2022 LSBC 38
Hearing File No.: HE20190068
HE20190069
Decision Issued: October 24, 2022
Citation Issued: November 5, 2019

THE LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL

HEARING DIVISION

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

AND:

TROY JOHN DUNGATE
AND
TREVOR SCOTT DUNGATE

RESPONDENTS

DECISION OF THE MOTIONS ADJUDICATOR ON APPLICATIONS FOR BIAS AND DISCLOSURE

Hearing dates:	March 31, 2022 May 5, 2022
Written submissions:	May 24, 2022 June 3, 9, 16, 22 and 24, 2022
Motions Adjudicator:	Michael F. Welsh, KC
Discipline Counsel:	Michael D. Shirreff and Jessie I. Meikle-Kahs
Appearing on their own behalf:	Troy John Dungate and Trevor Scott Dungate

DM3755620

[1] This multi-pronged set of pre-hearing applications is the fourth brought by the Respondents. The previous three are reported at 2020 LSBC 60, 2021 LSBC 10 and 2021 LSBC 21. I preface my dealing with each application to say that all are dismissed.

[2] The following is a truncated set of facts from which the citation arises. It provides background to understand the applications.

[3] 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 improperly charged disbursements (the "Original Investigation"). They retained a lawyer ("AB") to represent them, but following a fee dispute, they 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, the Respondents 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 in the Original Investigation by way of letter to the Respondents dated February 2, 2016 (the "Closing Letter"). The accuracy of what the Respondents 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 in the Original Investigation and that they were not yet required to advise AB of the Original Investigation closure.

[4] In their applications, the Respondents sought the following relief (in the order presented):

BIAS APPLICATION

(a) That I find there is a reasonable apprehension of bias of DK, the investigator in this matter, and that DK did not conduct a fair, impartial and unbiased investigation or comply with the basic principles of natural justice and procedural fairness.

(b) That I order a stay or rescission of the citation or, alternatively, order that:

(i) the opinion letter from DK to the Discipline Committee (the "Opinion") be disclosed to the Respondents; and

(ii) the Respondents be given a reasonable period of time to review the Opinion, correct any errors, and make submissions to the Discipline Committee in support of a request that the citation be rescinded under Rule 4-17(3) and substituted with another decision under Rule 4-4(1).

(c) In the further alternative, I order that the citation be referred back to the Discipline Committee with the following recommendations:

(i) that the Discipline Committee give full consideration of the issue of bias and whether a full, complete and unbiased investigation was conducted in accordance with the principles of natural justice and procedural fairness;

(ii) that a new investigator who has no previous relationship with the complainant nor the Respondents be retained;

(iii) that the Discipline Committee rescind the citation under Rule 4-17(3) and substitute another decision under Rule 4-4(1); and/or

(iv) that the Discipline Committee consider disclosing the Opinion to the Respondents and provide the Respondents with a reasonable period of time to review the Opinion, correct any errors, and make submissions to the Discipline Committee in support of a request that the citation be rescinded under Rule 4-17(3) and substituted with another decision under Rule 4-4(1).

ABUSE OF PROCESS APPLICATION

(a) That I find that the Citation is an abuse of process of the Law Society Tribunal and as such should be stayed or rescinded.

FAILURE TO COMPLY WITH TRIBUNAL ORDERS APPLICATION

(a) That I determine that:

(i) the Law Society failed to comply with the order of the President made on December 14, 2020;

(ii) the Law Society failed to comply with paragraph [16](c)(i) of the order of the President's Designate made on March 9, 2021;

(iii) the Law Society failed to apply to amend or clarify the orders made on December 14, 2020 and on March 9, 2021; and

(iv) the Law Society has failed to provide the Respondents with the disclosure that they are entitled to.

(b) I order that:

(i) the citation is stayed and/or rescinded;

(ii) alternatively, that the citation is referred back to the Discipline Committee with the recommendation that the Discipline Committee rescind the citation under Rule 4-17(3) and substitute another decision under Rule 4-4(1);

(iii) in the further alternative, that:

(aa) the Law Society forthwith provide to the Tribunal for its review the sixty-seven (67) documents set out in the "List of Privileged Documents" to determine whether:

- any claims to privilege have been properly claimed; and

- any privilege claimed has been waived by implication;

(bb) the Law Society forthwith provide to the Respondents the sixty-seven (67) documents set out in the List of Privileged Documents unredacted and in their entirety; and

(cc) the Respondents be given a reasonable period of time to review the sixty-seven (67) documents set out in the List of Privileged Documents unredacted and in their entirety and to make submissions to the Discipline Committee in support of a request that the citation be rescinded under Rule 4-17(3) and substituted with another decision under Rule 4- 4(1).

LIF FILES APPLICATION

[5] The Respondents made a fourth application for production of the Legal Indemnity Fund ("LIF") files pertaining to the Original Investigation. The Law Society opposed this application at the hearing but by subsequent letter dated June 22, 2022, its counsel advised that, "[i]n an effort to move this matter forward, despite

remaining of the view that its position on this application [that the files are privileged and non-producible, and have not earlier been ordered produced] is principled and correct in law, the Law Society has decided at this stage that the most efficient course is to provide the LIF documents to the Dungates", and enclosed what it says are " … all of the documents the LIF group had that related to the investigation files and the communications from the Professional Conduct department."

[6] While Law Society counsel hoped and one would have thought that this resolved the LIF document application, the Respondents think otherwise, writing by email on June 24, 2022 that the list and the documents provided are not complete and noting what they say is apparently missing. As a result, I have to decide how this is to be addressed in light of the Law Society's position on the privileged status of the LIF files, but where it has disclosed all or at least some of them without prejudice to that position.

ANALYSIS

[7] Before addressing the applications, I note in passing that in an email dated June 16, 2022, counsel for the Law Society said he understood that the Benchers were to pass a change to the Rules at their July meeting that might affect certain issues in these applications. The Respondents took umbrage to this email as it was sent after the deadline for additional Law Society submissions on an issue I raised on my ability as motions adjudicator to issue stays of proceedings. No such rule changes have been made and so this is a moot matter.

Preliminary question on jurisdiction to order stays of proceedings

[8] Just after the conclusion of the May 5, 2022 hearing, the decision of a hearing panel in *Law Society of BC v. Harding*, 2019 LSBC 30 came to my attention and I sought further submissions from the parties on the applicability of the decision. That decision arose when the respondent applied under the former Rule 4-36 for a preliminary determination, prior to commencement of the hearing, of three questions, one of which was whether the citation could and should be stayed. The hearing panel determined that it could, as a preliminary question matter, order a stay prior to the hearing but in the circumstances, declined to do so.

[9] Counsel for the Law Society has consistently submitted that a motions adjudicator as opposed to a hearing panel has no statutory or rule power to order a pre-hearing stay, while the Respondents have argued the opposite. While these applications for stays were initiated under Rule 4-36, that rule, in the meantime, has been rescinded

and Rule 5-4.3 applies to preliminary questions. The two rules are similar but not the same.

[10] I have reviewed the submissions with care but have decided that I need not determine my statutory jurisdiction to issue a stay in the circumstances. Borrowing from the principle of judicial restraint, when a question need not be answered by a court in order to make a decision, I exercise adjudicative restraint, as I find an answer to this interesting jurisdictional issue is not necessary in this case. I do thank the parties for the time and effort they put into this issue I raised but have decided to leave it unaddressed. I now turn to each application in turn.

Bias application

[11] The factual basis on which the Respondents make this application is that it is clear from correspondence between them that the primary investigator, DK, an experienced and distinguished member of the BC Bar, was on a first name and friendly basis with the complainant, AB. DK and the Respondents were not acquainted. Further, they submit that DK misled them by stating in correspondence that DK sought to meet with them and would arrange an in-person meeting. That meeting never occurred and they submit that as DK only spoke with AB, the investigation was biased and unfair as DK was, consequently, close-minded in the investigation conclusions.

[12] The Respondents further submit that DK advised them that they were being investigated only for breach of undertaking and never mentioned an investigation for making false or misleading representations, which is the substance of the second allegation in the citation.

[13] The Respondents rely on *Shoan v. Canada (Attorney-General)*, 2016 FC 1003 to lay out the principles relating to investigative bias. There the court said that "[a]ctual bias need not be shown. The test this Court has applied to investigative bodies, such as the investigator here, is that they must not have a closed mind." It goes on to reference case law where courts say the investigator must maintain an open mind and not predetermine the issue (see paras. 45 to 53).

[14] The difficulty for the Respondents, on which they were questioned at the hearing, is that the record of correspondence between them and DK makes clear that they had, but did not take, the opportunity to speak with DK. In a letter to them of August 10, 2019, in reply to letters they wrote on May 23, 2019 and June 21, 2019 in which they set out their position that all that occurred between them and AB constituted privileged communications between lawyer and client that AB breached but they

would not discuss with DK, that they had breached no undertakings, and that they demanded DK investigate AB instead, DK said:

> As you have made your position in respect of the breach of undertaking allegation clear, I see no need to meet with you or request a further response. If you would like to provide a further response prior to my assessment of this complaint, you may do so by August 23, 2019.

They did not do so, nor did they request a meeting with DK. When asked in the hearing why not, they said that they believed it not fair to have to ask DK for a meeting after receipt of the August 10, 2019 letter, and that they thought DK understood the points they had made already.

[15] Further, they take the statement of DK that only the breach of undertaking was being investigated out of context. When DK initially wrote them on April 25, 2019 advising of the investigation and stating a desire to meet them, their reply of May 23, 2019, as noted, contained complaints about the process and that AB was abusing it and that it was AB, and not them, who should be investigated. In the reply of August 10, 2019 quoted earlier, DK told the Respondents that the scope of DK's investigation was the complaint made against them and that if they wished to file a formal complaint against AB, they could do so, but that it was not within DK's investigative mandate, and finished by saying "[t]he narrow focus of my investigation is on whether you breached your undertaking, as has been alleged."

[16] Finally, the Respondents have already had a chance to make further submissions to the Discipline Committee following issuance of the citation. They made a request in 2020 for the Discipline Committee to consider rescinding the citation. The Discipline Committee agreed to reconsider and the Respondents were invited to make any submissions they wished. As counsel for the Law Society advised in a letter of June 15, 2020, "the Law Society wants to make sure that you have the opportunity to fully set out your position that the citation should be rescinded" and asked for a "package of everything that you want the Discipline Committee to review on the issue" and that "[t]his is your opportunity to make sure that the Discipline Committee receives everything that you want it to review when considering your request." What the Respondents submitted was for them to decide and they cannot complain if they did not make the best of the opportunity they had, or try again for another "kick at the can".

[17] Thus, even assuming that DK undertook a biased investigation, was close-minded and predetermined the investigation conclusion, none of which I accept in light of the evidence noted earlier, any such alleged investigative bias was cured by the Discipline Committee reconsidering the citation. Moreover, when this citation

finally and very belatedly gets to hearing, the hearing panel will entertain afresh the allegations against the Respondents independently of any conclusions of the investigator or the Discipline Committee. I rely here on *Histed v. Law Society of Manitoba*, 2006 MBCA 89 where the court held at para. 61:

> The panel was correct in ruling that the [investigator's] 'proceedings remained entirely investigative throughout' and that any reasonable apprehension of bias could be cured by a full and fair hearing before the panel. Because such a hearing occurred, any reasonable apprehension of bias was cured.

[18] As was said in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para. 28:

> The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

The citation contains allegations only. The conclusions will be for the hearing panel in an open and fair hearing.

[19] For all these reasons, I see no validity to this allegation of investigative bias and so the claim for the relief sought is dismissed.

Failure to comply with Tribunal orders application

[20] I begin by quoting at some length from the recent decision *Law Society of BC v. Tungohan*, 2022 LSBC 01:

> [7] The Respondent seeks disclosure of a variety of materials that are clearly irrelevant. The Respondent appears to believe the way he was investigated is in some way relevant to an administrative hearing into whether he committed the acts alleged in the citation and whether those acts amount to professional misconduct. The investigation and deliberations by Law Society committees, staff or counsel, are not relevant nor are they issues in the proceeding. Irrelevant materials do not have to be disclosed and should not be.

[8] The Respondent's allegations that the Law Society has violated unspecified principles of natural justice or otherwise acted improperly does not make the investigation into the Respondent's conduct and the legal opinions of discipline counsel relevant to the proceeding. For these materials to become disclosable the Respondent must establish on clear, reliable evidence that the Law Society, Law Society staff, discipline counsel, and/or committee improperly carried out their duties in a manner akin to a malicious prosecution. Speculation and unsupported allegations of improper conduct are insufficient. The Respondent has not provided any evidence supporting a finding of improper conduct. The requested materials are irrelevant and should not be disclosed.

[9] From the Respondent's materials, it is apparent that the Law Society has erred on the side of caution and disclosed more materials than were truly relevant so as to ensure they did not fail to provide all relevant materials. The Respondent speculates that there may be other relevant materials in the Law Society's possession. Absent compelling evidence that the Law Society has withheld relevant materials, I am not prepared to look behind the Law Society's representations. *To do otherwise would shift the focus of this administrative process from the allegations that the Respondent misconducted himself in a specific instance to a broad investigation and examination of the Law Society generally. The Law Society's conduct is not at issue in this matter. Only the Respondent's alleged conduct is before the Tribunal.* It is the Respondent who faces the burden of establishing that evidence relevant to the Respondent's alleged misconduct has been withheld from him. He has not done so.

[emphasis added]

[10] With respect to the privileged materials, the Law Society is entitled to rely on privilege when declining to provide specific materials. Absent the Respondent producing compelling evidence that the Law Society is claiming privilege where none exists on evidence relevant to the alleged misconduct, the materials cannot and should not be produced. Nor is the Law Society required to produce detailed descriptions of the materials and justifications for the privilege. Legal opinions provided to the Law Society and the Law Society's committees are both privileged documents and irrelevant.

> Discipline counsel's opinion alleging the Respondent misconducted himself is irrelevant to whether the Respondent actually misconducted himself.

[21] The core of this application is for the Law Society to produce materials over which it claims solicitor-client privilege and allegations of failure of the Law Society to comply with prior orders for document disclosure by certain dates.

[22] As to the latter allegations, for the reasons noted in *Tungohan*, I conclude that they are irrelevant. The conduct of Law Society discipline counsel is not the subject of the citation and I find, as I did in my earlier decision issued April 21, 2021 (2021 LSBC 21), that there has in fact been compliance on disclosure and the rationale for redactions.

[23] The law is clear that the principle of solicitor-client privilege covers Law Society counsel and is presumed to exist without the need for its articulation by the Law Society. (See: *Hanson v. Law Society of British Columbia*, (1981) 32 BCLR; 1981 CanLII 462 (BCCA) and *British Columbia (Attorney General) v. Lee*, 2017 BCCA 219 at paras. 30 and 51)

[24] Moreover, that privilege must be clearly waived by a party in a proceeding pleading as a material issue of its reliance on legal advice or its understanding of the law based on that legal advice. None of that applies here. (See: *Lawyer v. Law Society of British Columbia*, 2021 BCSC 914 at paras. 134 and135)

[25] As in *Tungohan*, absent compelling evidence from the Respondents that the Law Society has withheld relevant documents not protected by solicitor-client privilege, I am not prepared to go behind its representations that it has provided all documents relevant to the allegations of misconduct or to be provided by prior orders of the President and the President's Designate in this case. I am not prepared to order any investigation of the documents to which privilege is claimed.

[26] This application is dismissed.

Abuse of process application

[27] The crux of this application is the allegation that the complainant, AB, has used the Law Society disciplinary process for AB's own ends in collecting AB's accounts in an alleged contravention of the *Code of Professional Conduct for British Columbia*.

[28] The answer to this allegation of complainant misconduct is short and simple. Even if true, it is irrelevant.

[29] The issue for the hearing panel is whether the allegations in the citation can be proved by the Law Society. Whether AB should be subject of disciplinary or other proceedings is an entirely different matter.

[30] The application is dismissed.

LIF documents application

[31] For the reasons I set out earlier when dealing with solicitor-client privilege, and as Law Society discipline counsel is not waiving privilege on behalf of LIF, I am not prepared to make any orders for search and production of any of the further documents that the Respondents allege remain undisclosed.

[32] Without prejudice to this right of privilege, LIF and the Law Society have made disclosure of what they say are all the documents LIF holds respecting the Original Investigation. I will not (and it may be that I cannot) go behind the extent of the disclosure.

[33] Instead, I note that the Law Society has the list of alleged missing LIF documents prepared by the Respondents and I leave it to the Law Society and LIF to follow up and respond if they deem it appropriate given that they agreed to provide all the relevant LIF documents.

ORDERS

[34] All applications of the Respondents are dismissed. Pursuant to Rules 5-5.1(7)(k) and (8)(d), any further applications of either the Law Society or the Respondents will be directed to the hearing panel.

[35] Pursuant to Rule 5-5.1(10), the parties must, within 30 days from the date of this decision, set dates for the hearing of this citation. If they are not able to do so, then the matter will be returned to me to set hearing dates.