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(Footnote 8 Updated February 1, 2012)

## Lawyer as Escrow Agent – Is it Worth It?<sup>1</sup>

Acting as an escrow agent is a common task of lawyers in British Columbia, especially, the solicitor, as a component of transactions.<sup>2</sup> The duties of an escrow agent are primarily contractual and the escrow agent must carry out the duties accordingly, in a non-negligent fashion and without misconduct.<sup>3</sup> Lawyers must take care not to agree as escrow agent to duties that are in conflict with their duties as counsel, but there are additional considerations.

The LSBC's Professional Conduct Handbook ("PCH") addresses ancillary business activities directly in Chapter 7, Rule 6 (my emphasis added):

### ANCILLARY BUSINESS OR OCCUPATION

6. A lawyer must not carry on any business or occupation other than the practice of law in such a way that *a person* might *reasonably*:

- (a) find it difficult to determine whether in any matter the lawyer is acting as a lawyer, or
- (b) expect that in the carrying on of the other business or occupation the lawyer will exercise legal judgement or skill for the protection of that person.

A lawyer who concurrently practises law and carries on another business or occupation must not act for a client if the client's interests and the lawyer's business or occupational interests differ.<sup>4</sup>

Role confusion is an issue here, in addition to others<sup>5</sup> that may be *reasonably* suffered by a *person*, who is not necessarily, a detail-oriented, sophisticated student of contracts and fiduciary and other roles. Sometimes, the role, duties and responsibilities of the lawyer or law firm as escrow agent, are not well-defined and this is not good when it comes to professional regulation - proceed at your own peril! Sometimes, the role is properly described in contract or in retainers or in other documents (e.g. Closing Agendas).

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<sup>1</sup> The author wishes to acknowledge the research assistance of Nate Todd Jones.

<sup>2</sup> For an example, see *Nortel Networks Corporation (Re)*, 2010 ONSC 3874, *Roxul (West) Inc. v. McCarthy Tetrault*, 2001 BCCA 20.

<sup>3</sup> Consider also the application of the *Trustee Act*, R.S.B.C. 1996, c. 464 and, for example, *Cheong v. Futama*, 2002 BCSC 1385..

<sup>4</sup> The online, LSBC Professional Conduct Handbook at <http://www.lawsociety.bc.ca> contains annotations and footnotes that highlight considerations in this regard.

<sup>5</sup> Consider the application of the law of privilege, the potential for the lawyer as escrow agent to be called as a witness (see PCH's Chapter and Chapter 7.1, Rule 6, Return of Valuables) others.

In BC, I understand that the Law Society's ("LSBC") insurance program for BC lawyers (Part A) recognizes that insured lawyers act as escrow agents in the context of legal services provided<sup>6</sup>, but does not accept where this service is a separate, stand-alone service.<sup>7</sup>

Years ago, the LSBC published the following:

"In the past year, the insurance program has experienced several significant claims arising out of lawyers acting as escrow agents, stakeholders or trustees in connection with commercial transactions.

Without careful consideration of the obligations and proper documentation of the terms and conditions, these situations present a serious risk. Whenever possible, lawyers should consider alternate arrangements."<sup>8</sup>

It then went on to offer specific advice for escrow arrangements.

Separate, stand-alone escrow or trust services (i.e. not as incidental to the provision of legal services), may be uninsured and raise the specter of other professional regulation concerns, as well<sup>9</sup>. However, my experience tells me that professional regulation and insurance are not the only important considerations.

Consider this scenario: you have the great fortune to work with a great corporate client that uses your or your firm's legal services on a regular basis. You initially sold them, actively or through your professional reputation, on the quality of the legal services you would provide. Perhaps, stated, perhaps, just understood, were the concepts of client loyalty and zealous representation and acting in their interests, as client, confidentiality and privilege. As a solicitor, while very

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<sup>6</sup> In-house lawyers are often uninsured through this programme on the basis that they do not provide legal services, except to their employer and should seriously consider whether they can provide escrow services to their employer and others.

<sup>7</sup> The LSBC website states, at the time of writing, "As trusted advisors, lawyers in private practice are sometimes asked by clients to act as trustees or executors, or in some other similar fiduciary capacity. Lawyers prepared to accept such roles generally enjoy coverage under the [professional liability insurance policy \(Part A\)](#) for any negligence claims that might arise. Under the policy, coverage is available to you for mistakes made while acting as an administrator, executor, guardian, trustee or committee or in any similar fiduciary capacity, provided that such services are *connected with and incidental to* your practice of law. As long as you are not a full-time or professional fiduciary, have been asked to act because of a solicitor's (rather than, for example, a familial) relationship, and continue to maintain a law practice, your services are generally "connected with and incidental to" your practice of law. In these circumstances, any mistake made by you while providing services as a fiduciary will, prima facie, attract coverage under the policy."

<sup>8</sup> See <https://www.lawsociety.bc.ca/page.cfm?cid=2404&t=Risks-for-lawyers-as-escrow-agents.-stakeholders-and-trustees>.

<sup>9</sup> Consider LSBC Professional Conduct Handbook, Chapter 4, Rule 6 and its footnotes, which reinforce a lawyer's duty to be on guard against becoming the tool or dupe of unscrupulous clients who may use a lawyer's trust account or escrow services and insurance coverage to add credibility to a fraudulent enterprise.

aware of your need to negotiate and implement the transaction in your client's interests, you also live the reality of clients who, after the stress and demands of negotiating the deal have passed, just want you to *get the deal done*, as inexpensively and with as few obstacles as possible. Your Friend's clients feel the same way, so who will hold the holdback in escrow? Is it necessary to go to a professional escrow agent? "You can do this for us, right?" Sure, we can.

Alive to the possibility for role confusion, you negotiate a clear escrow agreement that specifically states that you cannot accede to the demands of either side, that you are operating as an escrow agent and not a lawyer and that will only operate in a purely mechanical fashion in dealing with the holdback (i.e. "If I receive this or a direction jointly signed by both sides, I will release the holdback", "if there is a dispute, I will pay the holdback into court"). The clients on both sides sign the agreement, after having received advice from their respective counsel, which includes your firm.<sup>10</sup> You may have even gone so far to use a special purpose company to be the escrow agent<sup>11</sup>.

A dispute arises between the parties and your client tells you not to release the holdback under any circumstances ...! How will your client react when you respond that you must act in accordance with the escrow agreement? From the client's perspective, where is the client loyalty and zealous representation and acting in the client's interests, then? Yes, your contact at the client knew the risks and even signed the escrow agreement, but in the end, will that matter? In my example of the corporate client, "client" can actually mean tens of employees or officers of the corporate client and even if the one who instructed you through this process fully accepts this – will her colleagues? The client relationship that you worked so hard to attract and foster is strained, if not destroyed, in circumstances where you may have done anything wrong. Rather, you took extra steps to assist the client to achieve its goals.

Well, was it worth it? Might it not have been better to avoid these complications and grief and assert your client's position, as counsel, with your relationship intact?

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<sup>10</sup> You will want to consider whether to send your client for independent legal advice.

<sup>11</sup> Please review your insurance policy(ies) or seek the advice of your insurer to determine your insurance coverage in this regard.