



DISCIPLINE CASE *DIGEST*

Case 10-15 (AMENDED)

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| Member: | James Richard Smith |
| Jurisdiction: | Winnipeg, Manitoba |
| Called to the Bar: | June 25, 1974 |
| Particulars of Charges: | Professional Misconduct (9 counts): <ul style="list-style-type: none">▪ Breach of Chapter 1 of the <i>Code of Professional Conduct</i> [failure to act with integrity] [x7]▪ Breach of Chapter 2 of the <i>Code of Professional Conduct</i> [failure to serve client in a conscientious, diligent and efficient manner]▪ Breach of Rules 5-64(3) and 5-64(4) of the <i>Rules of the Law Society of Manitoba</i> [failure to respond to the Law Society] |
| Plea: | Not Guilty |
| Date of Hearing: | January 4 & 6, 2010, July 5, 2010, October 12, 13 & 14, 2010, March 21, 2011 and March 30, 2011 |
| Panel: | <ul style="list-style-type: none">▪ Heather Leonoff, Q.C. (Chair)▪ Lawrence McInnes, Q.C.▪ Lorne Gibson (Public Representative) |
| Counsel: | <ul style="list-style-type: none">▪ Rocky Kravetsky for The Law Society of Manitoba▪ Sidney Green, Q.C. for the Member |
| Disposition: | <ul style="list-style-type: none">▪ Disbarred▪ Costs of \$24,500.00 |
| Appeal: | Appeal to the Manitoba Court of Appeal dismissed with costs on October 19, 2012. Application for Leave to Appeal to the Supreme Court of Canada dismissed with costs on April 26, 2012. |

Breach of Integrity and Failure to Serve

Facts

Mr. Smith was named as executor and trustee of the Estate of C.B. The estate had three residual beneficiaries: C.B.'s sons M and C, and the Winnipeg Humane Society. Part of the estate was a house in need of significant cleaning and re-painting, which Mr. Smith had appraised shortly after C.B.'s death. The estimated fair market value was \$90,000.00. This figure included the cost of cleaning and painting.

M expressed a desire to have the estate dealt with quickly. Shortly thereafter, Mr. Smith informed M and C that he had found an “investor” who would purchase the property for \$50,000.00. He claimed that sale of the house on the open market would be time-consuming and that fees—including those for painting, notwithstanding the fact that those costs were included in the \$90,000.00 valuation—would reduce the take-home value substantially. Mr. Smith urged M and C to obtain independent legal advice prior to accepting the deal.

M and C authorized Mr. Smith to sell the house. On the transfer of land document, Mr. Smith incorrectly recorded both fair market value and consideration received as \$90,000.00, though the consideration received was only \$50,000.00. Title transferred on March 28, 2007 prior to the April 1, 2007 possession date, and payments were made, with the final payment received on May 1, 2007. The terms of sale, however, required that final payment be made “upon completion of title transfer or sooner.”

At no time from the initial expression of interest by the “investor” to the finalization of the sale did Mr. Smith inform the Humane Society of the offer or seek its consent to the transaction.

A Law Society investigation revealed that the “investor” was in fact Mr. Smith’s wife. Mr. Smith had never disclosed her identity to any of the beneficiaries.

Mr. Smith was retained to represent the Estate of J.T. A letter from Social Development Canada (SDC) indicated that the deceased had unpaid student loans with an approximate value of \$4,600.00. The estate itself held assets worth less than \$2,200.00. Mr. Smith responded to the SDC letter, claiming that the estate assets “were applied to final expenses,” when in reality the money was in his firm’s trust account.

Mr. Smith’s wife was the executrix of the Estate of B.S. With less than \$5,000.00 in assets and over \$13,000.00 in liabilities, the estate was insolvent. None of the creditors were paid, but Mr. Smith’s wife received payment for her services in the amount of \$808.15.

The estate matters described above were investigated by The Law Society of Manitoba following a spot audit. Mr. Smith hired counsel to assist him. When the Law Society sent letters seeking answers to specific questions, Mr. Smith responded through counsel. He declined to answer the questions posed, and challenged the jurisdiction of the Law Society to investigate.

Mr. Smith paid the legal bills flowing from the Law Society investigation out of funds from the C.B. estate. He took the position that the costs of the investigation were legal fees, and since they pertained to Mr. Smith’s handling of the estate, they were legal fees that arose from the administration of the estate. As such, he took the position that he had a right to use estate funds to cover his costs.

Plea

Mr. Smith entered pleas of not guilty on all nine counts.

Decision and Comments

Mr. Smith admitted that he had not informed any of the beneficiaries of the C.B. estate that the purchaser of the house was his wife. He took the position that the beneficiaries were not his clients, and that the identity of the purchaser was irrelevant. The panel disagreed, stating that Chapter 1 of the *Code* requires the utmost honesty from lawyers, not only towards their clients, but to the public at large as well. They further commented that lawyers are not permitted to unilaterally decide on another’s behalf whether certain information is relevant or not. For failing to inform the beneficiaries of the identity of the purchaser, Mr. Smith was found to have breached his duty to act with integrity.

The letter that Mr. Smith sent, urging C and M to approve the sale of the house, was found to contain both explicit and implicit falsehoods. The panel determined that Mr. Smith’s intention was to encourage the sale with a view to improving his own family’s financial situation. This, too, was a breach of Mr. Smith’s duty to act with integrity.

The panel did not consider the merits of Mr. Smith's position that his powers as executor under the will did not require him to inform the Humane Society of the potential sale. Instead, the panel focused on the ethical obligations of legal practice. Under this avenue of inquiry, the panel found that Mr. Smith had breached his duty to act with integrity by failing to communicate with the Humane Society.

Mr. Smith was acquitted of the charge of professional misconduct that related to the error in the land transfer document. The panel was satisfied with his explanation for the mistake, namely that in most real estate transactions the two figures are identical.

Though the house purchase terms stipulated that the balance of proceeds would be paid on transfer of title, the final payment was delayed by over a month. The panel was not satisfied by Mr. Smith's explanation that because the purchaser was his wife, he knew the funds would be paid out eventually. The panel commented that Mr. Smith's client was the estate, and that he owed a duty to the estate to ensure that its interests were protected. By transferring title in advance of the final payment, he did not adequately protect his client, and breached his duties under Chapter 2 of the *Code*.

On the matter of Mr. Smith using estate funds to pay for legal fees he incurred during the investigation of his handling of the C.B. estate, the panel rejected Mr. Smith's position that he had a right to use estate funds. The panel characterized the issue under investigation as pertaining to Mr. Smith's conduct in particular, not as pertaining to legal rights or duties flowing from the will. That being the case, Mr. Smith's suggestion that the beneficiaries should pay for his defence was patently unreasonable. By applying funds in the estate's trust account to his personal expenses, Mr. Smith acted in breach of Chapter 1 of the *Code*.

The panel considered Mr. Smith's preliminary challenge to the jurisdiction of the Law Society to investigate. They held that the Law Society did have jurisdiction. They commented that the Law Society has a broad, though limited, ability to demand information from lawyers. It cannot be used for a fishing expedition, but if a matter uncovers potential issues, then the Law Society must be empowered to investigate further. That being the case, Mr. Smith was in breach of his duty to respond to the Law Society's request for information pursuant to Rules 5-64(3) and (4).

In dealing with the J.T. estate, Mr. Smith took the position that he had simply used the wrong sort of verb conjugation in the letter explaining to SDC that estate assets had been applied to funeral expenses, when in reality they were still in the estate's trust account. The panel found that this explanation amounted to an admission that Mr. Smith "did not bother to check out the facts." Additionally, by passing along misleading information to SDC, Mr. Smith denied SDC the right to challenge the distribution of estate funds. These both amounted to breaches of Mr. Smith's duties under Chapter 1 of the *Code*.

Mr. Smith was acquitted of the final count of professional misconduct, pertaining to his handling of the Estate of B.S. The panel did not consider whether Mr. Smith's interpretation of the law regarding payment to executors was correct. Final determination on this count rested upon the fact that at no time during his dealings with the B.S. estate did Mr. Smith provide anyone with false or misleading information.

Penalty

The panel ordered that Mr. Smith be disbarred. They found that the Law Society investigation uncovered a pattern of lack of integrity, and described the house sale in particular as having a "taint of dishonesty." The overall pattern identified by the panel revealed that Mr. Smith had been willing to breach his duty of candour if it meant improving his own financial interests. They were also concerned by Mr. Smith's position that he had done nothing wrong. In order to protect the public interest and maintain the reputation of the profession, the Law Society must ensure that the practice of law is only carried on by honest people. As such, the panel had only one choice of disposition, disbarment. The panel also ordered that Mr. Smith pay costs of \$24,500.00 to the Law Society.

The member appealed the conviction and the sentence to the Manitoba Court of Appeal. The appeal was dismissed on October 19, 2011 with costs. An application for leave to appeal to the Supreme Court of Canada was dismissed on April 26, 2012 with costs.