

2015 LSBC 52
Decision issued: November 18, 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
COSTS PERTAINING TO APPLICATION ON
JURISDICTION TO HEAR A S. 47 REVIEW**

Written submissions: July 23, 2015

Review Board: Lynal Doerksen, Chair
James Dorsey, QC, Lawyer
Martin Finch, QC, Bencher
Sharon Matthews, QC, Bencher
Laura Nashman, Public representative
Karen Nordlinger, QC, Lawyer
Lance Ollenberger, Public representative

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

- [1] Leonides Tungohan sought to review a decision made by a chambers bencher in a prehearing conference (the “chambers bencher’s decision”). On July 9, 2015, the Review Board ruled that Mr. Tungohan could not seek a review of the chambers bencher’s decision and quashed the notice of review (the “review jurisdiction application”): *Law Society v. Tungohan* 2015 LSBC 33.

- [2] The Law Society seeks costs of the review jurisdiction application in the amount of \$1,400, relying on Rule 5-11 and Schedule 4, Tariff for Hearing and Review Costs, of the Law Society Rules.
- [3] Mr. Tungohan takes the position that the Law Society should not recover costs.

FACTS

- [4] A chronology of facts pertaining to the jurisdiction review decision is contained in the jurisdiction review decision.
- [5] There are some additional procedural facts and events that are relevant to the parties' submissions on costs.
- [6] The chambers bencher made an oral ruling immediately after the hearing before him but did not issue the written reasons for that decision until September 8, 2014, five months later. On October 8, 2014, Mr. Tungohan sought to review the chambers bencher's decision and issued the notice of review, which this Review Board quashed.
- [7] On October 14, 2014, the Law Society wrote to Mr. Tungohan in an attempt to persuade him to withdraw the notice of review.
- [8] On November 27, 2014 the Law Society requested a pre-review conference to address the jurisdiction issue.
- [9] On December 11, 2014, the parties appeared before a single bencher at a pre-review conference. At that conference the single bencher referred the review jurisdiction issue to a seven-member review board.
- [10] On January 14, 2015, the hearing panel on the underlying citation issued its decision on Facts and Determination at 2015 LSBC 02, and found that Mr. Tungohan had committed professional misconduct. The hearing panel convened to hear evidence and submissions on disciplinary action. The hearing panel fined Mr. Tungohan \$3,000, required him to provide a quarterly report demonstrating his trust account is in compliance with Law Society Rules, and ordered him to pay costs in the amount of \$29,200 within a year of the decision: 2015 LSBC 26 (the "Disciplinary Action decision").
- [11] The bill of costs on which the \$29,200 costs award was based included costs for preparation and attendance at the hearing before the chambers bencher.

RULE 5-11 AND SCHEDULE 4, TARIFF OF COSTS

[12] Rule 5-11 reads, in part, as follows:

Costs of hearings

- 5-11(1)** A panel may order that an applicant or respondent pay the costs of a hearing referred to in Rule 5-1 *[Application]*, and may set a time for payment.
- (2) A review board may order that an applicant or respondent pay the costs of a review under section 47, and may set a time for payment.
- (3) Subject to subrule (4), the panel or review board must have regard to the tariff of costs in Schedule 4 *[Tariff for hearing and review costs]* to these Rules in calculating the costs payable by an applicant, a respondent or the Society.
- (4) A panel or review board may order that the Society, an applicant or a respondent recover no costs or costs in an amount other than that permitted by the tariff in Schedule 4 *[Tariff for hearing and review costs]* if, in the judgment of the panel or review board, it is reasonable and appropriate to so order.
- (5) The cost of disbursements that are reasonably incurred may be added to costs payable under this Rule.
- (6) In the tariff in Schedule 4 *[Tariff for hearing and review costs]*,
- (a) one day of hearing includes a day in which the hearing or proceeding takes 2 and one-half hours or more, and
 - (b) for a day that includes less than 2 and one-half hours of hearing, one-half the number of units or amount payable applies.
- (7) If no adverse finding is made against the applicant, the panel or review board has the discretion to direct that the applicant be awarded costs.
- (8) If the citation is dismissed or rescinded after the hearing has begun, the panel or review board has the discretion to direct that the respondent be awarded costs in accordance with subrules (3) to (6).

POSITION OF THE LAW SOCIETY

[13] The Law Society says that Rule 5-11 provides that a review board may order an applicant to pay costs of a review under section 47 and may set the time for payment. The Law Society says that, in determining the costs to be paid, the

review board should have reference to the tariff of costs found in Schedule 4. That tariff covers matters prior to the actual hearing of the review, such as costs of receiving the notice of review and correspondence pertaining to the review, pre-review conferences and hearings of procedural or preliminary issues.

- [14] The Law Society says that Mr. Tunoghan's refusal to withdraw his notice of review necessitated the steps for which it now seeks costs and he should be required to pay those costs as claimed in its draft bill of costs.

POSITION OF MR. TUNGOHAN

- [15] Mr. Tungohan cites a numbers of cases that he says stands for the proposition that there is discretion to award no costs or costs different from the tariff, and that costs ought to take into account a number of factors including the lawyer's financial situation and whether the costs are proportionate to the outcome.
- [16] He does not go on to apply the case law or the factors to the facts of this case in a way that is apparent. Instead, after citing the case law and factors, he makes "specific submissions."
- [17] The specific submissions are to the effect that the costs claimed by the Law Society are for arguments made three times prior to being made to this Review Board: in its October 14, 2014 letter, in its November 27, 2014 letter and at the pre-review conference on December 11, 2014.
- [18] Mr. Tungohan also submits that the costs are unreasonable because the Law Society sought costs for essentially the same services before the discipline hearing panel; because the Law Society "did not achieve its desired objective" at the pre-review conference; and because the number of times the Law Society had argued the review jurisdiction issue was such that it was seeking costs for duplicative work and would result in Mr. Tungohan paying costs more than once for the same legal arguments.
- [19] Mr. Tungohan's final submission is that the Law Society sought the pre-review conference (at which time this issue was referred to this Review Board) and the costs now sought amount to punishment to Mr. Tungohan for opposing the Law Society. In coming to this submission, Mr. Tungohan makes the following arguments, which he does not expressly relate to the issue of costs. These are:
- (a) the chambers bencher's delay in issuing written reasons over five months justified his submission that the chambers bencher had committed inordinate delay and caused serious prejudice;

- (b) he repeats his submissions as to why he should have been successful before the chambers bench based on the principles of abuse of process and not being vexed twice;
- (c) he also argues that the bench at the pre-review conference did not have the jurisdiction to decide the jurisdiction issue and did not, indeed, decide the jurisdiction issue.

ANALYSIS

[20] Since Rule 5-11 permits costs of “a review under section 47,” the first issue is whether a notice of review that is quashed before it is heard on its merits is “a review under s. 47.” Neither party addressed this issue.

[21] Section 47(1) 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.

[22] Reading s. 47 and the Rules pertaining to reviews, Rules 5-15 to 5-28, together, we are of the view that a review encompasses all matters pertaining to the notice of review from the time the notice of review is issued until it is determined, whether the determination occurs after a hearing of the review or prior to the hearing of the review. The only provisions of the Rules that give us pause in this regard are the rules pertaining to pre-review conferences. Since such conferences are held after a review is initiated by a notice of review, they are not really “pre-review” but rather part of the review if we are correct that the review commences with the delivery of a notice of review. We conclude that the best view of the statutory provisions and the Rules are that pre-review conferences are not really “pre-review” but rather “pre-review hearing” conferences in the sense that the hearing is one step in the review itself.

[23] In *Law Society of BC v. Johnson*, 2015 LSBC 40, a review board deciding a different jurisdiction issue pertaining to reviews ruled that the language “practice and procedure to be followed at the review” was not limited to the practice and procedure at the actual hearing of the review, but includes the practice and procedure for commencing the review; see paragraph 50. We agree with that reasoning as applied to the issue of costs when the review is determined prior to a hearing on the merits.

- [24] It is noteworthy that, in *Johnson*, the jurisdiction issue was decided such that the review would proceed. The review board declined to make an award of costs at that time, ruling instead that the issue of costs should be decided by the review board after the entire review had been determined. That option is not open here as the decision on the jurisdiction decision ended the review.
- [25] The tariff of costs covers several steps, such as receiving the notice of review, pre-review conferences and hearings on preliminary and procedural matters that take place before the hearing of the review, as well as the hearing.
- [26] Given that we are of the view that costs can be awarded for steps of a review short of the hearing of the review, we turn to Mr. Tungohan's objections.
- [27] Mr. Tungohan submits that the arguments made by the Law Society were made four times: in its October 14, 2014 letter to him attempting to persuade him to abandon the review; in its November 27, 2014 letter seeking a pre-review conference; before the single benchler who referred the issue to this Board; and before this Review Board. He says that the costs claimed by the Law Society seek duplicative recovery for these arguments under the correspondence tariff item, the pre-review conference tariff item and the preparation and delivery of written submissions tariff item.
- [28] We do not have evidence as to whether other issues were the subject of correspondence or the pre-review conference. Assuming that the jurisdiction issue was the most significant or the only significant issue dealt with, we are of the view that these tariff items are appropriate, or put another way, they are not inappropriately duplicative. Mr. Tungohan filed this review, and the Law Society employed an escalating series of tools to persuade him to withdraw it, starting with corresponding with him on the topic, seeking a pre-review conference on the topic and finally successfully arguing before this Review Board that there was no jurisdiction to support the notice of review. Mr. Tungohan was not persuaded at any step of the way, and so in order to bring the matter to a binding determination, it was referred to this Review Board.
- [29] In order for Mr. Tungohan to succeed on this argument, he would have to convince us that the Law Society's attempts to resolve the jurisdiction issue without taking it to a review board were illegitimate and/or wasteful. Instead, we find that they were appropriately measured and iterative.
- [30] Coming to Mr. Tungohan's final submission, we do not view these costs as a penalty for opposing the Law Society, but rather the consequence of mounting an unsuccessful argument.

- [31] In terms of the costs sought, the units sought are in the middle of the allowable amount for correspondence, the low end of the allowable amount for the pre-review conference, and two thirds of the maximum amount for written submissions. We view these claims as within the appropriate range. Mr. Tungohan made no specific submissions otherwise. Mr. Tungohan alludes to the principle that costs should take into account the financial impact on the payer, but led no evidence on that point and made no specific submissions on that point.
- [32] Mr. Tungohan also submitted that he was ordered to pay \$29,200 in costs by the discipline hearing panel for the same services. His submissions seemed to relate this to the principle that costs should be decided in the context of the entirety of the proceeding.
- [33] The proceeding before us was different in scope and topic than the proceeding before the discipline panel. There is no evidence or indication in any of the reasons that the jurisdiction issues argued by the Law Society were also dealt with by any of the other benchers or panels that have dealt with the citation except the single bencher on the pre-review conference. That pre-review conference is covered by the bill of costs we have been asked to approve, so there is no duplication. It is clear that many of the arguments Mr. Tungohan made before us were arguments he made before the chambers bencher and possibly before the discipline panel on the merits of the chambers bencher's decision, but those arguments did not address the preliminary question of whether the review board had jurisdiction. His decision to make those arguments in addition to the arguments directly on the jurisdiction point does not impact whether costs should be awarded on this review or the quantum of the costs on the review.

DECISION

- [34] Costs are awarded in the amount of \$1,400 payable by April 30, 2016.