2015 LSBC 57
Decision issued: December 11, 2015
Citation issued: November 10, 2014

THE LAW SOCIETY OF BRITISH COLUMBIA

In the matter of the *Legal Profession Act,* SBC 1998, c. 9

and a hearing concerning

TRACEY LYNN JACKSON

RESPONDENT

DECISION OF THE HEARING PANEL
ON FACTS AND DETERMINATION

Hearing dates:	July 27, 28 and September 15, 2015
Panel:	Herman Van Ommen, QC, Chair Woody Hayes, Public representative Gavin Hume, QC, Lawyer
Discipline Counsel:	Kieron Grady
Counsel for the Respondent:	Geoffrey Cowper, QC (evidentiary phase J. Kenneth McEwan, QC (submissions only

INTRODUCTION

[1] A citation was issued against Tracey Lynn Jackson for:

(a) engaging in dishonourable or questionable conduct in relation to instructions and guidance to a junior associate lawyer contrary to her obligation of candour to the Court and her duty to fully and frankly disclose all material facts in an *ex parte* application; and

(b) swearing and relying on an affidavit that contained misrepresentations that she knew or ought to have known were false, or potentially misleading.

This is a paraphrase of the citation, which is attached as Appendix A to these reasons.

[2] This conduct, which is asserted to be professional misconduct, occurred in and around August and November 2012.

[3] The citation was authorized on October 30, 2014 and issued on November 10, 2014. Ms. Jackson admits through her counsel that she was served on December 9, 2014.

THE HEARING

[4] By agreement the parties submitted a lengthy Agreed Statement of Facts containing 86 paragraphs of text and 42 attachments. The Law Society called Ms. R to testify as to her involvement. Ms. Jackson testified on her own behalf. No other witnesses were called.

BACKGROUND

[5] Ms. Jackson was called and admitted as a member of the Law Society of British Columbia on May 19, 1995. She practises exclusively in the area of family law.

[6] Ms. R was called and admitted as a member of the Law Society of British Columbia in May 2010. She commenced employment with Ms. Jackson's firm, Dunnaway Jackson & Associates, in February 2012.

[7] In June 2012, Ms. R met a potential client, KP, at Ms. Jackson's request. At the conclusion of this initial meeting Ms. R advised KP that the firm would not be able to assist her. She said she did this because:

> … Something in our meeting made me conclude that it was not a good file for the firm. I think that it was a combination of her unrealistic expectations about what we could achieve for her; and partly her, I think it was her demeanour, the way she conducted herself in the interview. …

[8] KP was unhappy with that decision and said so loudly in the waiting room on her way out. Ms. Jackson came into the waiting area at that time. Ms. Jackson spoke with KP and decided to take the file and instructed Ms. R to do so.

[9] A Notice of Family Claim was filed shortly thereafter, and in early July both sides brought applications in chambers. Ms. Jackson, on behalf of KP, sought interim spousal support and AA sought the return of chattels that he alleged KP had stolen.

[10] Ms. Jackson spoke to the application. AA was represented by TM. Master Taylor made various orders.

[11] Ms. Jackson and TM disagreed with respect to whether Master Taylor had ordered KP to produce the keys to a storage locker in which it was alleged KP had put the chattels AA sought to have returned.

[12] In his oral reasons for judgment, Master Taylor stated:

> Accordingly, the claimant should return items (a), (d), (e), (f), (g), (k), (l) and (m) in that list, and she could produce the key to the respondent or respondent's agent and the address of the storage locker where it is and those items can be taken from the storage locker, resealed, and the keys returned to the claimant. The respondent shall preserve those chattels returned to him pending a written agreement or order of the court.

[13] TM asserted that, although Master Taylor said "she could produce the key …," it was meant to be mandatory. Ms. Jackson did not agree. Both counsel agreed that, in the prior sentence where Master Taylor said "the Claimant should return items …," the word "should" meant must.

[14] After the court hearing on July 16, 2012, Ms. Jackson met with KP and her friends and discussed the return of AA's chattels. Because KP was in Canada on a temporary visa that had expired, she was leaving the country that evening. KP's friend was to be given the key and return the goods. Ms. Jackson said she expected her client to return the chattels as ordered.

[15] TM or others at her office communicated by email to Ms. Jackson during the next week seeking the keys. Ms. Jackson did not respond.

[16] On July 24, 2012 TM wrote:

> It has been over a week since Master Taylor ordered that your client disclose the location of her storage locker and produce the key to the storage locker to AA. She has not done so.
>
> We have contacted you three times to ask where the key is and to make arrangements for delivery of the key to our client. You have not replied to

> any of our communications. We are at a loss to understand the failure to reply or comply with the Order.
>
> …
>
> We are concerned that KP is emptying the storage locker of items that belong to AA that she took wrongfully, but has not yet admitted to doing so. This delay in delivering the key to us is prejudicial to AA. We ask, out of professional courtesy, if nothing else, that you respond in some fashion to our communications regarding the whereabouts of the locker and the key.

[17] July 24, 2012 was Ms. Jackson's last day in the office prior to a planned vacation. It was apparent at this time that the chattels had not been returned as expected, and there was a concern that the chattels were wrongfully being removed.

[18] She had in the days previous forwarded TM's emails to KP. She also advised KP that a further retainer of $10,000 was required before any further work would be done on the file.

[19] Ms. Jackson instructed Ms. R to take conduct of the file while she was gone. She advised her of the dispute concerning whether delivery of the keys was mandatory. She instructed Ms. R not to respond to the letters from TM until the client had paid the additional retainer. Ms. R asked whether they should write to TM to advise that they were unable to get instructions about the key but was told not to do so until a further retainer was paid.

[20] On July 25, 2012, TM wrote to the Respondent and stated:

> ... Lastly, we write further to our last four communications to you about the storage locker, to which you have not responded. Your client has had over a week to provide us with the key and the details about the location of the storage locker as per Master Taylor's order. Can you advise when we can expect the key and the relevant details about the storage locker? As we have previously advised, we are concerned that your client is delaying in order to dispose of other items that she has taken from AA.

[21] On July 30, 2012 a friend of KP delivered the key to the receptionist at Ms. Jackson's firm without speaking to Ms. R.

[22] On July 30, 2012 TM obtained an *ex parte* order restraining KP and her agents from accessing the storage locker.

[23] On August 1, 2012, TM delivered by fax and mail a letter to Ms. Jackson and asked, among other things, "Have you, at any point since Master Taylor made his order, been in possession of the key to the storage locker and do you have it now?"

[24] On August 2, 2012, the firm also received an unfiled Notice of Intention to Act in Person from KP and sufficient funds to permit Ms. R to commence work on the file. Ms. R emailed KP advising her of the July 30 injunction.

[25] On August 3, 2012 Ms. R wrote TM advising that Ms. Jackson was out of the office until August 20 and that she was seeking instructions from the client.

[26] On August 7 Ms. R wrote to TM advising that KP took the position that Master Taylor's order did not require her to deliver the keys.

[27] TM responded by advising that she would seek short leave for further orders against Ms. Jackson and the firm regarding disclosure of the location of the storage locker and keys and other related matters.

[28] Ms. R advised KP of the application and sought instructions. KP terminated the retainer on August 10. Ms. R advised TM of that on the same day.

[29] Also on August 10 TM wrote:

> ... There is evidence that you have the key to the locker even though you have refused to confirm the same. We would like you to advise us whether or not you have the key. We do not believe that this is a matter of privilege. If you decline to advise us, we will seek an order that you be compelled to tell us.

[30] On August 13, Ms. R, based on an August 10 discussion with a practice advisor from the Law Society of British Columbia, wrote to TM as follows:

> ... I can advise that I do not have permission from KP to impinge on solicitor-client confidentiality with respect to the location of the storage locker key.

[31] Ms. R attended in chambers on August 14 to determine whether an order would be made requiring her or the firm to disclose the location of the storage locker and keys or to deliver the keys. Mr. Justice Butler heard the application. She advised TM of her reason for attending and sat in the public gallery. She gave her copy of the materials to TM. Ms. R took lengthy notes but experienced some difficulty doing so without her materials to follow. She noted that no relief

was sought against the firm. She returned to the office and advised the staff that no order had been made with respect to the storage locker keys.

[32] Ms. R was mistaken. Butler J. had in fact made an order concerning the keys. An order was entered on August 14 which required delivery of the storage locker keys by August 17. TM emailed that order to KP who was at the time in South America. TM did not provide a copy of the order to Ms. R or the firm.

[33] Ms. Jackson returned to the office on August 17. She was advised of the August 14 hearing and of Ms. Rs' belief that no order had been made requiring delivery of the keys. She was also told of the advice from the Law Society practice advisor that solicitor-client privilege prevented them from disclosing that they had possession of the keys.

[34] Together they telephoned the practice advisor on August 21 who recommended they make an application equivalent to an interpleader allowing them to deliver the keys to the court. He suggested this could be done on an anonymous basis using other counsel.

[35] Following that call, Ms. R began to have doubts about her belief that no order requiring delivery of the keys had been made. She reviewed her notes and became concerned about the notation which states:

> Re Key. Seeking delivery of the key by August 16 – no – give the email info by August 17. Also, give key by August 17.

[36] After that review she concluded that she "may have made a mistake." She attended the Court Registry but was unable to obtain a copy of the clerk's notes or a copy of the entered order to determine whether she had made a mistake or not.

[37] Later that day, she met with Ms. Jackson and told her of her concerns. Ms. Jackson responded by saying "was an order made or not?" Ms. R replied that she was not sure. Ms. Jackson called out to the paralegals who were just outside her door and asked them what Ms. R had said the day of the application. Both paralegals confirmed that Ms. R, on her return from court, had been emphatic that no order had been made in relation to the key. Ms. Jackson suggested to Ms. R that she might be being overly paranoid. Ms. R testified that Ms. Jackson said further: "You should never admit that you thought an order may have been made."

[38] Ms. Jackson did not review Ms. Rs' notes, though they were offered to her. After a discussion about how to determine for certain whether or not an order had been made, Ms. Jackson instructed Ms. R to contact the client to ask her whether she knew whether an order had been made. The client had not been present in the court during the application.

[39] Ms. Jackson decided that they would not order a transcript and would not contact TM to determine whether an order had been made. Ms. Jackson suggested that if an order had been made concerning the keys, that TM would have served or delivered a copy of the order on the firm. Ms. R agreed with that assessment.

[40] As instructed, Ms. R emailed KP to ask whether or not she was aware an order had been made in relation to the keys. Ms. R received a phone call from KP on August 27 advising that no order had been made. This was in fact not true. TM had sent a copy of the entered order to KP by email on August 15, the day after the application.

[41] On receiving that information Ms. R advised Ms. Jackson and expressed some relief about learning that no order had been made. Ms. R was not entirely satisfied with that information but took no further steps to determine whether an order had been made or not.

[42] KP's claims were dismissed by Mr. Justice Myers on August 24, 2012.

[43] On September 11, 2012, TM advised that she would be appearing before Master Taylor on September 17, 2012 to settle the terms of the order made July 16, 2012.

[44] Ms. Jackson instructed Ms. R to prepare an interpleader application and have it set down for hearing on Friday, September 14, 2012. Ms. Jackson wanted to deliver the keys to the custody of the court before the terms of Master Taylor's order were settled.

[45] Ms. R prepared the materials. Ms. Jackson reviewed her draft affidavit and added paragraph 17 as follows:

> I have no knowledge that any orders have been made with respect to the storage locker keys and key fob.

[46] Ms. R testified that she expressed concern to Ms. Jackson about the accuracy of that statement. Ms. R said that it was not really true because they were not sure whether Butler J. had made an order regarding the keys. Ms.

Jackson responded saying that she didn't *know* an order was made, so the statement was in fact accurate.

[47] On Ms. Jackson's instruction the application was brought without notice. She did so because of a concern that the fact that the law firm had the keys was subject to solicitor-client privilege. By giving notice of the application they would be divulging solicitor-client information. She believed that proceeding without notice avoided that problem. The propriety of proceeding without notice is not part of this proceeding.

[48] Ms. R spoke to the application on September 14, 2012, and she obtained orders directing delivery of the keys to the court and extinguishing any liability the firm might have in relation to those keys.

[49] On September 17, 2012 the terms of Master Taylor's order were settled. It was decided that the Order included a term requiring that the storage locker keys be produced.

[50] On November 16, 2012 counsel for AA (TM's firm) applied to set aside the *ex parte* interpleader order and sought special costs against Ms. Jackson. In response to that application Ms. Jackson swore a further affidavit on November 28, 2012. In that affidavit she stated:

> In response to paragraph 13(c), I am advised by Ms. R that she sat in on the court hearing before Mr. Justice Butler, only with a view to ensuring that no orders were made against our offices. Ms. R further informed me that TM specifically told her that she was not seeking any orders against our offices. Ms. R did not have the amended application or full materials and was not able to follow the orders that Mr. Justice Butler made that day. Ms. R further informed me that she assumed that if any orders had been made for the delivery of the keys, that opposing counsel would have served us with such an order. We were served with no such orders. I did not know what orders Mr. Justice Butler made when I swore my affidavit in support of the interpleader application.

[51] The application proceeded on November 29, 2012. Ms. Jackson attended and sought an adjournment to a time at which her counsel could attend. Mr. Justice McEwan proceeded with the application in part. He set aside the portion of the order extinguishing liability of the firm and adjourned the application for special costs.

[52] Ms. Jackson settled the claim for specials costs by agreeing to pay $15,703.16.

[53] On February 7, 2013 Ms. Jackson appeared before McEwan J. and apologized for her conduct in relation to the interpleader application.

ONUS OF PROOF

[54] The onus of proof is well established, as is the standard of proof. The Supreme Court of Canada decision in *FH v. McDougall*, 2008 SCC 53, 297 DLR (4th) 193, has been adopted by numerous Law Society hearing panels. In *Law Society of BC v. Shauble*, 2009 LSBC 11, the panel quoted from *McDougall* at paragraph 43 as follows:

> The onus of proof is on the Law Society, and the standard of proof is a balance of probabilities: "… evidence must be scrutinized with care" and "must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But … there is no objective standard to measure sufficiency."

[55] To the same effect but stated differently, in *Law Society of BC v. Seifert*, 2009 LSBC 17 at paragraph 13 the panel wrote:

> ... the burden of proof throughout these proceedings rests on the Law Society to prove, with evidence that is clear, convincing and cogent, the facts necessary to support a finding of professional misconduct or incompetence on a balance of probabilities.

FACTUAL FINDINGS

[56] The central factual issue in this matter is the extent of Ms. Jackson's knowledge of the order made by Butler J. on August 14, 2012.

[57] She was not present and knew only what she was told by Ms. R, or by her staff, who also only knew what they were told by Ms. R.

[58] It is clear that, initially Ms. R told others that no order had been made, either against the firm specifically or in relation to the keys generally. It is also clear that Ms. R on August 21 began to doubt her initial belief and became concerned that she may have made a mistake. Her doubts arose based on a review of her notes.

[59] She checked the court registry on August 21, 2012 to review the clerk's notes or to obtain a copy of the order. Neither was in the file on that day.

[60] Later that day she went to speak to Ms. Jackson, her employer and the person responsible for the file. She advised Ms. Jackson that she may have made a mistake about whether an order was made in relation to the storage locker keys. Ms. Jackson's position in this hearing is that in response to this information she took reasonable steps to ascertain the truth. We do not agree.

[61] Ms. Jackson's initial response was, "Was an order made or not?" This response would not make it easy for a junior lawyer to confess her uncertainty. Ms. R could not answer that question because she was uncertain. She did not know whether an order had been made or not.

[62] Ms. Jackson also called out to the assistants asking them to confirm what Ms. R had said on return from court on August 14. They confirmed that Ms. R had been emphatic that no order had been made. This step also did not assist in ascertaining the truth. It merely verified that Ms. R initially believed no order had been made; which belief she was then doubting.

[63] Ms. Jackson also confirmed that she asked Ms. R if she was being paranoid. In her interview with the Law Society investigator prior to the hearing, Ms. Jackson described Ms. R as being in a frenzy about this issue. She initially denied that characterization in cross-examination but agreed on being confronted with her prior statement. Before this Panel, Ms. Jackson described Ms. Rs' doubt as being slight.

[64] Describing a junior lawyer admitting that she may have made a mistake as paranoid is not helpful in determining whether a mistake had been made at all. It is important to note that despite Ms. Rs' suggestion that she ought to, Ms. Jackson never asked to review Ms. Rs' notes to determine for herself why Ms. R was worried that she may have made a mistake. A quick review of her notes would have shown that there was indeed cause for concern.

[65] Ms. Jackson also testified that she was incredulous that TM had not obtained an order relating to the keys. Further, she testified that her paralegal assistant, who has 30 years' experience in the business, was also incredulous that such an order had not been obtained. This expectation, that in the normal course such an order would have been obtained, along with Ms. Rs' admission that she might have made a mistake, ought to have caused Ms. Jackson to take more seriously the possibility of an error.

[66] During this conversation, Ms. R suggested that they either order a transcript of the proceedings before Butler J. or that they enquire of TM. Ms. Jackson refused to take either of those steps.

[67] Instead, Ms. Jackson instructed Ms. R to ask KP (the client) whether she knew if an order had been made in relation to the key. Both knew that KP was not present in court that day and was in fact in South America. In the course of this discussion between Ms. Jackson and Ms. R, Ms. R testified that Ms. Jackson said words to the effect of "don't ever admit that you thought an order may have been made." Ms. Jackson denies making that statement. We accept the evidence of Ms. R.

[68] Ms. R was a very credible witness. She gave her evidence in a clear and concise manner. She was very subdued but direct. She gave evidence without hesitation that showed that she had made mistakes and had not fulfilled her duties to the court.

[69] Counsel for Ms. Jackson challenged her credibility in argument and pointed to two instances where her ability to observe events and subsequently accurately recall them was in doubt.

[70] The first instance was her observation of the application before Butler J. and her subsequent inaccurate reports. Clearly she was mistaken in that instance. As explained, she did not have the materials with her to follow along as she had given them to TM.

[71] The second instance pointed to was her evidence concerning what Ms. Jackson said in court before McEwan J. Ms. R testified as follows:

> Q: And you observed Ms. Jackson make her submissions on the 29th?
>
> A: Yes
>
> Q: And did you have any reaction to her submissions?
>
> A: Yes. I was very worried, and I was really upset that she told Justice McEwan that she had no idea that an order could have been made, and she emphasized with her hands and said, "no idea."

[72] A review of the transcript shows that Ms. Jackson did not speak those exact words. Ms. R was not cross-examined on this point. We do not know what Ms. R would have said if she had been confronted with the transcript. The substance of Ms. Jackson's comments before McEwan J. recorded in the transcript is, in our view, accurately characterized in Ms. Rs' testimony.

[73] On balance, we are satisfied that Ms. Rs' evidence can be relied on.

[74] Ms. Jackson's counsel argued that it would not make sense for Ms. Jackson to have said "do not admit any doubt" in the context of the surrounding circumstances. He argued that Ms. Jackson's instructions to ask the client whether an order had been made necessarily required them to acknowledge they were uncertain as to whether an order had been made or not. That is true, but the warning not to admit doubt was not directed at an admission to their client but to the other side.

[75] Ms. Jackson's actions on August 21 were not directed to ascertaining whether a mistake had been made. We conclude her actions were directed to convincing Ms. R that she had not made a mistake and limiting inquiries that would reveal the truth.

[76] On August 27, 2012, KP telephoned Ms. R and advised, untruthfully, that no order was made regarding the key. Ms. R reported that conversation to Ms. Jackson and expressed some relief at learning that news.

[77] Ms. R testified that she continued to have doubts because she did not trust KP. Master Taylor in his reasons had made very critical comments about KP's credibility. He stated:

> The mere fact that this lady has chosen, and I say "chosen" to lie to either the authorities of the United States Government in her applications for citizenship, or her affidavits in support of this application, tells me she cannot be trusted.

[78] The law firm continued to have possession of the key and, due to the concern of solicitor-client privilege, could not divulge that information to TM. The practice advisor, in their call on August 21, had suggested they bring an application equivalent to an interpleader to allow them to deliver the keys to the court.

[79] No steps were taken in relation to that application until September 11 when TM advised that she was setting down a hearing on September 17 to settle the terms of Master Taylor's order. Ms. Jackson decided that she wanted the interpleader application heard before the application to settle the terms of the order. She instructed Ms. R to do the research and prepare the necessary materials. This was done on an urgent basis. Ms. R emailed her assistant with instructions late in the evening of September 11, which was a Tuesday. The interpleader application was to be made on Friday, September 14, 2012.

[80] As noted earlier, the propriety of proceeding without notice in these circumstances in not part of the Law Society's case so we will not comment on it.

[81] The application prepared by Ms. R included a term extinguishing liability of the firm. This term is usual in interpleaders. Ms. Jackson testified that she had no experience with interpleader applications and relied on the research conducted by Ms. R.

[82] Ms. Jackson testified that she thought that the term "extinguish" operated for damage or loss that occurred after the key was delivered to the court. In addition to being illogical, it is inconsistent with the position she took before McEwan J.

> Ms. Jackson: And certainly I think it would be inappropriate for me to be speaking to it or for Ms. R to speaking [sic] to this application.
>
> Court: All right. Well, there are two different things, aren't there? There's a claim against you for special costs –
>
> Ms. Jackson: Yes, that's right.
>
> Court: – and I can see your point there. What about this order of Master MacNaughton, setting it aside?
>
> Ms. Jackson: Well, that's the – the application is really part and parcel of the same material, My Lord, because the part of Master MacNaughton's order, My Lord, that addresses responsibility, there's a section of her order that says that our firm and myself would not be liable for any costs in the matter or liable for any damages, and that's the portion of the very order of Master MacNaughton that my friends seek to set aside, and so that must be related to the question of costs.

[83] The idea that the order only operated prospectively makes no sense. The court would have possession of the keys and Ms. Jackson could not be responsible for them after that point. An order that only extinguishes liability prospectively would be unnecessary.

[84] The exchange in Chambers with McEwan J. shows she understood the extinguishment of liability was broader than that.

[85] Ms. Jackson testified that her objective in bringing the interpleader application was to get rid of the key. Her insistence that the interpleader be brought before Master Taylor's order was settled shows that this was not her only objective. When asked why she did not wait until Master Taylor's order was settled, she said she was

certain that it would be settled on the terms she understood, namely, that there was no requirement for KP to turn over the storage locker keys.

[86] Ms. Jackson testified that if there were an order compelling KP to deliver the keys, she would have delivered the keys in accordance with such order.

[87] If Ms. Jackson had waited one business day to see if Master Taylor agreed that his order was mandatory, i.e., that KP was required to deliver the storage key, there would have been no need for the interpleader, indeed it would have been improper.

[88] Ms. Jackson's certainty that the order would not be settled to require KP to deliver the key does not explain why she was prompted to bring the interpleader application when learning TM had scheduled the hearing to settle Master Taylor's order or why she rushed to have it prepared and heard before that hearing. The interpleader could just as well have been brought after if she was sure that it would not result in an order requiring delivering the keys. However, the interpleader would not have been necessary or proper after September 17 if the result was an order requiring delivery of the keys.

[89] We find that Ms. Jackson was motivated to obtain the order extinguishing liability.

[90] During the course of preparing the interpleader materials it was decided that Ms. Jackson would swear the affidavit in support and Ms. R would speak to it. Ms. Jackson amended her draft affidavit adding paragraph 17, which stated:

> I have no knowledge that any orders have been made with respect to the storage locker keys and key fob.

[91] Ms. R testified that, on seeing that paragraph she questioned its accuracy saying, "we are not sure." She testified that Ms. Jackson responded, "Well no, I don't know about an order, and therefore I have no knowledge."

[92] Ms. Jackson denied having a conversation about paragraph 17 specifically. She said that they did discuss adding Master Taylor's reasons to the affidavit to show the uncertainty in that regard.

[93] Her affidavit, which she knew was going to be used in an application without notice, did not disclose other orders that had been made in the proceeding either. With respect to the order of Myers J. dismissing KP's claim, she said that this was not included because Ms. R said they only knew about that order because the client sent it to them and that it would be privileged. Ms. Jackson says she accepted that. She ought not to have. Clearly, she could have obtained a copy of

the Myers J. order from the court registry and appended it as an exhibit to her affidavit.

[94] The injunction restraining KP from accessing the storage locker granted on July 30 was also not disclosed, although it ought to have been.

[95] Ms. Jackson says they did discuss the application heard by Butler J. and Ms. Rs' doubts as expressed in August about what was ordered:

> In the same conversation, we discussed whether or not to include any information about the conversation that we had had on the 21st of August about this uncertainty that she had had. And we discussed that, and I remember saying to her, "Well, if we put that in, then" – you know, we're just, we're walking through it – "then what do we, what do we do? We have got this uncertainty. We have to talk about then what you did about it," and what we did about the uncertainty that she had, and in my view, it was momentary uncertainty, was "you have to go and say that you have contacted the client," because that's how the uncertainty was resolved. "If you go and say that you contacted the client and the client told you that no order had been made, then again, you are in that problem of breaching solicitor/client privilege again.

[96] Ms. Jackson testified that at no time during the preparation of her affidavit did Ms. R say that she had a continuing doubt about whether an order had been made and that she was not satisfied with KP's advice.

[97] Whether paragraph 17 is true or not will be dealt with further, but it is clear that the application before Butler J., which concerned the keys, was a material fact that ought to have been disclosed. The order dismissing KP's claims and the injunction should also have been disclosed.

[98] If in fact there was no doubt about the result of the application heard by Butler J. at the time, Ms. Jackson could easily have stated that such an application was made but no order relating to the keys had been granted.

[99] We accept Ms. Rs' evidence that she expressed concern about the accuracy of paragraph 17. In our view, while paragraph 17 may well be true, on a very technical level, because Ms. Jackson did not know an order was made, she knew from Ms. R that an order might have been made.

[100] Counsel for Ms. Jackson submitted that Ms. Rs' evidence on this point ought not to be accepted. He noted that Ms. R took Ms. Jackson's affidavit and

that, if she thought it was improper, she ought not to have. Ms. R testified against her own interests that she did take the affidavit in those circumstances. In addition, it would take a very courageous young lawyer to refuse to take the affidavit of her employer, a senior lawyer, on the basis that it was misleading.

[101] Further, counsel noted that Ms. R spoke to the application and did not, as her duty to the court would require, disclose the uncertainty about the Butler J. order or a concern about the affidavit, if she in fact had those concerns at the time. Again, Ms. R testified against her own interests that she did. She had been instructed not to admit she had doubts about whether an order had been granted, and her employer had refused to put anything about that in the affidavit.

[102] Ms. Jackson said that, if Ms. R had expressed continuing doubts about the Butler J. order during discussions of her affidavit, she would have taken steps to ascertain the truth. She testified that she, and she thought Ms. R, were satisfied with KP's advice that no order regarding the keys had been made. She ought not to have been satisfied given Master Taylor's comments about KP's credibility. Also, given her expectation that an order regarding the keys would, in the normal course, have been given, she ought not to have been satisfied and ought to have taken the easiest and most direct route of asking TM or obtaining a transcript.

[103] Ms. Jackson wanted the interpleader heard by September 14, and disclosure of uncertainty concerning the Butler J. order would make obtaining the order less likely. Also, taking further steps to ascertain the terms of the Butler J. order would lead to a delay of the interpleader.

[104] We find that, while paragraph 17 may technically be true, it is misleading and incomplete. With the knowledge Ms. Jackson had, it was incumbent on her to disclose the fact of the application before Butler J. and that she did not know for certain whether an order regarding the keys had been made.

[105] Counsel for the Law Society argued, in the alternative, that Ms. Jackson was either wilfully blind or reckless with respect to paragraph 17 of her affidavit. Counsel argued that, given what Ms. Jackson knew, she was obliged to take steps to ascertain the truth. We have found that Ms. Jackson knew there was uncertainty as to whether Butler J. had made an order with respect to the storage locker keys and the failure to disclose that uncertainty is what rendered her affidavit misleading and incomplete. As a result we do not need to consider whether she was wilfully blind or reckless.

[106] In response to the application seeking to set aside the interpleader order and for special costs from Ms. Jackson personally, she swore a further affidavit on November 28, 2012.

[107] The citation incorrectly stated the affidavit was sworn November 26. By consent the citation was amended during the hearing to provide the correct date.

[108] In paragraph 15 of her November 28, 2012 affidavit, Ms. Jackson repeated the assertion made in paragraph 17 of her September 13 affidavit. This is problematic for the same reasons. In addition she stated:

> Ms. R further informed me that she assumed that if any orders had been made for the delivery of the keys, that opposing counsel would have served us with such an order.

[109] In fact, as Ms. Jackson testified:

> Q Did you not come up with that rationalization first?
>
> A Well, I put it to her, yes, and she agreed with me and she stated it, but I didn't say in my affidavit that she came up with it or that I came up with it. I don't think it really mattered who came up with it. The point is she informed me that she had that viewpoint, and she did have that viewpoint, and so did I.

[110] While her affidavit may technically be true, it is misleading. It is misleading because of the context in which it was sworn. Ms. Jackson's conduct was in question, and by suggesting that she relied on Ms. Rs' assessment, she minimized her own involvement.

DETERMINATION

[111] Professional misconduct is not a defined term in the *Legal Profession Act*, the Law Society Rules, the *Professional Conduct Handbook* or the *Code of Professional Conduct* for British Columbia.

[112] The leading case defining professional misconduct is *Law Society of BC v. Martin*, 2005 LSBC 16. At paragraph 171 of the panel wrote:

> … whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members; if so, it is professional misconduct.

[113] Further, at paragraph 154 the panel wrote:

> ... The real question to be determined is essentially whether the Respondent's behaviour displays culpability which is grounded in a fundamental degree of fault, that is whether its displays gross culpable neglect of his duties as a lawyer.

[114] Recently, in *Law Society of BC v. Gellert*, 2013 LSBC 22, the panel wrote at paragraph 67:

> Conduct falling within the ambit of the "marked departure" test will display culpability that is grounded in a fundamental degree of fault, but intentional malfeasance is not required – gross culpable neglect of a member's duties as a lawyer also satisfies the test.

[115] The parties are agreed as to those principles.

[116] Chapter 2, Rule 1 of the *Professional Conduct Handbook*, which was in effect at the relevant time, stated as follows:

> A lawyer must not, in private life, extra-professional activities or professional practice, engage in dishonourable or questionable conduct that casts doubt on the lawyer's professional integrity or competence, or reflects adversely on the integrity of the legal profession or the administration of justice.

[117] A lawyer must be candid and forthright in all dealings with the court. This is a fundamental ethical duty. This duty is enforced by the courts and the Law Society. The due administration of justice depends upon lawyers, at all times, displaying a high degree of trustworthiness and integrity. Any failure to comply with this duty is a serious transgression.

[118] In *Law Society of BC v. Samuels*, 1999 LSBC 36 the hearing panel wrote at paragraph 12:

> The Respondent misled the Provincial Court of British Columbia in the course of his representation of two young people. This is a very serious matter, as the Court has to rely on the submissions given to it by counsel as fact. It is an essential cornerstone of our system of justice that counsel's submissions reflect the actuality. Any departure is an assault on the integrity of that system. ...

[119] This duty is much more important when an application is made without notice and will benefit the lawyer in question personally. The British Columbia Court of Appeal in *Evans v. Silicon Valley IPO Network*, 2004 BCCA 149 wrote:

> [32] There is no disagreement between the parties on the principles of disclosure. The rule on *ex parte* applications (which was the nature of the proceeding on 18 December 2002) was described in the frequently cited decision of Wilson J., later CJSC, in *Gulf Islands Navigation Ltd. v. Seafarers International Union of North America (Canadian District) et al.* (1959), 18 DLR (2d) 216 at 218:
>
> > I find there is some divergence of judicial thought as to the grounds upon which an *ex parte* order ought, upon notice, to be discharged. The area of divergence does not include such generally accepted fundamental concepts as this: That the *ex parte* order is obtained *periculo petentis* so that *if there has not been made to the Judge a full and frank disclosure of relevant facts, the order will be voided*. Sheppard JA in *Kraupner v. Ruby* (1957), 7 DLR (2d) 383 at p. 391 cites Scrutton LJ in *Lazard Bros. & Co. v. Banque Industrielle de Moscou*, [1932] 1 KB 617 at p. 637: '*Persons applying ex parte to the Court must use the utmost good faith, and if they do not, they cannot keep the results of their application*.' To emphasize the strictness with which this rule is applied, see also *Re Gedye* (1852), 15 Beav. 254 at p. 257, 51 ER 535.
>
> [33] The appellant may have convinced himself that no notice to the other parties was required and that their claims were immaterial in respect of his application for an order absolute, but *his counsel was obliged as an officer of the court to disclose any facts which* ***might*** *have influenced the court's decision*. In *Money in a Minute Auto Loans Ltd. v. Price*, 2001 BCSC 864, McKinnon J. makes the point in a summary of the law with which I respectfully agree, at paras. 12-14:
>
> > [12] *It is trite law to observe that an ex parte applicant must make full and frank disclosure of all material facts to the court and failure to do so allows the court to set the order aside without regard to the*

> *merits of the application*: *Gulf Islands Navigation Ltd. v. Seafarers' International Union* (1959), 18 DLR (2d) 625 (BCCA) ("*Gulf Islands*"); *R v. Kensington Income Tax Commissioners*, [1917] 1 KB 504 (CA). *Counsel must also display a high standard of candour and diligence in disclosure*: *Wilder v. Davis & Co*. (1994), 92 BCLR (2d) 385 (CA).
>
> [13] ***A material fact is one that may or might affect the outcome of an application***: *CPR v. ULTU loc. 144* (1970), 14 DLR (3d) 497 (BCSC) at 500 - 501. It is for the court to decide what is a material fact: *Brink's-MAT Ltd. v. Elcombe*, [1988] 3 All ER 188 (CA); *Pulse Microsystems Ltd. v. SafeSoft Systems Inc.*, [1996] 6 WWR 1 (Man. CA).
>
> [emphasis added]

In coming to this conclusion we do not rely on the failure to disclose the other orders such as the injunction and the order dismissing KP's claims.

[120] We have found that, when Ms. Jackson swore her affidavit on September 13, 2012, she knew that there was continued uncertainty as to whether or not an order had been made by Butler J. regarding the storage locker keys. She was told so by Ms. R. Her conduct in convincing Ms. R that swearing the affidavit she did was appropriate and sending Ms. R into court on an application without notice based on such deficient material is conduct falling well short of counsel's duty to be frank and forthright with the court.

[121] We find Ms. Jackson committed professional misconduct as alleged in allegation 1 of the citation.

[122] With respect to allegation 2(a), we find that Ms. Jackson knew her affidavit sworn September 13, 2012 was misleading.

[123] With respect to allegations 2 (b) and (c), we find the statements made in her affidavit sworn November 28, 2012 were also misleading.

[124] We find that with respect to allegations 2(a), (b) and (c), Ms. Jackson committed professional misconduct.

APPENDIX A

Citation Authorized: October 30, 2014
Citation Issued: November 10, 2014

IN THE MATTER OF THE *LEGAL PROFESSION ACT*

AND

IN THE MATTER OF A HEARING CONCERNING

TRACEY LYNN JACKSON

(a member of the Law Society of British Columbia)

CITATION

TAKE NOTICE THAT by direction of the Discipline Committee of the Law Society of British Columbia, a Hearing Panel of the Law Society will, at a date and time to be set, conduct a hearing to inquire into your conduct or competence as a member of the Law Society of British Columbia, in accordance with Section 38 of the *Legal Profession Act*. Parts 4 and 5 of the Rules of the Law Society of British Columbia outline the procedures to be followed at the hearing. Your appearance before the Hearing Panel may be your only opportunity to present evidence, call witnesses or make submissions.

The nature of your conduct or competence to be inquired into at the hearing is:

1. Between approximately August 2012 and November 2012, in the course of preparing for an *ex parte* (without notice) application for interpleader relief in an action involving your former client, KP, you engaged in dishonourable or questionable conduct that casts doubt on your professional integrity or reflects adversely on the integrity of the legal profession, contrary to Chapter 2, Rule 1 of the *Professional Conduct Handbook* then in force by doing one or both of:

    (a) providing instructions and other guidance to a junior associate lawyer, regarding content of affidavit material, that was contrary to the general

obligation of candour to the Court and the specific duty to make full and frank disclosure of all material facts in an *ex parte* application;

(b) failing to make adequate efforts to clarify the terms of the August 14, 2012 order of Mr. Justice Butler before proceeding with your *ex parte* application for interpleader relief on September 14, 2012.

This conduct constitutes professional misconduct, pursuant to s. 38(4) of the *Legal Profession Act.*

2. In support of an *ex parte* (without notice) application for interpleader relief in an action involving your former client, KP, you swore and relied on affidavit(s) containing representation(s) to the Court and the opposing party and counsel that you knew or ought to have known were false or potentially misleading. In particular, you swore affidavit(s) containing one or more of the following misrepresentations:

(a) a representation in your affidavit sworn on September 13, 2012 that you had no knowledge that any orders had been made with respect to storage locker keys when you had information, including input from a junior associate and knowledge of a prior disputed Order of Master Taylor, that ought to have raised doubt about whether an order had been made with respect to storage locker keys;

(b) a representation in your affidavit sworn on November 26, 2012 that you did not know what orders Mr. Justice Butler had made when you swore your affidavit of September 13, 2012 when you had information, including input from a junior associate, that ought to have raised doubt about whether an order had been made; and

(c) a representation in your affidavit sworn on November 26, 2012 to the effect that your junior associate, and not you, had been responsible for the

rationale that your firm would have been served if an order had been made to require delivery of the storage locker keys.

This conduct constitutes professional misconduct, pursuant to s. 38(4) of the *Legal Profession Act.*

If you fail to appear at the hearing, the Hearing Panel may proceed with the hearing in your absence and make any order that it could have made had you been present.