

2020 LSBC 53
Decision issued: November 4, 2020
Citation issued: February 7, 2020

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

SPENCER OWEN MAY

RESPONDENT

**DECISION OF THE PRESIDENT ON
AN APPLICATION FOR IN-PERSON HEARING**

Written materials:	October 19, 2020 October 21, 2020 October 22, 2020
President:	Craig Ferris, QC
Discipline Counsel: Counsel for the Respondent:	Michael Shirreff William MacLeod, QC

- [1] The Respondent is the subject of a citation that is scheduled for hearing on February 1 to 5, 2021. He applies for an order directing an in-person hearing, as opposed to a video conferencing hearing using the Zoom platform. On April 27, 2020, I issued a Practice Direction providing that, unless otherwise ordered, all hearings will be conducted virtually. This process was confirmed during the pre-hearing conference in this matter on July 27, 2020 when I directed that the hearing would proceed by video conferencing unless an application for an in-person hearing was brought prior to the October pre-hearing conference. This is that

application and the parties have agreed that it can be determined in writing without any oral submissions. The Law Society does not oppose the application.

- [2] Nevertheless, in the context of the existing public health emergency, it is incumbent upon us as responsible citizens to ensure that the circumstances are justified before taking the risks of conducting an in-person hearing. While this Tribunal has conducted certain in-person hearings, the overwhelming majority continue to be conducted by video conferencing using the Zoom platform. For the duration of the public health emergency, it is expected that in-person hearings will continue to be the exception and will need to be justified in the circumstances of the particular case.
- [3] The Respondent first argues that the Tribunal is without statutory authority to order a hearing to be conducted by video conferencing because that mode of hearing is not provided by the Law Society Rules. In my view, this position is clearly wrong. Tribunals have jurisdiction to set their own procedure provided the procedure meets the necessary standards of fairness. In addition, this jurisdiction is expressly confirmed by the Rules. Rule 4-38(10) allows the Bencher presiding over a prehearing conference to make an order that “will aid in the fair and expeditious disposition of the citation” subject to the limit in subrule (11) that provides that, if such order affects “the conduct of the hearing on the citation, the hearing panel may rescind or vary the order.” This means that, subject to the discretion of the panel, a Bencher at a prehearing can order a hearing by video conference provided it will aid in the fair and expeditious disposition of the citation.
- [4] This jurisdiction is also confirmed in the hearing panel by Rule 5-6(1) that provides that the hearing panel may determine the practice and procedure to be followed at a hearing. The ability of the Tribunal, through its Chair, a bencher at a prehearing conference or a hearing panel, to control its procedure including ordering a hearing to be conducted by video conferencing is clear, and the position of the Respondent on this point is dismissed.
- [5] This leads to the real issue on this application – can a hearing panel conduct a fair hearing through a hearing using video conferencing with respect to this specific citation? The Respondent says “no” based on two points – first, it is argued that the Law Society is holding some other in-person hearings so it must be possible to do so in this case and, second, that this case “ will involve substantial issues of credibility” and that the presentation of “oral evidence and cross-examination by video presents novel challenges.” Again, in my view, neither point has merit based on the record before me.

- [6] With respect to other in-person hearings, each case is determined according to its own circumstances, and the fact that another case has been considered appropriate for an in-person hearing is not determinative in the case of this citation. In order to ensure fairness, we leave the maximum degree of flexibility for hearing panels and to benchers at a prehearing conference. Within the boundaries set by the Practice Direction, the Act and the Rules, we fashion a process suitable to the individual circumstances of each case. For example, while we have set video conference hearings as the default, we have allowed hearing panels, where the participants are willing and all appropriate safety precautions can be taken, to hear a matter in-person where the circumstances of the case allow or require. Accordingly, the simple fact that there have been other in-person hearings does not justify the Respondent's request for such a hearing in this case.
- [7] This means we finally get to the core of the issue in the case – can this hearing be fairly conducted by video conferencing? Unfortunately, nothing but generalities are included in the application. These generalities (assessment of credibility, conducting live testimony and cross-examination) have been rejected by the courts of this country and by this Tribunal. In *Law Society of BC v. Hart*, 2020 LSBC 39, there is a list of authorities where these arguments have been rejected by other bodies, and they have been rejected by this Tribunal in that decision as well as in *Law Society of BC v. Hart*, 2020 LSBC 34.
- [8] In my view, in order to justify requiring the hearing panel, counsel and other participants taking the health risk presented by proceeding with an in-person hearing during a public health emergency, an applicant needs to show something about this case that justifies taking that risk. What is it that sets this case apart and requires an in-person hearing? The application does not set out any facts that meet this standard.
- [9] In light of these reasons, in my view, the appropriate order is to adjourn this application. The Respondent can either:
- (a) file further evidence or submissions providing specifics of why an in-person hearing is required in this proceeding; or
 - (b) can renew this application before the hearing panel as a preliminary matter. If the Respondent chooses the first option, I would ask such further submissions or evidence be filed within 14 days of these reasons.