2014 LSBC 55
Report issued: November 10, 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 section 47 review concerning

VIVIAN CHIANG

APPLICANT

DECISION OF THE BENCHERS ON REVIEW

Review date:	September 12, 2014
Benchers:	David Mossop, QC, Chair Haydn Acheson Thomas Fellhauer Dean Lawton Sharon Matthews, QC Herman Van Ommen, QC Tony Wilson
Counsel for the Law Society:	Henry Wood, QC
Appearing on her own behalf:	Vivian Chiang

[1] The Applicant, Vivian Chiang applies pursuant to Section 47 of the *Legal Profession Act* for a review of the disciplinary action imposed by a hearing panel in reasons issued September 25, 2013.

BACKGROUND

[2] The citation was issued against the Applicant on May 11, 2007 (the "Citation"). There were four allegations in the Citation.

[3] At the hearing in October 2008, the Law Society withdrew one of the allegations. The hearing panel, by a majority decision, dismissed the Citation. A minority of the panel found professional misconduct in respect of one allegation that concerned misleading the court.

[4] The Law Society sought a review of the decision on Facts and Verdict.

[5] On review, the Benchers upheld the decision of the minority. The Benchers found professional misconduct with respect to one allegation in the citation and referred the matter back to the hearing panel for a determination on disciplinary action.

[6] The Applicant appealed the review panel's decision to the Court of Appeal. The review panel's decision was upheld by the Court of Appeal in *Law Society of British Columbia v. Chiang*, 2013 BCCA 8.

[7] The Applicant sought leave to appeal to the Supreme Court of Canada, but on June 13, 2013 her leave application was dismissed with costs.

[8] On August 29, 2013, the hearing panel reconvened to determine disciplinary action. In reasons issued September 25, 2013 (the "Disciplinary Action Decision") the hearing panel determined the appropriate sanction to be:

(a) one month's suspension to be served starting November 2013; and

(b) costs of $10,000 payable by August 31, 2014.

[9] The suspension was since stayed pending the outcome of this review

ADJOURNMENT REQUEST

[10] This Review commenced with a request by the Respondent for an adjournment to allow her additional time to prepare written submissions. She explained that until recently she expected to be represented by Mr. Tretiak, QC.

[11] When considering a request for adjournment, we must consider the Applicant's right to a fair hearing and any prejudice the Applicant may suffer if an adjournment is not granted. This must be weighed against the desirability of a speedy and expeditious proceeding. The right to a fair hearing is paramount.

[12] In this case the Applicant has a lengthy history of adjournment requests and missed deadlines. The details of those requests are set out in 2014 LSBC 10, 2014 LSBC 26, 2014 LSBC 28 and 2014 LSBC 43. A brief summary is as follows:

(a) on February 27, 2014 she applied for an adjournment of the review date then set for March 31, 2014, having missed the deadline to provide written submissions by February 10, 2014;

(b) the adjournment was not granted but the time to provide written submissions was extended to March 13, 2014. (see 2014 LSBC 10);

(c) on March 12, 2014, the Applicant applied again for an adjournment due to her desire to retain counsel. With the Law Society's consent, the Review was adjourned to July 21, 2014, and the time to file written submissions was extended to June 16, 2014;

(d) on June 14, 2014, the Applicant applied for yet another adjournment which was denied but the time for filing written submissions was extended to July 4, 2014 (see 2014 LSBC 28);

(e) subsequently the Law Society consented to an adjournment of the Review to September 12, 2014 on a peremptory basis; and

(f) on September 10, 2014, the Applicant applied for another adjournment which was denied (see 2014 LSBC 43).

[13] The Applicant confirmed that there had been no change in circumstances since two days earlier when her last adjournment request was denied.

[14] The lengthy history of adjournments and missed deadlines emphasizes the need for this matter to be heard. We were not advised of any prejudice the Applicant would suffer if the hearing proceeded as scheduled, other than the same grounds of prejudice that she asserted prior to 2014 LSBC 43.

[15] The Applicant is capable of representing herself; she is fully aware of the issues. The Applicant previously represented herself in all the Law Society proceedings as well as in the Court of Appeal and in the Application for Leave to the Supreme Court of Canada.

[16] The Review Panel noted that she read from a prepared text. This is a review on the record so there is no concern about dealing with new evidence. The Law Society, although a respondent in this Review, provided the Applicant with written submissions a week in advance of this Review, setting out, in detail, its position on this Review. The Applicant's request for adjournment was denied, and the Review proceeded.

[17] This Review Panel notes that the Applicant also wanted the transcripts of the review proceedings on liability and the Court of Appeal proceeding. This was another reason for an adjournment. This Review Panel fails to see how those transcripts would be of any assistance to her. Those proceedings were reviews on the record. In addition, she never ordered the transcripts.

[18] When deciding to grant an adjournment, a hearing panel or review panel balances two values: fairness to the lawyer; and the public interest. Public interest includes a speedy determination of discipline matters, which must be balanced against the applicant's ability to prepare. However, at some time in the process, the public interest in having discipline matters conclude will prevail over the right of the applicant to have more time to prepare. This case has reached that point. In our view, the Applicant has had ample opportunity to prepare, and the public interest in concluding the matter now far outweighs her further right in that regard. For that reason and because no new grounds for an adjournment (new since her application for an adjournment was dismissed two days previously) were asserted, we dismissed the application.

SECTION 47 REVIEW

[19] The Applicant, by letter dated October 23, 2013, applied for "a review on the record of the decision issued by the hearing panel on September 25, 2013".

[20] By letter dated November 26, 2013 the Applicant sought to amend her notice by seeking "a review on the record of all decisions related to my citation issued by the Law Society on May 11, 2007".

[21] Section 47 of the *Legal Profession Act* states:

> Within 30 days after being notified of the decision of a panel … the applicant or respondent may apply in writing for review on the record …

[22] The Applicant asserts that Section 47 is broadly worded and does not limit her right to a review of only the hearing panel's September 25, 2013 decision.

[23] Section 47 is limited to a review of a specific decision of a panel, not "all decisions related to my citation …". We find that this Review Panel's jurisdiction is limited to a review of the hearing panel's decision issued September 25, 2013.

[24] In addition to the plain wording of Section 47, it would be inappropriate for this Review Panel to review the decision of the Benchers on review issued in December 2010 because a review panel does not have the jurisdiction to review another

review panel's decision. A review panel is limited to reviewing the decisions of a panel made under Section 22(3) (a credentials hearing) or Section 38(5), (6) or (7), which are decisions made by a discipline hearing panel. The decision of the Benchers on review is a decision made pursuant to Section 47, which is subject only to an appeal to the Court of Appeal.

[25] Further, the Applicant has appealed the review panel's decision to the Court of Appeal. The decision of the review panel was upheld by the Court of Appeal. The Applicant has exhausted all avenues of appeal open to her with respect to the determination of facts and verdict. The principles of *res judicata* apply to prevent such a review even if we had the jurisdiction to entertain it.

[26] We reject the Applicant's request to review all decisions relating to the citation. This Review is limited to the decision of the hearing panel issued September 25, 2013.

STANDARD OF REVIEW

[27] Pursuant to Section 47(5) of the *Legal Profession Act*, the Benchers on review have the power to either confirm the decision of the panel or substitute a decision the panel could have made under the Act. The Benchers on review therefore have a discretion to exercise with respect to the nature and severity of the disciplinary action imposed.

[28] The leading case on the standard of review applicable to a review of a disciplinary action is *Law Society of BC v. Hordal*, 2004, LSBC 36. In *Hordal* it was held that the standard of review is one of correctness subject to qualifications:

(a) if the factual matters are in dispute and the initial hearing panel has made factual findings grounded in an assessment of credibility, the review panel should show deference to the hearing panel in respect to those factual findings; and

(b) in considering questions regarding the correctness of a finding or the duration of a suspension, the review panel should consider the hearing panel's decision to be correct if it falls within an appropriate range.

THE DECISION

[29] The hearing panel summarized the circumstances of the professional misconduct in question in paragraph 3 of their Reasons as follows:

> The finding of professional misconduct was made in respect of an appearance by the Respondent in the British Columbia Supreme Court on an application where the Respondent was representing a company in which the Respondent was a principal and had a significant personal financial interest. The dissenting decision, the Benchers on Review and the Court of Appeal determined that the Respondent had intentionally misled the Court by seeking from that Court on short leave, relief that was beyond the relief permitted by the order made allowing the application on short leave.

[30] We agree that this is an accurate characterization of the facts as found by the minority of the hearing panel and confirmed by the Benchers on review. The panel then considered the factors set out in *Law Society of BC v. Oglivie*, [1999] LSBC 17, which is recognized as the appropriate framework for determining the appropriate penalty.

[31] The panel then concluded in paragraph 31 as follows:

> We are of the view that the circumstances of this case require that a period of suspension of one month be imposed and we so order. The Respondent did not offer any explanation for the conduct that would allow a lesser penalty to be imposed. As indicated earlier, it is the view of the Panel that the Respondent has yet to develop an appreciation for the extent to which she has misconducted herself, despite a strong message to that effect from the highest court in this Province.

[32] The Applicant submitted that the disciplinary action was too harsh because:

(a) no harm was done;

(b) she has already suffered enough;

(c) she was treated differently than other lawyers;

(d) the Law Society ought to have taken a less punitive approach, such as a conduct review.

NO HARM WAS DONE

[33] The Applicant asserts that no harm was done. The panel considered this argument in paragraph 20. They found, correctly in our view, that the parties in the litigation were negatively affected. They faced additional unjustified costs due in part to the Applicant's misleading behaviour.

THE APPLICANT HAS SUFFERED ENOUGH

[34] In support of this position, the Applicant says she was ordered to pay costs in the court proceeding, her company went into bankruptcy, and she has been humiliated by publication of the reasons concerning this matter.

[35] With respect to costs in the court proceedings, there is nothing in the record verifying that the Applicant was held personally liable for costs. The plaintiff company was required to pay costs, but in the context of commercial litigation that should not be considered in these proceedings as punishment against her.

[36] The Applicant says publication of the Law Society reasons humiliated her. There is no doubt publication by the Law Society that a lawyer has committed professional misconduct is painful and humiliating. Publication is necessary and proper for two reasons. First, it aids in general deterrence of such behaviour. Second, the public interest requires that the Law Society be open and transparent in its disciplinary proceedings.

[37] Although publication is painful, it is a normal incident of the disciplinary process and thus not a basis for determining that the disciplinary action imposed was inappropriate.

TREATED DIFFERENTLY

[38] The Applicant says other lawyers found to have committed similar acts have received less severe sanctions. At the heart of this submission is the Applicant's failure to acknowledge the real gravamen of her misconduct.

[39] In her submissions, the Applicant directed us to paragraph 13 of the panel's reasons, asserting that she disagreed with that characterization of the evidence.

[40] Paragraph 13 of the reasons states:

> The entire matter of the advantage to be gained by the Respondent is at the centre of this citation. It has now been conclusively determined that the misconduct for which the Respondent has been found responsible was motivated by her desire to protect a wasting inventory of fruit product. The Respondent sought to protect her financial stake in the outcome of the litigation, and in that process disregarded clear directions from the Court about the limits of her ability to seek redress.

[41] In our view, the hearing panel was correct in this characterization of the Applicant's misconduct. The Applicant was found to have intentionally misled the Court while motivated by her financial interest.

[42] The panel considered the range of penalties in other cases at paragraph 27 as follows:

> The reported cases suggest that the penalty for misleading behaviour can be a fine or a period of suspension in the range from 30 to 90 days. The cases in which a fine was imposed are generally found to be situations where there is an explanation for the behaviour that suggests an absence of intent or a result from a mistake or misunderstanding. The longer periods of suspension were provided in those instances where there was particularly egregious misbehaviour or repeat instances of misleading behaviour.

[43] In our view, it is clear that intentionally misleading with financial motivation requires a suspension in the range of 30 to 90 days. A 30 day suspension for this type of conduct is at the lower end of the range. However, it is our view that the hearing panel did identify the appropriate range and this sanction falls within it.

[44] In our view, when one considers the proper characterization of the Applicant's misconduct, it is clear that she is not being treated differently from other lawyers who have committed similar misconduct.

LESS PUNITIVE APPROACH

[45] The Applicant suggests that a less punitive approach ought to have been taken by the Law Society. She says a conduct review would have been more helpful and more appropriate. The panel did not have the jurisdiction to consider such an approach nor do the Benchers on Review.

[46] The decision whether to proceed by way of citation or by way of a conduct review is made by the Discipline Committee under Rule 4-4. A hearing panel, when

hearing a citation, is limited to doing one of the things set out in Section 38 of the *Legal Profession Act*. Directing a conduct review is not within the power of a hearing panel.

APPROPRIATENESS OF THE DISCIPLINARY ACTION

[47] In considering the appropriateness of the disciplinary action imposed in this case we consider the following primary factors:

(a) the misleading conduct was intentional;

(b) the conduct was motivated by financial interests;

(c) the Applicant still fails to recognize the extent to which she misconducted herself.

[48] The disciplinary action of a one month suspension plus $10,000 for costs is well within the range of penalties for this type of conduct. We agree that the disciplinary action imposed is appropriate and dismiss this application for review with costs. The parties are at liberty to make submissions on costs in writing.

[49] We order the Applicant be suspended for one month commencing December 1, 2014, unless the parties agree to another date. The interim stay now in place remains in force until December 1, 2014 or the date agreed to by the parties, if they can agree to such a date.

[50] The costs awarded by the hearing panel below in the amount of $10,000 is confirmed.

[51] The above $10,000 must be paid by February 1, 2015.

[52] The Law Society has up to 30 days from the date of this decision to make written submissions on costs of this Review. Then, the Applicant will have 15 days to make written submissions on costs.