

2019 LSBC 39
Decision issued: November 8, 2019
Citation issued: September 26, 2018

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

PETER DARREN STEVEN HART

RESPONDENT

**DECISION OF THE PRESIDENT’S DESIGNATE
ON AN APPLICATION FOR ADJOURNMENT**

Written materials: October 31, 2019 and
November 1, 2019

President’s Designate: Sarah Westwood

Discipline Counsel: Alison Kirby
Counsel for the Respondent: Peter Firestone

- [1] On October 31, 2019, the Respondent requested, pursuant to Rule 4-40 of the Law Society Rules (the “Rules”), that the hearing on Facts and Determination scheduled to start on November 18, 2019 and continue through November 22, 2019, be adjourned.
- [2] On November 4, 2019, acting as the President’s Designate, I granted the application with reasons to follow. These are those reasons.

BACKGROUND AND CITATION

- [3] Dealing with events occurring between 2012 and 2014, the 11-allegation citation, authorized September 20, 2018 and issued September 26, 2018 (the “Citation”),

includes allegations of multiple breaches of the conflicts provisions of the *Code of Professional Conduct for British Columbia* (the “Code”), as well as other matters.

- [4] The dates for hearing the Citation were set, by consent, in April of 2019. The Respondent admitted the majority of the facts underlying the alleged misconduct in August 2019, following receipt of a Notice to Admit dated July 11, 2019. The Law Society anticipates that, by relying on the agreed statement of facts, the duration of the hearing will be reduced to two days from its currently scheduled five.
- [5] The Respondent only retained new counsel on or around October 25, 2019, although there is a submission that the Respondent had been hopeful of retaining other counsel earlier, which intention was frustrated by the unexpected illness of other counsel.
- [6] There is also a second citation, issued on May 24, 2019, covering very different subject matter to the Citation; a hearing date has not yet been scheduled for the second citation. The Respondent previously indicated his intent to consent to a proposed without prejudice resolution to resolve both citations, but the advice of new counsel is to reject that proposal and proceed with a hearing, albeit on different dates.
- [7] Respondent’s counsel has indicated that, if the adjournment is not granted, he will not be able to act for the Respondent, as there is not time to review the disclosure and adequately prepare for a hearing. Respondent’s counsel has also indicated that he is considering whether to apply to withdraw the admissions made in relation to the agreed statement of facts from August 2019, recognizing that this will likely require that the full five days be rescheduled, if the adjournment is granted.
- [8] Respondent’s counsel stated, as part of the adjournment request, that the Respondent waives any right to argue or raise the issue of delay (pursuant to the *Blencoe* considerations) as a result of this adjournment request.
- [9] The Law Society opposes the adjournment request.

ANALYSIS

- [10] The relevant portions of Rule 4-40 of the Rules state:

Adjournment

- 4-40** (1) Before a hearing begins, the respondent or discipline counsel may apply for an order that the hearing be adjourned by delivering to the President

and the other party written notice setting out the grounds for the application.

- (3) Before the hearing begins, the President must decide whether to grant the adjournment, with or without conditions, and must notify the parties accordingly.
- (4) The President may
 - (a) designate another Bencher to make a determination under subrule (3), or
 - (b) refer the application to a pre-hearing conference.

[11] Other than indicating that such a decision is a discretionary matter, the Rules do not provide any guidance as to the basis on which an application to adjourn may or may not be granted. It is therefore necessary to consider case law and commentary to establish a principled basis upon which to make such a decision. Counsel for the Law Society, in submissions opposing the adjournment, helpfully sets out both.

[12] The two cases provided by the Law Society, *Howatt v. College of Physicians and Surgeons of Ontario*, 2003 CanLII 29563, [2003] OJ No. 138 (Ont. Div. Ct.), and *Law Society of Upper Canada v. Abrahams*, 2014 ONLSTH 64, emphasize that the decision to grant or deny an adjournment requires a balancing of the Respondent's right to a fair hearing against the public protection consideration of having the administration of justice move forward in a timely and expeditious matter.

[13] In this context, as stated in Macaulay & Sprague, *Practice and Procedure Before Administrative Tribunals*, (Toronto: Thomson Carswell, 2004), the following non-exhaustive list of factors are to be considered:

- (a) the purpose of the adjournment (relevance to the proceedings, necessary for a fair hearing);
- (b) has the participant seeking the adjournment acted in good faith and reasonably in attempting to avoid the necessity of adjourning;
- (c) the position of other participants and the reasonableness of their actions;
- (d) the seriousness of the harm resulting if the adjournment is not granted;
- (e) the seriousness of the harm resulting if the adjournment is granted (to the other participants, etc., including the length of adjournment required);
- (f) is there any way to compensate for any harm identified;

- (g) how many adjournments has the party requesting the adjournment been granted in the past; and
- (h) was the hearing to be peremptory, and if so, were the parties consulted in selecting the date and were they advised of its peremptory nature.

[14] The Respondent agrees with the Law Society's characterization of the law and considerations to be applied to the question at hand.

[15] The primary factor weighing against the adjournment is the almost 14 months that have transpired between issuing the Citation and the date of the hearing, and the subsequent period of inaction between setting hearing dates seven months ago, and then the acceptance of the agreed statement of facts slightly over three months ago. At none of these occasions did the Respondent apparently consult counsel, nor consider whether an adjournment to obtain counsel would be available or required.

[16] Indeed, from Respondent's own submissions, it only appears that the Respondent sought independent legal advice and realized the need for counsel around October 25, 2019, when he sought advice about the without prejudice resolution. This left less than three weeks before the hearing was to begin to bring the application.

[17] Turning to the factors in *Macaulay and Sprague*, in reverse order:

- (a) the hearing is not peremptory;
- (b) there have been no previous adjournments requested or granted;
- (c) the harm identified is the damage to the Law Society's public protection mandate, which requires that hearings into allegations of professional misconduct move forward in a timely and expeditious manner. The harm is also to the process of scheduling, in that a new panel will have to be found for a multi-day hearing, and the volunteer panel members, whose calendars will have been needlessly adjusted to accommodate the Respondent's hearing if the adjournment is granted. There are no witnesses or experts who have been inconvenienced. There is no way to compensate for this harm, other than by denying the adjournment;
- (d) assuming dates in March 2020 are found, the proposed length of the adjournment is four months, making it over 16 months since issuing the Citation. The Respondent has waived the right to bring any delay argument;

- (e) if the adjournment is not granted, the Respondent faces a multi-day hearing without counsel that may result in disbarment or suspension. The Respondent has indicated that he may wish to apply to withdraw his admissions and has resiled from a “without prejudice” settlement proposal that would have seen all of his matters resolved together. It is as a result of seeking independent legal advice that the Respondent has adopted these positions, the consequences of which affect the length of time required for the hearing;
- (f) the Law Society opposes the adjournment, based on the need to uphold the public protection mandate of the Law Society in having hearings proceed expeditiously; they are not unreasonable in so doing. This application is brought less than three weeks before the hearing is scheduled to begin, when it has been scheduled for nine months, and admissions and other matters calculated to ease the process have been canvassed and concluded for over four months. Adjournment applications brought at this late date should not be encouraged. Respondent’s counsel has not provided alternative dates, other than suggesting he is available in March, 2020;

[18] Ultimately, this decision comes down to the balance between the fairness of a hearing held without counsel and the requirements of the Law Society’s public protection mandate requiring that hearings into allegations of professional misconduct proceed in a timely and expeditious manner. In the instant case, the jeopardy faced by the Respondent is serious and has possibly been made more so by steps taken following the receipt of legal advice regarding the Citation and procedural steps that have already occurred.

[19] The decision I am asked to make is therefore a discretionary one, to be exercised only after weighing the factors set out in the case law and commentary.

[20] It is concerning that this adjournment request was brought so far along in the process and that the Respondent did not apparently turn his mind to the need for independent legal advice sooner than three weeks before the hearing of the matter, particularly in light of the admissions already made and the agreed statement of facts already concluded.

[21] However, in all the circumstances, it appears that the adjournment should be granted.

[22] Although the Citation is over a year old and deals with matters that arose between 2012 and 2014, the Respondent is facing significant professional jeopardy, and

would have to do so without the assistance of counsel if the adjournment is not granted. In addition, having received legal advice, the Respondent is reconsidering some decisions made earlier and in good faith, but without the benefit of counsel.

[23] Rule 4-40 states that, as the President's Designate, I may order the adjournment "with or without conditions". Given the age of the Citation, and the uncertain duration of the adjournment being requested, I hereby grant the adjournment request with the following conditions:

- (a) The new hearing date for the Citation will be peremptory on the Respondent;
- (b) A prehearing conference must be scheduled before December 20, 2019, at which time the parties will:
 - (i) set any further prehearing applications and confirm dates for the exchange of related materials;
 - (ii) confirm time estimates and set hearing dates for the Citation;
 - (iii) set such further prehearing conferences as may be required or of assistance in moving this matter forward; and
 - (iv) address such other matters as the parties and the Chambers Benchers deem advisable or necessary.