

2023 LSBC 36  
Hearing File No.: HE20220032  
Decision Issued: September 6, 2023  
Citation Issued: October 25, 2022

THE LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL  
HEARING DIVISION

BETWEEN:

**THE LAW SOCIETY OF BRITISH COLUMBIA**

AND:

**GERALD EDWARD PALMER**

RESPONDENT

**DECISION OF THE MOTIONS ADJUDICATOR  
ON APPLICATION TO WITHDRAW DEEMED ADMISSIONS**

Hearing dates: August 31, 2023

Motions Adjudicator: Lindsay R. LeBlanc

Discipline Counsel: Gagan Mann

Counsel for the Respondent: Gregory T. Palm

**INTRODUCTION**

- [1] This is the Respondent's application for leave to withdraw his April 6, 2023 response to the notice to admit dated February 16, 2023 and substitute it with the one appended to the August 18, 2023 Notice of Motion.

- [2] The Law Society opposes the relief sought by the Respondent.
- [3] In providing his response to the notice to admit, the Respondent indicated “denied” for several of the admissions sought by the Law Society without providing further response. The Respondent submits that in responding to the notice to admit in the fashion that he did, he had not reviewed Rule 5-4.8 of the Law Society Rules or Practice Direction 10.3 of the LSBC Tribunal’s Directions on Practice and Procedure and therefore neglected to appreciate that each individual fact that he intended not to admit was required to be accompanied by a reason for not doing so. The consequence for not providing reasons for not admitting the truth of a fact or the authenticity of a document, is a deemed admission.
- [4] Rule 5-4.8(9) of the Law Society Rules and Practice Direction 10.3(10) of the LSBC Tribunal’s Directions on Practice and Procedure provides that admissions or deemed admissions may only be withdrawn with the consent of the other party or with leave granted on a motion to the Tribunal.
- [5] The following procedural history is relevant in considering the positions of the parties:

October 18, 2022	Citation Authorized by Discipline Committee (the “Citation”)
October 25, 2022	Citation Issued relating to the following allegations: (a) failure to provide the expected quality of service to a client in a family law matter; and (b) failure to respond promptly to communications from opposing counsel in the family law matter.
February 16, 2023	Law Society served the Respondent with a Notice to Admit (“NTA”) under Rule 5.4-8 of the Law Society Rules.
March 14, 2023	Respondent granted an extension of two weeks, to March 29, 2023 (“Extension #1”).
March 30, 2023	Respondent granted a further extension of one week to April 6, 2023 (“Extension #2”).
April 6, 2023	The Respondent served the Law Society with his Response to the NTA.
April 13, 2023	Discipline Counsel wrote to the Respondent noting several deemed admissions in the Response to the NTA and notifying the Respondent of Rule 5-4.8(9) of the Rules, which allows a party to seek leave to

	withdraw their admissions or deemed admissions by filing an application.
May 11, 2023	Pre-hearing Conference where the hearing of the Citation is scheduled for August 14 to 16, 2023.
July 21, 2023	Respondent filed application for adjournment of the hearing date.
August 8, 2023	Consent order is made by Motions Adjudicator and the hearing date is adjourned to October 16 to 18, 2023 on conditions, including that the adjournment is peremptory on the Respondent and any application to set aside deemed admissions to the NTA is heard on August 31, 2023.
August 15, 2023	Respondent files this Notice of Motion with amended Response to the NTA attached.

### APPLICABLE TEST

- [6] I was advised at the hearing of this application that there were no known reported decisions of the LSBC Tribunal concerning an application to withdraw admissions at a preliminary stage.
- [7] The Respondent referred me to a line of cases from the British Columbia Court of Appeal with respect to the test to be applied in civil procedure where a party wishes to withdraw admissions. The most recent decision is indexed as *Lockerbie & Hole Contracting Ltd. v. Universal Supply Co.*, 2023 BCCA 280 (“*Lockerbie*”).
- [8] The Law Society directed me to a decision from the Law Society of Upper Canada’s Tribunal indexed as *Law Society of Upper Canada v. Abrahams*, 2014 ONLSTH 64 (“*Abrahams*”).
- [9] The parties addressed the factors contained within the *Lockerbie* and *Abrahams* decisions in their submissions which I will address further below.
- [10] While the authorities provided to me depart in some respects, I do not see the underlying elements to be inconsistent. As a self-regulating profession there are additional considerations that may not be present in the civil context, and the applicable test should incorporate a consideration of the public interest. The ultimate test is as follows:

Whether it is in the interests of justice that the admission be withdrawn or qualified, taking into account a number of factors including whether the truth of the admission is a triable issue.

[11] The factors to be considered in the regulatory context are:

- (a) whether there is evidence that the admitted fact is untrue;
- (b) whether the “fact” admitted was or was not within the knowledge of the party making the admission;
- (c) whether the admission was made inadvertently, hastily, or without knowledge of the facts;
- (d) the nature of the admissions sought to be withdrawn and the significance of the same to the determination of the citation on its merits;
- (e) timeliness of the request to withdraw and where there has been delay, the reason provided for the delay;
- (f) whether and to what extent the withdrawal will result in further delays;
- (g) procedural considerations, including prior adjournments, orders, and positions taken by the parties;
- (h) whether and to what extent the withdrawal of the admission would prejudice a party; and
- (i) whether and to what extent the withdrawal will impact the administration of justice and the public interest.

[12] The above factors are non-exhaustive, and circumstances may exist in other cases where additional factors ought to be considered.

## **POSITION OF THE RESPONDENT**

[13] The Respondent submits that this is a disciplinary matter and, accordingly, has potential significant consequences for the Respondent professionally.

[14] The Respondent attempted to deny the facts which he seeks to withdraw as deemed admissions and submits that it would not be in the interests of justice to have those issues determined based on admissions that the Respondent did not intend to make.

[15] With respect to prejudice, the Respondent submits:

- (a) the Law Society has known of the Respondent's position as to the nature of his engagement with the Client and other counsel since the Respondent's letter of May 24, 2023;
- (b) the Law Society has known since April 6, 2023 that the Respondent denied the matters he is deemed to have admitted as they were marked "Denied" on the Response to the NTA;
- (c) in advance of the Pre-hearing Conference, the Law Society indicated an intention to call three witnesses which remains the case if the admissions are withdrawn;
- (d) the Law Society has known since the Pre-hearing Conference of the Respondent's intention to apply to withdraw his deemed admissions;
- (e) there are six weeks before the hearing of the Citation scheduled in October 2023 (the "October Hearing"), which should be ample time to address preparations; and
- (f) three days will remain sufficient for the October Hearing.

[16] On the issue of delay, the Respondent admits there has been some delay and addresses it as follows:

- (a) the delay is only approximately three months from when the Respondent advised of his intention to bring the application at the Pre-hearing Conference;
- (b) the delay stemmed from a miscommunication between the Respondent and his counsel, and in particular, the Respondent was waiting for confirmation from counsel that he was prepared to act for him while counsel assumed that the Respondent had obtained alternative counsel; and
- (c) as soon as counsel was properly retained, the application was promptly brought.

[17] Further, on the issue of delay, the Respondent sought to have the application heard in early August; however, due to holiday schedules of counsel for both parties, it could not proceed until now.

## POSITION OF THE LAW SOCIETY

- [18] The Law Society argues the delay in bringing this application and potential for a further adjournment of the October Hearing weigh against granting the relief sought by the Respondent. Based on the delays, the Law Society submits that it may need to call three additional witnesses it had not planned on calling which may necessitate it seeking an adjournment.
- [19] The Law Society further raises the Respondent's past experience with the Law Society, and the fact that the Respondent's vocation requires him to be proficient with interpreting rules and legislation. The Law Society submits the Respondent's ignorance is not an acceptable excuse.
- [20] Lastly, the Law Society says that deemed admissions narrowed the issues resulting in a simplified process. It was no longer intending to call the three witnesses identified at the Pre-hearing Conference.
- [21] When asked about prejudice to the Law Society, I was advised that there is no prejudice at this time, but that prejudice may arise if the October Hearing is adjourned due to witness unavailability.

## ANALYSIS AND DECISION

- [22] The Law Society's strongest argument against the relief sought is the potential delay in bringing this application and potential for delay of the October Hearing. It is in the public interest to have the hearings of citations proceed in a timely manner.
- [23] In this factual matrix, the following factors are at the forefront: delay (and reason for delay), the public interest in having a timely hearing, and having the Citation considered on the merits.
- [24] The Law Society seeks to have me follow *Abrahams* where the hearing panel was considering an application to withdraw deemed admissions that had been brought at the last minute and would have resulted in an adjournment of the hearing. In that case, relief was denied.
- [25] Here, the Respondent is not seeking an adjournment of the October Hearing and recognizes that a prior order of this Tribunal prevents him from seeking an adjournment. If an adjournment is required, it can only be at the request of the Law Society.

- [26] The Law Society at this time does not know if an adjournment will be required and indicates that no prejudice “at this time” exists.
- [27] The three additional witnesses proposed by the Law Society were previously identified as potential witnesses at the Pre-hearing Conference. I understand the time estimate for the October Hearing was provided on the basis that these witnesses may be required.
- [28] There is still more than a month from the scheduled October Hearing to address the expansion of issues if the Respondent’s request for relief is granted. The Citation was issued on October 25, 2022, and we are still within a year. Should the withdrawal of admissions result in an adjournment, which appears unlikely but is unknown, the resulting delay will not be so unreasonable that it is against the public interest.
- [29] The deemed admissions go to the heart of the defense of the Respondent and denying relief to the Respondent will result in the Citation not proceeding on its merits. With legal resources being in scarce supply, the finding of professional misconduct should follow a full hearing on the merits – which is in the public interest. This is not a case where the lawyer’s delay is unexplainable. Nor is it a case where the application is being used as a delay tactic or being used to seek expansion of the issues unreasonably.
- [30] I find after balancing the relevant factors and where no present prejudice has been advanced by the Law Society, that it is reasonable to grant the relief the Respondent seeks.

## **ORDER**

- [31] The Respondent is granted leave to withdraw his April 6, 2023, Response to the NTA dated February 16, 2023 and substitute it with the Response to NTA attached as Schedule “A” to the August 18, 2023 Respondent’s Notice of Motion.