

2016 LSBC 27  
Decision issued: June 27, 2016  
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**

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**DECISION OF THE HEARING PANEL  
ON DISCIPLINARY ACTION AND COSTS**

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Hearing date: April 20, 2016

Panel: Herman Van Ommen, QC, Chair  
Woody Hayes, Public representative  
Gavin Hume, QC, Lawyer

Discipline Counsel: Kieron Grady  
Counsel for the Respondent: J. Kenneth McEwan, QC and  
Rebecca J. Robb

**INTRODUCTION**

**The citation**

[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 affidavits that contained misrepresentations that she knew or ought to have to known were false, or potentially misleading.

## **FINDINGS OF FACT AND DETERMINATION**

- [2] In June 2012, Ms. Jackson was retained to represent a client, KP. Ms. Jackson appeared before Master Taylor on behalf of KP. Master Taylor gave oral reasons for judgment. His reasons dealt with certain chattels that were in a storage locker obtained by KP. KP was ordered to retain certain of the chattels. Master Taylor also said the KP “could produce the key” to the storage locker in which the chattels were located. Ms. Jackson and opposing counsel TM did not agree as to whether or not Master Taylor meant that the key must also be produced. TM wrote to Ms. Jackson on several occasions with respect to the chattels and key. However, Ms. Jackson did not reply as she had not received a further retainer.
- [3] Ms. Jackson left on holidays and instructed a junior associate, Ms. R, to take conduct of the file while she was away. She advised Ms. R of the dispute over the key and instructed her not to reply to the letters from TM until the additional retainer was paid.
- [4] The key was delivered by a friend of KP to the firm without speaking to Ms. R. TM also obtained an *ex parte* order restraining KP and her agents from accessing the storage locker.
- [5] The firm received sufficient funds to permit Ms. R to commence work on the file. Ms. R advised KP of the *ex parte* order and communicated with TM, ultimately advising TM that KP took the position that Master Taylor’s order did not require delivery of the key. TM responded advising she would seek further orders against the firm and KP regarding the storage locker and the key. On being advised of this, KP terminated the retainer. Ms. R advised TM of this. TM also asked if the firm had the key. Ms. R, on advice of a Law Society practice advisor, told TM that she could not disclose that information.
- [6] TM made the further application with respect to the storage locker and key. Ms. R attended in chambers to determine whether an order would be made against the firm with respect to the locker and key. As TM did not have her materials, Ms. R gave her copy to TM and sat in the public gallery. Mr. Justice Butler heard the application. Ms. R took notes but mistakenly believed that Mr. Justice Butler did not make an order with respect to the key as she had trouble following the

proceedings without the materials. She reported that to the staff on her return and to Ms. Jackson on her return from her holidays.

- [7] Ms. Jackson and Ms. R again phoned the practice advisor about the key. The practice advisor recommended the equivalent to an interpleader, allowing the key to be delivered to the court.
- [8] Following the call Ms. R began to have doubts about her belief that no order was made requiring delivery of the key. The order was not provided to Ms. R or the firm. She searched the court registry but was not able to obtain the clerk's notes or the order. She advised Ms. Jackson of her doubt.
- [9] Ms. Jackson decided not to order the transcript or contact TM to see if an order had been made. She instead instructed Ms. R to email KP, who was no longer in the country, to ask whether or not she knew of an order. Ms. R received a phone call from KP who incorrectly advised that no order was made. Ms. R was not satisfied with that information but took no further steps to determine whether an order had been made.
- [10] On September 11, 2012 TM advised she would appear before Master Taylor on September 17, 2012 to settle the terms of the order. Ms. Jackson instructed Ms. R to prepare an interpleader application and have it set down on Friday, September 14, 2012, before the terms of Master Taylor's order were settled. Ms. Jackson reviewed and revised her affidavit to add a paragraph that stated "I have no knowledge that any orders have been made with respect to storage locker and key fob." Ms. R expressed concern, but Ms. Jackson, in effect, brushed off the concerns.
- [11] On Ms. Jackson's instructions, the application was brought without notice. The order was obtained on September 14, 2012 directing delivery of the keys to the court and extinguishing any liability the firm might have with respect to the keys.
- [12] On September 17, 2012 Master Taylor decided his order including a term requiring production of the key.
- [13] On November 16, 2012 TM's firm applied to set aside the *ex parte* interpleader order and sought special costs against Ms. Jackson. In response, Ms. Jackson filed a further affidavit repeating the statement "I have no knowledge that any orders have been made with respect to the storage locker and key fob" and further stating that she had been informed by Ms. R that she assumed that, if an order had been made about the key, opposing counsel would have served the firm with that order.

- [14] The application to set aside the *ex parte* interpleader decision proceeded on November 29, 2012. Ms. Jackson attended. Mr. Justice McEwan set aside the order extinguishing liability of the firm and, in adjourning the application for special costs, spoke critically about Ms. Jackson's actions. Ms. Jackson voluntarily settled the claim for special costs by paying \$15,703.16. On February 7, 2013 before Mr. Justice McEwan, Ms. Jackson apologized for her conduct in relation to the affidavits in the interpleader applications.
- [15] In the decision on Facts and Determination issued on December 11, 2015 (indexed as 2015 LSBC 57) we concluded that, when Ms. Jackson swore her affidavit on September 13, 2012, she knew that there was a continued uncertainty whether an order had been made by Mr. Justice Butler regarding certain storage keys. She had been told that by Ms. R. We concluded that 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 and that that constituted professional misconduct.
- [16] We also concluded that Ms. Jackson knew her affidavit sworn on September 13, 2012 was misleading and that statements made in her affidavit sworn November 28, 2012 and summarized in paragraph 13 above were also misleading and that also constituted professional misconduct.

## **EVIDENCE**

- [17] No *viva voce* evidence was heard at the hearing with respect to disciplinary action. However, Ms. Jackson prepared, but was unable to read, an impact statement, which was instead read by her counsel. The impact statement described what motivated her to enter the practice of law. While she was in fourth year of university, her mother-in-law was murdered by an abusive common-law spouse. That motivated her to go into family law and take a master's degree focused on domestic abuse. Domestic abuse was the subject matter of her thesis. Her initial practice was focused on battered women. While her practice has evolved, domestic abuse is still an aspect of her practice.
- [18] Ms. Jackson also described the significant impact the discipline process has had on her. She also spoke about the devastating effect of the decision on Facts and Determination. Her health has suffered. However, she has treated the process and the decision as a learning experience. Amongst other steps, she has prepared a detailed manual for the associates in her office and has taken steps to ensure that the associates receive guidance on ethics and professional matters. The manual

reinforces the ethical and professional responsibilities of counsel. She acknowledged that mistakes were made and that she did not take adequate steps in the preparation of her affidavits and that, as a result of the profound effect of the process and decision, she is determined to exercise more care in the future in similar circumstances.

- [19] In addition, 18 character letters for Ms. Jackson were provided and reviewed by counsel. All of the authors of the letters had reviewed the decision. Fourteen of the letters were written by lawyers who had had a professional association with Ms. Jackson in one capacity or another. Those lawyers consistently described her as a diligent and competent lawyer. Terms such as intelligent and persuasive were used. More importantly, she was described as being honest and forthright and not one who would engage in dishonourable or questionable conduct. She was also described as not one who engaged in sharp practice. Some indicated that they never had any concern with respect to her professional integrity. Several expressed the view that the actions described in the decision were not characteristic of her approach to practice in their experience. Many of the authors stated that Ms. Jackson, in their experience, acted within proper ethical and professional boundaries. The lawyers who practise with her were equally consistent in their observations and experiences with respect to her ethical and professional approach to her practice. The letters from the lawyers lead to the conclusion that Ms. Jackson is a respected member of the profession.
- [20] Four of the letters were from members of the community who had extensive dealings with Ms. Jackson outside of the practice of law. They wrote about her contributions to the community and their interactions with her. Their observations were consistent with the members of the profession. She was described as making a significant contribution to various charitable activities and more importantly from their perspective, as acting with integrity and honesty.
- [21] The Law Society Rules permit the Panel to take Ms. Jackson's professional conduct record into account in determining the appropriate penalty. With the exception of our decision on Facts and Determination, Ms. Jackson does not have a record that is in any way relevant to the issues we must consider.

## **POSITION OF THE PARTIES**

### **The Law Society**

- [22] The Law Society submitted that the appropriate penalty was a suspension of one to two months. That submission was made on the basis that that penalty reflected the

appropriate sanction as it was the necessary denunciation of Ms. Jackson's actions and would act as a deterrence in the future, as well as sending the correct message to the profession and the public with respect to a matter of integrity. The Law Society also sought costs of \$6,000.

### **The Respondent**

- [23] While recognizing that the decision on Facts and Determination dealt with serious misconduct, Ms. Jackson submitted that the mitigating factors led to the conclusion that a reprimand and a fine was appropriate in the circumstances. The circumstances included the apology to the court, the payment of special costs without an order, the character letters, and the lack of any basis for progressive discipline. Ms. Jackson did not oppose the Law Society's claim for costs.

### **DISCUSSION**

- [24] The primary purpose of disciplinary proceedings is to meet the obligations of the Law Society as set out in section 3 of the *Legal Profession Act*. The essence of that obligation with respect to discipline is to protect the public interest, maintain high professional standards and preserve the public's confidence in the legal profession (MacKenzie, *Lawyers and Ethics: Professional Regulation and Discipline*, loose-leaf (Toronto: Carswell, 1993) at page 26-1).
- [25] For many years discipline panels of the Law Society followed the factors set out in *Law Society of BC v. Ogilvie*, 1999 LSBC 17, in determining the appropriate disciplinary action to be taken. The factors reflected the objects and duties set out in section 3 of the Act.
- [26] In a recent decision, *Law Society of BC v. Dent*, 2016 LSBC 05 the panel reviewed the *Ogilvie* factors and commented in as follows:

[15] The present *Ogilvie* factors are 13 in number. Many times hearing panels feel obligated to go through each and every *Ogilvie* factor. Many times these factors overlap with each other. In addition, depending on the case before the hearing panel, the hearing panel strains to find a rationale for each of the *Ogilvie* factors.

[16] It is time to provide some simplification to this process. It is not necessary for a hearing panel to go over each and every *Ogilvie* factor. Instead, all that is necessary for the hearing panel to do is to go over those factors that it considers relevant to or

determinative of the final outcome of the disciplinary action (primary factors). This approach flows from *Lessing*, which talks about different factors having different weight.

[17] There is an obligation on counsel appearing before the hearing panel to point out to the panel those factors that are primary and those factors that play a secondary role. Secondary factors need to be mentioned in the reasons, if those secondary factors tip the scales one way or the other. However, in most cases, the panel will determine the appropriate disciplinary action on the basis of the primary factors without recourse to secondary factors.

[27] The panel also consolidated the *Ogilvie* factors into four general factors and described them as follows:

#### **Nature, gravity and consequences of conduct**

This would cover the nature of the professional misconduct. Was it severe? Here are some of the aspects of severity: For how long and how many times did the misconduct occur? How did the conduct affect the victim? Did the lawyer obtain any financial gain from the misconduct? What were the consequences for the lawyer? Were there civil or criminal proceedings resulting from the conduct?

#### **Character and professional conduct record of the respondent**

What is the age and experience of the respondent? What is the reputation of the respondent in the community in general and among his fellow lawyers? What is contained in the professional conduct record?

#### **Acknowledgement of the misconduct and remedial action**

Does the respondent admit his or her misconduct? What steps, if any, has the respondent taken to prevent a reoccurrence? Did the respondent take any remedial action to correct the specific misconduct? Generally, can the respondent be rehabilitated? Are there other mitigating circumstances, such as mental health or addiction, and are they being dealt with by the respondent?

**Public confidence in the legal profession including public confidence in the disciplinary process**

Is there sufficient specific or general deterrent value in the proposed disciplinary action? Generally, will the public have confidence that the proposed disciplinary action is sufficient to maintain the integrity of the legal profession? Specifically, will the public have confidence in the proposed disciplinary action compared to similar cases?

**Nature, gravity and consequences of the conduct**

- [28] We turn first to the nature or gravity and consequences of the conduct. Clearly the conduct of Ms. Jackson was serious. One of the important duties of counsel is to be candid and truthful in his or her representations to the court. (See *Code of Professional Conduct for British Columbia, Canons of Legal Ethics* Chapter 2.1-2, *The lawyer as an advocate*; Rule 5.1-1 Commentary 1; *Law Society of BC v. Samuels*, 1999 LSBC 36, para. 4; *Law Society of BC v. Vlug*, 2014 LSBC 09, para. 32; *Law Society of BC v. Hart*, 2007 LSBC 50, para. 9.) However, the conduct was inconsistent with the usual manner in which Ms. Jackson practises. The character letters made that clear. This was a situation where there were no repeated incidents of misconduct.
- [29] The Law Society also emphasized that a concerning factor was the improper guidance of Ms. R. We agree with that submission. However, since the incident Ms. Jackson has prepared a detailed manual for the associates in her office that includes ethical and practice advice, including advice on the preparation of materials for court. She has also taken other steps to ensure associates receive guidance on ethics and professional matters.
- [30] The Law Society also referenced the fact that an application to set aside the term extinguishing liability for her firm was made. The initial suggestion for the application came from the Law Society practice advisor who was responding to Ms. Jackson's desire to advise the other side that the firm had the key without breaching what she understood from the practice advisor to be her obligation of confidentiality.
- [31] Ms. Jackson also reasonably promptly apologized to the court for her errors. Having recognized her errors, she also consented to and personally paid \$15,703.16 in special costs without the need for an order of the court.

### **Character and professional conduct record of the respondent**

- [32] Ms. Jackson does not have a record of misconduct that suggests progressive discipline is required. The Law Society quite properly agreed that her record was a neutral factor.
- [33] The character letters made clear that Ms. Jackson is well respected, both in and out of the profession. While, as the Law Society submits “She should have known better.” her errors are not consistent with her reputation among the members of the profession who took the time to write thoughtful character letters having read the decision on Facts and Determination.

### **Acknowledgement of the misconduct and remedial action**

- [34] The Law Society submits that Ms. Jackson has not acknowledged her misconduct as she vigorously defended the citation and filed a Notice of Appeal of the decision on Facts and Determination. She is entitled to do that. However, she also apologized to the court for the mistakes made and took responsibility for those mistakes. She also paid the special costs personally without the need for a court order. She has treated the discipline process and the decision on Facts and Determination as a learning process. It is clear from her testimony and her impact statement that she acknowledges her mistakes and has taken steps to ensure that it will not happen again. She has also taken steps to ensure that her associates are properly instructed on ethical and professional matters.

### **Public confidence in the legal profession including public confidence in the disciplinary process**

- [35] In *Dent*, the panel expressed the view in para. 39 that the primary factor under this heading is “similar cases.” The Law Society referred to several decisions and submitted that they stand for the proposition that the appropriate penalty for misleading a court is a suspension. (See *Law Society of BC v. Chiang*, 2013 LSBC 28; *Law Society of BC v. MacLeod*, [1998] LSDD No. 10; *Law Society of BC v. Batchelor*, 2014 LSBC 11; *Law Society of BC v. Galalmbos*, 2007 LSBC 31; *Law Society of BC v. Botting*, 2000 LSBC 30, [2001] LSDD No. 21.)
- [36] We agree with the Law Society submission that, in most circumstances, misleading a court should result in a suspension. However, on the basis of the somewhat unique facts in this case, we have concluded that a suspension is not necessary in order to maintain the public confidence in the profession. Ms. Jackson has apologized to the court, and paid the special costs without a court

order. There was no financial gain and in fact she was no longer representing the client at the time of the mistakes. Instead, given the practice advice she had received, she was attempting to divulge the location of the key without breaching the confidentiality of her former client. In that regard she followed the advice of the Law Society practice advisor.

- [37] It was evident to the Panel that she has suffered professionally and, more importantly, personally as a result of the disciplinary process and the decision on Facts and Determination. She has learned from this and taken steps to ensure that a similar mistake will not occur in the future. She has also taken steps to ensure that her associates are properly instructed on ethical and professional matters. She is strongly supported by members of the profession who interact with her. The members of the public who wrote character letters also agree that she demonstrates integrity in her conduct. In the circumstances, we have concluded that a reprimand and significant fine is appropriate. Counsel for the Respondent has suggested a fine of \$10,000, but it is our view that a larger fine of \$15,000 is required in all the circumstances of this case, including the seriousness of the misconduct.

#### **DISCIPLINARY ACTION**

- [38] We order that Ms. Jackson be reprimanded for her conduct and fined \$15,000, to be paid to the Law Society within 60 days of the date of this decision.

#### **COSTS**

- [39] As the parties have agreed on costs, we order that Ms. Jackson pay costs in the amount of \$6,000 to the Law Society within 60 days of the date of this decision.