

Report issued: May 15, 2023

The Society of Notaries Public of British Columbia
In the matter of the *Notaries Act*, R.S.B.C. 1996, c. 334
and a hearing concerning

Wing Yan (Tammy) Tsui

Decision of the Board of Directors

Hearing Date: February 3, 2023
Panel: Tegan Tang (chair), Michelle Broughton and Bill Chan
For the Society of Notaries Public: John Mayr
For the Member: Wing Yan (Tammy) Tsui

BACKGROUND

1. This is a review by the directors pursuant to sections 34 and 35 of the *Notaries Act* (the “Act”) to review the report of the inquiry panel in this matter and to determine whether the member is guilty of any of the conduct described in section 28 as professional misconduct or a breach of a provision of the *Act* or a regulation or rule made under it or of a bylaw of the Society, or conduct that in the opinion of the directors is contrary to the best interests of the public or the profession or tends to harm the standing of the notarial profession.
2. The inquiry into this matter was conducted on March 9, 2022. Wing Yan (Tammy) Tsui (the “Member”) attended the inquiry without counsel. The Inquiry Report dated March 29, 2022 was reviewed by the directors (the “Report”) before this hearing.
3. The review hearing was conducted on February 3, 2023. The Member attended the hearing without counsel.
4. The panel was assisted by its own counsel at the hearing and in writing this report.

The Notice of Inquiry

5. The Notice of Inquiry sent to the member by the Society alleged as follows:

(1) Inspection and follow-up inspection

Rule 18.02 establishes a Practice Inspection Committee whose objectives under Rule 18.02 (b) and (d) are to appoint practice inspectors to conduct practice inspections of Members and to identify Notaries who do not meet accepted standards of practice.

An inspection of the Member' s practice was conducted in 2020 and identified deficiencies in best practices standards. A follow-up inspection was conducted in accordance with Rule 18.05 (b) and done in 2021 by a different inspector.

The second inspection indicated many recommendations from the first report were not implemented, and many procedures in the Respondent's practice had not improved and, additionally, the Member did not comply with requests for information and documents.

As per Rule 18.04 the respective written reports with findings and recommendations were provided to the Member who elected not to provide any responses or comments.

As per Rule 18.05 (d) both inspection reports were referred in September 2021 to the Discipline Committee for review and determination.

(2) Breach of Rule 18.04: non-cooperation

The inspection reports advise that the Member was not cooperative with the inspectors and that, accordingly, the reports were incomplete.

Being uncooperative puts the Member in breach of Rule 18.04: A Notary whose practice is being inspected under this rule must:

- (a) permit the inspection and answer any inquiries;
- (b) provide the practice inspector with any information, files or records in the Notary's possession or power; and
- (c) permit the practice inspector to obtain printed or electronic copy of any information as he/she deems necessary.

(3) Breach of Section 28(1)(b) of the *Notaries Act*: incompetence

The inspection reports advise that the Respondent is not practicing in accordance with her education and training and does not meet accepted standards of practice. As such, the Respondent is guilty of incompetence (section 28(1)(b) of the *Notaries Act*).

Report of the Inquiry Panel

6. The panel carefully reviewed and considered the inquiry panel's Report. The following is a brief summary of the inquiry panel's findings and conclusion.
7. In its Report dated March 29, 2022, the inquiry panel found that the allegations against the Member in respect of the practice inspections and her non-cooperation with the practice inspectors were established.
8. The inquiry panel found that the Member did not treat the practice inspections seriously enough and that her conduct prevented the practice inspectors from completing their reports.
9. The inquiry panel also found that the allegation of incompetence against the Member was proven.

10. The inquiry panel noted that the Member's practice deficiencies are found across her work, with a multi-year pattern of sub-standard practices, including files with incomplete documentation and missing notes, lack of provision of documentation to the client, and lack of follow up on key matters.
11. In the conclusion of its Report, the inquiry panel found the Member guilty of the conduct alleged in the Notice of Inquiry.

POSITION OF THE PARTIES

Position of the Society

12. The Society submits that the Member is guilty of the conduct alleged in the Notice of Inquiry.
13. Firstly, the Society submits that the Member breached Rule 18.04 for not cooperating with the practice inspectors and therefore is guilty of professional misconduct.
14. Secondly, the Society submits that the Member is not practicing in accordance with her education and training and not meeting accepted standards of practice. The Society says that the Member's conduct and the practice inspections establish that the Member is guilty of incompetence pursuant to s. 28(1)(b) of the *Act*.
15. The Society relied on the findings in the Report, a letter from the Secretary of the Society recommending a discipline review, and two practice inspection reports dated July 20, 2020, and August 12, 2021 following practice inspections conducted by two different inspectors assigned by the Society.
16. Specifically, the Society submits that the Member:
 - a. did not respond to two separate written practice inspection reports dated July 20, 2020, and August 12, 2021;
 - b. did not comply with requests for some information from the practice inspectors, leading to incomplete practice inspection reports;
 - c. had deficient documentation systems and procedures which had not improved as expected after the first inspection report, including, for example, not retaining a standard conflict of interest letter on file for all mortgage files; insufficient notes in family transfer files such as no indication that a conflict discussion had been done with the client(s); failing to have a master list of personal planning files, lender and registration reports on file; and, not retaining copies of cheques and bank statements showing deposit of mortgage proceeds; and,
 - d. had documentation deficiencies which did not meet accepted standards of practice and demonstrated a lack of attention to details.

17. The Society further submits that the Member's conduct and documentation deficiencies present major problems. As an example, the Society indicates that inadequate documentation in the Member's files is problematic if the Member is unavailable to answer questions about her files or is required to recall details at a later date.

Position of the Member

18. The Member admits in her oral testimony at the hearing that she did not notice receipt of the email and letter dated September 2, 2021 from the Secretary of the Society and the second inspection report findings, otherwise she would have responded to the correspondence.

19. She agreed there were some shortcomings in her practice, including, for example: relying on an LTSA Notice of Receipt to confirm a real estate filing and registration number; doing LTSA searches to check on the status of discharges; telephoning clients to provide confirmation of discharges or mortgage releases rather than requesting and providing discharge documents to the client; and, not reporting to the Discharge Centre when lenders did not provide an executed Form C within the 60-day limit.

20. By the commencement of the discipline inquiry process, the Member indicated that she had reviewed the practice inspection reports, including the deficiencies and recommendations noted therein, and has since created plans and procedures to improve systems in her practice to address the deficiencies and avoid mistakes going forward.

21. The Member relied on a letter she wrote to the directors of the Society dated January 16, 2023 which outlines the steps she implemented to correct some of the deficiencies noted in the practice inspections. She also relied on her letter to the discipline committee dated March 5, 2022, which contains her responses to the allegations in the Notice of Inquiry.

22. The Member invited the Society and the directors to order a re-inspection of her practice, if needed.

ANALYSIS AND FINDINGS

23. The jurisdiction of the directors on a review is provided by section 34 of the *Act*. Among other things, that section allows the directors to accept and adopt a finding reported by the discipline committee, review the proceedings and evidence taken by the committee on an inquiry, hear further evidence, and make further findings of fact on the evidence.

24. It is incumbent upon the Society to prove each of the allegations contained in the Notice of Inquiry on a balance of probabilities. In this matter, the Society has alleged that the member is in breach of R. 18.04 for non-cooperation with the practice inspectors and is guilty of incompetence pursuant to s. 28(1)(b) of the *Act*.

25. The two alleged offences, particularly the allegation of incompetence pursuant to s. 28(1)(b) of the *Act*, were complex and required lengthy deliberation by the panel.

26. Incompetence is not defined in the *Act* or in the Rules of the Society. However, the Society's *Principles for Ethical & Professional Conduct* (the "*Principles*") provide some guidance. Principle 4 relates to competence, quality of service and relationship to clients. Principle 4-P1 states: "Every Member should competently perform the services that the Member undertakes on a client's behalf."

27. The relevant guidelines following Principle 4 provide as follows:

4-G1 *Standard of Service* - Every Member should serve clients in a conscientious, diligent and efficient manner, and should provide a quality of service at least equal to that which Members generally would expect of a competent Notary in a like situation.

4-G2 *Scope of Service* - A Member should not offer advice or service to a client whose requirements are such that they exceed the Member's competence. Instead, where possible, the Member should endeavour to direct the client to those from whom the client may obtain advice or service.

4-G2.1 A Member should not attempt to give a client advice on any matter other than those that come directly within the jurisdiction of a Notary Public as set out in the *Notaries Act* and should not, when acting as a notary, provide services other than those which a notary is authorized to perform under the *Notaries Act*.

....

28. The *Principles* also include the following commentary relevant to competence:

4.1 As Members of the notarial profession, Members hold themselves out as knowledgeable, skilled and capable in notarial practice. Accordingly, clients are entitled to assume that Members have the ability and capacity to deal adequately with matters that they undertake on the client's behalf.

4.2 A Member who is incompetent does his or her clients a disservice, and brings discredit on the profession. In addition, an incompetent member damages his or her own reputations and practice and may injure those who are associated with or dependent upon him or her.

4.3 It follows that Members should not undertake a matter unless they are competent to handle it or they can become competent without undue delay, risk, or expense to their client. If Members proceed on any other basis, they are not being honest with their clients. This is an ethical consideration and is to be distinguished from the standard of care that a court would invoke for purposes of determining negligence.

4.4 In the context of this Principle, "competence" goes beyond the formal qualification of the Notary to practise. It encompasses the sufficiency of the Notary's ability to deal with the matter in question. It includes knowledge, experience, and skill and the ability to use them efficiently in the interest of the client.

4.5 Competence in a particular matter involves more than an understanding of the relevant legal principles; it involves an adequate knowledge of the practices and procedures by which such principles can be effectively applied.

4.6 The standards of care and competence being demanded by the public of all professional bodies are continually rising. Members should be aware that the Society has an obligation to prepare for the future by working to increase knowledge and to raise professional standards. Members should keep abreast of developments in the areas in which they practice.

4.7 Notaries should be alert to situations or areas in which they have either not become competent, or have not maintained their competency to perform a particular task, and the disservice they would do their client in undertaking that task. When consulted in such circumstances, they should either decline to act or obtain their client's instructions to retain, consult, or collaborate with another Notary or lawyer competent in that field. Members should also recognize that competence for a particular task might require that they seek advice from or collaborate with experts in accounting or other fields, and they should seek their client's instructions to consult experts in such a situation.

4.8 Concerns about quality of service tend to focus on areas such as the following:

- a) failure to keep the client reasonably informed;
- b) failure to answer reasonable requests from the client for information;
- c) failure to respond to the client's telephone calls or to keep appointments with clients without explanation or apology;
- d) informing the client that something will happen or that some step will be taken by a certain date, then letting the date pass without follow-up information or explanation;
- e) failure to answer within a reasonable time a communication that requires a reply;
- f) doing work in hand but doing it so belatedly that its value to the client is diminished or lost;
- g) mistakes or omissions in statements or documents prepared on behalf of the client;
- h) failure to maintain office staff and facilities adequate to the Member's practice;
- i) allowing staff members to perform functions, including providing advice, which should only be done by a Notary;
- j) failure to make a prompt and complete report when the work is finished or, where a final report cannot be made, failure to make an interim report where one might reasonably be expected; and
- k) Any disability (e.g. substance abuse, etc.), which interferes with or compromises a Member's services to the client.

Otherwise, competent notaries may experience service problems such as those described above when they take on too much work, with the result that they cannot provide adequate service in each case.

29. The panel notes that at the Member's first practice inspection in July 2020, she was a new notary in her first year, being commissioned in 2019, and was practicing on her own without any staff.
30. In accordance with her submitted documents, and confirmed by the Member at the hearing before the directors, she operates a fairly steady practice of real estate files with a smaller number of estate planning files.

Allegation #1 -- Breach of Rule 18.04: Non-cooperation

31. It is evident that the practice inspection reports prepared by the Society's inspectors were delayed or incomplete as a result of the Member's failure to respond at all or in a timely manner to their repeated requests. The Member explained her conduct with various reasons such as not seeing certain email correspondence in her inbox, having to attend to her family and maintaining a busy workload.
32. During the hearing, the Member also indicated that she thought the inspection reports and recommendations were simply the inspectors' opinions, and that it was optional to comment and respond, so she elected not to respond.
33. In reviewing the letters dated July 30, 2020 and September 2, 2021 from the Secretary of the Society, the panel agrees that while the results and recommendations of the first and second practice inspections were important, some of the language in the letters and the inconsistent time given to the Member for response (30 days in the case of the first letter and 8 days in the case of the second letter) did not necessarily convey the urgency of the matter or a requirement to respond.
34. For example, the first letter indicates "if you wish to provide a response, please do so within 30 days" (emphasis added).
35. The second letter includes the following excerpts:
 - "It is disappointing that you have not implemented many of the recommendations made in that report...";
 - "If you disagree with any of the recommendations made or wish to comment on the report in general..."; and
 - "If I don't receive a response from you by September 10th, the file will be forwarded as is."

(Emphasis added.)

The Member admitted in her oral testimony before the inquiry panel that she missed seeing the email in her inbox from the Secretary of the Society attaching a letter dated September 2, 2021 and the second practice inspection report.

36. Moreover, the Member indicated in her response letter dated March 5, 2022 to the Discipline Committee that she “complied with most of the requests from the inspectors for the information and documents”, thereby confirming she had not provided all of the requested documents to the inspectors.
37. After reviewing the evidence provided by the parties, the panel accepts and adopts the finding made by the inquiry panel that the Member breached R. 18.04 by failing to cooperate with the practice inspectors.

Allegation #2 -- Section 28(1)(b) of the Act: Incompetence

38. With respect to the allegation of incompetence, the Society provided no definition for incompetence or prior decisions for guidance. However, the panel reviewed and considered all of the evidence and submissions presented at the hearing and the Report of the inquiry panel in its analysis. The panel also reviewed the *Principles*, as outlined above.
39. In the panel’s view, the commentary provided in the *Principles* serves as a helpful starting point. The panel finds the following commentary particularly relevant:
 - 4.4 In the context of this Principle, “competence” goes beyond the formal qualification of the Notary to practise. It encompasses the sufficiency of the Notary's ability to deal with the matter in question. It includes knowledge, experience, and skill and the ability to use them efficiently in the interest of the client.
 - 4.5 Competence in a particular matter involves more than an understanding of the relevant legal principles; it involves an adequate knowledge of the practices and procedures by which such principles can be effectively applied.
40. The panel considers competence as something that refers to a Member’s performance and ability to complete and deliver a service as a notary public, and to do it in such a way as to not damage a Member’s reputation and practice or the reputation of the notarial profession. While notaries must be held to a high standard, a finding of incompetence flows from a member’s serious failure in ability or capacity to adequately deliver a service as a notary public.
41. The panel agrees that the deficiencies in the Member’s practice noted at paragraph 16 c. and d. above can create vulnerabilities and increase the risk of errors, legal action and potentially damage the reputational standing of the notarial profession. Proper documentation and procedures are important for accountability, tracking and follow-up with the parties involved in a transaction.
42. It is also concerning that during the two practice inspections, the inspectors found the Member did not have the expected standard documents and notes in her files. For example, the Member had not been obtaining copies of post-searches after registrations, had not been ordering State of Title Certificates (“STCs”) unless the lender requested them, and had not been reporting to lenders or the Mortgage Discharge Centre to track whether mortgages have been discharged.

43. The Member admitted to not understanding why she needed to obtain some of the expected documents during the periods under review by the inspectors and at the time of the inspections.
44. The Member explained that while she did not provide some of the expected reports to the clients or lenders after the completion of some of the conveyances, she did provide the STCs to lenders who requested them, and provided verbal reports to clients over the telephone as she believed doing so addressed the follow-up requirement and was the preferred method of communication by her clients rather than providing written reports.
45. The panel carefully reviewed the inquiry panel's Report and the finding of incompetence made in that Report. It is important to note that the finding of incompetence in the Report was based on the evidence presented at the inquiry and the inspection reports, which are also before this panel.
46. Upon closer review of the inspection reports and the evidence presented at the review hearing, the panel finds that there was an insufficient basis to establish a finding of incompetence. In the panel's view, the deficiencies identified in the inspection reports and the inquiry panel Report did not rise to the level of seriousness required to constitute incompetence. Although the Member's practice did not meet best practices, operating below best practices does not necessarily lead to a conclusion of incompetence.
47. In the Report, the inquiry panel relied on the two inspection reports, one dated July 20, 2020 and the re-inspection report dated August 12, 2021, which included the practice deficiencies compared to best practices standards. In the first inspection report, there is a section for "Breaches" (page 9) which was left blank by the inspector. The "Recommendation" section, directly below the section for "Breaches", provided 17 bullet point recommendations, which included obtaining copies of plans to conduct appropriate pre and post filing searches. The recommendation and requirement for STCs is not mentioned until the re-inspection report. The re-inspection report also indicated 7 of 17 recommendations were outstanding from the first inspection report. Given the lack of breaches identified in the first inspection report and the reduced number of outstanding recommendations that remained in the second inspection report, the panel puts less weight on the inquiry panel's characterization of the Member's multi-year pattern of sub-standard practices.
48. The panel reviewed the Report's findings with respect to the Member's practice deficiencies and agrees that there is a deviation from best practices; however, the panel does not view the deficiencies as being sufficiently serious to constitute incompetence. The deficiencies did not affect the Member's ability or capacity to adequately deliver her services as a notary public.
49. There is no evidence to show that the deficiencies identified by the practice inspectors impacted the Member's ability to complete any of the real estate transactions and estate planning files she conducted. This is not to say that the panel condones the Member's practice deficiencies – the panel does not. The Member should take this decision as a strong warning to comply with all of the recommendations made by the practice inspectors as soon as reasonably practicable. However, the panel finds that the allegation of incompetence has not been established on the evidence before it.

Conclusion

50. The panel is satisfied that the Member's conduct was a breach of Rule 18.04 for non-cooperation and constitutes professional misconduct. However, the Society has not proven that the Member's conduct supports a finding of incompetence under s. 28(1)(b) of the *Act*.
51. The Member's practice deficiencies clearly show a need for the Member to implement and improve her systems and procedures but, in the circumstances of this case, they do not amount to incompetence.
52. In the result, the panel finds that the Member breached Rule 18.04 for non-cooperation and is guilty of professional misconduct.
53. The allegation of incompetence pursuant to s. 28(1)(b) of the *Act* is dismissed.

All of which is submitted this 15th day of May, 2023.

Tegan Tang, Chair