2015 LSBC 33
Decision issued: July 9, 2015
Citation issued: May 29, 2013

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

LEONIDES TUNGOHAN

RESPONDENT

DECISION OF THE REVIEW BOARD ON JURISDICTION

Written submissions: March 10, 2015

Review Board: **Majority decision:**
Lynal Doerksen, Chair
James Dorsey, QC, Lawyer
Martin Finch, QC, Bencher
Laura Nashman, Public Representative
Karen Nordlinger, QC, Lawyer
Lance Ollenberger, Public representative

Concurring decision
Sharon Matthews, QC, Bencher

Discipline Counsel: Alison Kirby
Appearing on his own behalf: Leonides Tungohan

MAJORITY DECISION OF LYNAL DOERKSEN, JAMES DORSEY, QC, MARTIN FINCH, QC, LAURA NASHMAN, KAREN NORDLINGER, QC AND LANCE OLLENBERGER

[1] The Respondent seeks a review of a decision made by a Bencher in a prehearing conference. A Bencher who conducts a prehearing conference is commonly referred to as the "Chambers Bencher."

[2] The issue is whether a review by a Review Board at this stage of the proceeding is permissible under the Act and Rules governing the Law Society.

CHRONOLOGY OF EVENTS

[3] The citation in this matter was issued May 29, 2013, and a hearing was conducted over five days on April 15, 16 and September 15, 16 and 17 of 2014. Prior to and on the eve of the commencement of the hearing, the Respondent made an application for a determination of a preliminary question pursuant to Rule 4-26.1. The application was referred to a single-person Chambers Bencher at a pre-hearing conference and heard on the morning of April 15, 2014.

[4] The Respondent's application consisted of the following questions for determination prior to the hearing:

(a) to seek relief as a point of law, whether the Law Society of British Columbia is precluded from issuing a citation to inquire into the truth of the allegations under paragraphs 3(a), 3(b), (c) [sic], 3(d), 3(e), 3(f), 3(g), 3(h), 3(i), 3(j), 3(k), 3(l), 3(m), 3(n), 3(o), 3(p), 3(q), 4(a), 4(b), 4(c), 4(d), 4(e), 4(f) and 5 on account of abuse of process, *res judicata,* and violation of procedural fairness;

(b) to ask for clarification of the phrase "May 2011" as alleged in paragraph 3 of the citation;

(c) to determine the legal import and effect of the acceptance of the "the [sic] referral of the G complaint from the Investigations, Monitoring & Enforcement (Professional Conduct) Department for inclusion in the Respondent's practice standards file";

(d) to determine the legal import and effect of the acceptance of the referral of the Auditor's Report by the Practice Standards Committee;

(e) to determine compliance with Rule 4-25(2) and Rule 4-25(3) of the Rules; and

(f) to prevent roving inquiry.

[5] In the alternative, the Respondent sought to make a preliminary application pursuant to Rule 4-16.2 of the Law Society Rules that allegations contained in paragraphs 1, 1(a), 1(b), 1(c) 1(d) and 2 in the citation be determined in a separate hearing.

[6] The Chambers Bencher gave an oral decision on April 15, 2014, and the Respondent's application was denied. The hearing proceeded in front of a three-person hearing panel. The written reasons of the Chambers Bencher decision were issued on September 8, 2014. On October 8, 2014 the Respondent filed a Notice of Review of the Chambers Bencher decision on the preliminary question.

[7] On January 14, 2015 the hearing panel issued its decision on Facts and Determination. A hearing and decision on disciplinary action was issued on June 5, 2015.

[8] Written submissions have been provided to this Review Board by the Respondent and discipline counsel; an oral hearing has not been requested.

POSITION OF THE RESPONDENT

[9] The Respondent relies on s. 47 of the *Legal Profession Act* and a number of Rules of the Law Society. The relevant portions of s. 47 are:

> (1) Within 30 days after being notified of the decision of a panel under section … 38(5), (6) or (7) … the applicant or respondent may apply in writing for a review on the record by a review board.
>
> ...
>
> (5) After a hearing under this section, the review board may
>
> (a) confirm the decision of the panel, or
>
> (b) substitute a decision the panel could have made under this Act.

[10] Section 38(6) is not applicable in this matter. Section 38(1), (5) and (7) states:

> (1) This section applies to the hearing of a citation.
>
> (5) If an adverse determination is made against a respondent … the panel must do one or more of the following:
>
> (a) reprimand the respondent;
>
> (b) fine the respondent an amount not exceeding $50,000;
>
> (c) impose conditions or limitations on the respondent's practice;
>
> (d) suspend the respondent from the practice of law …

(e) disbar the respondent;

(f) require the respondent to do one or more of the following …

(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.

[11] The Respondent submits that the Chambers Bencher decision is a legal determination pursuant to s. 38(7) of a "panel" distinct from the hearing panel and is therefore reviewable by a review board.

[12] The Respondent further submits that the Chambers Bencher decision is a decision of a panel because of the wording of the operation of Rules 4-26.1 and 5-2(2). Rule 4-26.1 states:

(1) Before a hearing begins, the respondent or discipline counsel may apply for the determination of a question relevant to the hearing by delivering to the Executive Director and to the other party written notice setting out the substance of the application and the grounds for it,

(2) ...

(3) When an application is made under subrule (1), the President must do one of the following as appears to the President to be appropriate:

(a) appoint a panel to determine the question;

(b) refer the question to a prehearing conference;

(c) refer the question to the panel at the hearing of the citation.

(4) ...

(5) A panel appointed under subrule (3)(a) is not seized of the citation or any question pertaining to the citation other than that referred under that provision.

[13] According to Rule 5-2(2) a panel may consist of one Bencher who is a lawyer to conduct a hearing to determine a preliminary question.

POSITION OF THE LAW SOCIETY

[14] The Law Society submits that s. 38(7), when read in the context of the whole section, is only intended to apply to a hearing panel at the conclusion of the disciplinary action phase of a citation hearing.

[15] Further, the Law Society submits that support for this interpretation of s. 38(7) is found in Rules 5-13(2.2), 4-35 and 4-34. Rule 5-13(2.2) states:

> Within 30 days after the decision of the panel under Rule 4-35 *[Disciplinary action]*, the respondent may deliver a notice of review under Rule 5-15 *[Notice of review]* to the Executive Director and discipline counsel.

[16] Rule 4-35 requires a hearing panel to do certain things (such as take disciplinary action pursuant to s. 38(5) and (7)) after an adverse determination under Rule 4-34.

[17] Rule 4-34 states:

> (1) Following completion of the evidence, the panel must invite submissions from discipline counsel and the respondent on each allegation in the citation.
>
> (2) After submissions under subrule (1), the panel must
>
> (a) find the facts and make a determination on each allegation, and
>
> (b) prepare written reasons for its findings on each allegation.

[18] Basically, the Law Society argues the Respondent is not permitted to a review until the completion of the hearing of a citation and:

> (a) an adverse determination has been made against the Respondent (such as a finding that the Respondent has committed professional misconduct or a breach of the rules) and,
>
> (b) a panel has imposed disciplinary action on the Respondent.

[19] In support of this the Law Society refers to two decisions: *Law Society of BC v. Berge*, 2006 LSBC 19; and *Law Society of BC v. Strother*, 2013 LSBC 01.

ANALYSIS

[20] Of note, s. 38(5) refers to "the" panel and s. 38(7) refers to "a" panel. If the article "the" identifies the panel hearing the citation, does the latter article "a" refer to "any" panel that made a determination in relation to the citation including the hearing panel? Would this include a panel constituted under Rule 4-26.1 to determine a preliminary question?

[21] "A" panel is referred to in subsections (2), (3) and (4) as well. However, these subsections are all prefaced by s. 38(1):

> This section applies to the hearing of a citation.

There can only be one hearing by one panel of a citation.

[22] We agree with the Law Society that s. 38(7) must be read in the context of the whole section. Section 38(7) is restated, with emphasis added:

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

[23] It may be better grammatically to have s. 38(3), (4) and (7) use the article "the" (panel), but the words "in addition to" make it clear what panel is being referred to. "The" panel in s. 38(5) is the hearing panel, that panel alone has powers under subsection (5) that no other panel can exercise. Given that the section applies to the hearing of a citation, there can be no other interpretation than the powers under subsection (7) belong only to the hearing panel. The grammar may cause confusion, but it should not result in a different interpretation when the intent is clear.

[24] Further support for this interpretation is found in Rule 4-35(1)(c), which requires a hearing panel to include in its decision any "order, declaration or imposition of conditions under section 38(7)." No other panel is explicitly conferred these powers in the Rules.

[25] Thus, a panel on a preliminary question cannot make an "adverse determination" in accordance with s. 38(4) and cannot impose a discretionary consequence as provided in s. 38(5) and therefore has no additional powers under s. 38(7).

[26] The Chambers Bencher, whether he was acting as a "panel" or not, had no authority to impose a disciplinary action against the Respondent pursuant to s. 38(5) when

determining a preliminary question. If the Chambers Bencher has no powers under s. 38(5), he cannot have "additional" powers under s. 38(7).

[27] The rationale for this is to promote the orderly and efficient hearing of a citation. If a respondent were permitted to seek a review for every decision, ruling or order made by a panel or a Chambers Bencher, the final determination of a citation could be delayed beyond any reasonable time frame.

[28] An example of this is Rule 4-29 governing the application for an adjournment. If a respondent was unsuccessful in making an adjournment application, would this be considered an "order" pursuant to s. 38(7)? Would a respondent be entitled to a review and a further appeal from the decision of a review board?

[29] This approach is common in statutory administrative schemes. The policy choice favours completing the initial decision-making stage before allowing a hierarchical review by insulating from review procedural and other decisions during the course of the initial stage. Review is permissible only when a final decision is made, at which time any preliminary or other decision along the way could be moot or of no substantive consequence. If not, it can be reviewed by a review board.

[30] This policy choice streamlines the administrative adjudicative process; avoids multiplicity of proceedings; avoids concurrent jurisdiction in separate tribunals (assuming the hearing panel can disagree with a ruling in pre-hearing conference); and discourages abuse of process or prolonged proceedings. Thus, we agree with the Law Society that the decision of the Chambers Bencher cannot be reviewed until the hearing is concluded as per Rule 4-35.

[31] This result falls in line with the case authority, and we adopt the words in *Strother*, which considered the same question, albeit on somewhat different facts, at paragraphs 23-25:

> [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.

IS THE CHAMBERS BENCHER DECISION THE DECISION OF A "PANEL"?

[32] Although it was not argued by either party, we query whether the decision of the Chambers Bencher is a decision of a "panel." When an application for a preliminary question was made, the President had three options available to her pursuant to Rule 4-26.1(3) – only two of the options refer to a "panel." The relevant portions of this rule state:

> (1) Before a hearing begins, the respondent or discipline counsel may apply for the determination of a question relevant to the hearing by delivering to the Executive Director and to the other party written notice setting out the substance of the application and the grounds for it,
>
> (2) ...
>
> (3) When an application is made under subrule (1), the President must do one of the following as appears to the President to be appropriate:
>
> (a) appoint *a panel to determine the question*;
>
> (b) refer the question to a prehearing conference;
>
> (c) refer the question to the *panel* at the hearing of the citation.
>
> (4) ...
>
> [emphasis added]

[33] The procedure for a prehearing conference is set out in Rule 4-27. The Rule does not give the Chambers Bencher the authority to make a finding under s. 38(4) or

impose a disciplinary action under s. 38(5). The authority of the Bencher presiding at a prehearing conference is as follows:

> (5.1) The respondent or discipline counsel may apply to the Bencher presiding at the conference for an order
>
> (a) for discovery and production of documents, including an order under section 44(4) of the Act,
>
> (b) to withhold the identity or contact information of a witness,
>
> (c) to adjourn the hearing of the citation,
>
> (d) for severance of allegations or joinder of citations under Rule 4-16.2 *[Severance and joinder]*,
>
> (e) for disclosure of the details of the circumstances of misconduct alleged in a citation under Rule 4-26 *[Application for details of the circumstances]*, or
>
> (f) concerning any other matters that may aid in the disposition of the citation.
>
> (6) The Bencher presiding at a pre-hearing conference may
>
> (a) adjourn the conference generally or to a specified date, time and place,
>
> (b) [rescinded]
>
> (c) set a date for the hearing to begin, and
>
> (d) allow or dismiss an application made under subrule (5.1) or referred to the conference under this Part.

[34] As already noted above, a "panel" may consist of a single Bencher to determine a preliminary question pursuant to Rule 5-2(2). Thus the President could have appointed a single bencher panel to determine the preliminary question pursuant to Rule 4-26.1(3)(a). However, as the President "referred" the question to a prehearing conference pursuant to Rule 4-26.1(3)(b), presided by a single Bencher, does this mean that the decision of the Bencher is a decision of a "panel"?

[35] We posit the question because it may be determinative of whether the Respondent could make an appeal under s. 48 of the Act. However, we refrain from answering

it as it is not necessary to do so to determine the question before us. Indeed, as already stated, we find that, even if the Chambers Bencher decision is that of a panel, the Respondent has failed to convince us that he may be permitted to have a review of that decision by a review board.

DECISION

[36] Under the administrative scheme established in the Act and the subordinate procedure for panel proceedings established by the Rules, a decision by a single bencher in a prehearing conference on a preliminary question is not an "adverse determination" from which flows panel imposition of mandatory and discretionary consequences for the lawyer named in a disciplinary citation.

[37] Therefore, the decision sought to be reviewed is not a decision the Respondent can apply to review, and his Notice of Review is quashed.

[38] We will receive written submissions with respect to costs by either party within two weeks of the date of this decision.

CONCURRING DECISION OF SHARON MATTHEWS, QC

[39] I agree with the conclusion that Mr. Tungohan does not have a right of review of the Chambers Bencher's decision by a review panel under the *Legal Profession Act*. However, I disagree with the analysis and the reasons of the majority, so I set out in brief my reasons why I find that a review panel has no jurisdiction to hear Mr. Tungohan's proposed review, now or at any time.

[40] I agree with the recitation of the facts in the majority's reasons, so I will turn directly to the analysis.

[41] Mr. Tungohan's review is brought pursuant to section 47(1) of the *Legal Profession Act*, which provides for reviews of decisions of a panel under section 22(3) or sections 38(5), (6) or (7).

[42] In my view, this jurisdiction question is a statutory interpretation issue, which requires us to decide whether the hearing at which the Chambers Bencher's decision was made was one that is covered by s. 47 and whether that hearing was constituted with the Chambers Bencher as a "panel."

Determination of a Question Before the Hearing Begins – Rule 4-26.1

[43] Immediately prior to the commencement of the hearing of the citation, Mr. Tungohan sought the determination of several questions related to the citation. He brought an application pursuant to Rule 4-26.1, which reads:

> (1) Before a hearing begins, the respondent or discipline counsel may apply for the determination of a question relevant to the hearing by delivering to the Executive Director and to the other party written notice setting out the substance of the application and the grounds for it.
>
> (2) ...
>
> (3) When an application is made under subrule (1), the President must do one of the following as appears to the President to be appropriate:
>
> (a) appoint a panel to determine the question;
>
> (b) refer the question to a prehearing conference;
>
> (c) refer the question to the panel at the hearing of the citation.
>
> (4) ...
>
> (5) A panel appointed under subrule (3)(a) is not seized of the citation or any question pertaining to the citation other than that referred under that provision.

[44] In this case, the President referred the question to a prehearing conference. The Chambers Bencher heard the application by telephone and dismissed it orally. Pursuant to Rule 5-2(2)(b.2), a panel may consist of one Bencher hearing a preliminary question under Rule 4-26.1. Accordingly, the Chambers Bencher's decision is the decision of a panel on a preliminary question at a prehearing conference.

Section 47 of the *Legal Profession Act*

[45] Section 47 reads as follows:

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

[46] Since section 22(3) is about credential hearings, it is not applicable. Accordingly, it is necessary for the Chambers Bencher's decision to be a decision of a panel made under section 38(5), (6) or (7) for a review to lie under s. 47(1). Above, I dealt with whether it is a decision of a panel. The next issue is whether it is a decision under section 38(5), (6) or (7).

Section 38 of the *Legal Profession Act*

[47] Section 38 only pertains to the hearing of citations. That is made clear by section 38(1), which provides that:

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

[48] The Chambers Bencher's order was not made during the hearing of a citation. Rule 4-26.1 allows for determination of questions before a hearing of the citation begins, and that is what happened here. In other words, a decision of a panel at a prehearing conference on a preliminary question under Rule 4-26.1 is not a decision made at the hearing of the citation. There is no right of review under s. 47(1) for such decisions.

[49] The majority does not deal with whether a decision on a preliminary question before the hearing of the citation begins is a s. 38 decision that can be reviewed. Rather, the majority focuses on whether the hearing of the citation is complete. It is, as I read the majority's decision, a timing issue: The Chambers Bencher's decision becomes reviewable under section 47 after the facts and determination and disciplinary action phase of the hearing of the citation have been completed.

[50] I do not agree with this analysis. In my view, it is not a question of timing or of when this review right arises. It does not arise at all because only decisions at the hearing of citations are reviewable, and the Chambers Bencher's prehearing determination decision is not part of the hearing of the citation pursuant to s. 38. The Chambers Bencher's decision does not become a decision of the panel hearing the citation simply by virtue of the discipline hearing panel completing the hearing of the citation. The Chambers Bencher's decision will always be a decision made by a panel at a prehearing conference of a preliminary question brought under Rule 4-26.1.

[51] It was open to the President to refer Mr. Tungohan's application to the discipline hearing panel. If that had been done, and if the discipline hearing panel commenced the hearing of the citation before hearing the application, this issue might be decided differently. I think it important to make this distinction because I am not confident that the majority's view that s. 38(7) orders are not reviewable

until the discipline hearing is complete is correct in all cases. I note that while s. 38(5) and s. 38(6) are orders made after an "adverse determination," s. 38(7) does not contain such a precondition. In my view it is possible that a s. 38(7) decision will give rise to the right of review before the conclusion of the hearing of the citation.

[52] It is my view, therefore, that the Chambers Bencher's decision is not reviewable under s. 47(1) and will not become reviewable under s. 47(1) after the hearing of the citation is complete given the language of s. 38 and s. 47(1) of the *Legal Profession Act*.

Section 48 of the *Legal Profession Act*

[53] There is no review right under s. 47(1), but s. 48 of the *Legal Profession Act* provides for an appeal to the Court of Appeal of any decision, determination or order of a panel or of a review board. Section 48 reads:

> 48(1) Subject to subsection (2), any of the following persons who are affected by a decision, determination or order of a panel or of a review board 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;
>
> (d) the society;
>
> (2) An appeal by the society under subsection (1) is limited to an appeal on a question of law.

[54] The Law Society's position is that the s. 48 right of appeal applies to Mr. Tungohan's case, subject to filing in a timely way. Conceptually, I agree with this, although I note this review board has no jurisdiction to decide that issue if it were contested. Given that my view is that such decisions will never attract a s. 47 review, it makes sense that there is an appeal avenue open to such persons, and I believe it is the only avenue open to Mr. Tungohan to appeal the Chambers Bencher's decision. It is important, given the timing issues on appeal that the Law Society avers to, that the rights and avenues open to persons in Mr. Tungohan's position be clear.

[55] This is a point of concern for me about the Law Society's position that there is also potential for a review under s. 47 in the future, which the majority has adopted. Notwithstanding the Law Society's view that he has a s. 48 appeal subject to time limits within which to file an appeal, discipline counsel suggested to Mr. Tungohan that he withdraw his s. 47 review until the completion of the citation hearing without prejudice to his right to file another Notice of Review once the disciplinary action phase of the hearing of the citation is complete. If I am correct, then Mr. Tungohan will still not have the right to review the Chambers Bencher's decision under s. 47. At paragraph 29 of the majority reasons, the majority says he may or may not have a s. 47 review after the hearing of the citation is complete. If he does not, what of his s. 48 appeal given the time limits to file?

Conclusion

[56] For these reasons, I believe the statutory interpretation of sections 38, 47 and 48 of the *Legal Profession Act* is capable of being answered on the clear language of those provisions without resort to inferring a legislative intention to set up a scheme of when reviews become available, which is not, in my opinion, supported by the clear language of the statute. On disciplinary matters, only decisions of panels hearing the citation are reviewable under s. 47. Other panel decisions, determinations or orders are covered by the appeal rights found in s. 48.