2023 LSBC 19
Hearing File No.: HE20220023
Decision issued: May 26, 2023
Citation issued: June 6, 2022

THE LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL
HEARING DIVISION

BETWEEN:

LAW SOCIETY OF BRITISH COLUMBIA

AND:

BRETT ROBERT VINING

RESPONDENT

DECISION OF THE MOTIONS ADJUDICATOR ON AN APPLICATION TO ADJOURN HEARING

Hearing date:	May 18, 2023
Motions Adjudicator:	Michael F. Welsh, KC
Discipline Counsel:	Mandana Namazi and Gagan Mann
Counsel for Respondent:	George E. Beaubier and Respondent in person

OVERVIEW:

[1] The Respondent, who had elected to represent himself in this matter, then changed his mind and sought to retain legal counsel for a Facts and Determination hearing that was set by agreement for May 23 to 25, 2023. He was successful in finding counsel, but that counsel was not available on the hearing dates, and so, two business days before it was to begin, the Respondent applied to adjourn the hearing. The Law Society opposed.

[2] At the hearing of the Respondent's motion seeking an adjournment (the "Application"), I ordered an adjournment on terms that are set out later in this decision, and now provide the reasons for allowing the Application.

Factual Background

[3] The Respondent practises in Nanaimo. He has been a member of the BC bar for just over 47 years.

[4] He has been cited for conduct alleged to have occurred at an examination for discovery he conducted of the female opposing party ("CK") in a family law matter. The Citation alleges that during and after the examination:

(a) he made statements that were discourteous, uncivil, offensive, or demeaning, and

(b) he engaged in harassment by inappropriate conduct or comments toward CK, that he knew or ought to have known were unwanted and could have the effect of violating CK's dignity.

[5] The alleged conduct occurred on September 16, 2020. The Citation was authorized on June 6, 2022.

[6] The Respondent elected to act on his own behalf instead of retaining legal counsel.

[7] CK is one of the two Law Society witnesses, the other being her former lawyer in the family law proceedings.

[8] The Law Society, concerned about the Respondent personally cross-examining CK, applied to have counsel appointed at no expense to the Respondent to conduct that cross-examination. The application came before me, as motions adjudicator, on January 19, 2023 and I made that order with the consent of the Respondent.

[9] The Respondent was advised by the Law Society on January 25, 2023, that he was responsible to locate counsel for the cross-examination. He contacted Trudi Brown, KC, a life Bencher and former Law Society president, who agreed to act. In a conference call with Law Society counsel on February 2, 2023, the Respondent told the Law Society that Ms. Brown was doing the cross-examination. He gave dates in May, June, and July 2023, when both Ms. Brown and he were available for the hearing.

[10] The May hearing dates were set on February 10, 2023, and a notice of hearing was sent out by the Tribunal office that day.

[11] The Respondent stated in an affidavit supporting the Application that after he sent relevant material to Ms. Brown for the cross-examination, she advised him on March 14, 2023, that she felt more comfortable in being a witness. He clarified in the Application that Ms. Brown said she was prepared to provide her opinion on whether his conduct crossed the line as alleged in the Citation.

[12] I was told that Ms. Brown then provided an affidavit with that opinion that has been disclosed to the Law Society.

[13] Ms. Brown suggested the name of another prominent counsel in Vancouver who acts in Law Society disciplinary matters to the Respondent. On March 22, 2023, the Respondent phoned that other counsel's office and left a message but got no reply. He then asked a lawyer in Nanaimo to act, but after they spoke on a number of occasions, that lawyer declined and recommended another lawyer in Vancouver.

[14] The Respondent spoke with that Vancouver lawyer on March 30, 2023, and sent the lawyer a letter, copied to the Law Society, with relevant material to allow the lawyer to assess the situation. In that letter the Respondent also advised he intended to call Ms. Brown as a witness. The Vancouver lawyer replied on April 3, 2023. The lawyer was not available on the hearing dates, and suggested the Respondent seek an adjournment.

[15] Also on April 3, 2023, Law Society counsel wrote to the Respondent saying it was incumbent on him to locate alternate legal counsel for the cross-examination on the scheduled hearing dates, and that any application to adjourn would be opposed.

[16] The Respondent then tried another Nanaimo lawyer who expressed discomfort in acting due to lack of experience, recommending yet another Vancouver lawyer.

[17] The Respondent tried contacting this lawyer, but meantime spoke with George E. (Ted) Beaubier on April 27, 2023. Meantime, the Respondent had written the Law Society on April 26, 2023, to advise he was still seeking counsel for the cross-examination and would know in the next day or two if he required an adjournment. Mr. Beaubier contacted the Law Society on May 12, 2023, to say he was retained but not available on the hearing dates.

[18] The Respondent filed the Notice of Motion May 17, 2023, on short leave to be heard the next day.

[19] Mr. Beaubier appeared with the Respondent at the Application, and both the Respondent and Mr. Beaubier participated. Mr. Beaubier stated in the Application that he was prepared to act for the Respondent if an adjournment was granted to

allow Mr. Beaubier to make arrangements to act. Both the Respondent and Mr. Beaubier also advised that Mr. Beaubier would act not just for the cross-examination of CK, but as the Respondent's legal counsel generally.

[20] Mr. Beaubier also advised that a combination of personal and family circumstances, his commitments in other client matters, and his review of the file and belief that further preparation is necessary to properly present the Respondent's case, all made it infeasible for him to represent the Respondent on the scheduled May dates.

[21] The Respondent in the Application stated that he decided to retain legal counsel generally after speaking with Ms. Brown. The Law Society was not apprised of this until the Application.

[22] The Law Society advised that CK had taken three days off from work to be available for the hearing. That hearing was to be heard on the Zoom video platform. Law Society counsel also advised that when CK was told that no counsel had been located to conduct the cross-examination on the hearing dates, CK said she was prepared to have the Respondent do the cross-examination of her personally to avoid the adjournment. The Law Society proposed that the hearing proceed on this basis.

Applicable Legal Principles

[23] Rule 5-5.2 of the Law Society Rules addresses adjournments, stating:

> (1) Before a hearing begins, a party may apply for an order that the hearing be adjourned by filing with the Tribunal and delivering to the other party written notice setting out the reasons for the application.
>
> (2) Before a hearing begins, a motions adjudicator must decide whether to grant the adjournment, with or without conditions, and advise the parties accordingly.

[24] A list of eight non-exhaustive factors to consider is stated in *Law Society of BC v. Hart*, 2019 LSBC 39, at para. 13, referencing Macaulay & Sprague, *Practice and Procedure Before Administrative Tribunals*, (Toronto: Thomson Carswell, 2004). I will go through each relevant factor in the Analysis section of these reasons.

Submissions of the parties

[25] The Respondent submitted that he took reasonable steps to locate counsel for the cross-examination and that, for proper presentation of his case and for the fairness of the hearing, the adjournment should be granted. He conceded that it should be a short adjournment, suggesting three months, and that the new hearing dates should be set as peremptory on him. He also stated for the record that if the adjournment was granted, he would not raise any arguments based on delay. Given he seeks the adjournment for his own benefit, this is more accepting the inevitable than it is an assurance.

[26] The Law Society, referencing the *Hart* factors, submitted that his ship had sailed. It submitted he chose not to have legal counsel, had ample notice of the hearing, and had not acted in good faith in seeking legal counsel. It also argued that an adjournment would be a great inconvenience to the two Law Society witnesses and to the hearing panel members, many of whom act on a volunteer unpaid basis. With the Law Society waiving the need for counsel to conduct the cross-examination, it submitted there was no need to adjourn.

Analysis

[27] I review each *Hart* factor that underlies my decision.

(a) the purpose of the adjournment (relevance to the proceedings, necessary for a fair hearing)

[28] Proceeding with the hearing would have created unfairness to both the Respondent and the complainant, CK. The Respondent, although he had initially decided to proceed without counsel, changed his mind after speaking with Ms. Brown. Mr. Beaubier on the Respondent's behalf noted some contested evidentiary issues that the hearing panel will face, both in terms of what he says are highly relevant documents the Respondent may try to introduce, but whose admissibility the Law Society disputes, and in whether the opinion of Ms. Brown in her affidavit can be admitted as expert evidence. It is preferable for a fair hearing that the Respondent have able and impartial counsel to address these issues, to conduct witness examination, and to make submissions. There is wisdom in the old maxim about the foolishness of those who represent themselves.

[29] It is also very unfair to CK to put her in the unenviable position of having to agree to the Respondent personally cross-examining her in return for the hearing proceeding. While it is commendable that she agreed to do so to help preserve the

hearing dates, the concerns that underlay my original order to appoint counsel to cross-examine have not gone away. The crux of the disputed allegations is the conduct of the Respondent while cross-examining CK. Repeating the process is not a helpful exercise for the parties or the hearing panel.

[30] While the basis for appointment of counsel to conduct cross-examination of complainants in criminal proceedings under section 486.3(2) of the *Criminal Code*, proceeds on a somewhat different basis, the rationale is similar. As stated in *R. v. Predie*, 2009 CanLII 33055 (ONSC) (quoted in *R. v. S.F.*, 2022 BCPC 283, which gives a thorough exegesis of the factors relevant to these orders):

> [5] A trial is a fact-finding exercise. Facts are determined on the basis of the evidence presented at trial. The ability of the trier of facts to reach accurate conclusions about the facts of the case improves as the record of relevant and material facts becomes fuller and more complete.
>
> [6] The goal of the trial process has been described by the Supreme Court of Canada as "truth seeking, and to that end, the evidence of all those involved in judicial proceedings must be given in a way that is most favourable to eliciting the truth": *R. v. Levogiannis*, 1993 CanLII 47 (SCC), [1993] 4 SCR 475, at para. 13.
>
> [7] Giving evidence in a trial is not a common experience for many witnesses. Speaking in public does not come naturally to most people. Being questioned in a formal setting, with a judge looking over one's shoulder and a jury listening intently to every word, is a daunting experience, particularly when the subject matter is, in many cases, intensely personal to the witness. The court room setting can undoubtedly be an inhibiting force to any witness. But for some witnesses, the circumstances of the case and the dynamics of the relationship of the witness to the accused are such that the risk of inhibition becomes so great that concern arises as to whether the court will obtain a full and candid account of the evidence of the witness.

[31] Section 486.3(2) provides the Court with the authority to appoint counsel to conduct the cross-examination of a complainant witness, rather than permitting an accused person to do so, where the court is of the opinion that it is necessary to do so to obtain a full and candid account from the witness. The aim of section 486.3(2) has been stated to be for protection of the complainant and it is presumptive in the case of an unrepresented accused. The court is mandated to grant the application unless to do so would interfere with the proper administration of justice.

[32] Under LSBC Tribunal Practice Direction 5.6, “Accommodation for witnesses”, there is no presumption, and the motions adjudicator or panel must decide if it would be fair and in the interests of justice to order any of the accommodations listed. The specific options listed are permitting a support person while the witness testifies, a witness testifying out of sight of the parties, appointment of counsel for the purpose of cross-examining a witness, or other reasonable options to accommodate or protect a witness. The onus is on the applicant and the factors supporting and negating the accommodation must be weighed to determine whether it will assist or hinder the presentation and reliability of the witness’s evidence.

[33] In both criminal trials and Tribunal disciplinary proceedings the general aim, to quote from section 486.3(3), is to enable the witness to give “a full and candid account … of the acts complained of” while maintaining the traditional safeguards for challenging the reliability of that evidence. The Tribunal must decide if it is a situation where the factors, including the Respondent’s ability to fully present a case, establish a need for a cross-examination by third party legal counsel that tests the evidence in a way that will assist the Tribunal hearing panel, rather than having potentially extraneous and argumentative exchanges between the witness and the Respondent questioner, or an inability of the witness to testify fully and frankly due to a past relationship with that questioner. Once that decision has been made, even if by consent, it is not for the party who sought the order to simply waive its effect. Instead, it is a matter for the Tribunal to reconsider. In these circumstances, I find no basis to reverse my order.

(b) has the participant seeking the adjournment acted in good faith and reasonably in attempting to avoid the necessity of adjourning

[34] I find on the facts that, once my order of January 19, 2023 was made, the Respondent made diligent if unsuccessful efforts to retain counsel for the May hearing dates. The only counsel he could locate were not available.

(c) the position of other participants and the reasonableness of their actions

[35] I have already addressed the situation for CK. The position of the Law Society to oppose the adjournment is reasonable given the public interest mandate for timely held hearings, but I find that interest is tempered on the facts of this case. I see no other participant to consider.

(d) the seriousness of the harm resulting if the adjournment is not granted

[36] I have addressed this under factor (a) earlier in my reasons.

(e) the seriousness of the harm resulting if the adjournment is granted (to the other participants, etc., including the length of the adjournment required)

[37] The seriousness is both in the delay itself as it affects the public interest, and in the inconvenience to CK who took time from work, and to some extent possibly to her former counsel who set aside time to testify. However, if that counsel's practice is like most, there were ample other files crying for attention to fill that time. Law Society counsel raised inconvenience to the panel as part of the harm from adjournment. While some are unpaid volunteers and all are appreciated for their service, they know adjournments can occur. The focus should not be on the interests of the "judges", but on witnesses and those who are judged.

(f) any way to compensate for any harm identified

[38] The harm here cannot be compensated for, only minimized, by setting terms on the adjournment, which I have done by requiring the new hearing dates be set in a timely way and making the adjournment to the new dates peremptory on the Respondent.

[39] The last two factors mentioned in *Hart*, prior adjournments and whether the adjourned hearing was set peremptorily, are not relevant. Neither occurred.

[40] When considering all relevant factors in the mix, the weight favoured a short adjournment.

Orders:

[41] The Facts and Determination hearing set for May 22 to 25, 2023 is adjourned.

[42] A new hearing date for 3 days will be set, subject to the availability of Law Society counsel and the Tribunal, for late July or early August 2023.

[43] The new hearing dates are set as peremptory on the Respondent, and this is by consent of the Respondent.

[44] A pre-hearing conference is set for Thursday, May 25, 2023, at 9 am to fix or confirm the new hearing dates.