

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

KENSEELAN GOUNDEN

RESPONDENT

**DECISION OF THE HEARING PANEL
ON AN APPLICATION PURSUANT TO RULE 5-12(2.1) FOR VARIATION OF
AN ORDER MADE UNDER RULE 5-8(2)(A)**

Written submissions completed: April 21, 2021

Panel: John Waddell, QC, Chair
Lance Ollenberger, Public representative
Chelsea Wilson, Bencher

Discipline Counsel: Jordanna Cytrynbaum
Counsel for the Respondent: Henry C. Wood, QC

- [1] This matter was heard on October 27, 2020. On February 16, 2021, the Panel issued its decision. That decision is reported at 2021 LSBC 07.
- [2] The parties proceeded before the Panel on the basis of a joint submission. In that joint submission, the parties sought a non-disclosure order under Rule 5-8(2)(a) of the Law Society Rules (the “Rules”) that portions of the transcript and exhibits that contain confidential client information, privileged information or sensitive personal information contained in the medical legal reports not be disclosed to members of the public.
- [3] At paragraph 92 of the decision, the panel held:

The parties seek an order under Rule 5-8(2) of the Rules that portions of the transcript and exhibits that contain confidential client information, privileged information or sensitive personal information contained in the medical legal reports not be disclosed to members of the public. Recent amendments to the applicable rules have made the order unnecessary, as explained in *Law Society of BC v. Edwards*, 2020 LSBC 57 at paras. 118 to 121. Like the panels in *Edwards* and *Law Society of BC v. Sangha*, 2021 LSBC 03, we decline to make the order sought.

- [4] On March 18, 2021, counsel for the Respondent, Kenseelan Gounden, applied under Rule 5-12(2.1) to vary the order made by the Panel under Rule 5-8(2)(a) insofar as it pertains to sensitive personal information concerning the Respondent. Counsel for the Law Society supports the application. The application is made by way of a joint submission (the “Joint Submission”).
- [5] Pursuant to Rule 5-12(4), the President’s Designate referred the application to this Panel, which is the same Panel that heard the matter.
- [6] In the Joint Submission, the parties submit that, while non-disclosure orders are now not necessary to the extent that they are sought for matters of confidentiality or solicitor-client privilege, the notion of confidentiality contemplated in Section 88 of the *Legal Profession Act* and in Rule 5-9(3) does not extend to personal information imparted by lawyers facing disciplinary tribunals. The parties submit that, if that particular information is determined to warrant protection under the authority granted to a hearing panel under Rule 5-8(2)(a), an explicit order is required.
- [7] By way of background, between the date of the hearing and the issuance of the Panel’s decision in this matter, Rules 5-8 and 5-9 were amended. Previously, the material portions of Rules 5-8 and 5-9 read as follows:

Public hearing

- 5-8** (1) Every hearing is open to the public, but the panel or review board may exclude some or all members of the public in any circumstances it considers appropriate.
- (2) On application by anyone, or on its own motion, the panel or review board may make the following orders to protect the interests of any person:
- (a) an order that specific information not be disclosed;
 - (b) any other order regarding the conduct of the hearing necessary for the implementation of an order under paragraph (a).

- (3) Despite the exclusion of the public under subrule (1) in a hearing on a citation, the complainant and one other person chosen by the complainant may remain in attendance during the hearing, unless the panel orders otherwise.
- (4) Except as required under Rule 5-9 [*Transcript and exhibits*], when a hearing is in progress, no one is permitted to possess or operate any device for photographing, recording or broadcasting in the hearing room without the permission of the panel or review board, which the panel or review board in its discretion may refuse or grant, with or without conditions or restrictions.
- (5) When a panel or review board makes an order or declines to make an order under this rule, the panel or review board must give written reasons for its decision.

Transcript and exhibits

- 5-9** (1) All proceedings at a hearing must be recorded by a court reporter, and any person may obtain, at his or her expense, a transcript pertaining to any part of the hearing that he or she was entitled to attend.
- (2) Subject to solicitor-client privilege or an order under Rule 5-8 (2) [*Public hearing*], any person may obtain, at his or her own expense, a copy of an exhibit entered in evidence when a hearing is open to the public.

[8] Effective October 30, 2020, the material portions of these Rules were amended to provide as follows:

Public hearing

- 5-8** (1) Every hearing is open to the public, but the panel or review board may exclude some or all members of the public.
- (1.1) The panel or review board must not make an order under subrule (1) unless, in the judgment of the panel or review board
- (a) the public interest or the interest of an individual in the order outweighs the public interest in the principle of open hearings in the present case, or
 - (b) the order is required to protect the safety of an individual.
- (2) On application by anyone, or on its own motion, the panel or review board may make the following orders to protect the interests of any person:

- (a) an order that specific information not be disclosed despite Rule 5-9 (2) [*Transcript and exhibits*];
 - (b) any other order regarding the conduct of the hearing necessary for the implementation of an order under paragraph (a).
- (3) Despite the exclusion of the public under subrule (1) in a hearing on a citation, the complainant and one other person chosen by the complainant may remain in attendance during the hearing, unless the panel orders otherwise.
 - (4) Except as required under Rule 5-9 [*Transcript and exhibits*], when a hearing is in progress, no one is permitted to possess or operate any device for photographing, recording or broadcasting in the hearing room without the permission of the panel or review board, which the panel or review board in its discretion may refuse or grant, with or without conditions or restrictions.
 - (5) When a panel or review board makes an order or declines to make an order under this rule, the panel or review board must give written reasons for its decision.

Transcript and exhibits

- 5-9 (1) All proceedings at a hearing must be recorded by a court reporter.
- (2) Subject to the Act, these rules and the *Freedom of Information and Protection of Privacy Act*, any person may obtain, at the person's own expense, a copy of
 - (a) a transcript of any part of the hearing that is open to the public, or
 - (b) an exhibit entered in evidence when a hearing is open to the public.
 - (3) This rule must not be interpreted to permit the disclosure of any information, files or records that are confidential or subject to a solicitor client privilege.

[9] The *Edwards* and *Sangha* decisions were issued after these amendments were made to the Rules. In both *Edwards* and *Sangha*, the information that was sought to be protected by a non-disclosure order was confined to information that was confidential and subject to solicitor-client privilege.

[10] In the matter at hand, the information that is sought to be protected extends beyond that which is confidential or subject to solicitor-client privilege. There is also sensitive personal information concerning the Respondent included in several of

the exhibits. That sensitive personal information was also the subject of submissions and discussion at the hearing.

- [11] Rule 5-9(2) permits any person to obtain a transcript of a hearing or an exhibit entered in evidence when a hearing is open to the public. Rule 5-9(2) is subject to any orders made under Rule 5-8(2)(a), which provides that a panel may order that specific information not be disclosed to protect the interests of any person.
- [12] The Panel accepts the parties' Joint Submission to vary the order made by the Panel under Rule 5-8(2)(a). It was the Panel's intention, in rendering its decision, that sensitive personal information concerning the Respondent not be disclosed to members of the public in order to protect the interests of the Respondent.
- [13] Accordingly, the Panel makes the following order:
- (a) If any person who is not a party applies for a copy of the transcript or exhibits, whether in whole or in part, the transcript and exhibits shall be redacted for information concerning the Respondent that is of a sensitive personal nature (including any medical or other personal history presented to the Panel by means of testimony, submissions or exhibits), before the balance of any such transcript and exhibits is disclosed to that person.