2019 LSBC 06
Decision issued: February 21, 2019
Citations issued: December 15, 2017, June 19, 2018
September 27, 2018 and September 27, 2018

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and an application under Rule 4-22 concerning

SEBASTIAN HOMAYOUN NEJAT

RESPONDENT

DECISION OF THE PRESIDENT'S DESIGNATE ON AN APPLICATION FOR JOINDER

Written submissions:	November 20, 2018 November 26, 2018
President's Designate:	Sarah Westwood
Discipline Counsel:	Kathleen M. Bradley
Counsel for the Respondent:	Michael D. Shirreff

[1] On November 20, 2018, the Respondent brought an application pursuant to Rule 4-22 that the four citations issued December 15, 2017, June 19, 2018, September 27, 2018 and September 27, 2018 (the "Citations"), be joined and heard in one hearing.

[2] On December 12, 2018, acting as the President's Designate, I granted the application with reasons to follow. These are those reasons.

BACKGROUND

[3] Called to the Bar in 2010, the Respondent practised as a sole practitioner focusing on the areas of immigration and family law, with some limited work in the areas of conveyancing and corporate-commercial transactions.

[4] Between December 15, 2017 and September 27, 2018, the Discipline Committee authorized four citations against the Respondent with respect to his actions regarding a number of clients, and the Law Society, over a period of time from 2013 to 2017.

[5] The Respondent states, and for the purposes of this application the Law Society accepts, that during the period covered by the Citations, the Respondent was suffering from a serious and untreated addiction and that medical evidence of this underlying illness will be tendered in respect of all four Citations.

[6] Effective November 26, 2018, the Respondent changed his status to "non-practising", although he intends to return to practice following completion of treatment for his addictions.

[7] The Citations deal with different matters and different clients and cover a period of approximately four years. The parties agree, however, that if the medical evidence of an underlying addiction will be led in relation to all four Citations, it will be more efficient and less costly for that evidence to be heard once and by the same panel, rather than repeating it on four separate occasions before four separate panels.

[8] While the Law Society consents to the application, I am not bound by that consent, and find that I still have to exercise my discretion and consider whether, on a principled basis, the Citations should be determined in one hearing.

ANALYSIS

[9] Rule 4-22 of the Law Society Rules states:

> **Severance and Joinder**
>
> (1) Before a hearing begins, the respondent or discipline counsel may apply in writing to the President for an order that

(a) one or more allegations in a citation be determined in a separate hearing from other allegations in the same citation, or

(b) two or more citations be determined in one hearing.

(2) An application under subrule (1) must

(a) be copied to the party not making the application, and

(b) state the grounds for the order sought.

(3) [rescinded 06/2016]

(4) The President may

(a) allow the application with or without conditions,

(b) designate another Bencher to make a determination, or

(c) refer the application to a pre-hearing conference.

[10] Although the issue of joinder and severance is a common matter in civil and criminal litigation, counsel were unable to identify any decisions published by the Law Society of British Columbia addressing the principles to be applied in an application brought under Rule 4-22.

[11] The Respondent points to the Review Board decision in *Law Society of BC v. Murray*, 2013 LSBC 29, and others, regarding the test for globalization in respect of disciplinary action, but I find those principles of little assistance in considering whether the Citations should be heard together. Whether or not discipline should be imposed on each citation separately, or a single penalty for all, is a matter to be determined at the disciplinary action phase and has little bearing on whether the Citations should, *ab initio*, be heard together.

[12] The Respondent also quotes *Robak Industries v. Gardner*, 2006 BCSC 1628, for the legal test for consolidation of two civil matters.

[13] In consenting to the application, discipline counsel also attempts to provide some principled basis for consideration of Rule 4-22 by drawing on decisions from other regulatory bodies in British Columbia and Canada.

[14] These decisions largely consider why matters should not be joined and, therefore, generally provide guidance in the negative, rather than offering any positive

assistance regarding how decisions in respect of an application under Rule 4-22 should be made.

[15] Of note, discipline counsel quotes from the British Columbia Supreme Court decision in *Hirt* v. *College of Physicians and Surgeons of BC* (1985), 63 BCLR 185, 1985 CanLII 462. In *Hirt*, the Court heard an appeal in which the appellant doctor alleged procedural unfairness arising from a discipline panel's hearing two charges at the same time and consequent improper admission of evidence.

[16] The appellant in *Hirt* relied on two cases, one from Saskatchewan and one from Ontario. In considering these cases, the Court found that the Saskatchewan and Ontario tribunals had a narrower latitude to receive evidence than those of British Columbia, but that in general the principles governing procedural fairness are the same. The Court confirmed that, if hearing two or more allegations together would be prejudicial to the Respondent, then the matters should not be joined.

[17] Discipline Counsel further quotes from the Law Society of Manitoba's decision in *Law Society of Manitoba v. Luk*, 2009 MBLS 11. In *Luk*, a respondent made a preliminary motion to sever two of a six-count citation in a case where the six counts arose from two sets of allegations and the subject matter of the two counts the respondent sought to sever was different from the remaining counts.

[18] The respondent in *Luk* argued that convenience alone is insufficient to justify combining counts in a situation arising from different matters, and that the onus should rest on the Law Society to convince a panel that disparate matters should be heard together.

[19] In finding that the respondent had not met the test for severance, the panel in *Luk* stated that the law governing severance in disciplinary matters "is the same as in civil proceedings," and that they were bound to follow those rules. Accordingly, the panel found that charges should only be severed where either there is a real danger of prejudice or the charges are so disparate that it would be extremely inconvenient to mix the evidence, "provided that the principle of fairness and impartiality with respect to the accused professional must be considered in the context of the public interest and the interests of the professional organization whose duty it is to protect the public."

[20] It therefore seems clear that matters should not be joined if it would be prejudicial or unfair to the Respondent to do so, and in general widely disparate matters should not be heard together.

[21] It also seems clear that mere procedural convenience or efficiency is insufficient grounds to justify joining matters.

[22] In the instant case, the Respondent submits that both efficiency and fairness are best served by joining the citations. The Respondent further suggests that it would be prejudicial not to have the matters heard together, in that not doing so runs the risk of inconsistent outcomes across the four Citations, all of which, alleges the Respondent, arose in the context of his underlying addiction.

[23] The Respondent highlights this commonality by arguing that, while the Citations differ in relation to the issues canvassed, the underlying similarities outweigh these differences. The Respondent lists these commonalities as a failure to provide quality service to clients, misleading clients, and practising law while administratively suspended, and also points to the overlap in time of the conduct at issue.

[24] To this end, the principles enunciated in *Robak* are of assistance in deciding whether matters should be joined. The Court in *Robak* cited with approval an earlier decision of Master Kirkpatrick in *Merritt v. Imasco Enterprises Inc.,* (1992) 2 CPC (3d) 275 at 282 (BCSC), in enumerating the factors to be considered in such a case. The Court states:

> … the decision is a discretionary one to be exercised after weighing the factors set out in [*Merritt*, where] Master Kirkpatrick, as she then was, set out these two tests to be met for separate actions to be heard together:
>
> 1. Do the pleadings disclose common claims, disputes and relationships between the parties?
>
> 2. Having regard to matters outside the pleadings, are the claims so interwoven as to make separate trials at different times before different judges undesirable and fraught with problems and economic expense?
>
> If the first test is passed then I must go on to consider the second test and specifically whether:
>
> 1. the order sought will create a saving in pre-trial procedures;
>
> 2. there will be a real reduction in the number of trial days taken up by the trials being heard at the same time;

3. there is a potential for a party to be seriously inconvenienced by being required to attend a trial in which that party may have only a marginal interest;

4. there will be a real savings in experts' time and witness fees;

5. one of the actions is at a more advanced stage than the other;

6. the order will result in a delay of the trial of one of the actions and, if so, whether any prejudice which a party may suffer as a result of that delay outweighs the potential benefits which a combined trial might otherwise have; and

7. there is a substantial risk that separate trials will result in inconsistent findings on identical issues.

[25] In applying these questions in the instant application, it appears that joining the Citations is warranted.

[26] Here, although the Citations cover different issues and complainants, the Respondent submits (and for the purposes of this application, at least, the Law Society accepts), that the underlying themes are similar and that his addiction is a significant unifying feature throughout. It is these commonalities that allow the Respondent to pass the first test as articulated in *Robak*.

[27] In light of the remaining considerations, it is clear that there will be substantial savings, both in terms of experts' time and fees, as well as efficiency, in hearing the matters together. Moreover, there is a risk that different panels might ascribe different weight to, or make differing findings regarding the impact of, the relevance of the Respondent's addiction to the matters contained within the Citations.

[28] The parties have agreed to manage any issues of delay or witness availability by approaching the hearing in a phased process, if necessary, and by managing scheduling issues through pre-hearing conferences. The need for having the Respondent's expert attend at only one hearing will reduce the total number of days required to hear the Citations, although the phased process, if required, may increase the overall time it takes to conclude matters. The Respondent, however, expresses no concern with this possibility.

[29] I am satisfied that joining the Citations in one hearing is therefore neither prejudicial nor unfair to the Respondent and that the public interest will be served by an expeditious and efficient disposition of the four Citations in one hearing.

[30] The Respondent's application to have the four Citations determined in one hearing is therefore granted.