

THE LAW SOCIETY OF BRITISH COLUMBIA

In the matter of the *Legal Profession Act*, SBC 1998, c. 9

and a section 47 review concerning

LEONIDES TUNGOHAN

RESPONDENT

DECISION ON COSTS OF SECTION 47 REVIEW

Written Submissions: August 23, September 5, 7 and October 10, 2018

Panel: Greg Petrisor, Chair
Don Amos, Public representative
Jeff Campbell, QC, Bencher
Woody Hayes, Bencher
Carol Hickman, QC, Lawyer
John Hogg, QC, Lawyer
Linda Michaluk, Public representative

Discipline Counsel: Deborah K. Lovett, QC
Appearing on his own behalf: Leonides Tungohan

BACKGROUND

- [1] This Review Board has been asked to make a further decision regarding the costs of Mr. Tungohan's s. 47 review hearing.
- [2] We will set out a brief overview of these proceedings as there is a long history.
- [3] Mr. Tungohan was found by a hearing panel to have committed professional misconduct with respect to his billing and accounting practices. He was ordered, among other things, to pay a fine and costs in respect of the proceedings.

- [4] Mr. Tungohan filed a review pursuant to s. 47 of the *Legal Profession Act*. Mr. Tungohan raised 13 grounds in the s. 47 review, including that the hearing panel erred in making the order for costs. Mr. Tungohan's s. 47 review was initially unsuccessful, and Mr. Tungohan was ordered to pay costs of the s. 47 review: *Law Society of BC v. Tungohan*, 2016 LSBC 45 and 2017 LSBC 19.
- [5] Mr. Tungohan appealed the s. 47 review decision to the British Columbia Court of Appeal. The Court of Appeal upheld the Review Board's decision confirming the finding of professional misconduct. The Court of Appeal allowed the appeal, however, with respect to the costs of the initial hearing, and the matter was remitted to this Review Board for reconsideration of the hearing panel's costs order: *Law Society of BC v. Tungohan*, 2017 BCCA 423.
- [6] This Review Board's reconsideration of the hearing panel's costs order is set out at *Law Society of BC v. Tungohan*, 2018 LSBC 15 (the "June 4, 2018 Decision"). In the June 4, 2018 Decision, we set aside the costs order imposed by the hearing panel and ordered that Mr. Tungohan pay costs for the discipline hearing in the amount of \$12,500.
- [7] In summary, Mr. Tungohan's s. 47 review ultimately resulted in what we will refer to as "divided success". The grounds of review with respect to the findings of misconduct were dismissed. Mr. Tungohan was successful, however, in setting aside the initial hearing costs order.
- [8] While this Review Board previously made an order for costs of the s. 47 hearing, that order was made prior to the Court of Appeal's decision remitting the matter for reconsideration. Given the Court of Appeal decision and the June 4, 2018 Decision (which resulted in divided success in the s. 47 review), we invited further submissions with respect to the costs of the s. 47 review. We proposed that Mr. Tungohan file submissions within 30 days and that the Law Society file a response within 14 days of receiving Mr. Tungohan's submissions.
- [9] No submissions were received within the proposed time periods. Mr. Tungohan subsequently filed a "motion for clarification" on August 23, 2018, which includes submissions regarding costs for the s. 47 review. Mr. Tungohan's motion goes beyond the issue of costs for the s. 47 review to include a number of other matters, which we will address later in this decision.
- [10] The Law Society filed a reply submission on September 5, 2018, in which the Law Society agrees that it is appropriate for this Review Board to make a fresh decision regarding costs of the s. 47 hearing. The Law Society does not object to Mr. Tungohan's submissions being filed outside of the timelines set in the June 4, 2018 Decision. Accordingly, we

extend the time period for receiving submissions pursuant to Rule 5-12(5) of the Law Society Rules and make the following decision regarding costs of the s. 47 hearing.

POSITIONS OF THE PARTIES

- [11] The bill of costs that was initially prepared by the Law Society for the s. 47 review amounted to \$12,119.96. This was calculated pursuant to the tariff of costs in Schedule 4 of the Law Society Rules. However, following the Court of Appeal decision and our June 4, 2018 Decision on costs of the initial hearing, the Law Society concedes that a lesser costs order is appropriate.
- [12] Mr. Tungohan submits that the costs of the s. 47 review should be set at \$4,000 payable in six months. He submits that the ability to pay is an important factor to be considered in assessing an order for costs. He submits that the bill of costs in the amount of \$12,119.96 is not reasonable and that the order for costs should not be punitive. He also makes submissions regarding the relative seriousness of the professional misconduct in this case, which is now dated and did not involve any allegation that he received any money to which he was not entitled. He submits that there is no evidence of any impropriety in his bookkeeping practices in the years since the citation.
- [13] Mr. Tungohan notes that, in our June 4, 2018 Decision, this Review Board considered his financial circumstances and reduced the costs order for the initial hearing from \$29,736.53 to \$12,500. He submits that we should apply a similar analysis to the costs for the s. 47 hearing.
- [14] The Law Society agrees that this decision should be guided by our findings in the June 4, 2018 Decision, including the ability to pay a costs order. The Law Society acknowledges that the costs order should be proportional to the conduct at issue and the penalty imposed, which in this case was a fine in the amount of \$3,000. The Law Society fairly concedes that, given this Review Board's June 4, 2018 Decision, it is appropriate to depart from the bill of costs calculated pursuant to the tariff. The Law Society suggests that the appropriate range is \$4,000 to \$6,000.

ANALYSIS

- [15] Rule 5-11(2) of the Law Society Rules provides that a review board may order that an applicant or respondent pay the costs of a review. Rule 5-11(3) states that, in calculating costs, the review board must have regard to the tariff of costs in Schedule 4 to the Law Society Rules. Rule 5-11(4) allows the review board to order no costs or order costs in an amount other than that permitted by the tariff if, in the judgment of the review board, it is reasonable and appropriate to do so.

- [16] In assessing the reasonableness of costs, relevant considerations include the seriousness of the offence, the financial circumstances of the respondent, the total effect of the penalty, and the extent to which the conduct of a party has resulted in either costs being accumulated or saved: *Law Society of BC v. Racette*, 2006 LSBC 29.
- [17] This decision should be read in conjunction with our June 4, 2018 Decision in which we set out the law with respect to costs of Law Society proceedings and also considered the evidence in this case regarding the ability of Mr. Tungohan to pay a costs order. In the June 4, 2018 Decision, we said the following in relation to the reasonableness of the costs for the initial hearing at paras. 15-17:

Financial circumstances are one of the factors to be considered in assessing an order for costs. Where the evidence of financial circumstances establishes that a respondent has no ability to pay, this will be a significant consideration in the calculation of a fine or costs order. Where there is a genuine inability to pay and no possibility of making future payment, it may be appropriate to make no costs order at all. Where the evidence establishes financial hardship falling short of an inability to pay, it may be appropriate to reduce the costs order or to provide a reasonable time to pay.

At the initial hearing, the Respondent made submissions regarding his financial circumstances but did not provide any financial statements. At the s. 47 review hearing, the Respondent was granted leave to admit fresh evidence regarding his financial circumstances. In the financial documents tendered as fresh evidence by the Respondent, he did not disclose that he owned any assets. In response to questions from the Review Board, the Respondent acknowledged that he owned assets at the time of the s. 47 review hearing, including investments and real property. The Respondent had significant equity in real property. This evidence is properly considered in calculating a fine or an order for costs: see for example *Law Society of BC v. Wesley*, 2015 LSBC 6 at paras. 34-35.

Given the evidence of the Respondent's assets, including his savings and home equity, we do not consider that the evidence establishes an inability to pay an order for costs. However, we do accept that the order for costs imposed by the hearing panel is a financial hardship for the Respondent given his income in recent years. Based on the Respondent's evidence at the time of the hearing, his payment of costs in any significant amount will likely have to be drawn from savings or home equity.

- [18] We consider the analysis set out above to be relevant to the decision on costs for the s. 47 review.

- [19] We also note that Mr. Tungohan was partially successful in the s. 47 review. The great majority of the grounds that he raised in the s. 47 review were dismissed, and the finding of professional misconduct was upheld. Mr. Tungohan was successful, however, in having the costs order imposed by the hearing panel substituted. Accordingly, we also take into account the divided result in the s. 47 review in determining the order for costs.
- [20] After considering all of the circumstances, including the proportion of costs that Mr. Tungohan was ordered to pay for the initial hearing, we order that Mr. Tungohan pay costs for the s. 47 review in the amount of \$5,000.

OTHER MATTERS RAISED BY MR. TUNGOHAN

- [21] In his submissions, Mr. Tungohan went beyond making submissions on costs of the s. 47 hearing by raising a number of other matters that are unrelated to costs of the s. 47 review.
- [22] One of the extraneous issues raised by Mr. Tungohan is the June 4, 2018 Decision. Mr. Tungohan has described this as a “motion for clarification” of that decision. His submissions generally involve rearguing the factors related to the costs of the original hearing. Mr. Tungohan attempts to relitigate various aspects of the Decision and asks the Review Board to lower the initial hearing costs from \$12,500 to \$10,000.
- [23] While Mr. Tungohan has framed his submissions as a “motion for clarification”, it is more accurately characterized as an application to reopen and revise our June 4, 2018 Decision. The Review Board has rendered its decision on the s. 47 review of the hearing costs order based on the direction from the Court of Appeal in *Law Society of BC v. Tungohan*, 2017 BCCA 423. There is no basis for the June 4, 2018 Decision to be reviewed or reconsidered by this Review Board.
- [24] Mr. Tungohan has also raised issues regarding the accounting reports that he was ordered to produce to the Law Society pursuant to the hearing panel’s decision on Disciplinary Action. Mr. Tungohan was required to produce accounting reports to the Law Society on a quarterly basis confirming that his trust and general accounts are in compliance with Law Society accounting rules. This requirement was to remain in force until the Practice Standards Committee determines it is no longer necessary.
- [25] This is not the first time that this Review Board has been asked to address Mr. Tungohan’s obligations to submit accounting reports. In June 2017, Mr. Tungohan filed a request for “deferment of enforcement” of the requirement to produce accounting reports. This application was dismissed, primarily on the basis that oversight by an accountant was considered to be necessary: *Law Society of BC v. Tungohan*, 2017 LSBC 31. Mr. Tungohan subsequently applied again several months later for an extension of time to

produce the accounting reports. That application was also dismissed: *Law Society of BC v. Tungohan*, 2018 LSBC 05.

- [26] As we understand Mr. Tungohan's submissions, he has taken some steps to produce accounting reports and submits that this Review Board should decide that those reports fulfill the requirements of the order. He has provided copies of certain correspondence between him and the Law Society. He reports that he has filed annual accounting reports in 2016 and 2017 and submits that those reports should fulfill the requirements of the order in these proceedings.
- [27] The Law Society does not agree that this Review Board should reconsider the decision regarding the accounting reports.
- [28] We agree that it is not appropriate for this Review Board to make an order with respect to the accounting reports. We have been provided with limited information regarding what appears to be an ongoing issue between Mr. Tungohan and the Law Society regarding compliance with the order to file accounting reports. We do not consider that it is appropriate to resolve this dispute based on the material that is before us, and moreover, we do not consider that it is the proper role of this Review Board to resolve the matters raised by Mr. Tungohan. It is not the role of this Review Board to review or approve Mr. Tungohan's accounting reports. The accounting report requirement should be addressed and resolved by Mr. Tungohan and the Law Society as set out in the order made by the hearing panel.
- [29] Mr. Tungohan also requests clarification regarding what he describes as "comprehension of obligations to clients; and risk to clients and public harm." He has made submissions with respect to his accounting practices since the hearing panel's finding of professional misconduct. It is not appropriate for this Review Board to make any decision with respect to those matters.

CONCLUSION

- [30] Pursuant to Rule 5-11(4) of the Law Society Rules, we order that Mr. Tungohan pay costs for the s. 47 review hearing in the amount of \$5,000 within six months of this decision. All other relief sought by Mr. Tungohan is dismissed.