2017 LSBC 34
Decision issued: September 26, 2017
Citation issued: October 20, 2016

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

MALCOLM HASSAN ZORAIK

RESPONDENT

DECISION OF THE HEARING PANEL
ON FACTS AND DETERMINATION

Hearing date:	July 27 and 28, 2017
Panel:	Sharon Matthews, QC, Chair Satwinder Bains, Public representative Sandra Weafer, Lawyer
Discipline Counsel:	Jaia Rai
Counsel for the Respondent:	Russell S. Tretiak, QC

INTRODUCTION

[1] Mr. Zoraik was convicted in 2010 of public mischief and fabrication of evidence in relation to the fabrication and delivery to the Victoria courthouse of a letter that falsely alleged jury tampering in a matter where Mr. Zoraik was counsel for the plaintiff. Mr. Zoraik admits this allegation and admits that it constitutes professional misconduct. The sole remaining issue is the impact, if any, of the delay between the commencement of the Law Society investigation into this matter and the hearing of the citation. In particular, Mr. Zoraik alleges that he is entitled to a stay of the disciplinary proceedings due to unreasonable delay.

BACKGROUND TO CRIMINAL CONVICTIONS

[2] In April 2009 Mr. Zoraik acted for the plaintiff in a personal injury lawsuit. This was a jury trial where liability was contested. On April 28, 2009 the jury returned a verdict for the defence, after about 20 minutes of deliberation. That same day Mr. Zoraik, on behalf of the plaintiff, applied to set aside the verdict due to the brevity of the deliberations. That application was adjourned to May 13, 2009 and later to July 30, 2009.

[3] On May 6, 2009 an envelope was placed on a counter in the Sheriff's office at the Victoria courthouse. The envelope contained a letter purportedly written by the husband of a juror who claimed that his wife, the juror, had been offered money for her vote. The allegations in the letter were false. Mr. Zoraik was the author of the letter and placed the letter in the Sherriff's office.

[4] Mr. Zoraik was interviewed by Victoria police on June 18 with respect to the letter. He feigned any knowledge of the letter. He then sought to obtain the Victoria police file with respect to the matter, ostensibly for use in his application to set aside the jury finding. In the Agreed Statement of Facts filed in this matter, Mr. Zoraik agrees that he knew that the letter was likely to become evidence in the application to set aside the jury finding, and he agrees that he sought to have the court rely on the letter.

[5] Mr. Zoraik was charged on July 20, 2009 with public mischief, obstruction of justice and fabrication of evidence. He was found guilty on all counts on June 14, 2010, and on November 2, 2010 he was sentenced to a conditional sentence order of 18 months. (A judicial stay was entered on the obstruction of justice charge applying *R. v. Kienapple*, [1975] 1 SCR 729). An appeal to the BC Court of Appeal was dismissed on June 26, 2012.

[6] Mr. Zoraik admits that the findings of the BC Court of Appeal are conclusive proof of the findings made by the court. The Court of Appeal found that the convictions were "firmly grounded in compelling evidence which, when accepted by the judge, formed a solid evidentiary basis for the convictions." (*R. v. Zoraik*, 2012 BCCA 283 at para. 38)

BACKGROUND TO DISCIPLINARY PROCEEDINGS

[7] In order to assess the argument with respect to delay, it is necessary to go through the history of this matter in some detail.

[8] The Law Society's involvement in this matter commenced on July 20, 2009 when it was informed that Mr. Zoraik had been indicted on criminal charges. On June 16, two days after the conviction, Mr. Zoraik signed an undertaking not to practise law. After the BC Court of Appeal decision, Mr. Zoraik was told that the matter would be referred to the Discipline Committee at the September, 2012 meeting. Mr. Zoraik sought a brief extension of time in order to make submissions. He made

submissions on October 5, 2012, and on October 18, 2012 the Discipline Committee considered the matter and decided to refer the matter to the Benchers pursuant to Rule 4-40.

[9] Rule 4-40, as it then was, (now Rule 4-52), is a very seldom-used provision of the Law Society Rules, which allowed for a summary process for suspension or disbarment of a lawyer if the lawyer was convicted of an indictable offence. In Mr. Zoraik's case, submissions were exchanged and an oral hearing in front of nine benchers was held on January 25, 2013.

[10] At the hearing before the Benchers, counsel for Mr. Zoraik noted the unusual nature of the process. He argued that reliance on Rule 4-40, insofar as it permitted only either disbarment or suspension, was contrary to principles of fundamental justice as enshrined in s. 7 of the *Charter of Rights and Freedoms*. It was however, unclear if he was seeking any relief based on the *Charter* as a result of the nature of the hearing.

[11] On May 30, 2013, the Benchers held that Mr. Zoraik be disbarred. In their reasons, the Benchers noted that Rule 4-40 was an unusual process, as usually there would be the issuance of a citation, followed by a determination of the facts and disposition by a hearing panel, followed by a penalty hearing.

[12] Mr. Zoraik sought a review of this decision by the BC Court of Appeal, who determined that the matter should be referred back to the Benchers for a hearing. The Court of Appeal specifically made no determination on whether Rule 4-40 was compliant with the *Charter*. They found:

> [26] Whether or not the Benchers have the authority to grant *Charter* remedies, they had the obligation, in this proceeding, to consider the *Charter* argument advanced by the appellant. They failed to do so.
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> [27] In the circumstances of this case and in light of the state of the record, I do not consider it appropriate for this Court to determine whether the appellant's *Charter* rights were violated. There is no determination as to whether, or the extent to which, the Benchers can entertain a *Charter* challenge. There was no consideration of the implication of s. 7 of the *Charter* to the proceeding at hand. On appeal, the appellant seeks an order striking down Rule 4-40, but the record lacks the type of evidence that is crucial to such an inquiry, such as information relating to the policy and purpose of the rule or the legislation that authorizes it.
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> *Law Society of BC v. Zoraik* 2015 BCCA 137

[13] After the BC Court of Appeal reasons, in March 2015, it was not clear what process should be followed given that a number of the Benchers who took part in the

original decision were no longer Benchers. Counsel for Mr. Zoraik and counsel for the Law Society were not in agreement as to the appropriate course of action in the circumstances. Over the next 14 to 16 months there was a series of communications between counsel for the Law Society and Mr. Zoraik where questions of the proper process were raised. In the circumstances, there is no need to look at this correspondence microscopically and determine who was responsible for which portions of this delay.

[14] Ultimately, on June 24, 2016, the Benchers determined to return the matter to the Discipline Committee to consider action pursuant to Rule 4-4. On September 29, 2016 the Discipline Committee met, considered the matter, and directed that a citation be issued. The hearing of the citation proceeded on July 27 and 28, 2017.

ARGUMENT AT THE HEARING OF THE CITATION

[15] At the hearing of this matter, counsel for Mr. Zoraik argued that the discipline proceedings against Mr. Zoraik should be stayed or alternatively, that the penalty should be reduced, as a result of excessive delay. As this is only the facts and determination stage of the proceedings, we did not hear, and will not address, any argument with respect to penalty.

TEST FOR DELAY

[16] Counsel for Mr. Zoraik submitted that this Panel, in assessing whether there has been inordinate delay, should be using the test set out in the recent Supreme Court of Canada decision of *R. v. Jordan*, 2016 SCC 27. In that case, the Supreme Court of Canada set out a new framework for determining whether a criminal case should be stayed on the basis of excessive delay. The Court clearly expressed that the framework is an s. 11(b) framework. The Court set presumptive ceilings beyond which delay is presumed to be unreasonable. These ceilings are 18 months for criminal trials in provincial courts and 30 months for criminal trials in superior courts. Significantly, the Court determined that the absence of prejudice could not be used to justify delays beyond the presumptive ceiling. Applying *Jordan* in the context of this hearing would mean that a delay beyond a certain threshold would be presumed to be excessive and warrant a stay of proceedings, notwithstanding the existence or lack of prejudice.

[17] *Jordan* is a criminal law case. It is not a case decided pursuant to s. 7 of the *Charter*, nor is it an administrative law case. It is a case decided according to s. 11(b) of the *Charter*, which guarantees an individual charged with an offence a trial within a reasonable time. A careful reading of *Jordan* shows that it is concerned solely with the criminal justice system. It does not address at all the issue of administrative tribunals, or the longstanding law from the Supreme Court of Canada pertaining to the circumstances in which an administrative tribunal hearing should be stayed as a result of excessive delay. Significantly, the Supreme Court did not either overrule or comment upon the well-established test from *Blencoe v.*

British Columbia (Human Rights Commission), [2000] 2 SCR 307. As the Supreme Court stated in *Blencoe*, at para. 88:

> The qualifier to this right [to be tried within a reasonable time] is that it applies to individuals who have been "charged with an offence". The s. 11(b) right therefore has no application in civil or administrative proceedings. This Court has often cautioned against the direct application of criminal justice standards in the administrative law area. We should not blur concepts which under our *Charter* are clearly distinct. The s. 11(b) guarantee of a right to an accused person to be tried within a reasonable time cannot be imported into s. 7. There is no analogous provision to s. 11(b) which applies to administrative proceedings, nor is there a constitutional right outside the criminal context to be "tried" within a reasonable time.

[18] That is not to say that the comments of the SCC in *Jordan* are irrelevant to administrative tribunals. Administrative tribunals, like criminal courts, should be mindful to avoid unnecessary delay, or a "culture of complacency" in order to maintain public confidence in the administration of justice. However, *Jordan* has not changed the legal test for determining when an administrative hearing should be stayed on the basis of delay.

[19] The test for delay in *Blencoe* requires the applicant seeking a stay of proceedings, in this case Mr. Zoraik, to establish that the delay constitutes an abuse of process such that the duty of fairness has been breached, or alternatively that the prejudice suffered as a result of the delay is significant. The onus is on the applicant to show an inordinate or unacceptable delay that has either impaired the ability of the applicant to make full answer and defence, or has caused significant prejudice in the form of duress and stigma. (*Christie v. Law Society of BC*, 2010 BCCA 195 at para. 23)

APPLICATION OF *BLENCOE*: WAS THE DELAY EXCESSIVE?

[20] The first step in this analysis is to determine whether there has been an excessive delay. Mr. Zoraik asks that we consider the time from the beginning of the Law Society investigation (July 2009) until the conclusion of this hearing in July, 2017. It is not, however, that simplistic an exercise. Without engaging in the sort of "complicated micro-counting" that the SCC in *Jordan* seeks to avoid, it is still necessary to highlight some of the important facts of this case, in order to deal with the question of delay in context. They are:

(a) The Law Society investigative file was opened when the criminal charges were laid in July, 2009. Mr. Zoraik's counsel requested that the Law Society hold its investigation in abeyance pending the outcome of the criminal charges. This request was granted in July, 2009 on the

undertaking of Mr. Zoraik not to raise any argument with respect to delay associated with the abeyance;

(b) Mr. Zoraik was convicted in June, 2010, sentenced in November 2010 and immediately filed an appeal;

(c) Mr. Zoraik's appeal was dismissed in June 2012;

(d) After submissions from Mr. Zoraik the Discipline Committee referred the matter to the Benchers pursuant to Rule 4-40 in October, 2012;

(e) Both parties made written submissions, and an oral hearing was held on January 25, 2013, and the Bencher decision disbarring Mr. Zoraik was issued in May, 2013;

(f) Mr. Zoraik appealed to the BC Court of Appeal in June, 2013. The appeal was originally scheduled for October 2014. At the request of counsel for Mr. Zoraik the hearing was adjourned, and reset for February, 2015;

(g) The BC Court of Appeal issued reasons in March 2015. Although the BC Court of Appeal allowed the appeal on the basis that the Benchers did not deal with Mr. Zoraik's *Charter* argument, the court did not strike down Rule 4-40 or preclude the Benchers from relying on that summary process;

(h) From March 2015 to June 2016 both the Law Society and counsel for Mr. Zoraik engaged in correspondence and discussion concerning the appropriate way to deal with the BC Court of Appeal order returning the matter to the Benchers, given that three of the original decision makers were no longer Benchers. While this period was lengthy, given the unusual circumstances and given the fact that some of this time was waiting for submissions from counsel for Mr. Zoraik, it cannot be said that this constituted an inordinate delay;

(i) In June 2016 the Benchers decided to remit this matter to the Discipline Committee to consider the issuance of a citation; and

(j) In September 2016 a citation was issued, and the hearing took place in July 2017.

[21] Counsel for Mr. Zoraik submits that the delay is excessive and that the Law Society should bear the consequences of pursuing a course of action (the Rule 4-40 process) that was, in his view, flawed from the outset. In our view, the amount of time that was expended by the pursuit of the Rule 4-40 process and the subsequent appeal should not be held against the Law Society. The Law Society pursued a process that was authorized by the Rules, and this process was not struck down by the BC Court of Appeal (although the BC Court of Appeal did find that the

Benchers should have considered the submissions on *Charter* relief). Although this prolonged the process, it does not create an unacceptable delay.

[22] With regard to the time this matter took from the conclusion of the BC Court of Appeal decision through to the hearing of the new citation, while we have avoided micro-counting and assigning blame, we have carefully looked at this time period to determine if it reaches the level of excessive in the circumstances. It is our view that the Law Society dealt with the matter appropriately from a time perspective. Periods of time lapsed while awaiting Mr. Zoraik's counsel to respond to communications from the Law Society. The Law Society granted appropriate accommodations to both requests for time and delayed responses from a busy senior practitioner. Some time was spent sorting through procedural new territory. Mr. Zoraik is critical of this and critical of the fact that his counsel was asked to respond to proposals regarding the procedural issues, but we do not accept that any of the requests made of him or input sought from him inappropriately caused delay. Importantly, there were no periods where the matter simply lapsed, no extended periods with no activity or where nothing was happening to move the case along. To borrow from *Jordan*, a culture of delay was not at play.

PREJUDICE

[23] In any event, Mr. Zoraik has not established any prejudice as a result of the delay. As set out above, the Supreme Court of Canada decision in *Jordan* does not change what the applicant needs to establish in order to seek a stay of administrative proceedings. Significant prejudice is still, pursuant to *Blencoe* and *Christie*, a required element.

[24] There is very little direct evidence of prejudice in this case. Mr. Zoraik did not testify. There was a letter from his wife where she sets out the financial and emotional difficulties they have experienced. It was written shortly after his conviction on the criminal charges and so is not apt or persuasive evidence as to prejudice caused by the Law Society proceedings which were, until that time, held in abeyance at his request. In this case, we accept that Mr. Zoraik has not been able to practise his profession. We do not, however, accept that this is solely as a result of the impending Law Society matter. Mr. Zoraik was convicted of very serious matters, which are the antithesis of what society expects from members of the legal profession. As the trial judge stated "they are actions so contrary to his oath, to his professional responsibility, that they remain what they are: planned actions, actions that can only be described as despicable." (Reasons for Sentence, paragraph 14) The prejudice that is alleged is tied back to the conviction as opposed to these Law Society proceedings. Even if we were to accept that there was some prejudice that can be attributed to these Law Society proceedings (he alleges this is preventing his application for admission to the Law Society of Upper Canada), it falls far short of the type or magnitude of prejudice required to grant a stay of the proceedings.

CONCLUSION ON DELAY

[25] Although this matter has taken some time for the citation to be issued and the hearing to take place, it does not, in all the circumstances amount to an excessive delay. Mr. Zoraik has not met the very heavy burden on him to show that he has been significantly prejudiced by the amount of time it has taken for this matter to come to hearing. His application for a stay of these disciplinary proceedings is dismissed.

ADVERSE DETERMINATION

[26] Having heard submissions from counsel for the Law Society on the two options for adverse determination proposed in the citation, namely professional misconduct or conduct unbecoming a lawyer, having been apprised of the agreement from counsel for Mr. Zoraik that, subject to his arguments on delay, the facts support a finding of professional misconduct, and having declined to dismiss the citation based on delay, we make an adverse determination of professional misconduct. Mr. Zoraik's conduct was a marked departure from that the Law Society expects from lawyers (the test for professional misconduct oft cited from *Law Society of BC v. Martin*, 2005 LSBC 16).