# In the Court of Appeal of the Northwest Territories

**Citation: Taylor v. Law Society of the Northwest Territories, 2010 NWTCA 09**

**Date:** 2010 07 29
**Docket:** A-1-AP2009000011
**Registry:** Yellowknife, N.W.T.

**Between:**

**Patrice Taylor**

Appellant

- and -

**Law Society of the Northwest Territories**

Respondent

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**The Court:**

**The Honourable Madam Justice Constance Hunt**
**The Honourable Mr. Justice Clifton O'Brien**
**The Honourable Mr. Justice Frans Slatter**

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**Reasons for Judgment Reserved**
**of The Honourable Madam Justice Hunt**
**Concurred in by The Honourable Mr. Justice Slatter**

**Reasons for Judgment Reserved**
**of The Honourable Mr. Justice O'Brien Dissenting in Part**

Appeal from the Whole of the Decision of the
Sole Inquirer Shannon Gullberg July 16, 2009;
and the Disposition on Sanction Made August 10, 2009
(Discipline File #0705-324)

## Reasons for Judgment Reserved
## of The Honourable Madam Justice Hunt

[1] Patrice Taylor (Taylor), a member of the respondent Law Society of the Northwest Territories, appeals from the determination that she is deserving of sanction for professional misconduct.

[2] The appeal is dismissed.

**Background**

[3] Taylor was cited by the Law Society for failing "to serve Legal Aid clients in a conscientious, diligent, efficient and competent manner by engaging in a pattern of neglect and mistakes in different matters and that such conduct is conduct deserving of discipline": A.B. 1. In accordance with the *Legal Profession Act*, R.S.N.W.T. 1988, c. L-2 (*Act*) a sole inquirer conducted a hearing and issued a report (Report).

[4] Under the *Act*, a sole inquirer hears less serious charges, while more serious allegations are dealt with by a committee. The sole inquirer must be a member of the Law Society's discipline committee, the majority of whom are active members of the Law Society and residents of the Northwest Territories: *Act*, sections 23 and 24.

[5] The Report noted the seven particulars making up the citation, including allegations that Taylor had publicly called a client a liar; appeared in court late on one occasion; failed to appear in court on behalf of clients on several occasions; and failed to pass on Crown disclosure, in a timely way, to another lawyer taking over responsibility for the file. The Law Society acknowledged during both the discipline hearing and before this Court that no action would have been taken about the late appearance had that been the only concern.

[6] The Report quoted subsection 22 of the *Act*. It also adverted to the Canadian Bar Association's Code of Professional Conduct which had been adopted by the Law Society, in particular Rule 2 and its accompanying commentary. It observed that the Law Society was required to prove its case on a balance of probabilities.

[7] The Report recounted Taylor's own admissions that as regards one of the matters at issue, she had "let the court down": A.B. 414. One of the failures to appear occurred because she had made "a mistake" for which she "was entirely responsible": A.B. 417. Her evidence concerning a third matter was that she had apologized for not being in court, that she "blew it", and that a judge of the Supreme Court had told her that the person for whom she failed to appear was upset and crying in the courtroom: A.B. 350 - 51.

[8] The Report concluded that Taylor had made mistakes in each of the seven instances. The Report stated that the standard was not perfection, since all lawyers make mistakes. Rather, the question was whether the mistakes showed a pattern.

[9] Based on the cumulative effect of the seven particulars, the Report concluded that Taylor's conduct showed a pattern of neglect or mistakes in different matters. She failed to recognize her ongoing responsibilities towards clients, the courts, and other lawyers. She left her clients without representation, put other lawyers in difficult situations, and inconvenienced the courts. She breached the Law Society's Code of Professional Conduct with respect to quality of service, and deserved to be sanctioned.

[10] The sanctions imposed for a single count of professional misconduct were a reprimand, a $2,000 fine payable over two months, and costs of $10,000 payable over ten months.

**Legislation**

[11] Significant changes to the discipline provisions of the *Act* took effect February 1, 2009 but the transition provision provides that if a sole inquirer was appointed before that day, the new provisions were of no effect. At the relevant time the *Ac*t provided:

> 22. (1) The question of whether a person is guilty of professional misconduct or conduct unbecoming a barrister and solicitor ... shall be determined by a Sole Inquirer ... or, on appeal, by the Court of Appeal.
>
> [...]
>
> 33. (1) A member ... whose conduct was inquired into ... may appeal to the Court of Appeal on a question of law from any finding or action taken by a Sole Inquirer ...
>
> (emphasis added)

**Scope of Appellate Jurisdiction**

[12] Although the *Act* does not require leave to appeal, subsection 33(1) gives this Court jurisdiction only over questions of law. During oral argument, the appellant submitted that subsection 22(1) gives the Court additional review powers over disciplinary decisions, by permitting the Court to make its own determination as to whether a person is guilty of professional misconduct or conduct unbecoming. According to the appellant, either the jurisdiction of the Court under section 22(1) is not limited to questions of law, or the determination of whether there has been professional misconduct or conduct unbecoming is automatically a question of law.

[13] Neither interpretation is persuasive. Section 33 limits the Court's jurisdiction to "a question of law from any finding or action taken." The determination of whether there has been misconduct or conduct unbecoming often involves a question of mixed fact and law because it requires the application of general principles of the *Act* to specific circumstances: *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247 at para. 41. Because subsection 33(1) expressly limits the scope of appellate review, only when a determination about misconduct or conduct unbecoming gives rise to an extricable question of law will this Court's jurisdiction be invoked. The words "on appeal" in subsection 22(1) must be interpreted within the confines of the narrow authority granted to the Court of Appeal by subsection 33(1).

[14] The interpretation proposed by the appellant would potentially rob subsection 33(1) of much of its meaning because, as explained above, issues about misconduct and conduct unbecoming are often properly characterized as matters of mixed law and fact. On the other hand, treating subsection 33(1) as a prerequisite to an appeal about the determination of misconduct or conduct unbecoming permits meaning to be given to both sections. Such an interpretation is preferable, see generally *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 S.C.R. 715 at para. 45 where the Court held there is a presumption against tautology:

> [e]very word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose ... [and] [t]o the extent that it is possible to do so, courts should avoid adopting interpretations that render any portion of a statute meaningless or redundant.

[15] An examination of similar legislation from other jurisdictions further supports this view. Many such statutes do not restrict appeals in the way that subsection 33(1) does, but instead provide an unqualified right of appeal to the courts from certain types of disciplinary decisions. See for example *The Legal Profession Act*, C.C.S.M. c. L107, section 75; *Legal Profession Act*, S.N.S. 2004, c. 28, section 36; and *Law Society Act*, R.S.O. 1990, c. L.8, section 49.38. The explicit reference to questions of law in subsection 33(1) suggests that the Legislature intended this Court to have a more limited scope of review than exists in many other jurisdictions.

[16] The same point is confirmed by Northwest Territories' legislation governing other professions. For example, the *Engineering and Geoscience Professions Act*, S.N.W.T. 2006, c. 16, section 50 permits appeals to the Supreme Court of the Northwest Territories as to "any finding or order of a Board of Inquiry": subsection 50(1). That Court may make any finding that it considers ought to have been made or any order it considers just in the circumstances: section 51. See also subsection 40(3) of the *Medical Profession Act*, S.N.W.T. 2010, c. 6 permitting the Supreme Court to determine if the removal of a person's name from the Medical Register is "unreasonable" and section 37 of the *Architects Act*, S.N.W.T. 2001, c. 10 which allows the

Supreme Court to determine whether a practitioner is guilty of improper conduct. The broader language of these statutes also demonstrates that, as regards the legal profession, the Legislature intended that recourse to this Court be available in only limited circumstances. An appeal is available only on a question of law.

**Standard of Review**

[17] Assuming there is a question of law, there is no established standard of review for a sole inquirer adjudicating disciplinary matters under the *Act.* Four factors are important to the determination of the proper standard of review: the *Act*'s privative clause, the nature of the question, the sole inquirer's purpose as determined by the *Act's* interpretation, and the sole inquirer's expertise: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paras. 57 and 64.

[18] Rather than assessing each factor separately, a useful starting point is the Supreme Court's recent application of *Dunsmuir* and *Ryan*, which held that reasonableness applies to the review of a disciplinary body's interpretation of its home statute: *Association des courtiers et agents immobiliers du Québec v. Proprio Direct inc.*, 2008 SCC 32, [2008] 2 S.C.R. 195 at para. 21. To similar effect see *Law Society of Upper Canada v. Evans* (2008), 91 O.R. (3d) 163 (Ont. S.C.J.).

[19] As regards the sole inquirer's mandate, expertise and the nature of the question, there is little to distinguish them from *Proprio*. As the Supreme Court explained, legislatures assign such delegates to interpret and apply "the statutory mandate of protecting the public and determining what falls beyond the ethical continuum for [its] members": *ibid*. In that case the statute provided for an unqualified right of appeal from the disciplinary committee's decisions whereas here appeals are only permitted from errors of law. It is arguable that the limited right of appeal provided by the *Act* further supports a deferential approach.

[20] This suggests that questions of law arising from the *Act* will usually be reviewable on the reasonableness standard:

> In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
>
> *Dunsmuir* at para. 47.

**Analysis**

[21] Most of the questions raised by Taylor (for example, whether what she did constituted misconduct) involve questions of mixed fact and law. For reasons given already, they are outside the Court's jurisdiction.

[22] Taylor's factum attempts to characterize a number of matters as issues of law. Even if some of them could be considered questions of law, the reasonableness standard would apply and has not been breached.

[23] For example, she asserts at para. 94 that the sole inquirer erred in holding that harm to the client was not a prerequisite to a finding of professional misconduct. The Report concluded the finding was justified if clients appeared unrepresented in court; other counsel were left unprepared; and the courts were inconvenienced: A.B. 429. The sole inquirer's reasons "bear a somewhat probing examination": *Ryan* at para. 46.

[24] Taylor also submits that it was an error to treat the clients as "legal aid" clients because some had not actually obtained a legal aid certificate. Again, the sole inquirer's findings were not unreasonable in light of the evidence about the structure of legal aid in the Northwest Territories, as well as the fact that Taylor herself sometimes described the individuals as legal aid clients.

[25] Similarly, Taylor's arguments about the meaning of the word "pattern" do not reveal any error that would justify appellate intervention.

[26] Taylor was given the maximum fine of $2,000 for a first offence along with a reprimand and a portion of the hearing costs. What sanction should be levied is a matter of mixed fact and law: *Ryan* at para. 41. The Court has no jurisdiction over the sanction in this case. Moreover, even though another decision-maker might have imposed a smaller fine or merely a reprimand without a fine, decisions about sanctions are generally subject to review on the reasonableness standard: *Ryan* at para. 42. Although the fine may have been harsh, in any event the reasonableness standard was not breached.

**Conclusion**

[27] It is apparent from the Report that representing legal aid clients in the Northwest Territories can be very challenging given the frequent need to be on circuit in remote places with little access to modern technology. While this reality may place a heavy burden on lawyers who choose to pursue such a practice, it does not mean that the public must accept a lower level of service or that other lawyers or the courts should settle for a reduced standard of competence from members of the bar. As noted in *Ryan* at para. 42 and *Proprio* at para. 21, determining what conduct falls outside the acceptable range for its members is a task for which a self-regulating body (here comprised mostly of lawyers who also live and practice in the Northwest Territories) is well-qualified.

[28] The determination by the sole inquirer that the appropriate standard of competence was not met and the resulting sanctions she imposed must be upheld. The appeal is dismissed.

Appeal heard on June 16, 2010

Reasons filed at Yellowknife, N.W.T.
this day of July, 2010

Hunt J.A.

I concur:

Authorized to sign for: Slatter J.A.

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**Reasons for Judgment Reserved**
**of The Honourable Mr. Justice O'Brien**
**Dissenting in Part**

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[29] With regard to the major issues raised in this appeal, I agree with my colleagues that the legislation limits any appeal to questions of law and that, on the record before us, the appellant has failed to extricate any legal issues with respect to the determination that she is deserving of sanction for professional misconduct.

[30] I dissent, however, with respect to the fine of $2,000 imposed upon the appellant. In my view, the appellant raises a question of law in that regard and I would quash the fine. I will explain my reasons for so concluding.

[31] Generally speaking, an appellate court will not interfere in matters of sanction unless, amongst other things, the sentencing court has applied some wrong principle or failed to consider all the relevant circumstances. The failure to apply proper principle or to consider all the relevant circumstances may be described as an error of law attracting the correctness standard: Roger P. Kerans & Kim M. Willey, *Standards of Review Employed by Appellate Courts*, 2d ed. (Edmonton: Juriliber, 2006) at 244 - 45. This characterization may arise from, or at least be related to, the so-called "missed-issue rule". This rule permits an appellate court to intervene where the judgment of the tribunal below discloses a lack of appreciation of relevant evidence: Kerans & Willey, *supra*, at 197; *R. v. Ahenakew*, 2008 SKCA 4 at paras. 29-31.

[32] As Hunt J.A. points out in her Reasons, serious allegations of lawyer misconduct are dealt with by a committee, while less serious charges are dealt with by a sole inquirer. Here, the sole inquirer's decision offers no explanation as to why the conduct required a fine, in addition to a reprimand and portion of costs, much less the imposition of the maximum fine leviable by a sole inquirer.

[33] The sole inquirer says that she took into account that the member had no prior record and that there was only one citation found against the member. The sole inquirer also says that she has taken into account an undertaking by the member to improve her office management, which the inquirer considered went "a long way to addressing the sorts of issues that were in question in this matter". These are mitigating factors. They do not explain the basis for the fine, but rather point in an opposite direction.

[34] Further, the sole inquirer does not make reference to the stress and physical health concerns experienced by the member during a relevant portion of the time, which resulted in her

hospitalization and explained, at least to some extent, her problems with matters of law office management, which seemingly underlay much of her conduct. Nor does the sole inquirer make any reference to the member's career change which saw her undertake practice in a challenging environment as a sole practitioner. The factors did not excuse the conduct from the perspective of the inquirer, but they were certainly relevant considerations when it came to penalty.

[35] In my view, the levying of the fine in the circumstances of this case can only be attributed to a failure on the part of the sole inquirer to have considered all the relevant circumstances. This is an error of law that allows this court to intervene. Furthermore, by assessing the fine, after taking cognizance of several significant mitigating circumstances, the sole adjudicator came to an unreasonable conclusion that cannot be sustained. Finally, the failure to adequately explain the reason for imposing the fine, in addition to the reprimand and award of costs, while not necessarily an error of law in these circumstances, should not be allowed to protect a harsh and unjustified penalty.

[36] Accordingly, I would set aside the fine, but confirm the decision in all other respects.

Appeal heard on June 16, 2010

Reasons filed at Yellowknife, N.W.T.
this day of July, 2010

O'Brien J.A.

**Appearances:**

P. G. Lister, Q.C.
for the Appellant

L. MacDonald, Q.C.
for the Respondent

A-1-AP 2009000011

IN THE COURT OF APPEAL
OF THE NORTHWEST TERRITORIES

BETWEEN:

Patrice Taylor

Appellant

- and -

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MEMORANDUM OF JUDGMENT