

2014 LSBC 26

Report issued: June 12, 2014

Citation issued: May 11, 2007

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

Vivian Chiang

Applicant

Decision on Application to Settle the Record

Application date: April 25, 2014

President's Designate: Lynal Doerksen

Counsel for the Law Society: Henry C. Wood, QC

Applying on her own behalf: Vivian Chiang

OVERVIEW

[1] The Applicant has applied for a Review of the hearing panel decision on disciplinary action issued on September 25, 2013. On October 31, 2013 the President's designate granted a stay of the suspension with conditions (see 2013 LSBC 30). The Review was originally scheduled to take place on March 31, 2014. On February 17, 2014 the Applicant requested an adjournment of the Review and this application was denied (see 2014 LSBC 10).

[2] On March 12, 2014 the Applicant renewed her application for an adjournment of the Review hearing based, among other things, on the desire to obtain legal representation. As representation by counsel may assist both the Applicant and the Review panel, and given the consent of counsel for the Law Society, the Review hearing was adjourned. The Review hearing is now set to be heard on July 21, 2014. The stay of her suspension was extended to July 31, 2014.

[3] On April 25, 2014 the Applicant made an "Application to Settle Record". Her application is based on s. 47 of the *Legal Profession Act*, which states, in part:

(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 for a review on the record by a review board.

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

[4] The Applicant also relies on Law Society Rule 5-17 which states:

(1) Unless counsel for the respondent and for the Society agree otherwise, the record for a review of a discipline decision consists of the following:

(a) the citation;

- (b) a transcript of the proceedings before the panel;
- (c) exhibits admitted in evidence by the panel;
- (c.1) any written arguments or submissions received 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 review board, there are special circumstances, the review board may admit evidence that is not part of the record.

[5] It is not relevant to this application, but I pause to note that, although s. 47 and Rule 5-17 currently require a review before a review board, this review arose before the creation of review boards and therefore will be heard by a review panel of Benchers.

[6] The Applicant agrees that she has received as part of the Record a copy of the following material as required by Rule 5-17(1), or with the consent of Law Society counsel:

- (a) The citation;
- (b) A transcript of the proceedings on October 7 and 8, 2008 (Facts and Determination) and August 29, 2013 (Disciplinary action);
- (c) The exhibits before the October 7 and 8, 2008 and August 29, 2013 hearing panels;
- (d) The written submissions received by the October 7 and 8, 2008 and August 29, 2013 hearing panels;
- (e) The decisions of the:
 - i. October 7 and 8, 2008 hearing panel (Facts and Determination issued June 17, 2009);
 - ii. September 30, 2010 Review panel (issued December 20, 2010)
 - iii. British Columbia Court of Appeal (dated January 15, 2013);
 - iv. Supreme Court of Canada (dated June 13, 2013);
 - v. August 29, 2013 hearing panel decision (Disciplinary action issued September 25, 2013).
- (f) The notice of review under Rule 5-15 dated October 23, 2013 (filed by the Applicant).
- (g) Revised Notice of Review dated November 26, 2013.

[7] The Applicant submits the following documents should be considered part of the "record" as set out by Rule 5-17 and do not require the consent of the Law Society counsel:

- (a) The transcript of the review hearing of September 30, 2010;
- (b) The submissions received by the September 30, 2010 Review panel.

[8] The Applicant relies on *Law Society of BC v. Berge*, 2006 LSBC 19, and quotes paragraph 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.

[emphasis added by the Applicant]

ISSUE

[9] The issue is: What is the “record” that is to be before the Review panel?

CHRONOLOGY OF LEGAL PROCEEDINGS

[10] Before proceeding further with the legal analysis, some history of the Applicant’s matter must be set out:

- (a) May 11, 2007 – citation issued
- (b) October 7 and 8, 2008 – hearing on Facts and Verdict conducted
- (c) June 17, 2009 – decision on Facts and Verdict issued (with a minority decision); the Law Society sought a review of this decision;
- (d) September 30, 2010 – Review on Facts and Verdict held;
- (e) December 20, 2010 – decision on Review reversed the hearing panel, found the Applicant guilty of professional misconduct and returned the matter to the hearing panel to determine disciplinary action. The Applicant appealed to the British Columbia Court of Appeal before hearing on disciplinary action was held;
- (f) January 15, 2013 – Court of Appeal dismissed the Applicant’s appeal with reasons, the Applicant sought leave to appeal to the Supreme Court of Canada;
- (g) June 13, 2013 – Supreme Court of Canada dismissed the application to appeal without reasons;
- (h) August 29, 2013 – Discipline hearing conducted by the original panel to determine disciplinary action;
- (i) September 25, 2013 – Decision on disciplinary action issued suspending the Applicant for one month;
- (j) October 23, 2013 – Applicant seeks a review of the decision on disciplinary action (the suspension).
- (k) November 26, 2013 – Applicant files a revised Notice of Review seeking a review of all decisions related to the citation issued on May 11, 2007.

POSITION OF THE LAW SOCIETY

[11] Counsel for the Law Society submits that the record, as set out in paragraph 4 above, satisfies the requirements of Rule 5-17 and a “plain reading” of Rule 5-17 does not permit the addition of any further material. Further, the Law Society does not agree that the additional documents requested by the Applicant (and set out in paragraph 5 above) form part of the “Record”.

ANALYSIS

[12] Section 8 of the *Interpretation Act* [RSBC 1996] Chapter 238 states:

Every enactment must be construed as being remedial, and must be given such fair, large and liberal

construction and interpretation as best ensures the attainment of its objects.

[13] The object of Rule 5-17 is to put before the Review panel all of the relevant material it will need to make a fair and rational decision. Rule 5-17(1) sets out the six items that are relevant in most cases. If Rule 5-17(1) meant to include “everything”, unless counsel agreed otherwise, there would be no need for Rule 5-17(2), which allows the Applicant to apply to the Review panel to add to the record where there are exceptional or “special circumstances”.

[14] The Applicant cites *Law Society of BC v. Berge* in support of her application. A careful review of *Berge* shows it is not helpful to her application. *Berge* concerns the relationship between sections 38 and 47 of the *Legal Profession Act* and a respondent’s right to a review of both the verdict and penalty decisions. In *Berge*, the respondent had been found guilty of conduct unbecoming a lawyer. In a subsequent hearing several months later, a penalty was imposed. After the penalty decision, the respondent sought a review of both the verdict and penalty. The Law Society argued, unsuccessfully, that the respondent could only apply to review the penalty decision as the *Legal Profession Act* permitted the Law Society to apply for a review only after the verdict was rendered.

[15] The review by the Benchers in *Berge* held that this was not how the Act and Rules are to be interpreted. The fact that the Rules only permit the Law Society to apply for a review after the initial hearing is because there is no need for a respondent to apply for a review if he or she is not found guilty of any misconduct after the initial hearing. The rationale for this interpretation is explained at paragraph 12 of *Berge*:

(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.

[16] Discipline hearings are usually conducted in two phases: the initial hearing to determine the facts and if the respondent has committed any misconduct; and, if misconduct is found, a second hearing to determine disciplinary action. It would be inefficient to allow the respondent a review of the facts and any finding of misconduct before the disciplinary action has been given.

[17] Thus, the Applicant’s reliance on paragraph 14 of *Berge* (quoted in paragraph 8 of this decision above) is not applicable to this case. The reference to “all past events” is a reference to the facts of the case at hand; and the “whole proceeding” is in the singular. *Berge* does not say that “all proceedings” are to be before the Review panel. Further support for this is found at paragraph 22 of *Berge*:

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.

[emphasis added]

And at paragraph 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.

[18] The Applicant’s case is a different situation than in *Berge*. The Applicant was initially found not guilty of any misconduct at the first hearing. The Law Society sought a review and was successful in overturning the initial decision. The Applicant did not wait until a hearing to determine penalty was completed but proceeded to the Court of Appeal. Thus, in the Applicant’s case, the proceedings have been bifurcated despite the intent of the Act and Rules as explained in *Berge*.

FURTHER OBSERVATION

[19] The issue before the Review panel concerns the sanction meted out to the Applicant. The facts that underlie the finding of professional misconduct are no longer available for review as a higher court has already determined this issue. The transcript and submissions of the first review hearing are not relevant to the matter before the current Review panel.

[20] However, as Rule 15-7(2) allows for the Applicant to make an application to the Review panel to include other information, my ruling is not necessarily the final word. This may be a situation where “special circumstances” exist, but that is a matter for the Applicant and the Review panel.

CONCLUSION

[21] I do not accept the Applicant’s submission that the record must include the transcripts and submissions of every proceeding in prior hearings. The application is denied.