2014 LSBC 53
Report issued: November 3, 2014
Oral reasons: July 7, 2014
Citation issued: November 13, 2012

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

DOUGLAS WARREN WELDER

RESPONDENT

DECISION OF THE HEARING PANEL ON APPLICATION TO ADJOURN

Hearing date:	July 7, 2014
Panel:	Lynal Doerksen, Chair Graeme Roberts, Public representative Sandra Weafer, Lawyer
Counsel for the Law Society:	Jaia Rai
Appearing on his own behalf:	Douglas Welder

[1] On the Monday morning of the first day of this hearing the Respondent applied to this Panel for an adjournment. The application came with very little notice. Law Society counsel was advised the previous Thursday and the Law Society Hearing Administrator advised this Panel of this application late on Friday afternoon by email. Due to the lack of notice a chambers Bencher was unable to be assigned to address the application, and thus the application came to this Panel. At the conclusion of the application for the adjournment, this Panel denied both the Respondent's application for an adjournment and his other applications. These are the reasons for that decision.

[2] The Respondent is currently facing a citation issued on November 13, 2012 that is attached to these reasons in an Appendix.

[3] In a letter dated July 4, 2014, the Respondent sought the following:

1. The Hearing of this Citation be adjourned on terms that are set out in this letter;

2. My entire file with the Law Society since May 1, 2007 be produced to me for inspection and copying any and all relevant information, notes, correspondence, committee minutes, information considered by any committees since May 1, 2007 or documents in the possession of the Law Society that relate to the writer since May 1, 2007;

3. The entire contents of the Law Society file be made available for my inspection and copying within one month;

4. To this extent, I understand that the Law Society has set up a committee that deals with all matters concerning the writer and I would like to inspect and copy all of their proceedings, including the resolution(s) of the Law Society that have established this committee or sub-committee;

5. That the Law Society provide me with the details of the investigations taken place concerning the writer since May 1, 2007 in regards to all complaints or investigations since that date. I am also including in my request all material and notes of discussions of the discipline committee or this sub-committee since May 1, 2007;

6. I am asking for production of the entire file of the Law Society in regards to a Conduct review that took place on November 20, 2009 and April 22, 2010 which was the subject ot [sic] Conduct Review Committee reports made on December 9, 2008 and April 23, 2010;

7. The Time for Response to the Notice to Admit dated May 21, 2014 be extended until two weeks after the Law Society has made the contents of the writer's file with the Law Society available for inspection by thwe [sic] writer. To this extent, I am asking that the time for the writer to Respond to the Notice to Admit be extended by agreement with the Law Society until the end of the two week period I am requesting after production of the writer's file with the Law Society;

8. Under Rule 4-25, the writer is requesting access to all of the proceedings of the Law Society since May 1, 2007 as they relate to the writer;

9. To the extent necessary for the Law Society to comply with the writer's requests herein, I am making a request under Rule 4-26 for details of all of the circumstances that relate to the Citation issued November 13, 2012, including an explanation from the Law Society as to why this matter has not proceeded in an expeditious manner since the Citation was authorized on October 18, 2012;

10. I also am requesting that the Law Society either make available benchers Ken Walker and Stacy Kuiack for the hearing of this Citation or in the event that the Law Society refuses to confirm the attendance of Mr. Walker and Mr. Kuiack, then a Subpoena be issued to them to compel their attendance at the Hearing of this Citation. In the event that the Law Society declines to ensure the attendance of Mr. Walker and Mr. Kuiack, you can consider this request as being made under Rule 4-26. This request for the attendance of Mr. Walker and Mr. Kuiack is based upon the fact that they have material evidence that is relevant to the Respondent being able to make a full answer and defence to the allegations made in the Citation.

[4] The Law Society opposes the application and the Respondent's other requests. The Law Society sets out the numerous pieces of correspondence that were sent to the Respondent in relation to this matter. Specifically:

(a) Letters and emails from Law Society counsel to the Respondent dated:

i. November 22, 2012 – a letter of introduction by Law Society counsel;

ii. December 10, 2012 – a letter setting out the Law Society's position;

iii. December 28, 2012 – a letter advising that Law Society counsel is on holidays;

iv. July 23, 2013 – a letter inquiring if the Respondent has counsel;

v. November 4, 2013 – disclosure in electronic form with a 55-page paper index listing 1,094 documents;

vi. January 29, 2014 – a letter inquiring of the Respondent's available hearing dates and advising that a Notice to Admit will be forthcoming;

vii. two letters on May 21, 2014 – the Notice to Admit and further disclosure;

viii. June 18, 2014 – a letter noting that the Respondent has not replied to the Notice to Admit;

ix. June 30, 2014 – an email advising the Respondent of the procedure counsel intends to follow at the discipline hearing;

(b) Emails from the Law Society Hearing Administrator to the Respondent dated February 12, 2014; February 17, 2014; March 3, 2014 and a couriered letter dated March 14, 2014; and

(c) An affidavit of service showing that the Respondent was personally served with the Notice of Hearing by a process server on March 25, 2014.

[5] Every letter from Law Society counsel was also sent by email, and delivery of disclosure and service of the Notice to Admit was done by courier. Law Society counsel received no response from the Respondent. In fact, Law Society counsel initiated contact with the Respondent by telephone on July 3, 2014, just the week prior to the hearing.

[6] The Law Society's Hearing Administrator's correspondence concerns the scheduling of the hearing. In the correspondence, the Respondent agrees to the hearing being scheduled for July 7, 2014.

[7] The Respondent explained to this Panel that he required the adjournment as he had not properly prepared and had only looked at the materials sent by the Law Society the week before this hearing. He agreed that he received the disclosure and the Notice to Admit. He accepted full responsibility for this lapse. The Respondent submitted that there was no prejudice to the Law Society if the adjournment was granted as he had recently started serving a one-year suspension ordered by another hearing panel.

[8] The Respondent made further representations to this Panel and elaborated on his various requests. His submissions are summarized below.

The sealed envelope

[9] The Respondent stated that a computer hard drive had been seized by the Law Society from his law office at the beginning of the investigation into this matter in May of 2007. There was an issue about the propriety of the seizure. The

Respondent and the Law Society agreed to make a mirror-image copy of the hard drive and place the copy into an envelope with a letter attached and leave the envelope with the Sheriff Service at the Kelowna courthouse.

[10] In October of 2010 the Law Society made an application to the court to have access to the Respondent's hard drive. In December 2010 the Respondent and Law Society counsel went to examine the sealed envelope and discovered it had been opened. The Respondent advises that he was told by the Sheriff that someone from the Law Society called the Sheriff's office and asked the Sheriff to locate the envelope and open it. The Respondent advises that Law Society counsel was unable to determine if anyone called from the Law Society to the Sheriff. The Sheriff could not provide a name of who called.

[11] There is no suggestion or evidence put forward by the Respondent that anyone actually attended the Sheriff's office and opened the envelope or that the envelope left the custody of the Sheriff. In fact, the Sheriff advised the Respondent that the envelope was kept in a locked cabinet and only the Sheriff had a key to it (transcript p. 12, line 25 – p. 13, line 1). There is no suggestion that the hard drive has been tampered with. The Respondent provided a photograph of the opened envelope, but there is no proof that anyone from the Law Society contacted the Sheriff's office.

[12] The Respondent asserts that, since the hard drive was used in the investigation that led to a citation and this hearing, he needs to know what the Law Society knows about this situation.

> I am saying that in order to properly defend myself I need access to that information, who was it, what were their instructions. Surely that person would have been aware of the fact that this letter was taped to the outside of it, and I need to know who instructed the person to make the call or did they make it on their own. In any event, I need proper disclosure of what happened that day, and *there's nothing in the material from the Law Society that even refers to this*. (transcript p. 10, line 10-19)

[emphasis added]

And further at page 15 of the transcript, lines 16-20:

> Based upon the fact that this hard drive was opened and *there's no notes and there's nothing in the Law Society's file disclosing any of it* I'm asking that all of my file, all of it, be produced from May 1 of 2007… .

[emphasis added]

[13] The emphasis added to the above statements of the Respondent are to show that the Respondent has been through the disclosure material provided by the Law Society.

The "Committee"

[14] The Respondent then asserted that there is a special committee at the Law Society that meets on a regular basis "that has control over the Law Society's dealings with me." (transcript p. 15, lines 11-12) The Respondent asserts that a Law Society staff member, Mr. Caldwell, told him this. "He sat in that chair in a hearing one day and told me that they had set up a committee." (transcript, p. 16, lines 7-9). Again, the Respondent notes that, "There's no disclosure in any of the material from the Law Society about the committee, about its meetings, about who's on it or about what their role is." (Transcript p. 15, lines 14-17)

[15] The Respondent presented no transcript of Mr. Caldwell's statement, nor did he seek to put forward any evidence from Mr. Caldwell or call him as a witness.

Disclosure of everything

[16] The Respondent asks that:

> The Law Society provide me with details of the investigations that have taken place concerning me since May the 1st of 2007 in regards to all complaints or investigations ongoing at that time or since that time. And I'm also including in that request all material and notes of discussions of the Discipline Committee or this subcommittee, whatever it's called, since May of 2007 as they relate to me. I'm not looking for anybody else. I'm just looking at my own stuff. (transcript p. 16, line 10-20)

[17] The Respondent again referred to the special committee that he believes has been set up to control the investigations of him as the basis for this request.

A prior Conduct Review

[18] The Respondent asks for the disclosure of two reports of a Conduct Review Sub-Committee dated December 9, 2009 and April 23, 2010. Although the Respondent asserts that these reports are "relevant" to this case, he does not elaborate and provide details as to why these reports are relevant. (transcript, p. 18, line 11-13)

Explanation as to delay

[19] The Respondent seeks an explanation from the Law Society as to why this matter has taken so long to proceed to a hearing. The Respondent does not assert that he is prejudiced in any way by this delay, or that some evidence or a witness is unavailable because of the delay.

The calling of two Benchers to testify

[20] Finally, the Respondent asks that two Benchers be made available for the Respondent to cross-examine or, alternatively, that this Panel issue subpoenas for their attendance. When asked what the relevance of their evidence to this hearing would be, the Respondent replied that they did not have direct evidence relevant to the facts of this case:

> … but they have evidence that this Panel needs to hear that, if it is believed will be – will put this hearing at an end, and I need them to be here so that I can ask them the questions. I know what their evidence should be. (transcript p. 21, line 11-16)

[21] However, the Respondent did not elaborate on what that evidence would be.

RELEVANT RULES OF THE LAW SOCIETY

[22] Rule 4-20.1 *[Notice to admit]* states:

(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

(a) be made in writing in a document clearly marked "Notice to Admit" and served in accordance with Rule 10-1 *[Service and notice]*, and

(b) 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.

(3) A request may be made under subrule (1) by a party that has made a previous request under that subrule.

(4) A respondent or discipline counsel who receives a request made under subrule (1) must respond within 21 days by serving a response on the other party in accordance with Rule 10-1 *[Service and notice]*.

(5) The time for response under subrule (4) may be extended by agreement of the parties or by an order under Rule 4-26.1 *[Preliminary questions]* or 4-27 *[Pre-hearing conference]*.

(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:

(a) an admission of the truth of the fact or the authenticity of the document attached to the request;

(b) 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 5-9 *[Costs of hearings]*.

(9) A party who has admitted or is deemed to have admitted the truth of a fact or the authenticity of a document under this Rule may withdraw the admission with the consent of the other party or with leave granted on an application

(a) before the hearing has begun, under Rule 4-26.1 *[Preliminary questions]* or 4-27 *[Pre-hearing conference]*, or

(b) after the hearing has begun, to the hearing panel.

[23] Rule 4-25 *[Demand for disclosure of evidence]* states:

…

(2) At any time after a citation has been issued and before the hearing begins, a respondent may demand in writing that discipline counsel disclose the evidence that the Society intends to introduce at the hearing.

(3) On receipt of a demand for disclosure under subrule (2), discipline counsel must provide the following to the respondent by a reasonable time before the beginning of the hearing:

(a) a copy of every document that the Society intends to tender in evidence;

(b) a copy of any statement made by a person whom the Society intends to call as a witness;

(c) if documents provided under paragraphs (a) and (b) do not provide enough information, a summary of the evidence that the Society intends to introduce;

(d) a summary of any other relevant evidence in discipline counsel's possession or in a Society file available to discipline counsel, whether or not counsel intends to introduce that evidence at the hearing.

[24] Rule 4-26 *[Application for details of the circumstances]* states:

(1) Before a hearing begins, the respondent may apply for disclosure of the details of the circumstances of misconduct alleged in a citation by delivering to the Executive Director and discipline counsel written notice setting out the substance of the application and the grounds for it.

(2) The Executive Director must promptly notify the President of an application under subrule (1).

(3) If the President is satisfied that an allegation in the citation does not contain enough detail of the circumstances of the alleged misconduct to give the respondent reasonable information about the act or omission to be proved, and to identify the transaction referred to, the President must order discipline counsel to disclose further details of the circumstances.

(4) Details of the circumstances disclosed under subrule (3) must be

(a) in writing, and

(b) delivered to the respondent or respondent's counsel.

(5) The President may

(a) designate another Bencher to make a determination under subrule (3), or

(b) refer the application to a prehearing conference.

[25] Rule 5-5 *[Procedure]* states, in part:

(1) Subject to the Act and these Rules, the panel may determine the practice and procedure to be followed at a hearing.

…

(3) The applicant, respondent or counsel for the Society may call witnesses to testify.

LAW SOCIETY RESPONSE

[26] Law Society counsel opposes the application for an adjournment and the other requests, such as the request for further disclosure or the calling of the two Benchers as witnesses. The basis for the Law Society's position is:

(a) The Respondent has not made reasonable efforts to avoid an adjournment;
(b) The Respondent's application materials disclose no proper basis for an adjournment; and
(c) An adjournment on the facts of this case is contrary to the public interest in commencing hearings in a timely way.

[27] The Law Society asserts that the Respondent has been provided full disclosure of all that is relevant to the citation before this Panel. The evidence shows that the Respondent received this disclosure by courier eight months before the commencement of this hearing, on November 6, 2013. The Law Society says that the Respondent's requests are neither timely nor relevant and that there is no adequate explanation by the Respondent for this delay in seeking further disclosure.

[28] With respect to the Notice to Admit, the Respondent has not made an application to withdraw any of the deemed admissions.

[29] With respect to the allegation of delay, the Law Society asserts that "the time it has taken to commence the hearing of this matter is not unreasonable given the nature of the allegations." Other than the passage of time "the Respondent has not shown any prejudice to his ability to make full answer and defence."

[30] With respect to the application to have Messrs. Walker and Kuiack called to testify before this Panel, the Law Society points out that Mr. Kuiack was a member of the Discipline Committee that authorized the citation that is before this Panel, and any information he has is privileged and inadmissible. Further, evidence related to prior conduct reviews is not relevant or admissible at this stage of the hearing.

[31] In sum, the Law Society describes the Respondent's application as nothing more than a "fishing expedition" and that he sat and "lay in the weeds" to make this application on the morning of this hearing.

ANALYSIS

[32] The Panel is mindful of the need to proceed with and ensure a fair hearing. What is a fair hearing will depend on the circumstances of the given case and the various factors that may be at issue. See *Howatt v. College of Physicians and Surgeons of Ontario*, [2003] OJ No. 138, at paragraph 31:

> There is no doubt that the right to an adjournment before an administrative tribunal, including a disciplinary body, is not an absolute right. In each case, whether or not the adjournment should be granted must be considered in the light of the circumstances, having regard to the right of the applicant to a fair hearing weighed against the obvious desirability of a speedy and expeditious hearing into charges of professional misconduct. When balancing these two factors, the right of the applicant to a fair hearing must be the paramount consideration.

[33] The various factors to consider in determining if an adjournment is appropriate are found in Macaulay & Sprague, *Practice and Procedure Before Administrative Tribunals* (Toronto: Thomson Carswell, 2004), at p. 12-148.41 to 12-148.42:

(a) the purpose for the adjournment …;
(b) has the participant seeking the adjournment acted in good faith and reasonably in attempting to avoid the necessity of an adjournment;
(c) the position of the other participants and the reasonableness of their actions;
(d) the seriousness of the harm resulting if the adjournment is not granted;

(e) the seriousness of the harm resulting if the adjournment is granted …;
(f) is there any way to compensate for any harm identified;
(g) how many adjournments has the participant seeking the adjournment been granted in the past;

…

[34] Applying the above factors to this case, this Panel finds that the only factor in the Respondent's favour is that he has not sought any prior adjournments. All other factors are not favourable to his application.

[35] Even the stated purpose of the application for an adjournment — to seek further disclosure — rings hollow with this Panel. The Respondent never suggested that:

(a) he does not know the case he has to meet, or
(b) crucial evidence is unavailable to him, or
(c) a crucial witness is unavailable to him, or
(d) his ability to defend himself is impaired or prejudiced.

[36] The Respondent has provided no evidence to show that any of the additional disclosure sought is relevant to this case. Indeed, the Respondent has not satisfied this Panel that some of the additional disclosure sought, such as the special committee, even exists. At this late stage we cannot simply accept the Respondent's word that the additional disclosure is relevant because he says so. More than hearsay evidence is required.

[37] When questioned by this Panel as to his failure to respond to the June 18, 2014 letter and email from Law Society counsel about the Notice to Admit and why he did not immediately make an application to adjourn this hearing or set aside the Notice to Admit, the Respondent explained that "it was too late … I had missed the deadline," and "I was dealing with these other issues that resulted from my suspension." (transcript p. 55, lines 10 - 18). The Respondent also stated, on at least two occasions, that he was on a "golf weekend" around this time (transcript p. 26, line 7; p. 56 lines 1-2).

[38] The Respondent may prioritize his life as he wishes, but this Panel has difficulty understanding how his participation in a golf weekend in the face of an impending Law Society hearing assists the Respondent in this adjournment application. If, as the Respondent said, he opened the disclosure material a week before the hearing, why did he not immediately contact the Law Society about seeking an adjournment? A chambers Bencher could have been assigned to deal with this application in advance of this hearing. The Respondent advised in his submissions he has recently been through another discipline hearing, he therefore knows full

well the commitments and time required of all the participants in a discipline hearing, and he showed complete disregard for this. By failing to at least attempt to seek an adjournment immediately after receiving the letter from the Law Society on June 18, 2014, the Respondent did not act in good faith or reasonably in attempting to avoid the necessity of a last minute adjournment application.

[39] That the Respondent is willing to accept the blame for the ensuing delay if this matter is adjourned is almost meaningless given his actions prior to the start of this hearing. It is this Panel's view that to allow an adjournment on the basis requested by the Respondent would do more harm to the administration of justice than to not allow the adjournment.

[40] Law Society counsel provided a case that has some parallels to the case at hand: *Law Society of Upper Canada v. Abrahams*, 2014 ONLSTH 64. In *Abrahams*, a lawyer appearing before a discipline panel sought a last minute adjournment of the hearing and the setting aside of admissions deemed to have been made in a process similar to the Notice to Admit in this jurisdiction. Three paragraphs are pertinent here:

> [22] I recognize that, in a case like this, the proceeding may have a significant impact on the licensee and this is an important factor. Given the nature of the allegations, he may lose his licence to practise law.
>
> [23] At the same time, there are other important values that must be considered. The public protection mandate of the Tribunal requires that the administration of justice move forward in a timely and expeditious manner. This is true even though the licensee is not practising law; the public, the profession and complainants expect that matters before the Law Society Tribunal will be dealt with in a timely way.
>
> [24] Minimizing adjournments is also important to effective administration of the Tribunal. All adjudicators at the Law Society Tribunal, other than the Chair, are part-time. When a hearing is scheduled, they set aside time and prepare for the hearing when materials are filed in advance. When a hearing is adjourned at the last minute, their time often cannot be used for other matters and a new panel must be found for another date.

[41] With respect to the Respondent's application to set aside the Notice to Admit, we note that the Respondent has not specified which facts in the Notice to Admit he takes issue with or the evidence he would call to refute or qualify them. The purpose of the Notice to Admit is clear: to save time and make the hearing process

more efficient. The Respondent has had ample time to review the material and respond to it. In any event, as is clear in the Respondent's submissions, he has reviewed the material in enough detail to explain to this Panel what he believes is missing in the disclosure. He could have explained what he disputes in the Notice to Admit but did not do so. Further, to set aside the Notice to Admit would require an adjournment as the Law Society is in no position to proceed with the hearing at this point, as the witnesses would need to be re-subpoenaed. There can be no doubt that the Respondent knows this.

[42] However, as was done in *Abrahams*, this Panel does allow the Respondent to withdraw the admissions as set out in paragraphs 364, 366, 368 and 370 of the Notice to Admit. These paragraphs do not admit any facts per se, but are an admission of professional misconduct, which is a conclusion that is for this Panel to decide.

[43] With respect to the Respondent's request to have the Law Society explain why this matter has taken so long, we note that he has not sought an explanation earlier. In any event, the Respondent has not explained how this factor is relevant to the case at hand. Even if we agree that this matter has taken too long, the Respondent has not explained how this has prejudiced his ability to make full answer and defence. The mere assertion that a matter has taken too long because of the passage of time is not in and of itself sufficient to cause this hearing to be delayed further.

[44] Finally, the Respondent's application to have Messrs. Walker and Kuiack subpoenaed is without any merit. We agree with the Law Society on this point that it has not been shown that their evidence is relevant and admissible.

CONCLUSION

[45] The Respondent knew full well the consequences of not responding to the Law Society's correspondence, and we agree with the Law Society's submission on this point: the Respondent "lay in the weeds" and hoped to delay this hearing with his woefully late application. The myriad requests by the Respondent upon the start of this hearing appear to be nothing short of an attempt to create a "smokescreen" that would be difficult to see through and therefore require of this Panel an adjournment. To grant an adjournment at this stage of the hearing on the basis put forward by the Respondent would undermine the purpose of the "Notice to Admit" and bring discredit to this hearing process. As stated at the beginning of these reasons, the applications of the Respondent, including the application for an adjournment of this hearing, are denied.