2019 LSBC 30
Decision issued: August 15, 2019
Citation issued: April 26, 2018

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

THOMAS PAUL HARDING

RESPONDENT

DECISION OF THE HEARING PANEL
ON PRELIMINARY QUESTIONS

Hearing dates:	May 21, 22, 23 and 24, 2019
Panel:	Steven McKoen, QC, Chair Lindsay R. LeBlanc, Lawyer Brendan Matthews, Public Representative
Discipline Counsel:	Kenneth McEwan, QC and Eileen Patel
Counsel for the Respondent:	Gerry Cuttler, QC and Oliver Pulleyblank

BACKGROUND

[1] On April 26, 2018, a citation was issued against the Respondent pursuant to the *Legal Profession Act* and the Law Society Rules. The Citation, as amended, provides as follows:

> 1. In or about April 2012, while acting as counsel for the plaintiff JW in Supreme Court Action No. [number] (Vancouver Registry), you made improper submissions to the jury in closing argument which resulted in Mr. Justice Voith declaring a mistrial on April 30, 2012 and awarding costs against you personally on February 25, 2014. In particular, you did one or more of the following:

a. implied that opposing counsel were not forthright or honest;

b. knowingly and intentionally made an expert witness an object of derision and ridicule;

c. asserted directly or indirectly that the expert was dishonest and had falsified measurements, misrepresented evidence or misquoted scientific literature, without any evidentiary foundation;

d. mischaracterized the issues before the jury by conflating how your client was injured with whether he was injured;

e. inaccurately and improperly asserted that the defendant's position was that your client was feigning his injuries;

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

2. Between or about June 29, 2012 and July 11, 2012, you made improper comments to a journalist about one or both of Dr. AT, an expert witness, and the judiciary, in that the comments were false, misleading, denigrating, unjust, disrespectful or otherwise inappropriate, contrary to one or more of Chapter 1, Rules 2(1), 2(2) and 3(4) of the *Professional Conduct Handbook*, then in force.

This conduct constitutes professional misconduct or conduct unbecoming a lawyer, pursuant to section 38(4) of the *Legal Profession Act*.

[2] Relying on Rule 4-36 of the Law Society Rules, the Respondent has filed an application seeking preliminary determination of the following questions:

a. Should the Citation be stayed in its entirety because of inordinate or unacceptable delay by the Law Society prior to the issuance of the citation?

b. In the alternative, should the Citation, except insofar as it relates to the allegation that the respondent "made improper comments to a journalist about … the judiciary" in a July 11, 2012 email, be stayed because of inordinate or unacceptable delay by the Law Society prior to the issuance of the Citation?

c. Further, and in the alternative, should Allegation 2 of the Citation, insofar as it relates to the allegation that the respondent "made

improper comments to a journalist about … the judiciary" in a July 11, 2012 email be dismissed because the said email does not disclose a marked departure from the conduct the Law Society expects of its members, having properly balanced the relevant *Charter* value with the Law Society's public mandate and objectives?

[3] Rule 4-36 of the Law Society Rules provides, in part, as follows:

> (1) Before a hearing begins, the respondent or discipline counsel may apply for the determination of a question relevant to the hearing by delivering to the President and to the other party written notice setting out the substance of the application and the grounds for it.

[4] The Panel was provided with an Agreed Statement of Facts and a Common Book of Documents. The Law Society relies on the affidavit of Kurt Wedel and the Respondent relies on the affidavit of the Respondent. Both Mr. Wedel and the Respondent were cross-examined on their affidavits at the Hearing.

[5] The Respondent submits that he is entitled to a stay of proceedings due to delay resulting in prejudice to the Respondent or that the Citation ought to be dismissed on a preliminary basis as the Citation relates to statements made by the Respondent that are protected by *Charter* rights.

[6] The Law Society submits that the Respondent cannot meet the high bar required to achieve a stay, that there has not been inordinate or unacceptable delay in the investigation and conduct at issue and that the Respondent has not been prejudiced. On the issue of *Charter* rights, the Law Society submits that this Panel has no jurisdiction to dismiss the Citation in advance of a hearing on the merits.

FACTS

[7] Commencing April 10, 2012, the Respondent acted as counsel for JW, the plaintiff in the trial of a personal injury action against ICBC and an unknown motorist (the "ICBC Trial").

[8] Two of the issues at the ICBC Trial were whether JW was injured in the manner he asserts and the extent of his injuries. Experts were retained by the plaintiff and ICBC. ICBC's expert was Dr. AT who prepared two reports for trial. Dr. AT gave evidence at trial and was cross-examined by the Respondent.

[9] Following the Respondent's address to the jury in the ICBC Trial, ICBC applied for a mistrial. Mr. Justice Voith gave oral reasons for judgment and allowed the mistrial application.

[10] On May 24, 2012, a notice of appeal was filed in respect of the mistrial order of Mr. Justice Voith.

[11] In late June 2012, a lawyer advised the Respondent that Postmedia Reporter, Ian Mulgrew might be interested in the mistrial ruling in the ICBC Trial.

[12] On June 29, 2012, Dr. AT filed a complaint with the Law Society about the Respondent's conduct in the ICBC Trial.

[13] On July 4, 2012, the Law Society opened the investigation leading to this Citation and the timeline of relevant events pre and post July 4, 2012 is as follows:

June 29, 2012	The Respondent contacts Mr. Mulgrew in an e-mail with the subject line "[plaintiff] decision re Carnac the Magnificent" with the following text: "I was the guy who made that Closing argument. EM tells me your interest was piqued. Want to talk?" (the "Mulgrew Initial Contact Email").
Between June 29, 2012 and July 3, 2012	Mr. Mulgrew interviews the Respondent by telephone.
July, 2012	Mr. Wedel is assigned to investigate the Respondent's conduct.
July 3, 2012	Vancouver Sun publishes an article by Mr. Mulgrew titled "Mistrial declared after lawyer channels Carson to mock witness." A portion of the text follows:

> Harding is unrepentant, however, and is appealing the decision. Although there will be a new trial regardless of the appeal, Harding wants the province's high bench to say the judge was wrong because under the rules, his client is on the hook for the exorbitant costs of the aborted trial. ...

> He said that [Dr.] AT's testimony – that the accident could not have occurred as described – added insult to the false charges. ...
>
> He said physical effects that happen to every other object didn't apply to motorcycles. – I pulled a gyroscope and spun it on the court bench – the jury laughed – I asked him about his measurements: "Is 'pretty similar' an engineering term?" They laughed at that too.

July 5, 2012	Dr. AT, through counsel, demands an apology from the Respondent for the comments made in the Vancouver Sun article.
July 11, 2012	The Respondent emails Mr. Mulgrew again inviting Mr. Mulgrew to write a follow-up story. Text of that email is as follows:

> One of the principal questions to be considered by this Court is whether that portion of the address of counsel with regard to which complaint is taken is merely an earnest plea to the jury, although perhaps an exaggerated one, on behalf of the respondent AS, or whether it is prejudicial to the appellant's case to the extent that the jury were influenced by it to reach a verdict without due and just consideration of the evidence.
>
> And, the judge NEVER asks the jurors about this?
>
> Seems pretty paternalistic, don't you think?
>
> Seems like judges presume jurors are idiot children, don't you think?
>
> (the "Mulgrew 2nd Email").

July 31, 2012	Dr. AT commences a defamation action against the Respondent, Mr. Mulgrew and others at the Vancouver Sun.

August 10, 2012	The Respondent delivers a signed apology to Dr. AT.
August 13, 2012	Mr. Wedel writes to the Respondent requesting particular documents.
August 16, 2012	The Vancouver Sun publishes an apology to Dr. AT.
August 23, 2012	Dr. AT delivers a copy of the apology to the Law Society.
August 24, 2012	The Respondent files a response to civil claim in the defamation action.
August 28, 2012	In response to the August 13, 2012 request of the Law Society, the Respondent delivers the following documents by DVD to the Law Society: Dr. AT's reports; plaintiff's expert reports; an excerpt of Dr. AT's evidence at trial; a transcript extract; and a transcript of the Respondent's closing argument.
November 7, 2012	The Respondent delivers the following documents by DVD to the Law Society: closing argument; transcripts of the ICBC Trial; and the factums of the ICBC Trial appeal.
November 20, 2012	Mr. Wedel writes to the Respondent asking for production of his correspondence with Mr. Mulgrew.
February 13, 2013	Mr. Wedel repeats his November 20, 2012 request for production from the Respondent.
February 28, 2013	The Respondent responds to Mr. Wedel's requests of November 20 and February 13, 2013 by indicating he has "none."
March 6, 2013	Mr. Wedel interviews the Respondent and the Respondent tells Mr. Wedel that he does not have any emails between himself and Mr. Mulgrew. The Respondent would not provide unequivocal answers to Mr. Wedel when asked whether the statements attributed to him in the Mulgrew article were statements that he had made.

March 8, 2013	Mr. Wedel writes to the Respondent with follow-up questions from the interview.
March 15, 2013	The Respondent provides a response to Mr. Wedel's March 8, 2013 letter.
April 15, 2013	Mr. Wedel writes to counsel for the Respondent seeking a responsive answer to the questions posed in the March 8, 2013 letter and seeking copies of the examination transcripts from the discovery of the Respondent in the Dr. AT defamation action. Mr. Wedel is advised that examinations have not taken place yet.
May 10, 2013	Counsel for the Respondent informs Mr. Wedel that the mistrial appeal had not proceeded and that the Court of Appeal had decided to adjourn that appeal until Mr. Justice Voith issued reasons for judgment on costs in the ICBC Trial.
May 14, 2013	Mr. Wedel writes to Postmedia and Mr. Mulgrew requesting information and documents.
May 22, 2013	Through counsel, Postmedia and Mr. Mulgrew decline to provide documents to Mr. Wedel; however, advise that "there was an exchange of email" between Mr. Mulgrew and the Respondent "that would presumably be available from Mr. Harding."
May 2013 – February 2014	Further exchanges between Mr. Wedel and counsel for Postmedia and Mr. Mulgrew; however, the position of Postmedia and Mr. Mulgrew go unchanged and no documents are produced.
January 24, 2014	ICBC brings an application seeking special costs of the mistrial, payable by the Respondent.
February 20, 2014	Mr. Wedel is designated for the purpose of conducting an investigation under Rule 3-5(1.1) (now Rule 3-5(2)).

February 25, 2014	Mr. Justice Voith issues reasons for judgment on the special costs application of ICBC.
March 5, 2014	Mr. Wedel issues a production order to Mr. Mulgrew and Post Media. The order required production of, inter alia, correspondence with the Respondent relating to the July 3, 2012 article.
March 27, 2014	A notice of appeal in respect of the costs award of Mr. Justice Voith is filed.
July 9, 2014	Post Media and Mr. Mulgrew commence a petition proceeding in the British Columbia Supreme Court challenging the orders and constitutionality of the provisions of the *Legal Professions Act*.
December 18, 2014	Mr. Wedel rescinds the March 5, 2014 production order and issues a new order to Mr. Mulgrew and Post Media, which required production of, *inter alia*, correspondence with the Respondent relating to the July 3, 2012 article during the period of June 29, 2012 to July 3, 2012.
January, 2016	Petition is commenced by Mr. Mulgrew and Post Media concerning the production order is heard.
April, 2016	Costs and mistrial appeals are discontinued.
July 11, 2016	Mr. Justice Butler issues reasons on the petition and dismisses Mr. Mulgrew and Post Media's petition.
July 28, 2016	Post Media and Mr. Mulgrew make production of documents to the Law Society, including the Mulgrew Initial Contact Email which had not been previously provided to the Law Society.
July 29, 2016	The Respondent settles JW's ICBC claim.
December 15, 2016	Mr. Wedel issues a further production order to Post Media and Mr. Mulgrew.
December 16, 2016	Post Media and Mr. Mulgrew respond to the further production order by producing the Mulgrew 2nd

	Email, which had not been previously provided to the Law Society.
May 15, 2017	Mr. Wedel writes to counsel for the Respondent to notify him of the anticipated referral of this matter to the Discipline Committee at a meeting scheduled for July 6, 2017.
June 23, 2017	Mr. Wedel writes to counsel for the Respondent to outline the issues and evidence in respect of the matter and to permit the Respondent an opportunity to respond before the investigation concluded. Mr. Wedel advises that the matter would go to the Discipline Committee at an August 24, 2017 meeting. Mr. Wedel requests a response by July 10, 2017. Counsel for the Respondent responds to Mr. Wedel indicating that a response would be possible by the end of August, 2017. Mr. Wedel responds indicating that based on that timeline, the matter would not be referred to the Discipline Committee until September 28, 2017.
August 24, 2017	Counsel for the Respondent requests that this matter be removed from the September 28, 2017 agenda in light of the upcoming October 3, 2017 mediation in the Dr. AT defamation action.
October 19, 2017	The Respondent requests an abeyance of the Law Society's investigation pending the delivery of reasons for judgment in the Dr. AT defamation action.
November 16, 2017	Request for abeyance is granted by the Law Society.
December 6, 2017	Dr. AT's defamation action is settled.
February 6, 2018	Mr. Wedel writes to counsel for the Respondent requesting the timing of his submissions.
March 19, 2018	The Respondent's submissions in response to the investigation are received.

April 26, 2018 The Law Society issues the Citation.

QUESTIONS 1 AND 2

[14] The first question the Respondent seeks to have preliminarily determined is whether the Citation should be stayed in its entirety because of inordinate or unacceptable delay by the Law Society prior to the issuance of the Citation, or alternatively, whether the Citation should be stayed, except insofar as it relates to the allegation that the Respondent "made improper comments to a journalist about … the judiciary" in a July 11, 2012 email, because of inordinate or unacceptable delay that has caused significant prejudice to the Respondent.

[15] This Panel finds that questions 1 and 2 as delivered by the Respondent are appropriate preliminary questions pursuant to Rule 4-36 and the Panel has the jurisdiction to make the findings that follow. If the Respondent is successful, a stay of the Citation would be issued and a full hearing avoided. Proceeding with these questions preliminarily is efficient.

[16] The parties agree that the applicable framework for assessing delay is as set out in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44.

[17] The hearing panel in *Law Society of British Columbia v. Zoraik*, 2017 LSBC 34, at para. 19, summarized the test as follows:

> The test for delay in *Blencoe* requires the applicant seeking a stay of proceedings, in this case Mr. Zoraik, to establish that the delay constitutes an abuse of process such that the duty of fairness has been breached, or alternatively that the prejudice suffered as a result of the delay is significant. The onus is on the applicant to show an inordinate or unacceptable delay that has either impaired the ability of the applicant to make full answer and defence, or has caused significant prejudice in the form of duress and stigma. (*Christie v. Law Society of BC*, 2010 BCCA 195 at 23)

[18] A stay of proceedings based on the ground of delay requires proof of significant prejudice resulting from the inordinate delay. The Respondent has the onus of establishing that both factors are present in this case.

[19] As stated in *Blencoe*, the determination of whether a delay has become inordinate depends on the factual matrix of the particular case. Factors such as the nature of the case and its complexity, specific facts and issues, the purpose and nature of the proceedings and whether the respondent contributed to the delay are factors that

can be considered, among others. This Panel is not restrained from considering the length of the delay in isolation. Contextual factors such as the various rights in the proceeding can be considered in an attempt to determine whether the community's sense of fairness would be offended by the delay.

[20] The Respondent submits that there was an inordinate delay of over five years from the time the complaint was made to the first time it was considered by the Discipline Committee. The Respondent further submits that the five year timeline is in excess of the Law Society's own guidelines. With respect to the significant prejudice suffered, the Respondent submits that his ability to defend himself will be prejudiced due to a fading memory and a serious injury he suffered in December 2015 which resulted in a concussion. The Respondent also submits that further prejudice will result from the duress and stigma associated with a hearing of the Citation as he will have to relive events that have been the subject of other court proceedings.

[21] The Law Society submits that there was no delay. The length of time between the complaint and the Citation, the Law Society submits, is due to the investigations that were actively proceeding and the need to reasonably await the outcome of court proceedings throughout. In response to the Respondent's submissions on prejudice, the Law Society submits that there is no significant impairment to the Respondent's ability to make full answer and defence to the Citation as there is an extensive record in this case. Further, the Law Society submits that the Respondent has failed to provide any concrete evidence supporting his assertions regarding memory loss. On further response to the prejudice the Respondent alleges, the Law Society says the prejudice is speculative.

[22] Counsel presented us with a number of cases where delay was considered. We have reviewed the cases and, considering the factual matrix of this case, we are unable to conclude that there has been an inordinate delay in bringing this matter forward.

[23] While a span of five years may seem long, in this factual matrix, the Law Society was engaging in appropriate investigation or was appropriately awaiting the outcome of court proceedings on related matters throughout.

[24] In support of his abeyance request, the Respondent submits that it would be appropriate to await the outcome of the Dr. AT defamation action before concluding the investigation. Similarly, we find that it was appropriate for the Law Society to await the outcome of the various actions and appeals relating to the ICBC Trial.

[25] In the circumstances of this case, where the nature of the Citation relates to statements and subsequent findings in the ICBC Trial under appeal, it was appropriate for that case to run its course before the Law Society concluded its investigation.

[26] Time also passed while the Law Society was seeking additional documents from Post Media and Mr. Mulgrew. These applications were on notice to the Respondent, and the Respondent had knowledge of the nature of the documents being sought. Those documents were originally authored and sent by the Respondent and not disclosed to the Law Society by the Respondent. Based on the original response from Post Media and Mr. Mulgrew that emails existed, it was reasonable for the Law Society to continue its investigation to obtain those documents.

[27] We further find that the Respondent has failed to establish significant prejudice. The Respondent continues to practise law and conduct trials. On cross-examination, the Respondent gave evidence that he was unable to recall dates or figures but provided no concrete evidence regarding his inability to respond to the Citation. The Respondent was able to provide detailed responses when convenient to do so, and we do not accept the Respondent's evidence that he would be unable to respond to the Citation due to the time that elapsed from the receipt of the complaint to the issuance of the Citation.

[28] As we have found that there was no inordinate delay or extreme prejudice to the Respondent, the Respondent's request for a stay of the Citation is refused.

QUESTION 3

[29] The Respondent seeks dismissal of the Citation, insofar as it relates to the allegation that the Respondent "made improper comments to a journalist about … the judiciary" in a July 11, 2012 email because the said email does not disclose a marked departure from the conduct the Law Society expects of lawyers, having properly balanced the relevant *Charter* value with the Law Society's public mandate and objectives.

[30] The Respondent seeks a determination of question 3 before a full hearing on the merits and brings the question as a preliminary question.

[31] The question seeks to have this Panel dismiss the Citation on the basis that the alleged conduct is not a marked departure from the conduct the Law Society expects of lawyers. This is not a question that can be determined without a full

hearing on the merits and is not a question that is preliminary in nature such that Rule 4-36 can be relied on.

[32] Rule 4-36 permits preliminary questions relative to the hearing. It does not contemplate proceeding with the hearing itself on a summary basis.

[33] The portion of the Citation sought to be struck by the Respondent requires a fact specific exercise that will consider *Charter* principles. It is premature to make a determination as to whether the impugned expression is capable of supporting a finding of misconduct, and a full hearing will be required.

[34] This Panel also finds that dismissing the Citation on the basis expressed in question 3 at this stage would effectively be a rescission of the Citation, which this Panel does not have the jurisdiction to do. The Law Society Rules provide that such authority lies with the Discipline Committee.

[35] For these reasons, we also decline to grant the relief sought by the Respondent in question 3.

ORDERS

[36] The Respondent's application is dismissed.