2013 LSBC 10
Report issued: March 26, 2013
Citations issued: October 18, 2010 and June 1, 2011

The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and a hearing concerning

THOMAS PAUL HARDING

Respondent

Decision of the Hearing Panel on an Application to Re-open the Hearing to Hear Further Evidence

Written submissions received: February 19, 2013, March 1, 2013 and March 11, 2013
Panel: Bruce LeRose, QC, Chair, William Everett, QC, Lawyer, June Preston, Public Representative

Counsel for the Law Society: Maureen Boyd
Counsel for the Respondent: Gerald Cuttler

[1] This is an application made by the Respondent, Thomas Harding, for an order that the Hearing Panel hear the evidence of Mr. Shawn Bobb before delivering its Reasons on Facts and Determination regarding the citation.

[2] The hearing of this citation regarding Facts and Determination took place on December 11 and 12, 2012. Most of the facts were not in dispute and are the subject of an Agreed Statement of Facts and a Supplemental Agreed Statement of Facts (Exhibits 1-A and 1-B).

[3] The only factual issue in dispute is set out at paragraphs 28 and 29 of Exhibit 1-A. These paragraphs read as follows:

> 28. On April 30, 2010, a taxation commenced of accounts issued by CLC to the Client. The taxation did not conclude and the matter was settled between the parties.
>
> 29. The Respondent says that he apologized to the complainant at the taxation on April 30, 2010. The complainant says that no apology has been made to him by the Respondent.

[4] The complainant, Mr. Shawn Jodway, who is a lawyer, and the Respondent gave conflicting evidence about whether the Respondent apologized to the complainant on April 30, 2012.

[5] The evidence of a Mr. Shawn Bobb, a sole practitioner associated with the Respondent, came to light in early January, 2013 approximately three weeks after the hearing on the Facts and Determination had concluded and prior to this Panel making a decision. A memorandum dated January 4, 2013 prepared by Mr. Bobb was provided to the Panel. The memorandum sets out Mr. Bobb's evidence as it pertains to the fact in dispute and the manner in which this evidence was drawn to the Respondent's attention.

[6] Mr. Cuttler, counsel for the Respondent, submits that this new evidence is of sufficient importance that it ought to be considered by the Panel before its decision is issued. In support of this submission he says that a hearing panel must conduct a fair hearing and it has power to control its process in order to ensure that a fair hearing is achieved.

[7] The Law Society is opposed to this application for an order that the Hearing Panel hear this new evidence of Mr. Bobb. In support of its position the Law Society submits firstly that the anticipated evidence of Mr. Bobb has limited probative value to resolve the conflict of evidence between Mr. Jodway and the Respondent and is therefore not likely to affect the outcome of

this matter, and secondly that this evidence of Mr. Bobb should have been available at the hearing if reasonable diligence had been exercised.

[8] The Hearing Panel has considered the written submissions made by both counsel and in particular the evidentiary background referenced in the Law Society's submission. After careful deliberation we have concluded that the application by the Respondent to call Mr. Shawn Bobb to give evidence in this Hearing is granted.

[9] The Panel has concluded that much of the time spent at the hearing of this matter surrounded this factual dispute, and it was clearly of significant importance to both parties. In arriving at this decision we considered the five factors set out in the *Mitsubishi Heavy Industries Ltd. v. Canadian National Railway Co.*, 2011 BCSC 1536, referred to on page 5 of the Law Society's written submissions:

> 1. whether the evidence could have been obtained before trial by the exercise of reasonable diligence;
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> 2. whether the evidence is intended to address a single, discrete fact and it was not intended to affect other issues;
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> 3. whether the other party would be prejudiced if the re-opening were permitted;
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> 4. the relevance of the proposed evidence and whether it would likely affect the outcome; and
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> 5. the effect of re-opening on the orderly and expeditious conduct of the trial.

[10] With respect to these five factors the Panel has concluded as follows:

> 1. Bearing in mind the time frame from when the alleged conversation took place, April 30, 2010, and the date of the hearing, December 11, 2012, it is not unreasonable to conclude that the Respondent did not remember Mr. Bobb being present at the time of the brief discussion between Mr. Jodway and Mr. Harding. It was not, therefore, a lack of diligence that prevented the evidence from being available at the hearing;
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> 2. The evidence is clearly intended to address a single, discrete fact;
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> 3. There is no prejudice to the Law Society in allowing the Respondent to call this evidence;
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> 4. The evidence is relevant because it may assist the Panel in resolving the only disputed fact in this case, although whether it would affect the outcome cannot be determined without hearing the evidence and considering submissions; and
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> 5. Calling evidence of one additional witness who will testify on one discrete matter in dispute can be done without significant disruption to the process and therefore should not affect the orderly and expeditious conduct of this hearing.

[11] Accordingly, the application of the Respondent is hereby granted with a direction from the Panel that the Hearing be reconvened as soon as possible to hear the evidence of Mr. Bobb.