

2019 LSBC 41

Decision issued: November 22, 2019

Citation issued: December 12, 2018

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

HONG GUO

RESPONDENT

**DECISION OF THE PRESIDENT'S DESIGNATE
TO SET ASIDE A NOTICE TO ADMIT OF THE LAW SOCIETY
OR TO EXTEND THE TIME TO RESPOND**

Written Submissions: November 13, 2019

President's Designate: Philip A. Riddell, QC

Discipline Counsel: Alison L. Kirby
Counsel for the Respondent: Craig E. Jones, QC

INTRODUCTION

- [1] On October 31, 2019 the Respondent filed an application under Rules 4-28(5) and 4-36 for an order that the Notice to Admit delivered by the Law Society on October 25, 2019 (the “Notice to Admit”) be set aside as an abuse of process or, in the alternative, an extension of time to respond to the Notice to Admit.
- [2] The hearing of this matter on Facts and Determination is scheduled to commence on December 16, 2019 and continue through to December 20.
- [3] A review of the timeline shows the following:
 - (a) The Notice to Admit was delivered to the Respondent on October 25, 2019, 51 days prior to the scheduled date for the hearing to begin. Rule 4-28 requires that a Notice to Admit be served no less than 45 days prior to the

commencement of the hearing. The respondent must respond within 21 days of the Notice to Admit being delivered; and

- (b) Under the Rules, the date by which the Respondent was to respond was November 15, 2019.

PRELIMINARY MATTERS

- [4] The hearing of this application was scheduled for 9:00 am on November 19, 2019 by telephone conference. At the commencement of the hearing, I canvassed counsel to ensure that I was in receipt of all the materials of the Law Society and of the Respondent. Having confirmed this I asked counsel if there were any further submissions. Both counsel indicated that there were no further submissions. I advised that I would make an oral ruling with reasons to follow. I dismissed the Respondent's application to have the Notice to Admit set aside, and extended the time to reply to the Notice to Admit to November 22, 2019.
- [5] At that point, counsel for the Respondent stated that he thought he would be able to make further oral submissions prior to a ruling being made. Counsel for the Law Society stated her view that, as she understood it, a ruling would be based on the written materials.
- [6] I indicated that there was now an issue since I had made a ruling in the absence of hearing full submissions from the Respondent. Counsel for the Respondent stated that he was in a position to waive any issue of "bias", and that he was comfortable with me continuing to hear the Respondent's application. The matter was rescheduled for continuation at noon on the same day.
- [7] At the commencement of the continuation:
- (a) Counsel for the Respondent confirmed that he continued to waive any issue of "bias" and that I should continue as the President's Designate;
 - (b) Counsel for the Law Society confirmed that there was no issue with my continuing;
 - (c) Counsel for the Respondent would commence with oral submissions. Counsel for the Law Society would then have an opportunity to make oral submissions. Counsel for the Respondent would then have a right of reply; and
 - (d) I would rely on the previously filed materials in making my decision.

POSITIONS OF THE PARTIES

- [8] The Respondent sought to have the Notice to Admit set aside as an abuse of process, or in the alternative, to extend the time to respond from 21 days to 63 days, and for an Order that Discipline Counsel provide to counsel for the Respondent the source of each document listed in the Notice to Admit and the location of the original document.
- [9] It is noted that the Respondent did not make an application to adjourn the hearing.
- [10] The Law Society agrees to extending the time for the Respondent to respond to the Notice to Admit to November 22, 2019.
- [11] The Respondent sought to set aside the Notice to Admit on the basis that the delivery of the Notice to Admit constituted an abuse of process. The basis for the claim of abuse of process is set out in the Respondent's Notice of Application as:

The huge size and last-hour delivery of the Notice to Admit in this case suggest that Discipline Counsel may be taking tactical advantage of the rules to prejudice Ms. Guo in her response to Citation. Even if this outcome were not intended, however, the prejudice in the circumstances requires that Ms. Guo be granted the relief she seeks.

- [12] The Respondent has not presented any evidence in support of the allegation of an improper motive on behalf of Discipline Counsel.
- [13] To determine if the time for the Respondent to reply to the Notice to Admit should be extended beyond the November 22, 2019 date proposed by the Law Society, the Notice to Admit has to be examined:
 - (a) Authenticity of 199 documents is sought. Upon a review of the descriptions of the documents, the overwhelming majority are cross-referenced to the disclosure index provided by Discipline Counsel to counsel for the Respondent on July 15, 2019; and
 - (b) There are 239 paragraphs setting out factual statements. The Law Society seeks admissions of the truth of those facts. A review of these paragraphs shows that the majority of them include references to documents that contain facts that the Law Society seeks to have the Respondent admit. Many of the paragraphs that do not have document references appear to contain information that might be within the knowledge of the Respondent, such as the identity of the signatory to her practice accounts or the Respondent's year of call.

- [14] The Law Society provided disclosure to Respondent's counsel on July 15, 2019. That disclosure consisted of 66 documents, indexed as documents 1 to 66, delivered in a banker's box. Counsel for the Respondent indicated that they amounted to approximately 2000 pages, which he described as a "document" dump that was not organized.
- [15] In the course of submissions, counsel for the Law Society indicated that documents 1 to 66 were numbered on the first page of each document with the document number that corresponded to the document disclosure index. As counsel for the Law Society described it, what was required was to insert an index tab before the first page of each document to create a binder or binders consisting of the 66 paper documents. It would appear that, prior to the hearing of this application, counsel for the Respondent made no effort to contact counsel for the Law Society to ask how documents 1 to 66 were organized in the banker's box.
- [16] Document disclosure by the Law Society on July 15, 2019 also contained two 8-gigabyte encrypted thumb drives. Counsel for the Respondent did not request the password to access the thumb drives until the day of the hearing of this application – November 19, 2019.
- [17] The Notice to Admit attaches the 199 documents concerning which the Law Society seeks admission of authenticity. Counsel for the Law Society advised that the electronic versions of the documents were indexed in a manner in which Bates numbering of the pages constituting the document were incorporated into the document file name on the applicable thumb drive.
- [18] Counsel for the Respondent argued that the Respondent must be given a reasonable period of time to respond. He pointed to the number of documents involved in the request for admissions. He pointed to the fact that the Respondent is also dealing with two other Law Society matters that require her attention and to the fact that the Respondent has been in China attending the criminal trials of two persons who are related to her impugned actions. It was not clear if the Respondent was required to attend those proceedings, although mention was made to a process in which the complainant to an offence must participate in the resolution of charges with some consideration being given to restitution being made. The details of this process were not provided with any degree of precision. The Respondent's absence is said to have created difficulty in preparing a response to the Notice to Admit.
- [19] The Respondent does not seek an adjournment of the hearing, but Respondent's counsel has stated that, if the matter is adjourned due to the currently scheduled hearing dates being lost due to the extension of time to respond, the Respondent would waive any delay caused by the adjournment.

- [20] In dealing with the Notice to Admit, the Respondent relies on *Ceperkovic v. MacDonald*, 2016 BCSC 939 at para. 36, to support the proposition that, in order to be effective in fulfilling its objectives, a notice to admit must be reasonably capable of evaluation within the time required for response.

ANALYSIS

- [21] The Respondent seeks to have the Notice to Admit set aside on the basis that its use in this case constitutes an abuse of process. The time frames for when a Notice to Admit can be delivered and when a response must be provided are set out in Rule 4-28. There has been no evidentiary basis presented by the Respondent to support this basis to set aside the notice.
- [22] The Respondent claims that the use of the Notice to Admit creates prejudice to the Respondent, and the argument is based upon the inability of the Respondent to analyze the Notice to Admit and to respond. The Respondent states that this prejudice can be dealt with by providing the Respondent with more time to respond than the 21 days set out in Rule 4-28.
- [23] The Respondent's submission rests on the argument that, given the volume of material both in the number of documents for which the Law Society seeks admissions of authenticity and in the number of facts for which the Law Society seeks admissions as to their truth, more time is required to respond. Specifically, the Respondent says she needs a reasonable time to respond.
- [24] In considering what constitutes a reasonable time to respond, I must examine the actions of the parties in providing the Notice to Admit, the discipline file disclosure, and steps taken by the Respondent to analyze the Notice to Admit and prepare a response.
- [25] The Law Society delivered the discipline disclosure to Respondent's counsel on July 15, 2019. This disclosure included all of the documents the authenticity of which is sought, and the documents from which many of the admissions of facts are drawn. The Notice to Admit was delivered to Respondent's counsel on October 25, 2019. Rule 4-28 required the Respondent to furnish a response by November 15, 2019. (The Law Society has agreed to extend the time to respond to November 22, 2019.)
- [26] The Respondent states that she is unable to respond because of other Law Society matters she is involved in, the volume of material dealt with in the Notice to Admit and due to her being in China with regard to the criminal proceedings against other persons.

- [27] The Respondent's efforts in responding to the Notice to Admit must be examined:
- (a) The Respondent filed this application on October 31, 2019;
 - (b) Respondent's counsel did not obtain the passwords to access the two encrypted thumb drives that contain some of the documents that form the basis of discipline disclosure, which was delivered on July 15, 2019, until November 19, 2019;
 - (c) Respondent's counsel did not contact counsel for the Law Society to determine how documents 1 to 66 in the document disclosure had been organized in its banker's box and did not learn of the "secret index" used to organize the documents until the issue arose in the course of questions I asked of counsel for the Law Society on November 19, 2019; and
 - (d) The Respondent did not provide any information as to the steps that have been taken to prepare a response to the Notice to Admit as of the date of hearing of this application.
- [28] The conduct of the Respondent to date does not portray a party who has been acting diligently to respond, but unable to do so because of factors (this is not exhaustive) such as: the passage of time since the facts sought to be admitted occurred; the volume of materials subject to the Notice to Admit; and the unavailability of a party to instruct counsel.
- [29] In reply, counsel for the Respondent stated that he might be able to interview a witness who had been interviewed by the Law Society. A transcript of the interview had been disclosed, and the Notice to Admit included facts related to the interview.
- [30] An analysis as to what is a reasonable time in which to respond to the Notice to Admit requires an examination as to how much time, on an objective basis, is required to evaluate the Notice to Admit and prepare a response. There is no body of evidence that the Respondent has made reasonable efforts to date to provide a response to the Notice to Admit but more time is required. In fact, the Respondent does not appear to have made a reasonable effort until late in the day to investigate the documents provided as discipline disclosure from which the 199 documents for which the Law Society seeks admissions of authenticity. In particular, she did not obtain passwords for the two thumb drives until the date of the hearing of this application.

DECISION

- [31] The application of the Respondent to have the Notice to Admit set aside as an abuse of process is dismissed.
- [32] The application of the Respondent to have Discipline Counsel deliver to her counsel a document setting out the source of each document listed in the Notice to Admit and the location of the original, if applicable, is dismissed.
- [33] The application of the Respondent to extend the time to provide a response to the Notice to Admit to 63 days is dismissed.
- [34] The Respondent will have until 11:59 pm on November 22, 2019 to provide her response to the Notice to Admit.