

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

LEONIDES TUNGOHAN

APPLICANT

DECISION ON APPLICATION FOR STAY

Application date: August 17, 2015

President's Designate: Sharon Matthews, QC

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

INTRODUCTION

- [1] On January 14, 2015 a hearing panel found Leonides Tungohan had committed professional misconduct in relation to his: handling funds received from clients; issuance of bills; failing to report a judgment to the Law Society Executive Director; and management and maintenance of his books, records and accounts in his law practice: *Law Society of BC v. Tungohan*, 2015 LSBC 02.
- [2] On June 5, 2015, the hearing panel imposed a fine of \$3,000 payable on or before August 31, 2015 and a condition that Mr. Tungohan provide quarterly accountant reports until relieved of the obligation to do so by the Practice Standards Committee: *Law Society of BC v. Tungohan*, 2015 LSBC 26. The first report is due September 5, 2015. The hearing panel also made an order for costs.
- [3] On July 5, 2015 Mr. Tungohan initiated a review of these orders. He now applies pursuant to Rule 5-20(3) of the Law Society Rules for a stay of these orders, with

the exception of the order for costs, which is automatically stayed in the event of a review.

- [4] The Law Society does not oppose the stay application, but proposes some conditions, which I will discuss below.
- [5] On August 31, 2015, I ordered a stay on conditions. These are the written reasons for the stay order.

ONUS AND APPLICABLE LAW

- [6] The onus is on the stay applicant to establish that he is entitled to a stay.
- [7] The test the stay applicant must meet is as follows:
1. The review must raise a serious issue.
 2. The applicant will suffer irreparable harm if the stay is not granted.
 3. The balance of convenience favours the imposition of a stay.
- [8] This is the well-known test for a stay or an injunction established in the case of *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311, which has been followed by several Law Society decisions, including: *Law Society of BC v. Chiang*, 2013 LSBC 30; *Law Society of BC v. Burgess*, 2011 LSBC 07; *Law Society of BC v. Richardson*, 2008 LSBC 34; *Law Society of BC v. Goldberg*, 2007 LSBC 53 and 2008 LSBC 03; *Law Society of BC v. Martin*, 2006 LSBC 22; and *Law Society of BC v. Welder*, 2005 LSBC 52.
- [9] Notwithstanding that the Law Society does not oppose the application for a stay, I must still be satisfied that the three-part test as set out in *RJR MacDonald* is satisfied.
- [10] Step one of the test, that the review raises a serious issue, is a low threshold. The bench hearing the application must be satisfied that the review is neither vexatious nor frivolous: see *Goldberg* at paragraph 10.
- [11] Step 2 is a factual matter: whether failure to stay will result in irreparable harm.
- [12] Step 3 requires an assessment of the balance of convenience, and in particular, if step 2 has been met, the prospect of irreparable harm must be balanced against protection of the public interest; see *Martin* at paragraphs 13 and 14 and *Welder* at paragraph 7. This balancing may be amenable to conditions being placed on the

stay, as was done in *Welder* and *Chiang* and as the Law Society proposes in this case.

APPLICATION OF THE LAW TO THE FACTS

Step 1 – is the review frivolous or vexatious?

- [13] Mr. Tungohan challenges the decision of the hearing panel on its finding of fact (including whether the panel properly interpreted admissions he made), its determination that those facts amount to professional misconduct and determination of a fine, and the requirement to provide quarterly accountant's reports on trust compliance.
- [14] Very generally, the allegations in the citation relate to Mr. Tungohan's practice with regard to retainer agreements, issuance of bills for fees, and receipt of funds from clients for services rendered or to be rendered. The Law Society alleged that Mr. Tungohan received funds that were trust funds and should have been deposited to trust but were deposited either to his firm's general account or to his personal account. On other allegations the Law Society alleged that Mr. Tungohan paid himself from trust prior to issuing a bill in some cases and in other cases when his trust records were inaccurate or not up to date, precluding payment out of trust in accordance with the rules. Other allegations on the citation include failing to maintain proper accounts and records.
- [15] The evidence at the hearing included findings of fact from a Registrar's hearing pertaining to one of the allegations and admissions made by Mr. Tungohan and the Law Society investigation. Mr. Tungohan sought to lead evidence to clarify his admissions and also sought to withdraw certain admissions. Mr. Tungohan's grounds of review challenges the hearing panel's review of the evidence including neglecting to conduct a determination of the nature, extent and meaning of his admissions, neglecting to conduct a meticulous examination of facts and neglecting to conduct a full and fair examination of the evidence of Mr. Tungohan.
- [16] Without commenting in any way on the merits of the rulings made by the hearing panel, it is apparent from the reasons that this hearing presented evidentiary challenges including the evidence that was apparently led to clarify admissions but that may have been seen to be contradicting the admissions and/or the findings of fact made by the registrar.

- [17] Based on the issues he has raised, the review cannot be characterized as frivolous or vexatious. The Law Society does not seek to characterize it as frivolous or vexatious, while maintaining that it does not concede that the hearing panel erred.

Step 2 – irreparable harm

- [18] On the second part of the test, Mr. Tungohan submits that his law practice has been severely affected by simultaneous and lengthy investigations conducted by the Practice Standards Committee and the Discipline Committee, including requiring an undertaking from Mr. Tungohan to restrict the areas in which he practises.
- [19] It is not necessary to review his submission on this point in detail, as the stay cannot and will not affect those investigations. However, it is accepted that the result of these proceedings has been financial constraint on the income he can generate.
- [20] Mr. Tungohan has also provided information about his annual income as reported on his income tax returns. His income in those tax years was very low.
- [21] The costs of the compliance audits at this time will add to his financial burden, but the evidence does not substantiate the costs or the amount of the burden that would satisfy the irreparable harm test. However, I am satisfied that requiring payment of the fine at this time will cause irreparable harm

Step 3 – balance of convenience

- [22] Turning to the third part of the test, the focus is balancing the potential of irreparable harm to Mr. Tungohan with the chance that the public will be put at risk again.
- [23] It is important to note that the citation concerned Mr. Tungohan's billing practices. The hearing panel found that he did not appear to understand his obligations under the Law Society Rules on trust accounting, including that he could not take client trust funds without properly billing the client.
- [24] With regard to the fine, the public interest is not greatly affected by the timing of the payment, and so the irreparable harm to Mr. Tungohan in this case tips the balance to a stay.
- [25] However, with regard to the compliance audit, the balance is in the favour of the public interest, especially given the hearing panel's finding that he did not have a

good appreciation of trust accounting rules. That calls for timely action to protect the public.

- [26] In addition to the reporting required by the panel, a Law Society compliance audit of Mr. Tungohan's practice is scheduled to commence on September 28, 2015. When compared to the date that the first compliance report was to be delivered under the hearing panel's order, September 5, 2015, the timing is very close and satisfies me that the first compliance report need not be delivered when considering the balance between Mr. Tungohan's unspecified burden (but it is obvious that there will be some burden) and the public protection.
- [27] The Law Society submits that the results of the compliance audit commencing September 28, 2015 will be available by mid-November, 2015. It further submits that with those results, the Law Society will be in a better position to assess whether there is risk to the public in continuing a stay of the requirement to provide quarterly compliance reports. The Law Society suggests that the stay be for the first compliance report, the one that would be delivered September 5, 2015, and that the first one be due January 15, 2016 instead. The Law Society further submits that it should be open to Mr. Tungohan to apply to continue the stay based on the results of the compliance audit.
- [28] I agree that these conditions strike an appropriate balance between the potential harm to Mr. Tungohan and the public interest that his trust account be appropriately monitored.

DECISION

- [29] The fine in the amount of \$3,000 is stayed until the first of the following:
- (a) Mr. Tungohan's review is discontinued or abandoned by him;
 - (b) Mr. Tungohan's review is dismissed by the review board; or
 - (c) further order of the review board pertaining to the payment of the fine.
- [30] The hearing panel's order that Mr. Tungohan provide a quarterly accountant's report is stayed until the first of the following events:
- (a) Mr. Tungohan's review is discontinued or abandoned by him;
 - (b) Mr. Tungohan's review is dismissed by the review board;

- (c) further order of the review board pertaining to the requirement to submit a quarterly accountant's report; or
- (d) January 15, 2016, meaning that the first quarterly accountant's report will be due on that date, subject to the right of Mr. Tungohan to apply for a further stay based on the pending compliance and audit report once it is available, which is anticipated to be in November, 2015.