

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a section 47 review concerning

DONALD FRANKLIN GURNEY

RESPONDENT

DECISION OF THE REVIEW BOARD

Hearing date: October 14, 2020

Review Board: Jamie Maclaren, QC, Chair
Catherine Chow, Lawyer
Lindsay R. LeBlanc, Lawyer
Paul Ruffell, Public representative
Heidi Zetsche, Bencher

Discipline Counsel: J. Kenneth McEwan, QC and Kyle Thompson
Appearing on his own behalf: Donald F. Gurney

BACKGROUND

[1] On January 20, 2017, the hearing panel issued an order (“Hearing Panel Order”) containing interim and final orders regarding non-disclosure of various documents provided to the Law Society during its investigation, pending its final facts and determination decision. The hearing panel’s interim order (“Interim Order”), was as follows:

Pursuant to Rules 5-8(2), and except as expressly referred to below, Exhibits 1 through 3, 5 through 7 and 13 in these proceedings, be sealed until further order of this hearing panel.

- [2] Unfortunately, through inadvertence, the hearing panel did not make a permanent order regarding Exhibits 1, 2, 3, 5, 6, 7 and 13 (“Interim Exhibits”) and the Interim Order remained in place.
- [3] On May 18, 2017, the hearing panel rendered its facts and determination decision *Law Society of BC v. Gurney*, 2017 LSBC 15 (“Hearing Panel Decision”). The hearing panel found that the Respondent provided no substantial legal services to his client and held that he had committed professional misconduct by allowing his trust account to be used to transfer substantial funds without providing substantial legal services.
- [4] The Respondent filed a review of the Hearing Panel Decision but did not pursue his review, which was eventually dismissed as abandoned, *Law Society of BC v. Gurney*, 2019 LSBC 23.
- [5] In early 2020, the Law Society of British Columbia received inquiries from media regarding information pertaining to this matter, and it was only then discovered that the Interim Order was not addressed by the hearing panel in the Hearing Panel Decision or elsewhere.
- [6] In order to vary the Interim Order, the Law Society applied under Rule 5-19.1 for an extension of time to commence a review for that purpose. On July 10, 2020, the President of the Law Society granted the application subject to conditions to ensure a speedy review.
- [7] Only the scope of the Interim Order regarding the Interim Exhibits is at issue in this Review. The Law Society seeks to maintain the permanent non-disclosure order in balance of the Hearing Panel Order. For further clarity, the Hearing Panel Decision itself is not under review, except to the extent that it did not address the issue of the Interim Order.

ISSUES

- [8] Whether this Review Board should set aside the Hearing Panel Order entirely, and issue an order that:
- (a) replicates the portions of the Hearing Panel Order respecting the exhibits under permanent order; and
 - (b) declare an order respecting the disclosure of the Interim Exhibits.

- [9] Alternatively, whether this Review Board should issue an order on the Interim Exhibits alone, to be read in conjunction with the Hearing Panel Order.

ANALYSIS AND PROCEEDINGS

- [10] For administrative clarity, the Law Society requested this Review Board to set aside the Hearing Panel Order and replace it with a new order encompassing both the permanent order and Interim Exhibits, so that there would be only one singular non-disclosure order regarding all submissions and exhibits in this matter.
- [11] As part of its submissions the Law Society produced the proposed redactions to the Interim Exhibits, which Mr. Gurney accepted except for one minor amendment which the Law Society accepted. Taken together, the redacted Exhibits 1, 2, 3, 5, 6, 7 and 13 (“Redacted Exhibits”) are accepted by the parties as appropriate disclosure.
- [12] The Review Board was referred to case the of *Law Society of BC v. Pyper*, 2019 LSBC 01 at paragraph 42, in which that panel determined that there may be legitimate reasons to restrict public access to exhibits filed at a public hearing. Solicitor-client privilege and confidentiality are balanced against the public’s interest for openness and transparency in disciplinary hearings.
- [13] The Review Board accepts the Redacted Exhibits as appropriately protecting the identifiable information protected by solicitor-client privilege while balancing the public interest for transparency, openness and access to the balance of the information.
- [14] With the Redacted Exhibits accepted, the analysis turns to the scope of the order this Review Board is entitled to make. The Respondent objected to the issuance of a singular new order. He argued that the Review Board did not have the authority to revoke the Hearing Panel Order and replace it with its own order, even if the identical wording of the permanent order was used. The Respondent submitted that the hearing panel was not *functus officio* on the issue. He argued that it is a matter of law that the Review Board does not have authority to review the permanent aspects of the Hearing Panel Order. However, the Respondent ultimately consented and did not oppose the Review Board’s jurisdiction to deal with the Hearing Panel Order in its entirety.
- [15] After considering the written submissions and hearing oral submissions from the parties, the Review Board agreed with the parties that the Review Board will deal only with the Interim Order.

- [16] The Review Board recessed for an hour to give time to Law Society counsel and the Respondent to develop a consent order. After reconvening, the Review Board reviewed and adopted the consent order.
- [17] The Review Board was also referred to the case of *Law Society of BC v. Ahuja*, 2020 LSBC 31, in which that review board, at paragraph 25, determined that the proper standard of review from a hearing panel to a review board on issues of law remains “correctness”. The Review Board has considered the issues of law on this basis, even though the parties reached a consent. The Review Board has not abrogated its authority and gave due consideration to the issues and matters before them.
- [18] As costs for this Review were not sought, none are granted.

RESULT

- [19] The Review Board finds the following:
- (a) Section 1 of the Hearing Panel Order of January 20, 2017 is set aside;
 - (b) Pursuant to Rule 5-8(2), any client names, identifying information and any other confidential or privileged information contained in Interim Exhibits are redacted as in the Redacted Exhibits;
 - (c) Pursuant to Rule 5-8(2), any client names, identifying information and any other confidential privileged information contained in the transcripts to these proceedings are redacted; and
 - (d) If any person other than a party seeks to obtain copies of any exhibits or transcripts to these proceedings, the Redacted Exhibits and transcripts to these proceedings shall be disclosed to that person.
- [20] The form of order consented to by the parties is accepted as this Review Board’s order.