

2010 LSBC 22

Report issued: September 24, 2010

Oral Reasons: September 1, 2010

Citation issued: January 16, 2006

The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and a section 47 review concerning

Re: Lawyer 11

Respondent/Applicant

**Decision of the Benchers on the Application of the Respondent/Applicant to
Dismiss the Law Society's Supplemental Notice of Review**

Oral Decision date: September 1, 2010

Benchers: Bruce LeRose, QC, Chair, Haydn Acheson, Leon Getz, QC, Peter Lloyd, Thelma O'Grady,
Lee Ongman, Greg Petrisor, Alan Ross

Counsel for the Law Society: Dennis Murray, QC

Counsel for the Respondent: David Mulroney

Background

[1] This is a preliminary motion by the Applicant for dismissal of the Law Society's Supplemental Notice of Review dated May 11, 2010.

[2] The Applicant is the Respondent in the original citation, and both an Applicant and a Respondent in cross-Reviews. He is the Applicant in this motion.

[3] By consent, this application was dealt with by written submissions.

[4] The Applicant's application arises because the Law Society filed two Notices of Review: one dated February 9, 2010, and a second "Supplemental Notice of Review" dated May 11, 2010. The Applicant says that the Supplemental Notice of Review was originated and filed out of time.

Facts and Chronology

[5] For the purpose of this decision we need not recount in detail the circumstances of the citation. The facts are described fully in the Decision of the Hearing Panel on Facts and Verdict issued September 9, 2009.

[6] In summary, the Law Society issued a citation against the Applicant in 2006. The citation contained three separate allegations, which are paraphrased as follows:

a. Allegation 1 alleged a scheme to mislead the Supreme Court with respect to a specific loan allegedly made to the Applicant's father's company.

b. Allegation 2 contained two allegations pleaded in the alternative. The Law Society alleged that the

Applicant either:

- (a) misled the Court, or alternatively;
- (b) misled a financial institution,

regarding the financial affairs of his father's company.

c. Allegation 3 alleged that, by conducting himself in the manner set out in allegations 1 and 2, which was dishonourable or questionable conduct, the Applicant had cast doubts on his professional integrity and/or competence or reflected adversely on the integrity of the legal profession or the administration of justice.

[7] The hearing on the three allegations proceeded in the latter half of 2008 with further submissions in early 2009. The Decision of the Hearing Panel on Facts and Verdict was issued on September 9, 2009.

[8] As noted, the allegations in 2(a) and 2(b) were pleaded in the alternative. The Panel dismissed allegation 2(b) during the hearing after a no-evidence motion by the Applicant.

[9] In its Decision on Facts and Verdict, the Panel found that the Applicant provided misleading information to the Court as alleged in 2(a) and found that his actions were professional misconduct.

[10] The Panel found that the Law Society had not proven the allegations 1 or 3 on a balance of probabilities.

[11] As noted above, the Decision of the Hearing Panel on Facts and Verdict was issued September 9, 2009. The Decision of the Hearing Panel on Penalty was issued January 5, 2010. The time period for the Discipline Committee to seek a Review runs from the former date.

[12] On October 5, 2009 the Discipline Committee of the Law Society resolved to refer the dismissal of allegation 3 to the Benchers for a Review. The Law Society issued a Notice of Review dated January 16, 2010. That Notice sought a review of allegation 3 of the citation.

[13] The Applicant issued his own Notice of Review dated February 4, 2010 seeking to set aside the finding of professional misconduct on allegation 2(a).

[14] The Discipline Committee of the Law Society then resolved on April 22, 2010 that, in addition to seeking a Review of the dismissal of allegation 3, the Law Society would also seek a Review of the dismissal of allegation 1.

[15] To this end, the Law Society then issued the "Supplemental Notice of Review" dated May 11, 2010.

[16] Counsel for the Applicant immediately notified counsel for the Law Society that he objected to the Supplemental Notice.

THE STATUTE AND THE RULES

[17] The *Legal Profession Act*, SBC 1998, c. 9 provides:

47(3) Within 30 days after being notified of 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.

...

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

[18] The Law Society Rules provide:

Review by Benchers

5-12(1) In Rules 5-12 to 5-21, “review” means a review of a hearing panel decision by the Benchers under section 47 of the Act.

(2) Subject to the Act and these Rules, the Benchers may determine the practice and procedure to be followed at a review.

Initiating a Review

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

(1.1) A respondent may initiate a review by delivering a Notice of Review under Rule 5-15 to the Executive Director within 30 days after the respondent is notified of the decision of the panel with respect to penalty.

(2) The Credentials Committee may initiate a review by adopting a resolution within 30 days of a decision to refer the decision to the Benchers for a review.

(3) The Discipline Committee may initiate a review by adopting a resolution within 30 days of a decision to refer the decision to the Benchers for a review.

(4) When a review is initiated under subrule (2) or (3), the Executive Director must promptly deliver a Notice of Review under Rule 5-15 to the applicant or respondent concerned.

The Position of the Parties

[19] The Applicant submits that the Supplemental Notice of Review is out of time. Put simply, the Discipline Committee did not refer the matter that forms the subject of the Supplemental Notice of Review to the Benchers for a review on the record within 30 days of the Decision to be reviewed. He submits that, as a statutory body, the Law Society only has the powers and jurisdiction given to it by the statute.

[20] In addition, the Applicant argues that he would be prejudiced because allegation 1, which is the subject of the Supplemental Review, contains an allegation of fraud, while the finding being appealed (allegation 2(b)) did not result in a finding of fraud. We do not find it necessary to deal with the Applicant’s submissions on prejudice or his characterization of the distinction between the basis of allegations 1 and 2.

[21] Counsel for the Law Society submits that the Benchers have the authority to determine practice and procedures upon Reviews. He submits that the Law Society has the authority to control its own processes in a manner that is reasonable and does not prejudice any member. He characterizes this as an issue of “controlling the process” as opposed to a “power” or “jurisdiction” issue.

[22] The Law Society cites *Knight v. Indian Head*, [1990] 1 S.C.R. 653 as authority for the proposition that administrative bodies are the masters of their own procedure.

Analysis

[23] We do not agree with the submission of counsel for the Law Society that this is an issue relating to the control of the discipline process. The rights of Review prescribed by s. 47 of the Act, for both lawyers and the Law Society, are time limited. The time limit for the Discipline Committee to refer such a Review is 30

days after being notified of the decision of the panel. There is no provision for an application by either party to extend the time required for a Review.

[24] Counsel for the Law Society is correct that the Law Society has control over its own processes. Section 47(6) of the *Legal Profession Act* provides that the Benchers may make rules establishing procedures for an application for review. Rule 5-13 appears to be a part of the implementation of that power. Rule 5-13(3) re-states the requirement that the Discipline Committee must initiate a review by adopting a resolution within 30 days.

[25] Thus, to the extent that the Law Society has been given the power to exercise control of its own processes, the Law Society Rules have exercised that power via Rule 5-13.

[26] The Law Society is bound by the provisions of the Legal Profession Act and the Rules. This is not a situation where an unexpected occurrence has arisen that is not contemplated in either the Act or the Rules. The Act and the Rules provide the time limits. The Discipline Committee's decision to refer the Supplemental Notice of Review falls outside of those time limits.

[27] Further, it cannot be said that the Supplemental Notice of Review is merely an amendment of the original Notice of Review. When the Discipline Committee considered the Decision on Facts and Verdict on October 5, 2009, it made a decision to refer one "matter" to the Benchers for review. The "matter" referred was the "dismissal of allegation 3". On April 22, 2010 the Discipline Committee decided to refer another "matter" to the Benchers for review. That "matter" was the dismissal of an aspect of allegation 1 of the citation.

[28] On the basis of this reasoning, we find that the Supplemental Review was out of time. It is not a matter that the Discipline Committee resolved to refer to the Benchers for review within 30 days of the Decision to be reviewed.

[29] In setting out this reasoning, we are not to be taken to be stating that the Law Society does not control its own processes. It clearly does. However, in this circumstance the Act and the Rules clearly set out the process.

Disposition

[30] The Applicant's application is granted. The Law Society's Notice of Supplemental Review is dismissed.