

2022 LSBC 49
Hearing File No.: HE20220030
Decision Issued: December 1, 2022
Citation Issued: September 29, 2022

THE LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL
HEARING DIVISION

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

AND:

MARK SAGER

RESPONDENT

DECISION OF THE MOTIONS ADJUDICATOR

Hearing date:	November 17, 2022
Motions Adjudicator:	Lindsay R. LeBlanc
Discipline Counsel:	William B. Smart, KC and Susan J. Humphrey
Counsel for the Respondent:	Robin N. McFee, KC and Elizabeth Janzen

INTRODUCTION

[1] The Respondent seeks an order that the citation issued against him on September 29, 2022 be published without identifying him or any other information that could be used to identify him and argues that extraordinary circumstances exist such that anonymization of the citation is necessary to prevent harm to him and others.

- [2] The Law Society opposes the application on the basis that no extraordinary circumstances exist.
- [3] The Respondent was called to the Bar of British Columbia on March 15, 1991. The Respondent has deposed an affidavit wherein he states that he is no longer taking on new clients and is in the process of closing or transferring all files. At the time of this hearing, the Respondent is a practising member of the Law Society.
- [4] For the reasons that follow, I find that the Respondent has not demonstrated exceptional circumstances such that I should exercise my discretion to anonymize the citation.

CHRONOLOGY

Previous professional misconduct

- [5] The Respondent has a prior professional misconduct record that is relevant to the consideration of the request for anonymization.
- [6] On May 10, 2018, a Citation was issued and on July 3, 2019, the Respondent was found to have committed two instances of professional misconduct. The professional misconduct was summarized as follows:
- (a) by causing to be prepared for his client JB a will that gave him a testamentary gift from JB, contrary to rules 3.4-26 and 3.4-38 of the *BC Code*; and
 - (b) by accepting a gift that was more than nominal from his client JB namely, a gift of \$75,000 in July, 2014, when JB had not received independent legal advice, contrary to rule 3.4-39 of the *BC Code*.
- [7] On June 9, 2020, the Respondent was ordered to pay a fine of \$20,000 and costs in respect of the professional misconduct.

Current citation

- [8] On September 19, 2019, the Law Society notified the Respondent that it had opened an investigation and the Respondent acknowledged the Law Society's letter on September 20, 2019.

[9] On September 27, 2022, the Respondent's lawyer at the time was notified that the Discipline Committee had authorized a citation against the Respondent on September 21, 2022.

[10] The Citation was issued on September 29, 2022 and alleges the following:

1. On or before April 14, 2010, you acted in a conflict of interest by causing the preparation of a will for your client, OM, in which you were named trustee of a life interest and received absolute discretion to use estate funds for the purpose of traveling to England, when your client had not received independent legal advice, contrary to one or both of Chapter 7, Rules 1 and 2 of the *Professional Conduct Handbook*, then in force.

This conduct constitutes professional misconduct, pursuant to s. 38(4) of the *Legal Profession Act*.

2. Between approximately July 2010 and October 2017, while acting as the executor and trustee of the estate of your former client, OM, you improperly withdrew from trust some or all of \$8,801.03 when you were not entitled to those funds, contrary to one or both of Rule 3-56 [now Rule 3-64] of the Law Society Rules and your fiduciary duties.

This conduct constitutes professional misconduct, conduct unbecoming a lawyer [now conduct unbecoming the profession] or a breach of the Act or rules, pursuant to s. 38(4) of the *Legal Profession Act*.

3. Between approximately December 2010 and May 2019, while acting as the executor and trustee of the estate of your former client, OM, you improperly withdrew from trust some or all of \$40,000.00 in executor fees and \$24,113.25 in management fees (not including taxes), prior to receiving signed releases from the beneficiaries waiving the passing of your accounts or obtaining a court order authorizing the payments, contrary to one or both of Rule 3-56 [now Rule 3-64] of the Law Society Rules and your fiduciary duties.

This conduct constitutes professional misconduct, conduct unbecoming a lawyer [now conduct unbecoming the profession] or a breach of the Act or rules, pursuant to s. 38(4) of the *Legal Profession Act*.

4. Between approximately December 2010 and May 2019, while acting as the executor and trustee of the estate of your former client, OM, you invested estate assets with your spouse, an investment manager at an investment firm, without the knowledge and consent of all beneficiaries, contrary to one or both of

Chapter 7, Rule 1 of the *Professional Conduct Handbook* then in force [now rules 3.4-26.1 and 3.4-28 of the *Code of Professional Conduct for British Columbia*] and your fiduciary duties.

This conduct constitutes professional misconduct or conduct unbecoming a lawyer [now conduct unbecoming the profession], pursuant to s. 38(4) of the *Legal Profession Act*.

5. Between approximately December 2010 and June 2020, while acting as the executor and trustee of the estate of your former client, OM, you failed to fulfill your obligations to the Law Society and/or the beneficiaries contrary to one or both of Rule 3.48-1 [now Rule 3-55] of the Law Society Rules and your fiduciary duties, by failing to do one or more of the following:
 - (a) produce the records necessary to create a full accounting of the receipt or disbursement of the fiduciary property;
 - (b) consider all beneficiaries in administering the trust and administer the estate in their best interests;
 - (c) make and maintain contact with the residual beneficiaries for approximately nine years;
 - (d) pay all income to the beneficiary, pursuant to the terms of the trust; and
 - (e) file terminal and estate tax returns as required, so as to avoid levies, penalties, and interest.

This conduct constitutes professional misconduct, conduct unbecoming a lawyer [now conduct unbecoming the profession], or a breach of the Act or rules, pursuant to s. 38(4) of the *Legal Profession Act*.

[11] On October 14, 2022, the Respondent's lawyer waived the citation service requirements and advised that this application for anonymization would be made.

[12] On October 15, 2022, the Respondent was elected Mayor of the District of West Vancouver and on November 7, 2022 was sworn in as Mayor.

LEGAL PRINCIPLES

[13] Rule 4-20 provides that the Executive Director must publish on the Society's website the fact of the direction to issue a citation, the content of the citation and

the status of the citation and, except as allowed under Rule 4-20.1, a publication must identify the respondent.

- [14] Under Rule 4-20.1, a party may apply to the Tribunal for an order that publication of the citation under Rule 4-20.1 not identify the respondent and on such an application, where in the judgment of a motions adjudicator, there are extraordinary circumstances that outweigh the public interest in the publication of the citation, the motions adjudicator may grant the order or order limitations on the content means, or timing of the publication.
- [15] The decision to grant relief pursuant to Rule 4-20.1 is discretionary.
- [16] Both parties rely on a redacted unpublished decision made under Rule 4-20.1 identified as *Law Society of BC v. Lawyer*, 2021 LSBC 41 (“*Lawyer*”) in which the President’s Delegate, at para. 16, confirmed that in any discretionary decision, the president ... must consider the object and duty of the Law Society to “uphold and protect the public interest in the administration of justice.”
- [17] Openness and transparency in the disciplinary process is required to maintain confidence in the Law Society as a self-regulating body and there is a strong presumption in favour of an open process. Even though public scrutiny can be a source of inconvenience and embarrassment, such factors are not enough to overturn the strong presumption that the public can attend and be made aware of hearings (*Lawyer* at paras. 17 and 20 citing *Sherman Estate v. Donovan*, 2021 SCC 25).
- [18] In seeking anonymization, each case will depend on its circumstances and, at a minimum, a respondent is required to demonstrate the order sought is necessary to prevent the potential risk, and the benefits of such an order outweigh its negative effects (*Lawyer* at para. 18).

POSITION OF THE RESPONDENT

- [19] The Respondent submits there are two categories of extraordinary circumstances that I should consider:
- (a) impaired municipal operations; and
 - (b) reputational damage and mental health challenges.
- [20] The evidence in support of the Respondent’s application consisted of an affidavit sworn by Mr. Sager on November 4, 2022.

Impaired municipal operations

- [21] The Respondent submits that if his identity is published, his ability to effectively negotiate on behalf of his community for spots in Metro Vancouver committees may be endangered due to stigma arising from the Citation resulting in significant and longstanding public harm to the residents of his community.
- [22] The Respondent says that publication of his identity will generate difficult internal dynamics within the District as staff and senior staff members who participated in the Law Society investigation against the Respondent will be required to report directly to him, which will place them in a difficult position.
- [23] The Respondent says that responding to media attention arising from the publication of the Respondent's identity will be a significant distraction from his responsibilities as Mayor during a key time in his term.
- [24] The Respondent relies on the Court of Appeal decision *A Lawyer v. The Law Society of British Columbia*, 2021 BCCA 284 ("A Lawyer"), wherein reputational harm was considered in granting a sealing order.

Reputational damage and mental health challenges

- [25] The Respondent submits that, given the public facing nature of his role as Mayor, the reputational damage he would face is much more serious than it would be for a typical lawyer facing a citation.
- [26] The Respondent further submits that this case is unique as the reputational damage will also affect the community he represents as Mayor.
- [27] The Respondent says that the media attention generated from publication will likely deteriorate the Respondent's mental health, which he says is already under strain.
- [28] The Respondent submits that consideration should be given to his intention to leave the practice of law.
- [29] The Respondent relies on *Lawyer* as a case where mental health was taken into consideration in the determination of extraordinary circumstances.

POSITION OF THE LAW SOCIETY

- [30] The Law Society submits that the circumstances advanced by the Respondent are not extraordinary and do not outweigh the public interest in the publication of the

Citation or the strong presumption in favour of openness and transparency that is critical to maintaining the public's confidence in the ability of the Law Society to adequately regulate the legal profession.

Impaired municipal operations

- [31] The Law Society submits that the Respondent is already the subject of stigma associated with previous proven professional misconduct and that his ability to negotiate on behalf of the District is arguably therefore already endangered.
- [32] The Law Society further submits that the Respondent was aware of his prior professional misconduct along with the Citation prior to being elected and put the residents of the District in this position.
- [33] With respect to employees of the District being in a "difficult position", the Law Society submits that it is incumbent upon the Respondent to ensure that these employees are not made to feel uncomfortable about their participation in the investigation and to ensure that working relationships remain uncompromised.
- [34] The Law Society submits that any inconvenience or embarrassment that the Respondent may suffer from media attention resulting from publication is insufficient to overturn the strong presumption in favour of the open tribunal process.
- [35] The Law Society says that *A Lawyer* is distinguishable as: (a) the Law Society did not oppose the application; (b) no citation had been issued and the process was only in an investigation stage; and (c) the sealing order was sought over materials related to a judicial review proceeding and not a citation.

Reputational damage and mental health challenges

- [36] The Law Society says there is insufficient evidence to consider mental health challenges as the Respondent has not provided any supporting evidence of any diagnosed mental health condition. The only evidence provided is that of the Respondent and relates to being highly stressed with associated difficulty sleeping.
- [37] The Law Society submits that what the Respondent is experiencing is not different than what would be expected of any member against whom a citation has been issued.

[38] The Law Society distinguishes *Lawyer* on the basis that no independent medical evidence has been tendered by the Respondent whereas in *Lawyer* there was medical evidence supporting the mental health claims and associated harms.

ANALYSIS AND FINDINGS

[39] To grant the relief sought by the Respondent, I must find exceptional circumstances exist in this case that outweigh the public interest in publication.

Impaired municipal operations

[40] The Respondent stresses that extraordinary circumstances exist given his profile as a newly elected Mayor and the District will suffer if the Citation is published. In seeking election, the Respondent had a 2019 professional conduct record containing professional misconduct findings that are not dissimilar to the allegations contained in the Citation. I note that the findings were relatively recent and are searchable in the Law Society database. If there is any reputational risk or risk to the constituents of the District, it already exists from the proven misconduct findings. In this case, publication of the Respondent's name with the Citation will not exacerbate the reputational risk such that it meets the legal test of being an exceptional circumstance.

[41] I reject the proposition that the Respondent's newly elected role as Mayor makes him more deserving of anonymity or somehow puts him in a different category than the average lawyer. Lawyers, by profession, have a public profile and many take on positions that are in the public eye. The Law Society cannot be seen as creating different categories of transparency – especially those that may hold public or high-profile offices.

[42] I agree with the Law Society that the facts in this case are distinguishable from those in *A Lawyer*. In this case, the investigation concluded, and the Discipline Committee authorized the Citation. Further, this is not a situation where the Respondent seeks to have certain documents sealed – he seeks complete anonymity such that the public would not be aware that there is a Citation issued against him.

[43] I have difficulties with the submission of the Respondent that the employees will be put in a difficult situation. The Respondent has raised this as a ground I should consider but I was not provided with specifics to understand what the Respondent meant by “difficult situation” or who would be creating the “difficult situation”. When seeking election, the Respondent had knowledge of the investigation and sought to be in a close working relationship with these employees. It is the

Respondent that has created the situation and he has the ability to ensure that appropriate measures are put in place to protect employees from any consequences that may arise from publication.

Reputational damage and mental health challenges

[44] The Respondent has not tendered a report prepared by a medical professional that would assist in considering the mental health challenges the Respondent says he is suffering from, nor has the Respondent tendered any evidence with respect to treatment plans or steps taken to address his stress and/or sleeping challenges. As such, I have a lack of evidence to find that stress and lack of sleep equate to the type of exceptional circumstances whereby I would exercise my discretion to anonymize publication.

ORDERS MADE

[45] I dismiss the Respondent's motion dated November 4, 2022.

COSTS

[46] The Law Society seeks costs of this application. I decline to make a preliminary order respecting costs. Costs can be addressed at the conclusion of this matter.