

2021 LSBC 21

Decision issued: May 28, 2021

Citation issued: November 5, 2019

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

TROY JOHN DUNGATE

AND

TREVOR SCOTT DUNGATE

RESPONDENTS

**DECISION OF THE PRESIDENT'S DESIGNATE ON AN
APPLICATION TO DETERMINE A PRELIMINARY QUESTION**

Application date (by telephone): April 21, 2021

President's Designate: Michael F. Welsh, QC

Discipline Counsel: Michael D. Shirreff and Jessie I. Meikle-Kahs
Appearing on their own behalf: Troy John Dungate and Trevor Scott Dungate

- [1] This is the third prehearing application to the President or Designate in this matter. The previous two are reported at 2020 LSBC 60 and 2021 LSBC 10. Given that much of the factual and procedural backdrop to this matter is laid out in those prior decisions, I will not repeat any more than is necessary to explain my decision.
- [2] The Respondents, who are brothers, practised in a law firm in Prince George with their father, who is now deceased. They were investigated by the Law Society over whether they charged disbursements improperly and retained a lawyer, “AB”, to represent them but, following a fee dispute, discharged AB as their lawyer. AB moved to have the disputed fee account assessed, and the Respondents made an

agreement with AB. Under that agreement they paid part of the account and accepted an undertaking from AB that they would advise AB when the Law Society investigation was concluded “such that the prejudice you claim would no longer be a factor,” so that AB could pursue the balance of the account. The Law Society closed its file by letter dated February 2, 2016 to the Respondents (the “Closing Letter”). The accuracy of what they told AB about that Closing Letter is the basis of the subject citation for breach of undertaking and false or misleading representations. The Respondents defend on the basis that there remained ongoing prejudice and they were not yet required to advise AB of the investigation closure.

- [3] This application is brought by the Respondents for orders relating to two Notices to Admit delivered to counsel for the Law Society (“Discipline Counsel”) on January 18, 2021 and January 26, 2021. Specifically they seek orders under Rule 4-36 as follows:
 - (a) a determination as to whether the responses of Discipline Counsel to the Notices to Admit were adequate and complied with Rule 4-28(6) and the intention of Rule 4-28;
 - (b) an order:
 - (i) that the admissions sought in the Notice to Admit are deemed to be admitted for the purposes of the hearing only pursuant to Rule 4-28(7); or
 - (ii) alternatively, that Discipline Counsel provide a comprehensive response to the admissions sought in the Notices to Admit within fourteen (14) days in compliance with Rule 4-28(6).
- [4] Discipline Counsel opposes the application, submitting that in large part the Notices to Admit are ill-founded and do not deal with admissions of fact and that, to the extent they do, the responses given are adequate within the Rules.
- [5] The Notices to Admit are each lengthy, and I will not set them out in full.
- [6] The January 18, 2021 Notice to Admit seeks admission of the authenticity of the December 14, 2020 decision of the President reported at 2020 LSBC 20, and admission of the truth of 27 matters relating to what is said in that decision and of the Law Society not meeting deadlines for document production under that decision. Those failures are detailed in my prior decision of March 9, 2021, reported at 2021 LSBC 10. Finally it notes that the Closing Letter was incorrectly dated February 2, 2015.

- [7] Discipline Counsel responded to this first Notice to Admit in a letter of February 4, 2021, stating in part:

I am writing in response to your Notice to Admit, dated January 18, 2021.

The Law Society does not admit any of the paragraphs on which you have sought admissions. To be clear, each and every paragraph from 1-27 in the Notice to Admit is **Not Admitted**.

As a general response, none of the issues on which you have requested a factual admission has any bearing or relevancy to the allegations in the Citation.

The Law Society accepts that [the President] rendered a decision on December 14, 2020. The authenticity of that decision is accepted. The decision states what it states and it is not necessary or proper for you to seek admissions about what was written by [the President] in the decision.

With respect to the timing of the delivery of the disclosure that [the President] directed, the correspondence in relation to that issue also makes it very clear what occurred with respect to the timing. I acknowledge that I did not deliver the DVD of disclosure to your office in Prince George by Friday, January 15, 2021. I have previously explained why that happened and I will address those events before the President and/or another bencher in some detail, if need be.

- [8] In that letter the Law Society agrees the Closing Letter was in fact written on February 2, 2016.
- [9] The second Notice to Admit of January 26, 2021 relates to an internal manual of the Law Society entitled “The Professional Conduct Manual”. That manual sets out guidance for staff dealing with professional conduct matters. It is not a public document on the Law Society website and was obtained by the Respondents under their FOI request noted by the President at paragraph 12 in the December 14, 2020 reasons.
- [10] That second Notice to Admit seeks admission of the authenticity of the manual and admission of the truth of 57 matters. Almost all of those are either quotations from the manual or short summaries made by the Respondents as to what they allege different parts of the manual state. The last admission sought (No. 57) is that, on November 5, 2019, the undertaking that they are alleged to have breached was withdrawn by AB, the lawyer to whom they gave it.

- [11] Discipline Counsel responded to that Notice to Admit by a second letter of February 4, 2021 that states in part:

I am now writing in response to your second Notice to Admit, dated January 26, 2021.

Again, the Law Society does not admit any of the paragraphs on which you have sought admissions. Each and every paragraph from 1-57 is Not Admitted.

The Professional Conduct Manual (“Manual”) that your requested admissions are based on is an internal Law Society document that is entirely irrelevant to the allegations against you in the Citation. The authenticity of the Manual is admitted.

It is not a proper use of a Notice to Admit to seek “admissions” that are nothing more than excerpts from an underlying document.

- [12] Rule 4-28 relied on by the Respondents states:

Notice to admit

- 4-28**(1) At any time, but not less than 45 days before a date set for the hearing of a citation, the respondent or discipline counsel may request the other party to admit, for the purposes of the hearing only, the truth of a fact or the authenticity of a document.
- (2) A request made under subrule (1) must
- be made in writing in a document clearly marked “Notice to Admit” and served in accordance with Rule 10-1 [*Service and notice*], and
 - include a complete description of the fact, the truth of which is to be admitted, or attach a copy of the document, the authenticity of which is to be admitted.
- ...
- (6) A response under subrule (4) must contain one of the following in respect of each fact described in the request and each document attached to the request:
- an admission of the truth of the fact or the authenticity of the document attached to the request;
 - a statement that the party making the response does not admit the truth of the fact or the authenticity of the document, along with the reasons for not doing so.

- (7) If a party who has been served with a request does not respond in accordance with this rule, the party is deemed, for the purposes of the hearing only, to admit the truth of the fact described in the request or the authenticity of the document attached to the request.
- (8) If a party does not admit the truth of a fact or the authenticity of a document under this rule, and the truth of the fact or authenticity of the document is proven in the hearing, the panel may consider the refusal when exercising its discretion respecting costs under Rule 5-11 [*Costs of hearings*].

...

- [13] The Respondents submit that the responses of Discipline Counsel fail to comply with Rule 4-28(6)(b) in that they are in large part general denials and not particularized to each admission sought, setting out specified reasons for refusing each admission in turn.
- [14] When asked why the admissions sought were relevant to the underlying citation, the Respondents submitted:
 - (a) With the first set of admissions, the conclusions reached by the President in his December 14, 2020 reasons as to why the Law Society must produce its “Investigation Files” are relevant to whether the Respondents did breach their undertaking (see paras. 5 to 11 of the decision). They say these reasons contain findings of fact made by the President as part of making his decision and should be before the hearing panel as facts.
 - (b) With the second set of admissions, the internal Professional Conduct Manual sets out the processes followed by the Law Society in investigating matters of potential professional misconduct. Part of it states that an investigation, once closed, can be reopened based on additional information, including documents received into evidence in court proceedings. They submit that had they told AB the investigation was closed, there was a potential of AB proceeding to a registrar’s assessment of the fee account, and from that assessment hearing the Law Society could potentially obtain evidence that, to their prejudice, might trigger a reopening of the prior discipline investigation. They submit that part of the reason the manual is therefore relevant is that it lays out that process for reopening a file.

DECISION

- [15] In both their Notices to Admit and in this application the Respondents show a misunderstanding of what constitutes factual admissions. This application must fail. I will explain with respect to each Notice to Admit.
- [16] The first Notice to Admit seeks to admit the truth of matters that are part of reasons for reaching the two procedural decisions in this discipline matter. The reasoning process of a decision-maker is not a “fact” capable of admission when parties are before another decision-maker. While the President found that there is a potential that the Law Society “Investigation Files” might contain relevant information that would assist the Respondents make their case, any factual findings he found along the way to that conclusion are not binding on a hearing panel. It is the underlying evidence as to the facts that is relevant, not the factual conclusions of the President. Those conclusions are persuasive at best. While the Respondents can certainly refer to that decision in argument before the hearing panel, the hearing panel must form its own factual conclusions.
- [17] As to the Law Society not meeting a deadline to provide the Investigation Files, the details of which are set out in the March 9, 2021 decision, the Law Society admitted this in its response to that first Notice to Admit and in both hearings before me. The date on which the Respondents received those files is not in issue. I will not comment in this decision if it is of any relevance. If the Respondents wish to argue its relevance before the hearing panel, they can refer to that Law Society admission of fact to found their argument.
- [18] Turning to the second Notice of Admit, the Professional Conduct Manual, to paraphrase what Discipline Counsel said about the President’s decision, “states what it states.” Its authenticity is admitted, and the Respondents are free to use it before the hearing panel, reading what they feel is relevant. Extracting or paraphrasing small portions, which may or not be in context, is not listing facts.
- [19] There is one admission sought in the second Notice to Admit that is of a fact. That is its final admission at 57 that AB withdrew the undertaking. At the application, when this was pointed out by the Respondents, Discipline Counsel readily admitted it as a fact and stated that it had been overlooked when reviewing the Notice to Admit.
- [20] There is a shade of irony here, in that Discipline Counsel had previously sought to obtain this very same admission of fact from the Respondents, who would not make it. Discipline Counsel produced the Law Society Notice to Admit dated

September 8, 2020, that contained this proposed admission and the actual waiver form signed by AB. The parties now seem onside with each other on this fact.

- [21] As a result, I order that Discipline Counsel make a response under Rule 4-28(6) to admission 57 of the January 26, 2021 Notice to Admit, but otherwise dismiss the Respondents' application.

PREHEARING CONFERENCE

- [22] The other aspect of this application before me is as a prehearing conference set in accordance with the March 9, 2021 decision. In that decision I ordered that:

- (a) this prehearing conference address further disclosure including:
 - (i) admissions, in particular with authenticity of documents;
 - (ii) the status and potential of any Notices to Admit;
 - (iii) witnesses;
 - (iv) the length of the Facts and Determination ("F&D") hearing and prospective hearing dates.
- (b) Discipline Counsel by March 16, 2021 provide the Respondents with:
 - (i) a list of all redactions and reasons for those redactions from its disclosure;
 - (ii) a list of its intended witnesses, together with a "will say" statement or affidavit from each witness, and any statement that has already been made by that witness;
 - (iii) a list of all documents on which it intends to rely;
 - (iv) before this prehearing conference, provide a list any legal authorities on which it presently relies, and if it subsequently decides on other legal authorities on which it intends to rely, will provide reasonable notice.
- (c) the Respondents provide reasonable notice to Discipline Counsel of any legal authorities on which they rely.

- [23] I was provided with confirmation that Discipline Counsel has complied with all the directions I made, including listing witnesses and providing witness statements, a list of documents and list of authorities on which the Law Society presently relies.
- [24] The Respondents raised an issue of not being provided with any prior statements made by witnesses. Discipline Counsel replied that there were none, and I find there are none as contemplated in Rules 4-34 or 4-38. The Respondents also took issue with the list of redactions and reasons for redactions, but I find that Discipline Counsel has properly complied with that direction.
- [25] While I have addressed two Notices to Admit of the Respondents, I have been advised by the parties that the Respondents have more recently delivered two further Notices to Admit, to which Discipline Counsel has responded. Overall there have been few admissions on either side. As the refusal to make admissions may, as noted earlier when quoting from Rule 4-28(8), have cost consequences in the hearing process, the parties should consider carefully whether they can come to any further agreement on factual matters to shorten that hearing process.
- [26] The parties are agreed that three days is a reasonable estimate of time for the F&D hearing, and I order that it be set for three days and be set at the earliest date available to the Tribunal and the parties. If either party believes that the other is unreasonably refusing to agree to set a hearing date, then that party may apply to me as President's Designate to set the specific hearing dates.
- [27] Finally I order that the Respondents will provide the Law Society with a brief of all documents and brief of all legal authorities on which they rely at least three weeks before the commencement of the F&D hearing.