not being practised.

[19] In addition to admitting professional misconduct, the Respondent has consented to disciplinary action as follows:

(a) a reprimand; and

(b) costs in the amount of \$2,000 payable by October 31, 2011.

[20] This Panel is prepared to accept the proposed disciplinary action. Unfortunately, these reasons are delivered long after October 31, 2011, and accordingly the Respondent’s time to pay costs in the amount of

\$2,000 is extended to February 28, 2012.

[21] The Panel has in mind the factors set out in *Law Society of BC v. Ogilvie*, [1999] LSBC 17.

[22] In this case, general deterrence is a factor, although specific deterrence is not, as the Respondent has already developed a new protocol to deal with this type of scenario which does not offend the Law Society Rules and does satisfy the Ships Registry.

[23] The Respondent had not considered and did not appreciate that he was in breach of Appendix 1, Rule 1 of the *Professional Conduct Handbook*.

[24] The documents were, in fact, executed before the Respondent years before, but the jurat was, on its face, not true. RM and DM had agreed to leave particulars of the transfer details blank and should not have been surprised that the executed documents were relied upon and submitted.

[25] The Respondent has been called to the bar for 30 years and does not have a professional conduct record. He has corrected his practice and while the consequences of the Respondent's conduct are not insignificant, in that all documents sworn before lawyers need to be accurate and reliable, no harm resulted from his misconduct in this case.

[26] The Hearing Panel was referred to a number of cases regarding the improper commissioning of documents and the range of disciplinary action from a reprimand to suspension. Where the lawyers have self reported misconduct, the penalty has tended to be a reprimand. The Respondent did not self-report, because he did not fully appreciate Rule 1 of the *Handbook*. The penalties in similar cases have included fines where the lawyer has a professional conduct record, which The Respondent does not. Further, no one was harmed in this instance.

[27] The Panel considered the factors regarding costs set out in *Law Society of BC v. Racette*.

[28] Pursuant to Rule 4-22, this Panel accepts the Respondent's proposed conditional admission and orders that he be reprimanded and pay costs in the amount of \$2,000 and that the Executive Director record this decision on the Respondent's Professional Conduct Record.