THE LAW SOCIETY OF ALBERTA
HEARING COMMITTEE REPORT

IN THE MATTER OF THE Legal Profession Act, and

In the matter of a Hearing regarding
the conduct of TERRI-LYNN McLAUGHLIN,
a Member of The Law Society of Alberta

SUMMARY OF RESULT

Terri-Lynn McLaughlin was charged with one citation, namely:

1. *It is alleged that you consented to an order without the instructions of your client, M.Q., and that such conduct is conduct deserving of sanction.*

The complaint alleged that Ms. McLaughlin consented to an order relating to a custody and access matter dated October 25, 2010, without the approval or instructions of the complainant, her client.

Preliminary Application:

Preliminary to this hearing proceeding, the panel was asked to consider an application brought on behalf of Ms. McLaughlin to direct a discontinuance of the complaint. After considering the application and hearing representations of counsel for Ms. McLaughlin and the Law Society, the application was dismissed, this panel finding that the threshold test was met, notwithstanding the new evidence alleged, and the matter proceeded to hearing.

Hearing on the Citation:

Based upon a review of the material provided in the Exhibit Book agreed to between the parties, and based upon a review of the evidence adduced by the Law Society, and on behalf of Ms. McLaughlin, the panel determined that the Law Society had failed to provide sufficient evidence to meet its burden of proof to establish, on the balance of probabilities, that Ms. McLaughlin had engaged in conduct deserving of sanction.

Accordingly, the citation against Ms. McLaughlin, was dismissed.

INTRODUCTION

1. On June 9, 2014 a Hearing Committee of the Law Society of Alberta (LSA) convened at the Law Society offices in Edmonton, Alberta to inquire into the conduct of Ms. McLaughlin, Terri-Lynn McLaughlin. The Committee was comprised of Robert G. Harvie, Q.C., Chair, Anne L. Kirker, Q.C. and Robert Dunster, Esq. The LSA was represented by Ms. G.E. Clarke. Ms. McLaughlin was present throughout the hearing and was represented by Mr. Richard W. Rand, Q.C.

2. At the commencement of the hearing, counsel for the LSA and Ms. McLaughlin presented the Hearing Committee with an agreed Exhibit Book, containing Exhibits marked 1 to 30, and contained within the Exhibit Book was an Agreed Statement of Facts (Exhibit 26).

3. Following the admission of the Exhibit Book, jurisdiction of the panel was properly established, and in the absence of any application to have the matter, or any part of it, heard in private, the matter proceeded as a public hearing.

CITATION

4. The conduct of Ms. McLaughlin relates to a complaint brought by her client, M.Q., who alleged that during the course of a highly contested custody and access dispute between M.Q. and her former husband, Ms. McLaughlin did enter into a consent Order dated October 25, 2010 which she alleged prejudiced her interests and which she alleges was entered into without her instructions or approval.

5. As a result of this complaint the matter was directed to come before this panel for a formal hearing, to consider a citation against Ms. McLaughlin as follows:

> ***1. It is alleged that you consented to an order without the instructions of your client, M.Q., and that such conduct is conduct deserving of sanction.***

Preliminary Application:

6. At the outset of this hearing, counsel for Ms. McLaughlin brought a preliminary application seeking to discontinue these proceedings, based upon the submission that there was new evidence, not available to the Appeal Panel which directed this matter to hearing, which was sufficient to compel this panel to effectively dismiss the complaint without further hearing.

7. The specific basis of the application was that, in the course of preparing for this hearing, counsel for Ms. McLaughlin received Exhibit 25, a note with the heading, "Shared Expenses", with a notation at the bottom of that document stating:

> *??Now how is this going to work for weekly activities for the girls. He has never enrolled them in a weekly activity. Am I now only going to be able to find activities that falls on Wednesday and Thursday evenings?????*

8. To put this into some context, the crux of this complaint surrounds the issue of what, if any, instructions were given to Ms. McLaughlin during a meeting between herself and the complainant on October 21, 2010.

9. Ms. McLaughlin alleges that it was at that meeting which her client gave her instructions to enter into the Order in question, while the complainant, M.Q., alleges that she did not give any such instructions.

10. The result of the Consent Order entered as Exhibit 22 was to expand the access of M.Q.'s former husband to their children, such that the children would be in his care on "Mondays, Tuesdays, and alternate weekends".

11. The parties agreed that the document marked as Exhibit 25, entitled "Shared Expenses" was delivered by M.Q. to Ms. McLaughlin on October 27, 2010.

12. The allegation of the complainant is that she did not become aware of the Order until it was received by her on October 29, 2010, as reference in her correspondence of November 15, 2010 (Exhibit 1).

13. The submission of Mr. Rand is that as Exhibit 25 appears to reference a contact regime consistent with the terms of the Order, which the complainant did not receive until October 29, 2010, that is evidence that, in fact, the complainant was aware that such an Order was in fact being entered prior to it having been actually received by her.

14. In considering this preliminary application we are guided by paragraph 32 of the LSA Threshold Guideline (formerly paragraph 31):

> ***There are two cases in which a discontinuance application may be entertained:***
>
> ***a) Where counsel for the Law Society takes the position that the threshold test is not met. In such cases, the position of counsel for the Law Society is entitled to great deference.***
>
> ***b) Where new information has arisen, where that information was not before the original panel and where that information is material in the sense that it could reasonably have had an impact on the decision made by the original panel.***

15. The first case is not applicable here, as counsel for the LSA does not suggest or admit that the threshold test has not been met.

16. Accordingly, the test before this panel is whether or not there is new information, not before the original panel, which is material, such that it may have had an impact on the decision of the original panel.

17. This panel finds (and counsel for the LSA concedes) that this information (Exhibit 25) was not available to the original panel and accordingly, we are at liberty to consider whether the new evidence is sufficient to warrant a discontinuance of this matter.

18. In considering the application this is an application *de novo*. We are not bound by or obligated to give any deference to the original panel, but are asked to consider at first instance, whether based upon a review of the evidence before us at this stage, and in particular, the new evidence referenced above, the threshold test has been met. Namely, is there evidence which is sufficient to result in a reasonable prospect of conviction of Ms. McLaughlin?

19. In considering this threshold test, it is important that we do not attempt to make findings of credibility at this stage. The parties have not yet been subject to cross-examination, and as such, in the absence of compelling and clear independent evidence or admissions which allow us to make a clear finding of credibility in favor of one side or the other, we are not entitled to engage in arguments respecting credibility based upon the mere written assertions of the respective parties.

20. Accordingly, while the panel certainly has a significant question relating to the intent and meaning of the comments set out in Exhibit 25, we do not believe this is a sufficient "admission" to allow us to make a finding of credibility in favor of Ms. McLaughlin or against the complainant.

21. As such, we have a situation where the complainant says an Order was entered into without her consent or instructions, and where Ms. McLaughlin suggests there were such instructions. In the absence of sufficiently clear evidence at this stage to find in favor of either version of events, we are bound to find that there is a reasonable prospect of conviction, should a credibility finding be made in favor of the complainant, and accordingly, the preliminary application seeking a summary discontinuance is dismissed.

Hearing on the Citation:

22. This panel had before it, as stated, an agreed Exhibit Book, including a reasonably detailed Agreed Statement of Facts. Further, counsel for the respective parties called viva voce evidence respecting the matters in issue, specifically, relating to the circumstances surrounding the complainants meeting with Ms. McLaughlin on October 21, 2010.

23. The crux of the allegation against Ms. McLaughlin relates to the outcome of that meeting. The complainant, M.Q., suggests that she was under extreme emotional distress, was feeling very unhappy about the prospect of the matter proceeding to Court which was scheduled for October 29, 2010, and ultimately, in response to a request for instructions, she became so frustrated that she said, "whatever", threw her hands up and left the office – giving no specific instructions.

24. The evidence of M.Q. was that she advised Ms. McLaughlin that she did not want her to go to court on October 29th, but that she was not agreeable to the Order being proposed by her former husband either. She was rather equivocal about the basis of her understanding for what would then happen, as she acknowledges that she did instruct her counsel that she was not to go to Court on the 29th, but in her evidence did not give any suggestion that there was a discussion of how else the matter would be dealt with.

25. M.Q. seemed to have been of the position that if she did not want the Court application to proceed, that was sufficient to result in a cancellation of the hearing – though in response to questions put to her by the panel, she acknowledged that no such advice was given to her by Ms. McLaughlin. She simply asserts that she declined to give instructions beyond the matter not going to court, and then left the office, with no further discussion or advice taking place once she got up and left the Ms. McLaughlin's office. In response to questions put to her of any

conversation or instructions taking place in the hallway or reception area, she denies, absolutely, any such conversation.

26. The evidence of Ms. McLaughlin to a great extent corroborates that of M.Q. to the point of the "whatever" comment and her client then walking out of her private office.

27. The evidence of Ms. McLaughlin, however, is in direct contradiction to that of M.Q. Her evidence, in fact, is that she followed her client from her office, out in to the reception area, and at that time, demanded that her client give her instructions relative to the Order, advising her that "whatever" wasn't good enough. At that point, she suggests that after following her client out and demanding instructions relative to the Order, her client acceded to the proposed order on a trial basis.

28. It is common ground that, following that meeting, the Order in question was consented to by Ms. McLaughlin on behalf of her client.

29. The issue then, before his panel, is simply whether or not Ms. McLaughlin had received instructions to enter into the Consent Order in question. Considering the divergence in the evidence between the position advocated by the complainant, M.Q., and Ms. McLaughlin, we are required to engage in an examination of the relative weight to afford the evidence put forth by the parties, specifically, surrounding the circumstances of the meeting which took place on October 21, 2010.

30. At best the evidence of M.Q. is that her intentions at that meeting were ambiguous; that her response respecting whether or not the Consent Order should be agreed to was "Whatever" and "Court is not an option".

31. The evidence of the member was not ambiguous. The member's evidence was that while she and her client were in her office, she explained to her client the risks she faced on the upcoming application in which she hoped to obtain an order granting her the primary parenting responsibilities for her two children. M.Q. was understandably frustrated with the ongoing resistance and lack of cooperation she felt her ex-husband was demonstrating in relation to parenting issues. The difficulty was that her husband had proposed a form of Consent Order which continued the then existing shared parenting arrangement, but altered the schedule to try to address many of the issues outlined in M.Q.'s affidavit. Although M.Q. did not believe the altered schedule would work, Ms. McLaughlin tried to explain that a refusal to at least try the schedule proposed could be self defeating. If the proposed schedule was not workable, the form of Consent Order preserved Ms. McLaughlin's right to proceed with her application. Ms. McLaughlin testified that when M.Q. got up and left her office saying nothing more than "whatever", Ms. McLaughlin understood she had not received proper instruction and so she followed her client out into the lobby of the law office to make it clear that "whatever" was not an instruction.

32. Clearly, the evidence of Ms. McLaughlin was that she required approval to either: 1) agree to the proposed Consent Order which contemplated a change in the parenting schedule (which could be changed if, as M.Q. suspected, it did not work); or, 2) go to Court. Ms. McLaughlin understood based upon her exchange with M.Q. in the lobby that she had instruction to consent to the proposed order.

33. The evidence of Ms. McLaughlin was corroborated to some degree by her husband who was present in the office when the exchange in the lobby occurred and by a legal assistant in the law office at the time. While neither of these witnesses heard exactly what was said, they both said that Ms. McLaughlin did follow her client out of her office to try and continue to engage her client on some level. This is in direct conflict with the evidence of the complainant M.Q. who was very definite that her lawyer did not follow her or have further discussion after she walked out of Ms. McLaughlin's private office on that day.

34. This then leads this Panel to grapple with the ultimate question. We are required at this juncture to consider two fundamental issues. The first issue is who bears the burden of proof in this matter, and the second part of that question is what is that burden of proof?

35. Clearly the Law Society is required to establish guilt. It is not up to Ms. McLaughlin to prove innocence. The burden placed upon the Law Society is to establish the citation against Ms. McLaughlin on the balance of probabilities, as some have said, using clear and cogent evidence.

36. As such, if the Panel is left without a preference for the evidence of either side; if we were truly left in a position where we could not prefer the evidence of either party, we would be required to dismiss the citation against Ms. McLaughlin.

37. In this case credibility is clearly the central issue. As counsel for the Law Society has very fairly stated, when considering issues of credibility, we must not limit ourselves to a simple judgment of the witnesses' demeanor. We must look to the consistency of their evidence as it relates to other known facts and consider whether the evidence as given is in harmony with the preponderance of probabilities.

> *In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.*
>
> *Faryna v Chorny, [1951] BCJ No 152 at para 11.*

38. In this respect, there actually was little to distinguish in the demeanor of the witnesses. For the most part, the evidence of the witnesses themselves appeared to be given sincerely and consistently. However, when looking at the harmony of their evidence with surrounding issues, the evidence of the version of events put forward by Ms. McLaughlin resonates with greater weight than does that of the complainant.

39. The collateral witnesses, as have been referenced above, directly refute the testimony of the complainant and support the version of Ms. McLaughlin.

40. With regard to Exhibit 25 -- which Mr. Rand has referred to as a "smoking gun" -- the Panel does not find it is necessarily a determinative document, but it does impact clearly on the credibility of the evidence of M.Q.. The complainant suggests that the reference in that note relates to the order which had been in place for some 5 years. However, as we look at Exhibit 25 in particular, the reference to "Now" suggests an immediacy inconsistent with an order that

was by then five years old. It is difficult to read that notation without considering it a reference to an immediate change to what had been the status quo -- in this case, a new parenting regime outlined in the order in question.

41. The fact that the complainant never raised her concerns regarding the Consent Order directly with Ms. McLaughlin also raises a concern in this Panel. When there is an allegation that Ms. McLaughlin did something so diametrically opposed to the instructions of her client, one might reasonably assume that that client will speak directly to Ms. McLaughlin. In other words, look her in the eye and say "Why did you do this?" The fact that she never chose that opportunity and, in fact, went to a third party who had no involvement with the matters in question raises a concern to this Panel.

42. Suffice to say; as we considered the harmony of the evidence, in total we prefer the evidence of Ms. McLaughlin to that of the complainant.

43. As a result, this Panel is compelled to make a determination that the Law Society has not met its burden to establish guilt on the preponderance of the evidence. The evidence of the complainant contains certain inconsistencies with the totality of the evidence, and as such, this panel cannot make a finding that Ms. McLaughlin entered into the Order without proper instructions, as alleged in the citation. In fact, this panel accepts the evidence of Ms. McLaughlin, as given, that she did solicit and ultimately obtain the agreement of her client to enter into the Order in question. As such, this Panel is obligated to dismiss the citation against Ms. McLaughlin.

CONCLUDING MATTERS

44. The Hearing Committee Report, the evidence and the Exhibits in this hearing are to be made available to the public, subject to redaction to protect privileged communications, the names of Ms. McLaughlin's client and such other confidential personal information.

Dated this 16th day of September, 2014.

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Robert Harvie, Q.C. (Chair)

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Anne L. Kirker, Q.C.

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Robert B. Dunster, Esq.