

2006 LSBC 19

Report issued: May 10, 2006

Citation issued: July 30, 2004

The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and an application concerning

Howard Raymond Berge, Q.C.

Respondent

Decision of the Benchers

Written Submissions: March 28, 2006

Benchers: G. Glen Ridgway, Q.C., Chair, James D. Vilvang, Q.C., David A. Zacks, Q.C., Michael Falkins, Patrick Kelly, Gavin Hume, Q.C., Bruce LeRose, Dirk Sigalet, Q.C., Leon Getz, Q.C., Thelma O'Grady, Kathryn Berge, Q.C., Richard N. Stewart, David M. Renwick, Ronald S. Tindale, Robert D. Punnett

Counsel for the Law Society: Herman Van Ommen

Counsel for the Respondent: Christopher E. Hinkson, Q.C.

Background

[1] On July 14, 2005 the Panel rendered its decision on Facts and Verdict, finding the Respondent guilty of conduct unbecoming a lawyer. A penalty hearing was held on October 21, 2005. The Panel issued written reasons on December 19, 2005, imposing a penalty on the Respondent.

[2] On January 18, 2006, the Respondent emailed a notice seeking a Review on the Record by the Benchers of the findings of the Panel made July 14, 2005 and December 19, 2005.

[3] The Respondent's application is governed by Sections 38, 47 and 48 of the *Legal Profession Act* which are as follows:

Discipline hearings

38(1) This section applies to the hearing of a citation.

(2) A hearing must be conducted before a panel.

(3) A panel must

(a) make a determination and take action according to this section,

(b) give written reasons for its determination about the conduct or competence of the respondent and any action taken against the respondent, and

(c) record in writing any order for costs.

(4) After a hearing, a panel must do one of the following:

(a) dismiss the citation;

(b) determine that the respondent has committed one or more of the following:

(i) professional misconduct;

(ii) conduct unbecoming a lawyer;

(iii) a breach of this Act or the rules;

(iv) incompetent performance of duties undertaken in the capacity of a lawyer;

(v) if the respondent is not a member, conduct that would, if the respondent were a member, constitute professional misconduct, conduct unbecoming a lawyer, or a breach of this Act or the rules;

(c) make any other disposition of the citation that it considers proper.

(5) If an adverse determination is made against a respondent, other than an articulated student, under subsection (4) the panel must do one or more of the following:

(a) reprimand the respondent;

(b) fine the respondent an amount not exceeding \$20,000;

(c) impose conditions on the respondent's practice;

(d) suspend the respondent from the practice of law or from practice in one or more fields

of law

- (i) for a specified period of time,
 - (ii) until the respondent complies with a requirement under paragraph (f),
 - (iii) from a specific date until the respondent complies with a requirement under paragraph (f), or
 - (iv) for a specific minimum period of time and until the respondent complies with a requirement under paragraph (f);
- (e) disbar the respondent;
- (f) require the respondent to do one or more of the following:
- (i) complete a remedial program to the satisfaction of the practice standards committee;
 - (ii) appear before a board of examiners appointed by the panel or by the practice standards committee and satisfy the board that the respondent is competent to practise law or to practise in one or more fields of law;
 - (iii) appear before a board of examiners appointed by the panel or by the practice standards committee and satisfy the board that the respondent's competence to practise law is not adversely affected by a physical or mental disability, or dependency on alcohol or drugs;
 - (iv) practise law only as a partner, employee or associate of one or more other lawyers;
- (g) prohibit a respondent who is not a member but who is permitted to practise law under a rule made under section 16 (2) (a) or 17 (1) (a) from practising law in British Columbia indefinitely or for a specified period of time.
- (6) If an adverse determination is made against an articulated student under subsection (4), the

panel may do one or more of the following:

- (a) reprimand the articulated student;
- (b) fine the articulated student an amount not exceeding \$2,000;
- (c) extend the period that the articulated student is required to serve under articles;
- (d) set aside the enrollment of the articulated student.

(7) In addition to its powers under subsections (5) and (6), a panel may make any other orders and declarations and impose any conditions it considers appropriate.

(8) A fine imposed under this Act may be recovered as a debt owing to the society and, when collected, it is the property of the society.

Review on the record

47(1) Within 30 days after being notified of the decision of a panel under section 22 (3) or 38 (5), (6) or (7), the applicant or respondent may apply in writing to the benchers for a review on the record.

(2) Within 30 days after the decision of a panel under section 22 (3), the credentials committee may refer the matter to the benchers for a review on the record.

(3) Within 30 days after the decision of a panel under section 38 (4), (5), (6) or (7), the discipline committee may refer the matter to the benchers for a review on the record.

(4) If, in the opinion of the benchers, there are special circumstances, the benchers may hear evidence that is not part of the record.

(5) After a hearing under this section, the benchers may

- (a) confirm the decision of the panel, or
- (b) substitute a decision the panel could have made under this Act or the rules.

(6) The benchers may make rules establishing procedures for an application for a review under this section.

Appeal

48 Any of the following persons who is affected by a decision, determination or order of a panel or of the benchers may appeal the decision, determination or order to the Court of Appeal:

(a) an applicant;

(b) a respondent;

(c) a lawyer who is suspended or disbarred under this Act or the rules.

[4] At issue is whether or not a respondent lawyer is entitled to a Review on the Record of both the Verdict and the Penalty Decisions under Section 47 of the *Legal Profession Act*.

[5] The Law Society takes the position that only the Law Society is entitled to request a Review on the Record of a decision made under Section 38(4) of the *Act*. The Respondent submits that he is entitled to request a review of both the Verdict and the Penalty Decisions.

[6] The Respondent does not dispute that the Verdict decision was a decision made under Section 38(4) of the *Act*.

[7] At issue is the correct interpretation of subsections 47(1) and (3) of the *Act*.

[8] The Law Society submits that, since subsection 47(1) does not make a reference to a decision under Section 38(4) and section 47(3) does make a reference to a decision under that Section, the result is that only the Discipline Committee may seek a review of a decision made under Section 38(4).

[9] Section 38 sets out the procedure for the conduct of a Discipline hearing. It provides for the conduct of the hearing, the determinations that can be made and, where a determination adverse to the respondent is made, the panel's options to impose a penalty.

[10] Section 38(5) provides that, where an adverse determination has been made, the panel must impose a penalty. The hearing includes both the determination phase and the penalty phase. The record of the panel therefore is composed of both phases. The right of the respondent to a Review under Section 47(1) arises after both the verdict and the penalty phase are complete.

[11] Section 47(1) provides that an appeal lies against the record and stipulates the time frame for initiating the appeal. Section 47(1) provides " after being notified of a decision of a panel under section 22(3) or 38(5), (6), or (7)." The exclusion of Section 38(4) from that list only serves to prevent a respondent from commencing a Review on the Record until a decision under Section 38(5) has been made.

[12] The rationale for this is twofold:

(a) review of a verdict and penalty should occur at the same time, and

(b) the respondent should know the penalty before deciding whether or not to appeal.

[13] Section 47(1) provides " the applicant or respondent may apply in writing to the benchers for a review on the record." It does not state " the applicant or respondent may apply in writing to the Benchers

for a review of a decision under Section 38(5), (6), or (7)" . *Black's Law Dictionary*, 7th edition, defines the term " record" at page 1279 as:

record, n. 1. A documentary account of past events, usu. designed to memorialize those events; information that is inscribed on a tangible medium or that, having been stored in an electronic or other medium, is retrievable in perceivable form.

2. The official report of the proceedings in a case, including any filed papers, a verbatim transcript of the trial of hearing (if any), and tangible exhibits.

[14] Section 47(1) requires a review on the record. Subsection (4) includes all past events. This includes the whole proceeding that has been undertaken before the Panel, including both verdict and penalty. There is one record, not a record for the verdict phase and a separate and different record for the penalty phase.

[15] The Law Society relies on *Law Society of British Columbia v. Thomson* [1998] LSDD No. 129. However, that decision was made under the previous Act. *The Legal Profession Act*, RSBC 1996, c. 255 (Previous Act) provided:

49(1) A respondent, in respect of whom action was taken under section 48 may, within 30 days after the action was taken, apply in writing to the benchers for a review.

(2) On a review under subsection (1), the benchers may confirm or decrease the severity of the action taken under section 48, after hearing the respondent and any evidence that the benchers may, in their discretion, permit the respondent to adduce.

[16] *The Law Society of British Columbia v. Thomson* held that the Benchers were without jurisdiction to review other than penalty under Section 49 because:

(a) Section 49(1) referred to a review of action taken under Section 48. This section only deals with the powers of a discipline panel to impose penalties after a determination under Section 47, the verdict section of the Act.

(b) Section 49(2) set out the only powers of the Benchers, on a review under Section 49; to confirm or decrease the severity of the action taken under Section 48.

[17] It is not of assistance under the new Act. The Previous Act related to the appeal of a decision under Section 48, which was the penalty section. The Previous Act also provided a mechanism for a review of a decision, and not a review on the record. The new provisions of the Act do not relate to appealing a decision under a section. They relate to a review of the record and set out the time limits for initiating that review.

[18] This was made clear to the members of the Law Society by the notice in the *Benchers' Bulletin* of June-July 1998 which provided:

Appeals to the Benchers - the new Act allows the Society to rationalize provisions on appeals, so that all appeals to the Benchers are reviews on the record of the proceeding before the hearing panels, with discretion for the Benchers to hear further evidence in extraordinary circumstances. Another provision allows the Credentials Committee to appeal to the Benchers the decision of a credentials hearing panel, which parallels the right of the Discipline Committee to appeal a decision of a discipline hearing panel.

[19] While the Rules are subordinate to the *Act*, they are consistent with the right of the respondent under the *Act* to seek a review of a decision under Section 38(4). Rule 5-13 of the Law Society Rules provides:

Initiating a review

5-13(1) An applicant or a respondent may initiate a review of a decision under section 47 of the *Act* by delivering a Notice of Review under Rule 5-15 to the Executive Director within 30 days after the applicant or respondent is notified of the decision of the panel.

(2) The Credentials Committee may initiate a review of a decision of a panel under section 22(3) of the *Act* by adopting a resolution to refer the decision to the Benchers under section 47 of the *Act* within 30 days of the decision.

(3) The Discipline Committee may initiate a review of a decision of a panel under section 38(4), (5), (6) or (7) of the *Act* by adopting a resolution to refer the decision to the Benchers under section 47 of the *Act* within 30 days of the decision.

(4) When a review is initiated under subrule (2) or (3), the Executive Director must promptly deliver a Notice of Review to the applicant or respondent concerned.

[20] Rule 5-13 limits the type of decisions the Discipline Committee can initiate a review from. It does not limit the type of decisions a respondent can initiate a review from.

[21] Rule 5-15 and Rule 5-17 of the Law Society Rules provide:

Notice of review

5-15 A Notice of Review must contain the following in summary form:

- (a) a clear indication of the decision to be reviewed by the Benchers;
- (b) the nature of the order sought;
- (c) the issues to be considered on the review of the decision.

Record of discipline hearing

5.17(1) Unless counsel for the respondent and for the Society agree otherwise, the record to be reviewed by the Benchers under section 47(1) or (2) of the *Act* consists of the following:

- (a) the citation;

- (b) a transcript of the proceedings before the panel;
- (c) exhibits admitted in evidence by the panel;
- (d) the panel's written reasons for any decision;
- (e) the Notice of Review under Rule 5-15.

(2) If, in the opinion of the Benchers, there are special circumstances, the Benchers may admit evidence that is not part of the record.

[22] If a Review initiated by a respondent were limited to a review on the penalty alone, the record of the discipline hearing would not be required. Only the penalty decision would be required. The above Rules support a respondent having the right to have a decision under Section 38(4) reviewed.

[23] The old Law Society Rules provided:

Appeal to Bencher from disciplinary action

500(1) An application for review under section 49 of the Act shall be delivered to the Secretary within 30 days after the action being appealed from was taken.

(2) Rule 473, 485(1) to (7), 13, (15) and (18) and 490 apply, with the necessary changes and so far as they are applicable, to a review under section 49 of the Act.

Review by Benchers

501 (1) The Secretary must promptly notify the respondent in writing of a referral to the Benchers under section 50 of the Act.

(2) Rule 473 and 485 (1) to 16(a) and (18) apply, with the necessary changes and so far as they are applicable, to a review under section 50 of the Act.

[24] The old Law Society Rules set up a separate procedure for different claims. The current Rules create a single procedure for Reviews on the Record. Both the respondent and the Discipline Committee now have the ability to appeal any decision on the record.

[25] If the Law Society's interpretation were to prevail, the member's only remedy would be to appeal the verdict to the British Columbia Court of Appeal. The Law Society's interpretation of its power or review could afford the Law Society an unfair advantage over its members as the standard of review employed by the Benchers is one of "correctness", which in effect permits the Benchers to substitute their own view for that of a hearing panel, while the standard of review employed by the Court of Appeal for British Columbia could be the narrower standard of "clear and palpable error" depending upon the particular issues or issues

which are appealed. The Law Society could take advantage of a broader standard of review before the Benchers while depriving the member of a similar scope of review. The result could be inequitable.

[26] Section 47(1) provides that the respondent's time for appealing a decision under Section 38(4) does not begin to run until a decision is made as to penalty. The fact that Section 47(1) does not refer to Section 38(4) does not mean that a lawyer has no right of appeal of a decision under Section 38(4).

[27] Section 47 allows a Review on the Record. That record includes a decision made by a panel under Section 38(4). The Respondent is entitled to a Review on the Record under Section 47 of the *Legal Profession Act* with respect to the decisions of the hearing panel pronounced July 14, 2005 and December 19, 2005.