2015 LSBC 40
Decision issued: August 27, 2015
Citation issued: February 21, 2012

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a section 47 review concerning

MARTIN DREW JOHNSON

RESPONDENT

DECISION OF THE BENCHERS ON JURISDICTION TO EXTEND TIME TO APPLY FOR REVIEW

Submissions:	December 30, 2014 January 30, 2015 March 31, 2015
Benchers:	**Majority decision:** Nancy Merrill, Chair Joseph Arvay, QC Martin Finch, QC Dean Lawton Sharon Matthews, QC Jamie Maclaren **Dissenting decision:** Elizabeth Rowbotham
Discipline Counsel:	Alison Kirby
Counsel for the Respondent:	Richard Peck, QC

MAJORITY DECISION OF NANCY MERRILL, JOSEPH ARVAY, QC, MARTIN FINCH, QC, DEAN LAWTON, SHARON MATTHEWS, QC, AND JAMIE MACLAREN

INTRODUCTION

[1] This is an application for an extension of the time to apply for a review on the record of the decision of a hearing panel pertaining to a citation issued against Martin Johnson. Mr. Johnson seeks a review on the record pursuant to s. 47 of the *Legal Profession Act* (the "Act"); however he provided notice that he is applying for the review after the 30-day period stipulated in s. 47.

[2] Mr. Johnson's counsel wrote to the Executive Director seeking the extension of time. At a pre-review conference, the Chambers Bencher directed that the issue of whether there is jurisdiction to grant an extension of the time to apply for a review be referred to a review panel of seven benchers. The parties also made submissions on whether the application should be granted if the jurisdiction exists, so we have addressed that issue also.

ISSUES

[3] The issues are:

(a) whether the jurisdiction exists to extend the time to make a written application for a review on the record under s. 47;

(b) if the jurisdiction exists, whether it should be exercised to permit Mr. Johnston an extension.

FACTS

[4] The Law Society issued a citation against Mr. Johnson for professional misconduct in relation to an altercation at the Kelowna courthouse with a police officer who was a witness in the criminal matter on which Mr. Johnson was acting. The central fact in the hearing of the citation for professional misconduct was that Mr. Johnson said "fuck you" to the police officer during a heated exchange.

[5] A hearing panel heard the citation pursuant to s. 38 of the Act. The hearing panel issued its decision on facts and determination on February 4, 2014: 2014 LSBC 08. The hearing panel held that Mr. Johnson committed professional misconduct. Two

members of the panel held that provocation for the conduct was not relevant. The majority concluded at paragraphs 9-10:

> We also wish to make in abundantly clear that there should not be a defence of "provocation" as suggested by our learned colleague. Although the Majority agrees that the Respondent had committed professional misconduct by uttering those words in anger within a courthouse, we believe that the Respondent had an obligation to ignore any "provocation" by the witness, "rise above the fray", and act with civility and integrity in a dignified and responsible way that lawyers are expected to act, notwithstanding the fact that acting as a lawyer and advocate can sometimes be hostile, aggressive and fierce.
>
> We do not accept that there are any circumstances in which a lawyer in a courthouse could say "fuck you" in anger to a witness, to another lawyer or to any member of the public. Such conduct might well lower the reputation of the legal profession in the eyes [sic] the public and, arguably, bring the administration of justice into disrepute.

[6] The concurring hearing panel member found that the profanity used by Mr. Johnson was provoked by the RCMP officer. He also held that the use of profane language could be excused in circumstances where the provocation was extreme but that this was not such a case.

[7] Accordingly, the hearing panel was unanimous that Mr. Johnson's use of profane language in the circumstances was professional misconduct, but differed on whether provocation was relevant and could ever be a defence.

[8] The hearing panel reconvened for the disciplinary action phase of the hearing of the citation on June 16, 2014. On November 3, 2014, the hearing panel issued its unanimous reasons on disciplinary action: 2014 LSBC 50. It held that Mr. Johnson was provoked by the police officer, but that in all of the circumstances, including his prior significant professional conduct record, the appropriate discipline was a 30-day suspension to commence on a date to be agreed upon between counsel and costs in the amount of $10,503.05 to be paid within 30 days of the decision. Pursuant to Rule 10-1 of the Law Society Rules, the disciplinary action decision is deemed to have been served on Mr. Johnson on November 4, 2014.

[9] Mr. Johnson's counsel and counsel for the Law Society agreed that the commencement date of Mr. Johnson's suspension would be January 1, 2015.

[10] On December 30, 2014, 56 days after Mr. Johnson was deemed to have received the decision on disciplinary action, his new counsel wrote to the Executive Director of the Law Society and advised that he had been recently retained. He was in the process of determining whether there was a viable review, but given that Mr. Johnson was currently out of time, he was writing to request an extension of time. He advised that Mr. Johnson was set to commence his suspension on January 1, 2015 and did not seek any change to the scheduling of the suspension.

[11] On January 6, 2015, and apparently in response to a conversation and an email that followed the letter written by counsel for Mr. Johnson on December 30, 2014, counsel for Mr. Johnson wrote to discipline counsel for the Law Society enclosing a notice of review pertaining to both decisions of the hearing panel and requesting an extension of time. His letter also provided submissions on the issue of the request for an extension of time, including the issue of whether the jurisdiction exists to grant it.

POSITION OF THE PARTIES

[12] Mr. Johnson takes the positon that the Law Society has the jurisdiction to extend the time to apply for a review and that an extension ought to be granted to Mr. Johnson in this case.

[13] The Law Society is of the view that there is no jurisdiction to extend the time to apply for a review, opposes Mr. Johnson's application for an extension of time if there is jurisdiction to permit it, and seeks to quash the notice of review.

STATUTORY FRAMEWORK

[14] Hearings of citations are held pursuant to s. 38 of the Act. A review to a Law Society review board is available from the decision of a hearing panel made pursuant to sections 38(5), (6) or (7) by virtue of s. 47 of the Act.

[15] Section 47 reads as follows:

> **Review on the record**
>
> **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.

(2) Within 30 days after the decision of a panel under section 22(3), the credentials committee may refer the matter for a review on the record by a review board.

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

(3.1) Within 30 days after an order for costs assessed under a rule made under section 27 (2) (e) or 46, an applicant, a respondent or a lawyer who is the subject of the order may apply in writing for a review on the record by a review board.

(3.2) Within 30 days after an order for costs assessed by a panel under a rule made under section 46, the credentials or discipline committee may refer the matter 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.

(4.1) [repealed]

(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.

(6) The benchers may make rules providing for one or more of the following:

(a) the appointment and composition of review boards;

(b) establishing procedures for an application for a review under this section;

(c) the practice and procedure for proceedings before review boards.

[16] Section 47(6) permits the Benchers to make rules providing for, *inter alia*, procedures for an application for review under s. 47 and the practice and procedure for proceedings before review boards. The rules which are the subject of the submissions on this application and arguably have been made pursuant to ss. 41 and 47(6) include Rule 5-10(1), 5-12 and 5-13.

[17] Rule 5-10(1) reads:

Application to vary certain orders

5-10(1) An applicant or respondent may apply in writing to the Executive Director for

(a) an extension of time

(i) to pay a fine or the amount owing under Rule 5-9 *[Costs of hearings]*, or

(ii) to fulfill a condition imposed under section 22 *[Credentials hearings]*, 38 *[Discipline hearings]* or 47 *[Review on the record]*,

(b) a variation of a condition referred to in paragraph (a)(ii), or

(c) a change in the start date for a suspension imposed under section 38 *[Discipline hearings]* or 47 *[Review on the record]*.

[18] Rule 5-12 reads:

Review by review board

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

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

[19] Rule 5-13 reads:

Initiating a review

5-13(1) Within 30 days after the decision of the panel in a credentials hearing, the applicant may deliver a notice of review under Rule 5-15 *[Notice of review]* to the Executive Director and counsel representing the Society.

(2) Within 30 days after a decision of the panel in a credentials hearing, the Credentials Committee may, by resolution, refer the decision for a review on the record by a review board.

(2.1) When a review is initiated under subrule (2), counsel representing the Society must promptly deliver a notice of review under Rule 5-15 *[Notice of review]* to the Executive Director and the applicant.

(2.2) 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.

(3) Within 30 days after a decision of the panel in a hearing on a citation, the Discipline Committee may, by resolution, refer the decision for a review on the record by a review board.

(4) When a review is initiated under subrule (3), discipline counsel must promptly deliver a notice of review under Rule 5-15 *[Notice of review]* to the Executive Director and the respondent.

(5) Within 30 days after the order of the Practice Standards Committee under Rule 3-18(1) *[Costs]*, the lawyer concerned may deliver a notice of review under Rule 5-15 *[Notice of review]* to the Executive Director.

ANALYSIS

Is there jurisdiction to extend the time to apply for a review?

[20] The interpretation to be placed on s. 47(1) must be determined in accordance with the principle that words of an individual provision should be read in their grammatical and ordinary sense, with reference to the *Act* as a whole read in its entire context: *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 SCR 559 at paras. 26-27; *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 SCR 24.

[21] Mr. Johnson's position is that Rules 5-10 and 5-12 provide jurisdiction to extend the time for review. The Law Society's positon is that s. 47 sets an inflexible limitation period, confirmed in Rule 5-13, for which there is no jurisdiction in the *Act* or the rules to vary.

Do Section 47 and Rule 5-13 set an inflexible limitation period

[22] We start with this issue because it provides context for the analysis of how s. 47 and the rules made by the Benchers relate to each other.

[23] This submission invites an analysis of whether the s. 47(1) time limit is analogous to a mandatory or "must" statutory clause or a permissive or "may" statutory clause. The precise wording and structure of s. 47(1) are important to understand the submissions on this point, so we set it out again here for reference:

> 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.

[24] Mr. Johnson's position is that the s. 47(1) time limit is permissive because it contains the language that the respondent "may" apply for a review "within 30 days."

[25] The Law Society's position is that the opening clause of s. 47(1) is mandatory. The Law Society's précis of the subsection in its submissions incorporates the word "must" which does not actually appear in s. 47(1).

[26] Section 47(1) is neither mandatory nor permissive in so far as the time to apply for a review. The word "may" does not apply to the time requirement, but rather the choice to apply for a review or not. Nor is it appropriate to read "must" into the time requirement.

[27] It is also noteworthy that the Benchers did not seek to set a mandatory practice on the time for applying for a review by incorporating "must" into Rule 5-13(5).

[28] In our view, the time limit in the opening clause of s. 47(1) is neither mandatory nor permissive. It is best characterized as a condition placed on those seeking to apply for a review. Relief from time elements of conditions is addressed in Rule 5-10, as we discuss next.

Rule 5-10

[29] Mr. Johnson's position is that the 30-day time period in s. 47(1) is a condition that can be extended or varied under Rule 5-10. Mr. Johnson says that the conditions that may be subject to variation under Rule 5-10 are those imposed under the enumerated statutory provisions, which includes s. 47, and therefore the s. 47(1) time limit is open to be varied under Rule 5-10.

[30] The word "condition" does not appear to be defined anywhere in the *Act* or Rules. Mr. Johnson submits that a condition is, as defined by the *New Shorter Oxford English Dictionary*: "A thing demanded or required as a prerequisite to the granting or performance of something else." We agree with this submission. The time limit in s. 47(1) is a condition in the sense that it is a prerequisite to a review.

[31] The Law Society says that s. 47(1) is not a condition that is subject to extension pursuant to Rule 5-10 for three reasons, all of which lead to the conclusions that the only s. 47 conditions that can be varied under Rule 5-10 are "conditions of

practice" imposed under s. 47(5). The three reasons for this interpretation relied upon by the Law Society are: the subheading before Rule 5-10 is "Application to Vary Certain Orders"; the use of the words "fulfill and "imposed" in Rule 5-10; and the grouping of s. 47 with ss. 22 and 38.

[32] With regard to the subheading, the Law Society relies on R. Sullivan, *Sullivan on the Constructions of Statutes,* 5th ed. (Markham, Ont.: LexisNexis, 2008) at 393, which says that the weight of authority is that "headings should be considered part of the legislation and read and relied on like any other contextual feature." We note that this seems to be contrary to the *Interpretation Act*, RSBC 1996, c. 236, s. 11, which makes clear that a headnote to a provision is not part of the enactment and must be considered to have been included for reference and convenience only. We also note that, in the 6th edition of *Sullivan on the Construction of Statutes* (2014) at 461, the author notes that the contextual feature approach to the use of headings has been adopted in regard to provincial legislation notwithstanding provincial Interpretation Acts. However, the BC case cited, *Arts Umbrella v. British Columbia (Assessor of Area #9 - Vancouver*, 2007 BCCA 45 (Huddart JA in Chambers), states that the parties are agreed that the heading may be used as a "guide," and it is clear that is how Huddart JA used it in that case. We find that approach to be more in line with the *Interpretation Act* reference approach and not the contextual interpretation approach. Accordingly, the words of the header to Rule 5-10 only assist as a guide to understanding that Rule in the context of the rules as a whole, and not to import an interpretation as to its scope.

[33] With regards to the words "fulfill" and "imposed," the Law Society says that the use of these words in relation to the references to ss. 22, 38 and 47 of the Act assists in interpreting the meaning of "conditions" in Rule 5-10; i.e., they must be conditions that are fulfilled or imposed under those sections. In our view, this position is consistent with the position taken by Mr. Johnson. Section 47(1) imposes a time limit that is to be fulfilled by persons applying for a review. Rule 5-10 permits relief in relation to the timing of the fulfillment of conditions imposed under s. 47.

[34] The third prong of the Law Society's argument is that, by grouping s. 47 with ss. 22 and 38, Rule 5-10 must be interpreted to apply only to practice conditions imposed by discipline panels under s. 38(5), accreditation panels under s. 22(3)(b) or (5) or review boards under s. 47(5). We are of the view that that places a narrow scope on the application of Rule 5-10 not warranted by the plain language of the rule. Rule 5-10 does not limit its scope of application to those subsections of the sections listed in the rule. Rule 5-10 refers to conditions under ss. 22, 38 or 47 without limitation.

[35] In addition, as pointed out by Mr. Johnson, the Law Society's interpretation that Rule 5-10 only applies to conditions place on a practice is not supported by the language of Rule 5-10 which does not use the phrase "practice conditions" but rather the broader word "conditions." In other rules, such as Rule 5-10.1, the phrase "practice conditions" appears when the scope of the rule is so limited. Had the intention been to limit the application of Rule 5-10 to only "practice conditions," the drafters would have used that terminology in Rule 5-10, as was done in Rule 5-10.1, and specified which subsections of ss. 22, 28 and 47 were covered. Similarly, when providing for review rights, the drafters stipulated that they arise from decisions made under s. 22(3), 38(5), 38(6) and 38(7), instead from decisions made under ss. 22 and 38. It is clear that, where the drafters of the Rules intended to limit their applications to specific subsections or circumstances, they so specified.

[36] While we do not agree that the scope of Rule 5-10 is limited to relief from time to fulfill practice conditions or in reference to only subsections of the sections that are stipulated, we do note that the scope of Rule 5-10 is limited by the provisions of the Act delegated rule-making authority to the Benchers. Section 47(6) permits the Benchers to make rules pertaining to establishing procedures for an application for a review under s. 47 and for practice and procedure for proceedings before review boards. In order for Rule 5-10 to apply to the s. 47(1) time limit, an extension of time must be a matter of practice or procedure. That point is related to the argument under Rule 5-12, to which we now turn.

Rule 5-12

[37] Rule 5-12 permits a review board to determine the practice and procedure to be followed at a review.

[38] Extension of the s. 47(1) time limit must be a matter of practice or procedure, and therefore within the jurisdiction of the Benchers to make rules, for Rule 5-12(2) to be operative in these circumstances.

[39] The Law Society's position is that the power to makes rules pertaining to practice and procedure does not extend to altering a statutory time limit. The Law Society argues that statutory time limits are analogous to limitation periods, and the Supreme Court of Canada has held that limitation periods are substantive in nature: *Castillo v. Castillo*, 2005 SCC 83, citing *Tolofson v. Jensen*, [1994] 3 SCR 1022.

[40] The application of this law to time limits to review administrative law decision-makers was considered by the Nova Scotia Court of Appeal in *Central Halifax Community Association v. Halifax (Regional Municipality),* 2007 NSCA 39. In

that case, which is relied upon by the Law Society, the Nova Scotia Court of Appeal considered the application of a six-month time limit to commence a proceeding for an order in the nature of a writ of certiorari found in rule 56.06 of the Nova Scotia Civil Procedure Rules. It is noteworthy that the provision was mandatory, requiring that the originating notice "shall be filed and served within six (6) months after the judgment …" and expressly excluded the operation of rule 3.03, which otherwise provided the court with discretion to extend or abridge the time to do anything under the rules. In addition, the Court of Appeal held that rule 56.06 was not a delegated regulation, but had the force of legislation. Notwithstanding, the court held that it had the discretion to extend the rule 56.06 time limit under its inherent jurisdiction to control its own process, but declined to do so in that case.

[41] In its analysis of whether the inherent jurisdiction to extend the time could apply to such a strict time limit with the power of legislation, the Court of Appeal relied on a decision of Chief Justice Glube of the Supreme Court of Nova Scotia, Trial Division (as she then was) in *Blue v. Antigonish District School Board* (1990), 95 NSR (2d) 118 (TD). In that case, Glube CJTD relied on the court's inherent jurisdiction to control its own process to extend the time to file and serve an originating notice that was otherwise out of time due to the combination of an intervening holiday and a power outage that prevented the documents from being processed and served.

[42] *Central Halifax* and *Blue v. Antigonish* are not directly applicable because the Benchers have no inherent jurisdiction to control their own process. However, the Benchers have been delegated the jurisdiction to make rules regarding process and procedure. The analyses in *Central Halifax* and *Blue v. Antigonish* are consistent with the conclusion that relief from a time limit, including strict statutory time limits, is a matter of discretion in relation to procedure, otherwise the inherent jurisdiction of the court to control its own procedure would not have been applicable.

[43] This conclusion must be reconciled with the Supreme Court of Canada authorities noted above, which provide that limitation periods are substantive in nature. In *Central Halifax*, the Court of Appeal discussed *Tolofson* and noted that what was at issue in that case was a limitation period in the context of a conflict of laws issue. The limitation period was one that barred the cause of action. In *Tolofson* the Supreme Court of Canada limited the scope of the substantive nature of limitation periods and held that a deadline for filing an application found in a rule, limitations found in various rules of court or other matters pertaining to pleadings of

limitations periods are undoubtedly matters of procedure: see *Central Halifax* at para. 53 and *Tolofson* at p. 1073.

[44] Returning to the Act, s. 47(1) as a whole provides an applicant or respondent an opportunity to have an internal review of a decision made by a hearing panel on a discipline matter or a credentials matter. This is an opportunity to have the expertise of Law Society review boards, within an overall scheme of self-regulation, to review decisions. The member also has the opportunity to appeal to the Court of Appeal for British Columbia instead of applying to review, or after the review if unsuccessful on the review (s. 48 of the Act). Accordingly, the applicant or respondent has a choice to stay within the expertise of the Law Society's internal review procedures, or appeal to the Court of Appeal. If the member opts to appeal to the Court of Appeal, time limits to file the appeal govern as well as the ability to extend those time limits in certain circumstances: *Davies v. CIBC* (1987) 15 BCLR (2d), 1987 CanLII 2608 (CA).

[45] On a policy basis, the interpretation is which is most consistent with the legislative scheme of allowing the applicant or respondent to stay within the internal review process and the expertise of the Law Society review boards is to allow the Law Society to control its own practice and procedure and extend the time period to seek a review where to do so is just.

[46] Based on all of the foregoing and considering the Act as a whole, we find the *Central Halifax* and *Tolofson* decisions support that an extension of the time to apply for a review is a matter of practice or procedure delegated to the Benchers and about which the Benchers have made rules.

[47] While we do not use the rules to interpret the statute, and we rest our interpretation of the statute on the analysis of the case law above, it is also worth noting that when making Rule 5-13(5) pertaining to the procedure for bringing a review, the Benchers simply adopted the opening language of s. 47(1) on timing. The Benchers can only make such a rule if it is a matter of practice or procedure. This confirms that the Benchers were of the view that the time to apply for a review is a matter of practice or procedure, which the Benchers have jurisdiction to deal with pursuant to s. 47(6).

[48] We also make the observation that the Law Society's position is that Rule 5-10 does permit the extension of time to comply with conditions imposed by panels on the practice of a member pursuant to the statute, such as conditions on the operation of a trust account, the payment of fines, the repayment of monies, or limitations on a member's practice. If the extension of time on such matters is permissible as a matter of practice or procedure, then surely a condition pertaining to the time to

apply for a review (which is not statutorily set as a mandatory or inflexible time as discussed below) is a matter of practice or procedure. The key point is that the condition remains intact, but the time to comply with it can be extended or varied.

[49] Accordingly, we are of the view that the power to extend the time to comply with the 30-day time limit as a condition precedent to bring a review under s. 47(1) is a matter of practice or procedure within the meaning of s. 47(6) and therefore the Benchers have the jurisdiction to make rules pertaining to it. We hold that Rule 5-10 is applicable and provides the jurisdiction to extend the time.

[50] With regard to Rule 5-12(2), the Law Society says it cannot apply because it applies to "practice and procedure to be followed at a review." We are of the view that the procedure and timing of applying for a review, which is set out in Rule 5-13 which immediately follows Rule 5-12, is part of the practice and procedure to be followed at a review. However, we are of the view that Rule 5-10 clearly covers the matter and provides the discretion to extend the time and that this the provision we rely on.

HOW SHOULD THE DISCRETION BE EXERCISED?

[51] There are no criteria in the statute or rules governing the discretion we find to exist. Mr. Johnson submits that the criteria used by the Court of Appeal set out in *Davies v. CIBC* are too complex and disproportionate to the circumstances of this case. The Law Society submits they should govern.

[52] We are of the view that the exercise of the discretion should be used in a principled manner on criteria that are known and understood. The Court of Appeal criteria are appropriate guide posts and a flexible application of them is appropriate. Those criteria are:

(a) whether there was a bona fide intention to appeal within the time for bringing the appeal;

(b) when the applicants informed the respondent of their intention to appeal;

(c) whether there would be prejudice to the respondent if an extension were granted;

(d) whether there is merit in the appeal; and

(e) whether it is in the interests of justice that an extension be granted.

[53] In this case, there is no evidence of when the intention to appeal was first developed, but we know that Mr. Johnson changed counsel and his new counsel first provided notice 26 days after the time limit in s. 47(1) had expired. Lack of evidence of an intention to appeal within 30 days weighs against the exercise of discretion, but informing the Executive Director of the Law Society of the intention immediately on retaining new counsel and less than one month after the time limit had expired weighs in favour.

[54] Prejudice to the Law Society is the most important factor. The Law Society justifiably is concerned about the finality of proceedings.

[55] The specifics of the concerns around finality in this case are not insignificant. The events took place in March 2011. The citation was issued in February 2012. There were five pre-hearing conferences and two prior changes of counsel by Mr. Johnson. The facts and determination hearing was adjourned twice. There is no evidence as to what circumstances caused five pre-hearing conferences and two adjournments. We can infer that changes in counsel are due to Mr. Johnson. We also note that there were five months between the hearing on facts and determination and the issue of the decision in February 2014, two years after the citation was issued. The hearing on disciplinary action took place on June 16, 2014, and the decision was issued on November 3, 2014, four and one-half months later.

[56] Overall, it is not possible to say on the evidence before us that the bulk of the delay between the altercation at the Kelowna courthouse, the two hearings and now are due to Mr. Johnson.

[57] Mr. Johnson did not seek to defer or delay his suspension pending the review. There can be no prejudice in the sense of the public interest or public protection aspects of a delay in the discipline. We find no prejudice to the Law Society has been established.

[58] Since Mr. Johnson served the suspension and paid the costs, the Law Society submits his interest in the review is abstract only. We disagree. This finding of professional misconduct has been recorded against Mr. Johnson and forms part of his discipline record. He was suspended for this conduct. Even though he has served the suspension, should the finding of misconduct or the disciplinary action taken be overturned, that will result in a substantive and significant change to his discipline record.

[59] With regard to merit, the focus of the proposed review appears to be on the facts and determination phase. As noted above, the hearing panel differed on whether

provocation could be a defence. That is an element of the proposed review, as are the context in which the factual utterance was made, misapprehending the extent and seriousness of the provocation, and the finding that it is a lawyer's duty to promote the interests of the state. These are issues that relate to the governance and discipline of collegiality and civility in the profession. They are issues that the Law Society deals with in complaints that reach the citation stage and complaints that do not. They are being dealt with by other law societies in Canada. We are of the view that these issues warrant review. The proposed review has sufficient merit for this factor to weigh in favour of exercising the discretion to extend the time.

[60] Overall, it is our view that the interests of justice are served by granting an extension to Mr. Johnson to apply for a review of the decisions of the hearing panel.

COSTS

[61] The Law Society seeks costs in the amount of $1,000. Mr. Johnson says costs cannot be awarded for a pre-review application. The Law Society says they can.

[62] Given our decision, we order that costs of this application, included whether they are permitted and to whom, if anyone, they should be awarded, be determined by the review board that hears the review.

DISSENTING DECISION OF ELIZABETH ROWBOTHAM

[63] I agree with the facts as set out by the majority.

ISSUES

[64] The issues identified by the parties in this matter are:

(a) Whether a review board has the jurisdiction to extend the time to make a written application for a review on the record under s. 47(1) of the *Legal Profession Act* (the "Act"); and

(b) If the jurisdiction exists, whether it should be exercised to permit an extension of time in this matter.

[65] The first issue is a matter of statutory interpretation and is a question of law. For the reasons set out below, I am of the opinion that this review panel does not have the jurisdiction to extend the time to file a notice of review and therefore the second issue does not need to be considered.

[66] I appreciate that, in certain circumstances the 30-day time period in which to make an application for a review of a panel decision in a disciplinary matter may be challenging for respondents to meet (for example, if a decision is rendered in the midst of a lengthy trial) and that it may be desirable to allow for relief of the 30-day time period. However, the issue of whether review boards *ought* to have the jurisdiction to vary the 30-day period is an issue that should be considered and decided by the Benchers as a whole.

[67] Should the Benchers as a whole consider that, as a matter of policy, review boards (or the Discipline or Credentials Committee, or the Executive Director, or some other Law Society body) should have the jurisdiction to exercise discretion to extend the time in which a review of a hearing panel decision can be brought, the Benchers could direct the Law Society to request a legislative amendment of the Act to grant that jurisdiction. Alternatively, should the Benchers decide that the Act does give the Benchers the authority to make rules varying the 30-day time period, the Benchers could direct Law Society staff to draft rules for the Benchers' further consideration that clearly: (i) state that a review board (or other Law Society body) has the delegated discretion to extend the time to make an application for a review on the record; and (ii) identifies the criteria that that body may consider when exercising that discretion. Just as it is important to members and the public that the responsibilities and obligations of lawyers are clearly set out in the Law Society Rules, it is equally important that relief from statutorily prescribed limits also be clearly set out.

[68] In the interim, given that Mr. Johnson is not challenging the sanctions imposed by the hearing panel and has complied with those sanctions, but rather, is concerned with whether provocation can ever be a defence to misconduct (the hearing panel was divided on this issue) Mr. Johnson could request an opinion on the issue of provocation from the Ethics Committee of the Law Society.

POSITION OF THE PARTIES

[69] Mr. Johnson advances two arguments in support of his position that the jurisdiction to grant an extension of time to file a notice of review exists. The first is that Rule 5-12(2), which confers on a review board the ability to determine the practice and procedure to be followed at the review, includes the ability to determine whether an

extension of time should be granted to an applicant seeking to submit a notice of review. Mr. Johnson submits that, if no specific rule addresses extensions of time to submit a notice of review, then Rule 5-12(2) provides the review board with the jurisdiction to determine extensions of time to submit a notice of review as a point of "practice and procedure."

[70] Mr. Johnson's second argument is that the 30-day notice requirement in s. 47(1) of the Act is a "condition" that can be extended or varied under Rule 5-10.

[71] With respect to Mr. Johnson's first argument, the Law Society's position is that, if it was the intention of the Legislature that review boards have the ability to extend the time to bring an appeal of a hearing decision, the Legislature would have expressly said so. I agree. The reason there is no specific rule addressing extensions of time to make an application for a review is because the Act does not give the Benchers the authority to make such a rule.

[72] With respect to Mr. Johnson's second argument, the Law Society's position is that s. 47(1) of the Act is not a condition that is subject to extension pursuant to Rule 5-10. I agree.

REGULATORY FRAMEWORK

[73] Sections of the Act and Rules relevant to the issue of jurisdiction and the position of the parties are summarized below. The relevant provisions of these sections and rules not set out by the majority above are set out more fully in Appendix A.

[74] Section 21 of the Act authorizes the Benchers to make rules that establish conditions under which a non-practising or retired member in good standing with the Law Society may apply for admission to become a practising member.

[75] Section 22(3) of the Act authorizes a hearing panel at a credentials hearing to grant an application subject to conditions or limitations the panel considers appropriate. Section 22(5) authorizes the Benchers to vary or remove conditions or limitations imposed by a hearing panel at a credentials hearing.

[76] Section 27(2)(d.1) authorizes the Benchers to make rules permitting the Practice Standards Committee to make orders imposing conditions and limitations on a lawyer's practice.

[77] Section 32(2)(c) authorizes the Benchers to make rules to permit the imposition of conditions and limitations on a law firm, or the practice of a lawyer, that does not meet the financial standards established by the Benchers.

[78] Section 38 provides that a hearing of a citation must be conducted by a panel and authorizes the panel to dismiss a citation or impose disciplinary sanctions. Section 38(5)(c) authorizes a hearing panel on a disciplinary matter to impose conditions or limitations on a lawyer's practice. Section 38(5)(d) authorizes a hearing panel on a disciplinary matter to suspend a lawyer from practice until conditions imposed on the lawyer by the hearing panel are fulfilled.

[79] Section 47(1) through (3.2) sets out a 30-day period in which an application may be brought for a review of the decision of a credential or disciplinary hearing panel. These reviews are a review on the record and are conducted by a "review board." As this matter arose before the creation of review boards (January 1, 2013) it is being heard by a review panel of Benchers.

[80] Section 47(5)(b) authorizes a review board to confirm the decision of the hearing panel or make any decision that the panel could have made under the Act. Consequently, a review board (or a review panel of the Benchers) also has the ability to impose conditions on a lawyer's practice.

[81] Section 47(6) authorizes the Benchers to make rules regarding the appointment and composition of review boards; the procedure for an application for a review; and for practice and procedures before review boards.

[82] Section 48 of the Act states that an appeal of a hearing panel decision or a decision of a review board may be made to the Court of Appeal. Consequently, persons, including the Law Society, have the option of appealing a hearing panel decision to a review board and then to the Court of Appeal or directly appealing a hearing panel decision to the Court of Appeal.

[83] Part 5 of the Law Society Rules in force at the time of the hearing of this matter[1] governs hearings and appeals (including appeals to a review board). Rules 5-1 to 5-11 set out the composition of hearing panels and the practice and procedure before those panels. Rules 5-12 to 5-21 set out the composition of review boards and the practice and procedure before a review board. Rule 5-1(c) states that Part 5 applies to a review board of a hearing decision unless the context indicates otherwise.

[84] Rule 5-10 governs the process by which a lawyer may seek to have a condition that was imposed by a panel at a credentials or disciplinary hearing varied.

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[1] The Law Society Rules 2015 came into force on July 1, 2015. For the purposes of this matter, there is no substantive difference between the Law Society Rules in force at the time of the application in this matter and the Law Society Rules 2015 currently in force.

[85] Rule 5-12(2) of the Rules states that "Subject to the Act and these Rules, a review board may determine the practice and procedure to be followed at a review."

[86] Rule 5-13 repeats the 30-day period set out in s. 47(1) through (3.2) of the Act in which an application for a review may be brought.

ANALYSIS

The 30-day period in section 47 of the Act

[87] The Law Society is a statutory body, and it and the Benchers derive their authority to act solely from the Act. The Benchers do not have any inherent jurisdiction.

[88] When interpreting legislation it is well settled, as set out in *Sullivan on the Construction of Statutes*, 5th ed., at page 1, that:

> … the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[89] As outlined above, ss. 22(3) and (5), 27(2)(d.1), 32(2)(c), 38(5)(c) and (d) read in context and in their grammatical and ordinary sense all relate to the imposition of conditions on a lawyer's practice. These sections are unrelated to practice and procedures before a hearing panel. For example, sections 22(3) and 38(5)(c) are the statutory grant of authority whereby hearing panels may impose conditions on a lawyer's practice. Section 47(5)(b) confers on review boards the same authority to impose conditions that hearing panels have.

[90] In contrast, the 30-day time period set out in sections 47(1) to (3.2) of the Act is not a condition imposed by a panel or review board. It is also not a condition made in relation to a lawyer's practice. It is a time period imposed by the Act during which an application for a review on the record may be made.

[91] There is nothing express in the Act enabling the Law Society or a review board to extend the time to apply for a review on the record. The issue then becomes whether the authority to extend the time to apply for a review on the record can be inferred from s. 47(6), which authorizes the Benchers to make rules for procedures for an application for a review and for the practice and procedure before review boards. In my opinion, this provision, and the rules enacted pursuant to it, do not support such an interpretation.

[92] The Law Society references s. 10(1) and (4) of the *Court of Appeal Act,* RSBC 1999, c. 77; s. 243(3) of the *Workers Compensation Act*, RSBC 1996, c. 492, and s. 50.61(4) of *the Health Professions Act* as examples where the Legislature has expressly granted the relevant body with the authority to extend time for a review or appeal. One further example is the *Administrative Tribunal Act*, SBC 2004, c. 45 (the "ATA'). Pursuant to s. 44.1 of the Act, three sections of the ATA (sections 48, 49 and 56) apply to, among other things, discipline hearings and appeals (reviews on the record). Section 44.1 came into effect on January 1, 2013.[2]

[93] Briefly summarized, s. 48 of the ATA authorizes a tribunal to maintain order at hearings. Section 49 of the ATA authorizes the tribunal to bring contempt applications to the court in respect of uncooperative witnesses. Section 56 of the ATA provides immunity protection to tribunal members from legal proceedings.

[94] However, the Legislature did not extend application of s. 24 of the ATA to the Law Society or a review board. Section 24 of the ATA expressly confers on tribunals the authority to extend the time to file an appeal (which a review on the record by a review panel is) and states:

> (1) A notice of appeal respecting a decision must be filed within 30 days of the decision being appealed, unless the tribunal's enabling Act provides otherwise.
>
> (2) Despite subsection (1), the tribunal may extend the time to file a notice of appeal, even if the time to file has expired, if satisfied that special circumstances exist.

[95] If the Legislature had intended the Law Society or a review board to have the jurisdiction to extend the time to apply for a review on the record, it could have simply extended application of s. 24 of the ATA to the review board. It did not.

[96] At this juncture, it is worth noting that the modern principle to statutory interpretation is not the only aid to statutory interpretation. Two other rules are also relevant. The first is the presumption against tautology which is summarized in *Sullivan on the Construction of Statutes* at p. 210 as:

> It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain. Every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose. ...

[2] B.C. Reg. 339/2012.

[97] In my opinion, the majority's reasoning renders the 30-day time period in s. 47 of the Act, and repeated in Law Society Rule 5-13, superfluous.

[98] The second presumption, also summarized in *Sullivan on the Construction of Statutes*, at p. 411 is that:

> … The legislature is presumed to know its statute book and to draft each new provision with regard to the structures, conventions, and habits of expression as well as the substantive law embodied in existing legislation.

[99] As discussed above, the Legislature has expressly conferred on other appellate bodies the discretion to extend the time for a review or appeal. Given the express grant of jurisdiction to other administrative and statutory bodies, an implied grant of jurisdiction to review boards of the Law Society cannot be inferred.

[100] I appreciate that s. 47(1) of the Act says that an applicant or respondent "may" apply for a review on the record by a review board while s. 24 of the ATA says that a notice of appeal "must" be filed within 30 days of the decision being appealed. However, in the context of this matter, nothing turns on that difference in wording. Both permit an appeal if the appellant wishes and both require that a notice of appeal be made within 30 days of the decision being appealed. "May" as used in s. 47(1) is empowering. It is not used in the sense of conferring discretion, that is, as conferring the discretion on the applicant or respondent to appeal at any time, irrespective of the 30-day limit.

[101] As s. 47 of the Act confers no authority on the Benchers to extend the time to make a written application for a review on the record of a panel decision, the Benchers have no authority to pass any rules authorizing a person, committee or panel to vary the 30-day period. It is my further opinion that the Benchers have not passed any rules that would authorize the variance of the 30-day period.

Variance of conditions

[102] Rule 5-10(1) of the Law Society Rules in force at the time of the hearing of this matter authorizes an applicant in a credentials matter or a respondent in a disciplinary matter to apply to the Executive Director for: (a) an extension of time to pay a fine or fulfill a condition imposed at a credentials hearing, a discipline hearing, or a by a review panel; (b) for a variation of a condition imposed at a credentials hearing, and discipline hearing, or a review panel; and (c) a change in the start date for a suspension imposed at a disciplinary hearing or on review.

[103] Rule 5-10(1.1) requires the Executive Director to promptly notify the President of the Law Society of any application made under Rule 5-10(1).

[104] Pursuant to Rule 5-10(2), the President must refer an application under Rule 5-10(1) to: (a) the same panel that made the order; (b) a new panel; (c) the Discipline Committee; or (d) the Credentials Committee as in the President's discretion appears appropriate.

[105] Respectfully, I do not agree that the time period in s. 47(1) of the Act in which to commence a review by a review board is a condition subject to variance pursuant to Rule 5-10. The 30-day time period is not a condition imposed by a credential panel, a hearing panel, or a review board.

[106] Rule 5-10 uses the term "conditions" while Rule 5-10.1 uses the term "practice conditions." Mr. Johnson's position is that, if Rule 5-10 had been meant to only capture "practice conditions," it would have been worded more specifically as was done in Rule 5-10.1. Consequently, "conditions" in Rule 5-10 has a broader meaning than "practice conditions" used in Rule 5-10.1.

[107] Even if "conditions" in Rule 5-10 are broader than "practice conditions" in Rule 5-10.1 (and I make no decision either way), both are conditions imposed by a hearing panel or a review board. The 30-day period set out in s. 47(1) of the Act is not a condition imposed by a hearing panel and, therefore, is not a condition that can be varied by a review board (or any other body of the Law Society).

[108] Section 47(1) of the Act is a statutory time limit on a person's statutory right to apply for a review on the record. The authority granted to the Benchers in s. 47(6) of the Act to determine the practice and procedures of review boards does not include the authority to vary the 30-day time period in s. 47(1) of the Act in which to apply for a review. Rule 5-12(2), which authorizes a review board to determine "the practice and procedure to be followed at a review," does not confer on a review board the authority to extend the time in which to make an application for review. Rather "practice and procedure" in Rule 5-12(2) means the practice and procedure of a review board, after an application for a review has been submitted within the time period set out in the Act.

COSTS

[109] As I am of the view that this panel does not have the jurisdiction to extend the time to make an application for a review on the record, I would make no order as to costs.

APPENDIX A

LEGAL PROFESSION ACT

S.B.C. 1998, C. 9

PART 2 – MEMBERSHIP AND AUTHORITY TO PRACTISE LAW

Division 2 – Admission and Reinstatement

Admission, reinstatement and requalification

21 (1) The benchers may make rules to do any of the following:

(a) establish a credentials committee and delegate any or all authority and responsibility under this Part, other than rule-making authority, to that committee; …

(e) set a fee for reinstatement;

(f) establish conditions under which a member in good standing of the society who is not permitted to practise law, may apply to become a practising lawyer. …

(3) The benchers may impose conditions or limitations on the practice of a lawyer who, for a cumulative period of 3 years of the 5 years preceding the imposition of the conditions, has not engaged in the practice of law.

Credentials hearings

22 (1) This section applies to a hearing ordered under section 19 (2) (c).

(2) A hearing must be conducted before a panel.

(3) Following a hearing, the panel must do one of the following:

(a) grant the application;

(b) grant the application subject to conditions or limitations that the panel considers appropriate;

(c) reject the application. …

(5) On application, the benchers may vary or remove conditions or limitations imposed by a panel under this section.

PART 3 – PROTECTION OF THE PUBLIC

Practice standards

27 (1) The benchers may

(a) set standards of practice for lawyers, …

(2) The benchers may make rules to do any of the following:

(a) establish a practice standards committee and delegate any or all authority and responsibility under this section, other than rule-making authority, to that committee; …

(d.1) permit the practice standards committee established under paragraph (a) to make orders imposing conditions and limitations on lawyers' practices, and to require lawyers whose competence to practise law has been investigated to comply with those orders; …

(f) permit the discipline committee established under section 36 (a) to consider …

(ii) any remedial program undertaken or recommended

(iii) any order that imposes conditions or limitations on the practice of a lawyer, and

(iv) any failure to comply with an order that imposes conditions or limitations on the practice of a lawyer. …

(4) Rules made under subsection (2) (d.1)

(a) may include rules respecting

(i) the making of orders by the practice standards committee, and

(ii) the conditions and limitations that may be imposed on the practice of a lawyer, …

(b) must not permit the imposition of conditions or limitations on the practice of a lawyer before the lawyer has been notified of the reasons for the proposed order and given a reasonable opportunity to make representations respecting those reasons.

Financial responsibility

32 (1) The benchers may establish standards of financial responsibility relating to the integrity and financial viability of the professional practice of a lawyer or law firm.

(2) The benchers may make rules to do any of the following: …

(c) permit the imposition of conditions and limitations on a law firm that, or the practice of a lawyer who, does not meet the standards established under subsection (1).

(3) Rules made under subsection (2) (b) and (c) must not permit the suspension of a lawyer or imposition of conditions and limitations on the practice of a lawyer or the imposition of conditions and limitations on a law firm before the lawyer or law firm, as the case may be, has been notified of the reasons for the proposed action and given a reasonable opportunity to make representations respecting those reasons.

PART 4 – DISCIPLINE

Discipline hearings

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

(2) A hearing must be conducted before a panel. …

(4) After a hearing, a panel must do one of the following:

(a) dismiss the citation;

(b) determine that the respondent has committed one or more of the following:

(i) professional misconduct;

(ii) conduct unbecoming a lawyer;

(iii) a breach of this Act or the rules;

(iv) incompetent performance of duties undertaken in the capacity of a lawyer;

(v) if the respondent is not a member, conduct that would, if the respondent were a member, constitute professional misconduct, conduct unbecoming a lawyer, or a breach of this Act or the rules;

(5) If an adverse determination is made against a respondent, other than an articled student, under subsection (4), the panel must do one or more of the following: …

(c) impose conditions or limitations on the respondent's practice;

(d) suspend the respondent from the practice of law or from practice in one or more fields of law

(i) for a specified period of time,

(ii) until the respondent fulfills a condition imposed under paragraph (c) or subsection (7) or complies with a requirement under paragraph (f) of this subsection,

(iii) from a specified date until the respondent fulfills a condition imposed under paragraph (c) or subsection (7) or complies with a requirement under paragraph (f) of this subsection, or

(iv) for a specific minimum period of time and until the respondent fulfills a condition imposed under paragraph (c) or subsection (7) or complies with a requirement under paragraph (f) of this subsection; …

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

(i) complete a remedial program to the satisfaction of the practice standards committee;

(ii) appear before a board of examiners appointed by the panel or by the practice standards committee and satisfy the board that the respondent is competent to practise law or to practise in one or more fields of law;

(iii) appear before a board of examiners appointed by the panel or by the practice standards committee and satisfy the board that the respondent's competence to practise law is not adversely affected by a physical or mental disability, or dependency on alcohol or drugs;

(iv) practise law only as a partner, employee or associate of one or more other lawyers;

(g) prohibit a respondent who is not a member but who is permitted to practise law under a rule made under section 16 (2) (a) or 17 (1) (a) from practising law in British Columbia indefinitely or for a specified period of time.

(6) If an adverse determination is made under subsection (4) against an articled student, the panel may do one or more of the following:

(a) reprimand the articled student;

(b) fine the articled student an amount not exceeding $5 000;

(c) extend the period that the articled student is required to serve under articles;

(d) set aside the enrollment of the articled student.

(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.

PART 5 – HEARINGS AND APPEALS

Appeal

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.

LAW SOCIETY RULES

PART 5 – HEARINGS AND APPEALS

Application to vary certain orders

5-10 (1) An applicant or respondent may apply in writing to the Executive Director for

(a) an extension of time

(i) to pay a fine or the amount owing under Rule 5-9 *[Costs of hearings]*, or

(ii) to fulfill a condition imposed under section 22 *[Credentials hearings]*, 38 *[Discipline hearings]*, or 47 *[Review on the record]*,

(b) a variation of a condition referred to in paragraph (a)(ii), or

(c) a change in the start date for a suspension imposed under section 38 *[Discipline hearings]* or 47 *[Review on the record]*.

(1.1) An application under subrule (1)(c) must be made at least 7 days before the start date set for the suspension.

(1.2) The Executive Director must promptly notify the President of an application under subrule (1).

(2) The President must refer an application under subrule (1) to one of the following, as may in the President's discretion appear appropriate:

(3) The panel or Committee that hears an application under subrule (1) must

(a) dismiss it,

(b) extend to a specified date the time for payment,

(c) vary the conditions imposed, or extend to a specified date the fulfillment of the conditions, or

(d) specify a new date for the start of a period of suspension imposed under section 38 *[Discipline hearings]* or 47 *[Review on the record]*.

(3.1) If, in the view of the President and the chair of the Committee to which an application is referred under subrule (2)(c) or (d), there is a need to act on the application before a meeting of the Committee can be arranged, the chair of the Committee may hear the application and make the determination under subrule (3).

(4) and (5) [moved to Rule 5-10.1 – 09/2014]

(6) An application under this Rule does not stay the order that the applicant seeks to vary.

Failure to pay costs or fulfill practice condition

5-10.1 (1) An applicant or respondent must do the following by the date set by a hearing panel, review board or Committee or extended under Rule 5-10 *[Application to vary certain orders]*:

(a) pay in full a fine or the amount owing under Rule 5-9 *[Costs of hearings]*;

(b) fulfill a practice condition as imposed under section 21 *[Admission, reinstatement and requalification]*, 22 *[Credentials hearings]*, 27 *[Practice standards]*, 32 *[Financial responsibility]*, 38 *[Discipline hearings]* or 47 *[Review on the record]*, as accepted under section 19 *[Applications for enrollment, call and admission, or reinstatement]*, or as varied under these Rules.

(2) If, on December 31, an applicant or respondent is in breach of subrule (1), the Executive Director must not issue to the applicant or respondent a practising certificate or a non-practising or retired membership certificate, and the applicant or respondent is not permitted to engage in the practice of law.