

2013 LSBC 01
Report issued: January 9, 2013
Oral decision: December 6, 2012
Citation issued: September 8, 2009

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and an application concerning

ROBERT COLLINGWOOD STROTHER

RESPONDENT

**DECISION OF THE BENCHERS
ON THE ISSUE OF JURISDICTION FOR A REVIEW
UNDER S. 47 OF THE *LEGAL PROFESSION ACT***

Written submissions received: October 19, 2012
November 9, 2012
November 23, 2012

Benchers: David Renwick, QC, Chair
Haydn Acheson
Rita Andreone, QC
Ben Meisner
Nancy Merrill
Lee Ongman
Thelma O'Grady
Catherine Sas, QC

Counsel for the Law Society: Henry Wood, QC
Counsel for the Respondent: Peter Gall, QC and Robert Grant, QC

PRELIMINARY MATTERS

- [1] In a pre-review conference on September 19, 2012, the President directed that the issue of jurisdiction to hear the June 8, 2012 and August 13, 2012 Notices of Review be determined by the Benchers.
- [2] Written submissions on jurisdiction were provided by Messrs. Wood and Gall (dated October 19 and November 23, 2012 by Mr. Wood and November 9, 2012 by Mr. Gall) and were considered by the Benchers on December 6, 2012. The Benchers were also asked to consider the request by counsel for the Respondent that oral submissions be made. The Benchers were satisfied that given the thorough, comprehensive and well written submissions, oral submissions were not required.

BACKGROUND

- [3] On September 8, 2009, the Law Society issued a citation against the Respondent, which was subsequently amended on September 14, 2010 and December 4, 2010 (“Citation”). A further amendment to the citation on August 10, 2012 is in issue in this review. The Citation contained two allegations.
- [4] On May 3, 2012, the hearing panel issued its reasons for dismissing the first allegation of the Citation (“May 3, 2012 Ruling”), indexed as 2012 LSBC 14.
- [5] On June 8, 2012, a Notice of Review of the May 3, 2012 Ruling, under section 47(3) of the *Legal Profession Act* was issued by Mr. Wood on behalf of the Discipline Committee.
- [6] On August 10, 2012, the hearing panel allowed an amendment to the remaining allegation in the Citation and provided written reasons (“August 10, 2012 Ruling”), indexed as 2012 LSBC 28.
- [7] On August 13, 2012, counsel for the Respondent delivered a Notice of Review of the August 10, 2012 Ruling under section 47(1) of the Act.
- [8] Counsel for the Respondent maintains that the Respondent is entitled to a review of the August 10, 2012 Ruling.

ISSUES

- [9] The issues to be determined are as follows:

- (a) Is the Respondent entitled to a review of the August 10, 2012 Ruling prior to the hearing panel making its determination on: (a) facts and determination; and (b) any disciplinary action?
- (b) Is the Law Society entitled to a review of the May 3, 2012 Ruling prior to the hearing panel making its determination on: (a) facts and determination; and (b) any disciplinary action?

DISCUSSION

Jurisdiction to review the August 10, 2012 Ruling

- [10] The answer to the issues raised requires a statutory interpretation of the relevant provisions of the Act and the Rules.
- [11] The Respondent's Notice of Review was brought pursuant to section 47(1) of the Act, which states:
 - (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.
- [12] Counsel for the Law Society says that the Benchers have no jurisdiction, at this time, to review the August 10, 2012 Ruling and that there must be a determination on: (a) facts and determination; and (b) any disciplinary action first.
- [13] Counsel for the Respondent says that it is procedurally unfair and prejudicial to the Respondent to require him to complete a disciplinary hearing before he is allowed to appeal purported errors made by the hearing panel. He maintains that, before the Respondent is put through a costly process, he should be allowed the same rights and opportunity to appeal as the Law Society has.
- [14] Counsel for the Respondent concedes that the only provision that would allow for a review on the record under section 47(1) is a decision of the panel made under section 38(7) of the Act. The remaining provisions, sections 22(3), 38(5) and 38(6), are inapplicable.
- [15] Section 38(7) of the Act states:
 - (7) In addition to its powers under subsection (5) and (6), a panel may make any other orders and declarations and impose any conditions it considers appropriate.

- [16] Accordingly, counsel for the Respondent submits that an order to amend the Citation is an order under section 38(7) and is therefore subject to review under section 47(1). This would allow the Respondent to apply for a review of an order within 30 days of making the order, regardless of whether or not the hearing panel has made a decision on facts and determination and disciplinary action.
- [17] Counsel for the Respondent submits that a broad interpretation be placed on the wording “any other orders” and that its interpretation not be restricted to disciplinary action only.
- [18] Counsel for the Respondent suggests that to put a restrictive interpretation on section 38(7) places the Respondent in an unfair position *vis-à-vis* the Law Society, in having to wait until there has been a final determination. If the Law Society is allowed to proceed on the amended Citation and it is later determined that the amendment shouldn’t have been allowed, the Respondent will have been put to considerable expense. It would impose unnecessary harm to his reputation and relationships and result in a tremendous waste of resources.
- [19] Furthermore, he states, to allow the amended Citation to proceed is an abuse of process and puts the Law Society in a more favourable position.
- [20] The Law Society’s position is that the hearing panel’s order to amend the Citation is not an order contemplated by section 38(7) and, therefore, none of the propositions made by the Respondent need be considered.
- [21] The governing principles of statutory interpretation are set out in *Bell Express Vu Limited Partnership v. Rex*, 2012 SCC 42. That case stands for the proposition that the provisions of an Act are to be given a contextual analysis and one needs to consider the scheme, subject and intention of the legislation.
- [22] The mere fact that there are disagreements over the interpretation of a provision does not necessarily mean that it is ambiguous, and therefore, we need to look at the entire context of the provision to see if there are multiple interpretations.
- [23] If we accept the Respondent’s interpretation of section 38(7), then every decision made by a hearing panel, be it an evidentiary ruling, an amendment to a citation or resolution of any other interlocutory issue, would be the subject of a review under section 47(1), regardless of whether or not there has been a final determination.
- [24] Clearly, this could not have been the intention of the Legislature. Such a truncated approach to defending a citation would result in a fractured and prolonged exercise

that would not benefit anyone other than a respondent who may wish to proceed down that path.

[25] We are of the view that the intention of the legislation was to restrict section 38(7) to the imposition of a disciplinary sanction. This section must be read in conjunction with section 38(5) and (6), which provide for penalties once there has been an adverse determination. Section 38(7) is not to be provided broad interpretation as suggested by counsel for the Respondent, but rather is meant to supplement penal sanctions. Section 38(5) and (6) were not meant to be exhaustive, and the purpose of section 38(7) was to provide further flexibility for the panel in taking disciplinary action in respect of a respondent. It was not intended to be used as a basis for an appeal on an interlocutory ruling.

[26] In *Law Society of BC v. Berge*, 2006 LSBC 19, the decision of the Benchers on Review stated:

[10] ... The right of the respondent to a Review under Section 47(1) arises after both the verdict and the penalty phase are complete.

[27] The Review Panel further explained the absence of a reference to section 38(4) within section 47(1) as it relates to the Respondent's right of review:

[11] ... 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.

[28] We accept the reasoning in *Berge*.

[29] In the event the Respondent believes that an interlocutory ruling is wrong, he does have a remedy under section 48 of the Act. The Legislature clearly addressed the concerns of unfairness raised by the Respondent. Section 48 contemplates an appellate review of not only a decision of the panel but also a determination or order of the panel. Therefore, although this may not be the best alternative, we do not agree with the Respondent that the provisions are unfairly weighted in favour of the Law Society.

[30] If section 38(7) were meant to be given the same interpretations as section 48, the language would have reflected it.

[31] We note that the Respondent, on September 10, 2012, filed a Notice of Application for Leave to Appeal, appealing the August 10, 2012 Ruling, so he is not without remedy.

Jurisdiction to review the May 3, 2012 Ruling

- [32] The Respondent submits that there appears to be two different sets of rules that apply when initiating a review, and that this puts the Law Society in an unfair advantage.
- [33] In reviewing the legislative framework, we are satisfied that there is no inconsistency or unfairness in the process. Section 47(3) contemplates a review if the panel has made a determination, *inter alia*, under section 38(4)(a).
- [34] The referral for a Benchers Review of the May 3, 2012 Ruling was made pursuant to section 47(3) of the Act, which provides:
- (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.
- [35] In this case, there was a dismissal of the first allegation in the Citation. If the Law Society wishes a review, it must do so within 30 days of the decision and not wait until the completion of the discipline process (see Rule 5-13(3)).
- [36] As noted by counsel for the Law Society, the critical factor to be determined is whether or not the process is finalized. In this case, the order dismissing the first allegation in the Citation was a final order and therefore section 47(3) contemplates a review within 30 days. There is no ambiguity.

RULING AND ORDER

- [37] The Benchers have the authority to review the May 3, 2012 Ruling, and the Respondent is unable to have a review of the August 10, 2012 Ruling until there has been a determination on either facts and determination or disciplinary action. As a result, the Hearing Administrator will set a date for the review by the Benchers of the May 3, 2012 Ruling. The review of the August 10, 2012 Ruling is dismissed.