

2013 : No. 01 Spring

Thomas John Johnston

Summerland, BC

Called to the bar: May 10, 1983

**Discipline hearing** : November 14, 2012

**Panel** : Gregory Petrisor, Chair, Dennis Day and David Layton

**Report issued** : January 25, 2013 (2013 LSBC 04)

**Counsel** : Jaia Rai for the Law Society; J. Grant Hardwick for Thomas John Johnston

## Facts

When Thomas John Johnston was retained by clients in December 2008, he knew that the trial was scheduled to commence on February 23, 2009. Examinations for discovery still had to be conducted and his clients' instructions were to proceed to trial expeditiously. He also knew that the clients' previous lawyer withdrew because they were not willing to follow his advice to settle the action on the basis that the outcome was uncertain and the trial would be uneconomical.

Examinations for discovery were not completed before February 23, 2009, a trial certificate was not filed on time, and the scheduled trial dates were lost.

On April 3, 2009, Johnston forwarded a counter-offer to opposing counsel. After one of the clients saw the counter-offer, the clients instructed Johnston to withdraw it because its terms did not match their instructions. Johnston did not withdraw the counter-offer.

Based on Johnston's advice, the clients wrongly believed that the court could impose a settlement and that the settlement would not be in their favour. Johnston continued trying to persuade his clients to accept the settlement offer. He took no steps to schedule a trial date.

On July 16, 2009, during the hearing of a summary judgment application, Johnston agreed that his clients would provide a general release as a term of settlement. He did so without instructions from his clients.

After the hearing, Johnston prepared a form of release for the clients to sign. Despite what was said at the hearing, Johnston drafted a limited release that applied only to claims arising out of or in relation to the action. The clients did not understand that Johnston had already agreed to a general release as he had not clearly explained this.

In August 2009, the clients retained new counsel. Johnston was requested on a number of occasions to release the client's file. He provided some of the file contents in November and turned over the remainder in December.

## Admission and disciplinary action

Johnston admitted to failing to serve his clients properly and to misleading them. He admitted that his conduct constituted professional misconduct.

The panel agreed that Johnston was acting in the best interests of his clients as he perceived them. However, he clearly contradicted his clients' instructions and, at times, misled them. He left his clients with

no choice but to agree to a settlement they did not want. On the other hand, the result obtained at the end of proceedings was arguably as good as could ever have been achieved at trial.

The panel found it was not acceptable for Johnston to simply disregard his clients' instructions, even if he considered his actions to be in his clients' best interests. Clients are entitled to expect that a lawyer will follow their instructions, within the bounds of the lawyer's professional responsibilities. As a senior lawyer, Johnston should have known the importance of being truthful to his clients, following his clients' instructions and obtaining reasonable instructions.

An aggravating factor was that the conduct in question was not a single incident, but a course of action that took place over almost a year.

The panel considered the 15 letters of reference submitted in support of Johnston's character and the fact that he did not have a relevant prior discipline history.

The panel accepted Johnston's admission and ordered that he:

1. be suspended from the practice of law for one month, and
2. pay \$6,448 in costs.