2018 LSBC 33
Decision issued: November 16, 2018
Citation issued: July 13, 2017

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

GEORGE COUTLEE

RESPONDENT

DECISION OF THE HEARING PANEL CONCERNING PRELIMINARY MOTION THAT PANEL BE RECONSTITUTED

Hearing dates:	August 13 and 14, 2018
Panel:	Shona A. Moore, QC, Chair Darlene Hammell, Public representative Michael F. Welsh, QC, Bencher
Discipline Counsel:	Jaia Rai
Appearing on his own behalf:	George Coutlee

SUMMARY

[1] This decision concerns the second of two applications made by the Respondent at the outset of the hearing of the citation. The Panel dismissed the Respondent's first application that the citation be withdrawn or stayed as being baseless and in breach of natural justice and procedural fairness.

[2] The Respondent's second application is brought pursuant to Rule 4-36 seeking a determination that the Hearing Panel should include a person who is an Indigenous lawyer or Elder. The Law Society took no position on this application except to

oppose any decision by the Panel that would result in an adjournment of the hearing of the citation.

[3] After hearing from the parties and reviewing all of the material before us, the Panel granted the Respondent's application by deciding to make a recommendation to the President's Designate that the Panel be reconstituted pursuant to Rule 5-2 to include an Indigenous person, and to adjourn the hearing with written reasons to follow.

[4] Below are our reasons for that decision.

BACKGROUND

[5] The citation alleges that the Respondent committed professional misconduct when he provided legal services to FE in a family law matter in or about 2005 and 2006, contrary to an order of a disciplinary hearing panel by which the Respondent was suspended from the practice of law in all fields except criminal defence and personal injury claims, and on March 16, 2006, when he failed to disclose these practice restrictions in an affidavit filed with a court in Oregon.

[6] The Law Society alleges that the legal services provided by the Respondent to FE were in the "family law area". The Respondent disputes this characterization of the services he provided.

[7] Although the Respondent's second application was heard and determined by this Panel before any evidence was called, certain facts were admitted by the Respondent:

(a) The facts giving rise to the citation arose from the Respondent's representation of RE;

(b) FE and RE were parties to a family law proceeding in Oregon. They reached a property settlement agreement that included terms concerning the division of property, some of which was located in British Columbia;

(c) The property settlement obligations were reflected in an order of the Circuit Court of the State of Oregon (the "Oregon Order");

(d) Ten years after the Oregon Order, RE brought an application to find FE in contempt of the Oregon Order regarding the property settlement agreement and the British Columbia property. It was in connection with

those proceedings that FE retained the services of the Respondent and an Oregon lawyer;

(e) The Law Society's investigation began when it received a complaint from FE (now deceased).

[8] In our decision dealing with the first preliminary motion (2018 LSBC 32) the Panel set out additional background facts that are also relevant to this second ruling:

> [4] [The Respondent alleges] ... that the person who contacted the Law Society with the initial complaint, FE (now deceased), before her death provided the Law Society with an "exonerating statement" that the legal advice and work Mr. Coutlee had done for FE were within his permitted areas of practice of personal injury law and criminal law.
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> [5] Mr. Coutlee also submits that a further statement from RE, the ex-spouse of FE, also established no basis for the allegations that form this citation.
>
> [6] Mr. Coutlee argues that, based on these statements, staff investigating the matter should have concluded that there was no basis for the allegations.

[9] The Respondent says that the statements of the deceased, FE, and the interview of RE were so clearly exonerating that, in his mind, the only explanation for a citation being authorized is that the investigation must have been clouded by his being Indigenous. In his Notice of Application Mr. Coutlee states, in part:

> ... The Respondent has reason to believe that the Law Society [in its response to the Respondent's Notice to Admit] unreasonably and arduously dispute the relevance and truth of the Law Society's transcribed statements of the [FE and RE statements] by the Law Society investigator ... because they know the statements do reasonably prove and corroborate that the Respondent was in full compliance with the Law Society's restriction to his law practice when providing legal advice to [FE]. Consequently resulting with the long stressful investigation being a sham and prejudicial to the health and wellbeing of the Respondent.
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> ... The Respondent believes he will be more self-assured of a non-discriminatory citation hearing panel, as a status Indian, if a registered status Indian lawyer and/or status Indian Elder were designated or appointed members of the citation panel at the hearing. He is of the opinion and believes the said [exonerating] statements of FE and RE

> would be perhaps more fairly weighed, considered and analysed, than by the alleged apparent racist law societies [sic] legal investigators [and staff], that failed to consider it's [sic] strong inference [RE] was manipulating the boundaries of [FE]'s property and taking the property from her.
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> ... the Respondent believes the Law Society' investigators, legal and possible lay staff allegedly contravened the Respondent's section 15 [of the *Charter of Rights and Freedoms*] equality Rights and/or Human Rights because being of a status Indian race, by their alleged intentional failure to give the logical interpretation to [the exonerating statements of RE an FE] that a Caucasian and other race would have allegedly been granted.

[10] When asked by the Panel why he would feel more self-assured should the Panel be reconstituted as requested, Mr. Coutlee replied that he was at a citation hearing because, in spite of the two statements by RE and FE, "none of the investigators are Native Indian. Maybe this is another racist smearing of an Indian."

[11] Mr. Coutlee filed a written application pursuant to Rule 4-36 only one day prior to the commencement of the hearing. Although a pre-hearing conference was attended by the Respondent and counsel for the Law Society on May 3, 2018, Mr. Coutlee gave no indication that he intended to apply to have the Panel include an Indigenous member.

[12] Rather, he first raised his objection to the constitution of the hearing panel on July 30, 2018 when he contacted the office of counsel for the Law Society as he was leaving town for a number of days of vacation. He was advised that he must make a written application in accordance with Rule 4-36.

[13] Mr. Coutlee called the office of counsel for the Law Society again on July 30, 2018. A note of counsel's staff of that call records that the Respondent was consulting some Elders regarding making an application to have some Elders on the Panel. Mr. Coutlee was again advised that he should contact the Law Society and speak to the Hearing Administrator.

[14] On July 31, 2018, counsel for the Law Society sent an email to Mr. Coutlee to acknowledge that Mr. Coutlee had contacted the Hearing Administrator to request that "an Elder be appointed to the Panel hearing the Citation" and to further confirm that Mr. Coutlee had been advised to submit an application in writing as soon as possible since the hearing was scheduled to commence on August 13, 2018.

[15] Mr. Coutlee acknowledges receipt of that email.

[16] Aside from indicating that he was on vacation for some period of time on and after July 30, Mr. Coutlee offered no explanation to the Panel why his written application was not made at an earlier time.

POSITION OF THE PARTIES

[17] Mr. Coutlee grounded his application in his constitutional status as an Indigenous person and referred to the analysis of the Supreme Court in *R. v. Kokopenace*, [2015] 2 SCR 398, for the proposition that he has a right to be treated somewhat differently, at least to the extent of ensuring that he is "tried" or heard by a panel that includes an Elder. He argues that, as an Indigenous person, there is a basis upon which we should conclude that he should be judged by a panel that includes an Indigenous lawyer or Elder.

[18] Mr. Coutlee says that he would be more self-assured of a non-discriminatory decision were an Indigenous person on the Panel because, in his mind, the defects in the investigation as well as the conclusions drawn from the investigation may have been affected, at least in part, by a bias against him as an Indigenous person. He stated that he would, in these circumstances, be more confident in the decision if an Indigenous person were a member of the Panel.

[19] The Law Society takes no position on the merits of the Respondent's application but submits that there should be no adjournment of this hearing.

[20] Counsel for the Law Society distinguished *Kokopenace* as dealing with an accused's right to a fair trial under Section 11 of the *Charter of Rights and Freedoms* and submitted that Section 11 does not apply to proceedings before a Law Society hearing panel as such proceedings do not attract true penalty consequences.

[21] With respect to the adjournment, counsel for the Law Society accurately, in our view, notes that Mr. Coutlee has not given any explanation why the application was not made earlier.

[22] Counsel referred us to *Law Society of BC v. Welder*, 2014 LSBC 53, and *Law Society of BC v. Spears*, 2017 LSBC 29, two decisions that set out the legal principles that we ought to consider when faced with an application for an adjournment.

ANALYSIS AND LEGAL REASONING

[23] We have considered all of the material before us on the Respondent's Rule 4-36 application, including the written and oral submissions of the Respondent and of the Law Society. We have also considered the comments of the Truth and Reconciliation Commission of Canada on the lack of "adequate cultural, historical, or psychological knowledge" on the part of many lawyers of Indigenous history and culture, and the need for lawyers to develop that knowledge, (*Honouring the Truth, Reconciling for the Future, Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, 2015, p. 168.) We have concluded that specifically addressing cultural competencies on the Panel is warranted in this case. We have therefore decided to grant the Respondent's application, as the Panel is satisfied the absence of an Indigenous member on the Panel raises a reasonable apprehension of institutional bias in the specific circumstances of this case. We will address the adjournment issue that necessarily arises from our decision.

[24] As noted earlier, while the Law Society takes no position on the application, it does oppose an adjournment of the hearing.

[25] We recognize that to grant the Respondent's application will necessitate an adjournment of the hearing.

[26] The Respondent's application was brought one day prior to the commencement of the hearing. The Law Society says that the Respondent knew that a written application should be made without delay, but that he failed to do so and failed to provide any reason for his delay.

[27] By July 31, the Respondent had written confirmation that the composition of panels is the responsibility of the Tribunal, that the Law Society would not be taking a position on his application, and that, if he wished to make an application, he was to do so in writing to the President of the Law Society. He was also given notice that the Law Society may oppose any adjournment.

[28] The Respondent does not deny any of these essential facts.

[29] We accept the approach taken by the hearing panel in *Law Society of BC v. Welder*, 2014 LSBC 53 (followed in *Law Society of BC v. Spears*, 2017 LSBC 29) to determining adjournment applications. In *Welder*, the Panel states at paragraphs 33 and 34:

> The various factors to consider in determining if an adjournment is appropriate are found in Macaulay & Sprague, *Practice and Procedure*

Before Administrative Tribunals (Toronto: Thomson Carswell, 2004), at p. 12-148.41 to 12-148.42:

> (a) the purpose for the adjournment …;
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> (b) has the participant seeking the adjournment acted in good faith and reasonably in attempting to avoid the necessity of an adjournment;
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> (c) the position of the other participants and the reasonableness of their actions;
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> (d) the seriousness of the harm resulting if the adjournment is not granted;
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> (e) the seriousness of the harm resulting if the adjournment is granted …;
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> (f) is there any way to compensate for any harm identified;
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> (g) how many adjournments has the participant seeking the adjournment been granted in the past;
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> ...
>
> Applying the above factors to this case, this Panel finds that the only factor in the Respondent's favour is that he has not sought any prior adjournments. All other factors are not favourable to his application.

[30] No one factor is determinative of whether an application should succeed or fail. Rather, we are required to weigh all the relevant factors in reaching a decision as to how to exercise our discretion.

[31] This is the first adjournment in this matter, and it arises from an application that was one of two preliminary matters dealt with at the outset of the hearing. These two matters, together with other pre-hearing issues, took up most of the time scheduled for the hearing of the citation.

[32] With respect to the Respondent's conduct, we are not persuaded that he took any, let alone reasonable, steps to make his application promptly so that it could have been dealt with before the dates set for the hearing. By July 31, at the latest, the Respondent knew that he needed to apply in writing as soon as possible. Rather than attend to the application, he continued with his plans to leave town. He offered no other explanation for his delay.

[33] Further, an adjournment is inherently costly. Dates had been set aside for a hearing, counsel for the Law Society was prepared to proceed, and two of the members of the Panel traveled to Vancouver to attend the hearing.

[34] In many cases, these factors would weigh against granting an adjournment.

[35] In the circumstances of this case, however, we are persuaded that greater weight be given to the purpose of the adjournment and to the seriousness of the potential resulting harm should the adjournment not be granted.

[36] This adjournment is necessitated by our decision, having considered all of the material before us, on Mr. Coutlee's Rule 4-36 application, including the written and oral submissions of the Respondent and the Law Society, that the absence of an Indigenous member on the Panel raises an apprehension of institutional bias in the circumstances of this case. A failure to reconstitute the Panel with an Indigenous member, in our view, would be inconsistent with the values and objectives of the Law Society made evident in its commitment to its Truth and Reconciliation Advisory Committee Report.

[37] The Respondent does not assert any actual bias in the members of the Panel. He does raise his personal concern that, as an Indigenous person, this citation reflects a biased institutional process that "strikes at the dignity of a Status Indian." In his submissions to the Panel, the Respondent stated his belief as an Indigenous person that he would be more confident that a Panel, reconstituted as requested, would be non-discriminatory and weigh the evidence fairly.

[38] In reaching this decision we do not rely on *Kokopenace.* Rather, we are guided by the Law Society having identified the challenges arising from the Truth and Reconciliation Commission Report as some of the most important and critical issues facing the country and the legal system. The Benchers have taken a concrete step in the process of reconciliation by adopting a Truth and Reconciliation Action Plan earlier this year. That plan seeks to address the "unique needs of Indigenous people within the Law Society's regulatory processes." The Law Society has publicly stated that it appreciates its moral and ethical obligation to advance truth and reconciliation.

[39] We also note the comments of the court in *Moore v The Law Society of British Columbia*, 2018 BCSC 1084 at paragraph 82:

> The Law Society submits that it is very sensitive to the ways the Canadian justice system has perpetuated injustices for Indigenous peoples. It is also aware and very concerned about the under-representation of Indigenous

> lawyers at the bar. The Law Society is committed to working to foster reconciliation and to undertake initiatives to improve the treatment and representation of Indigenous lawyers within the legal profession.

[40] In the context of that commitment and after balancing all of the relevant factors, it is our view that the importance of ensuring there is no institutional bias, actual or apprehended, on racial or any other grounds outweighs any detriment occasioned by an adjournment of the hearing.

[41] We grant the application and refer this matter to the President's Designate, the effective Chair of the Law Society Tribunal, with a recommendation that the Hearing Panel be reconstituted under Rule 5-2 to include an Indigenous person.