

2023 LSBC 12  
Hearing File No.: HE20220037  
Decision Issued: March 28, 2023  
Citation Issued: December 7, 2022

THE LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL  
HEARING DIVISION

BETWEEN:

**THE LAW SOCIETY OF BRITISH COLUMBIA**

AND:

**PHILIP MICHAEL BOLTON, KC**

RESPONDENT

**DECISION OF THE MOTIONS ADJUDICATOR  
ON AN APPLICATION FOR NON-PUBLICATION**

Hearing date:	February 9, 2023
Motions Adjudicator:	Lindsay R. LeBlanc
Discipline Counsel:	J. Kenneth McEwan, KC Saheli Sodhi
Counsel for the Respondent:	Peter Leask, KC Alison M. Latimer, KC

**INTRODUCTION**

[1] The Respondent seeks an order for non-publication of the Citation issued on December 7, 2022 or in the alternative, publication with anonymization for all individuals affected by this proceeding.

- [2] At the hearing, the Respondent submitted that the *audi alteram partem* principle applied to this application and relied on the Ontario Superior Court of Justice Divisional Court decision of *Blake v. Blake*, 2021 ONSC 7189. I did not have the decision before me at the hearing and I invited the parties to provide further written submissions on this issue. Following that invitation, I received the following:
- (a) February 22, 2023 submissions of the Respondent;
  - (b) March 1, 2023 response submissions of the Law Society; and
  - (c) March 2, 2023 reply submissions of the Respondent
- [3] The Respondent argues extraordinary circumstances exist in this case warranting anonymization, including:
- (a) there is no evidentiary support for two of the most important allegations in the Citation;
  - (b) publication will cause the public to believe there is a basis for the serious allegations resulting in catastrophic consequences to the Respondent's career; and
  - (c) publication will cause significant prejudice to the clients who are identifiable in the Citation as presently published.
- [4] The Law Society opposes the application on the basis that the Respondent's circumstances 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 in the Law Society's disciplinary process.
- [5] For brevity, I will not reproduce the Citation here. In summary, the Citation alleges misuse of the Respondent's trust account contrary to rules 3.2-7 and 3.2-8 of the *Code of Professional Conduct for British Columbia*. Rule 3.2-7 provides that a lawyer must not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud. Rule 3.2-8 provides that a lawyer who is employed or retained by an organization to act in a matter in which the lawyer knows or ought to know that the organization has acted, is acting or intends to act dishonestly, criminally or fraudulently, must take certain action as described in the rule, in addition to their obligations under rule 3.2-7.
- [6] The alleged misuse of trust funds relates to the sums of \$4,866,976.72 CDN and \$6,508,949.78 USD in relation to allegations 1 and 2 in the Citation and \$10,159,297.95 in relation to allegations 3 and 4 in the Citation.

- [7] The Respondent did not file affidavit material in support of the application. The Law Society filed an affidavit sworn by a legal assistant.

## **BACKGROUND**

- [8] The Respondent has been a member of the Law Society for over 50 years, having been called to the Bar of British Columbia on October 1, 1969.
- [9] The Respondent was the subject of a compliance audit conducted in July 2019. On February 7, 2020, the Law Society notified the Respondent that it had opened an investigation as a result of a referral from the Law Society's Trust Assurance Department.
- [10] On November 30, 2022, the Discipline Committee of the Law Society authorized the Citation.
- [11] As of the date of the hearing the Citation has been published on the LSBC Tribunal's website under "Respondent 3" and anonymizes companies and individuals referenced in the Citation by initials. The Respondent has not been identified pending a decision of this application. Schedules are appended to the non-published version of the Citation that include additional information and particulars. I was advised during the hearing and find that the Schedules will not be published, and use of Schedules is standard practice to avoid disclosure of solicitor and client privileged information.

## **LEGAL PRINCIPLES**

- [12] Rule 4-20 of the Law Society Rules 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.
- [13] Under Rule 4-20.1, a party may apply to the Tribunal for an order that publication of the citation under Rule 4-20 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.

- [14] In *The Law Society of BC v. Macdonald*, 2023 LSBC 01 at para. 17, the motions adjudicator summarized the principles considered on an application for anonymization:
- (a) the applicant must show extraordinary circumstances, those extraordinary circumstances must outweigh the public interest in publication of the citation and the order sought must be necessary to prevent the potential risk;
  - (b) any decision made under Rule 4-20.1 is an exercise of discretion, which depends on the facts of the particular case; and
  - (c) there is a strong presumption in favour of open courts, including openness of discipline proceedings carried out by a regulator such as the Law Society, and this presumption is not overturned by public scrutiny, embarrassment and intrusion on privacy, that is necessarily a part of this type of disciplinary proceeding.

## **RESPONDENT'S POSITION**

- [15] The Respondent submits there are two categories of extraordinary circumstances that I should consider:
- (a) there is no evidentiary support for two of the most important allegations in the Citation; and
  - (b) reputational damage to the Respondent.
- [16] In addition, the Respondent submits that publication will cause significant prejudice to persons and entities who are identifiable in the Citation as presently published.
- [17] The Respondent submits that the Rules make clear that I am not restricted in the type of order I may make and that limitations on publication extend to all contents of the Citation and to various means and timing of publication.
- [18] I have been provided with lengthy submissions arguing that the Citation lacks merit. In brief summary, the Respondent submits that substantial legal services were rendered although the specific personal retainers remained unspent.
- [19] The Respondent relies on a letter from investigation counsel for the Law Society, Craig Dennis, KC dated July 13, 2021, to support his submission that the Citation

lacks merit (the “Dennis Letter”). The Dennis Letter was sent to the Respondent to advise him that his matter was going to go before the Discipline Committee for consideration on September 27, 2021 and inviting further opportunity for submissions.

- [20] The Respondent takes issue with the fact that the basis for the Discipline Committee’s decision has not been disclosed to him and argues that I should consider the same in exercising my discretion.
- [21] The Respondent referred me to the BC Court of Appeal decision in *Party A v. The Law Society of British Columbia*, 2021 BCCA 130. In particular, the Respondent directed me to para. 71 wherein the Court commented that the Supreme Court’s ruling on the lawyer’s right to take fees, which was a substantive part of the citation, would have to be considered in deciding whether to publish without anonymization as the ruling was in the lawyer’s favour.
- [22] The Respondent seeks as concurrent or alternative relief further anonymization of the Citation with respect to third persons and entities. The Respondent says that the anonymization in the currently published Citation raises substantive and procedural fairness concerns for the clients and that to the Respondent’s knowledge these third persons and entities have not been notified of the Citation. I was referred to the *audi alteram partem* principle and the *Blake v. Blake*, 2021 ONSC 7189.
- [23] The Respondent argues that it is substantively and procedurally unfair to have allegations made against third parties in the Citation in a way that may reveal their identity without providing them an opportunity to protect their privacy, confidentiality, and other interests, all of which are put at risk by the publication. The Respondent further submits it is easy to connect the dots and figure out to whom the Citation relates.
- [24] With respect to reputational damage, the Respondent submits that he has been practising law primarily in criminal defense and has earned an excellent reputation and publication prior to a decision on the merit’s risks destroying that reputation.

## **LAW SOCIETY’S POSITION**

- [25] The Law Society’s position is that the Respondent’s circumstances are not extraordinary and do not outweigh the public interest in the publication of the Citation or the strong presumption in favour of the openness and transparency of the Law Society’s disciplinary process.

- [26] The Law Society submits that to the extent the Citation contains information subject to solicitor and client privilege or confidentiality, such information is contained in the Schedules and is excluded from publication.
- [27] The Law Society says that it is a critical consideration that the Respondent has provided little, if any, evidence of the risks or harms asserted and that in the absence of such evidence, there is nothing that takes the present circumstances beyond the “public scrutiny, embarrassment and intrusion on privacy that is necessarily a part of” these disciplinary proceedings.
- [28] The Law Society submits that no determinations on the merits of the Citation can be made at this stage.
- [29] The Law Society further submits that the Dennis Letter is not a report, as particularized by the Respondent and that materials prepared by investigation counsel for review by the Discipline Committee, and drafts of any such materials, are confidential and subject to solicitor-client privilege and that the Law Society has not waived privilege over these materials.

## **ANALYSIS AND FINDINGS**

- [30] The Respondent’s main argument rests on the merits of the Citation and the alleged lack of disclosure concerning the Discipline Committee’s deliberations.
- [31] At this stage of the proceeding there is no determination of the merits of the Citation and the Respondent’s argument rests entirely on his counsel’s submission that the Citation is meritless. While the submissions provided to me were substantive, they were merely submissions without an evidentiary basis. I do not find that the Respondent’s views, as expressed through his lawyers, constitute extraordinary circumstances such that anonymization is warranted. I say “expressed” as the Respondent did not file affidavit evidence in support of the application.
- [32] This is not a case that engages the principles discussed in *Party A*. No parallel or additional proceeding has made a finding after a full hearing on the merits engaging the same or similar allegations contained in the Citation.
- [33] With respect to the Respondent’s arguments that the lack of disclosure of the Discipline Committee’s reasons constitutes justification for anonymization, Rule 4-8(1) of the Rules provides that no one is permitted to disclose information and documents that form part of the consideration of a complaint under Rule 4-4 or 4-5 or the result of a consideration under Rule 4-4 except for the purpose of complying

with the objects of the Act or with the Rules. Further, Rule 4-8(6) provides that Rule 4-8 must not be interpreted to permit the disclosure of any information subject to solicitor and client privilege or confidentiality.

- [34] Discipline committee deliberations and materials are subject to confidentiality and/or solicitor and client privilege and disclosure is not required. Based on the material put in front of me, there is nothing to suggest that the process by which this Citation was issued departs from the statutorily approved process.
- [35] The Dennis Letter is not a comprehensive report of evidence and was a letter addressed to the Respondent providing notice and the opportunity to respond further prior to the Discipline Committee meeting. As I found above, I cannot consider the merits of the Citation and the letter at this stage does not assist with the analysis I must conduct.
- [36] As stated above, the Respondent has chosen not to file evidence in support of his application. I only have counsel's submissions that publication of the Citation will result in reputational damage to the Respondent. Without evidence of the harm, I cannot make a finding that publication will result in harm. The Respondent has failed to demonstrate that his circumstances are extraordinary and justify non-publication.
- [37] The Citation uses initials where third persons and entities are referenced. The Respondent says this is a breach of the *audi alteram partem* principle. I have been advised that if someone wanted to identify the person and entities, it could be done through cross-referencing publicly available information. While this may be the case, I was not provided with the evidence necessary to make any findings in this regard and further, such cross-referencing would not be conclusive of identity. It would lead to a "this might be" conclusion.
- [38] I find that the Respondent has failed to demonstrate exceptional circumstances exist such that I should exercise my discretion to anonymize the Citation. Notwithstanding my finding, there is no harm in this particular case to further anonymizing the Citation to err on the side of caution with respect to identifying third persons and entities. In making this decision to exercise my discretion, I have not made the finding that the Citation as presently published contains solicitor-client privileged information or violates the *audi alteram partem* principle.

## **ORDERS MADE**

- [39] The Respondent's application for non-publication of the Citation is dismissed.

[40] The Respondent's alternative relief is granted in part as follows:

- (a) the Citation shall be amended so the presently anonymized third persons and entities are mentioned by a single letter randomly selected with a corresponding table for identification purposes included as a non-published schedule to the Citation; and
- (b) the Citation shall be amended in accordance with this order prior to publication of this Decision.

## **COSTS**

[41] 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.

[42] For the purposes of considering costs, the Law Society was the successful party in this application.