2015 LSBC 59
Decision issued: December 31, 2015
Citation issued: April 2, 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

GARY RUSSELL VLUG

APPLICANT

DECISION OF THE BENCHERS
ON APPLICATION TO INTRODUCE FRESH EVIDENCE

Review dates:	May 1, 2015 and June 10, 2015
Benchers:	Kenneth Walker, QC, Chair Haydn Acheson Satwinder Bains Pinder Cheema, QC Jamie Maclaren Elizabeth Rowbotham A. Cameron Ward (did not participate in the decision)
Discipline Counsel:	Carolyn Gulabsingh
Appearing on his own behalf:	Gary R. Vlug

INTRODUCTION

[1] The Applicant, Gary Vlug, applies to introduce fresh evidence in the course of this Review. His Notice of Application seeks to "bring forward a Response to Notice to Admit, dated May 8, 2013."

[2] Mr. Vlug submits that the fresh evidence consists of his Response to Notice to Admit, marked as Exhibit 1 in his application, presented at the commencement of this Review on May 1, 2015.

BACKGROUND

[3] On April 2, 2012, the Applicant was cited for professional misconduct with respect to 11 allegations arising from three separate complaints. All three complaints were combined into one citation.

[4] A hearing panel issued its decision on Facts and Determination on February 26, 2014 and found that all allegations were proven. A decision on Disciplinary Action was issued on September 5, 2014.

[5] The Applicant's Notice of Review is dated September 10, 2014. He seeks a review of both determination and disciplinary action.

[6] At the commencement of this Review hearing, the Applicant made an application to present fresh evidence in the form of his "Response to Notice to Admit" (the "RNA") dated May 8, 2013, in response to allegation 6 of the citation. The RNA was marked as Exhibit 1, and after hearing submissions, we reserved judgment on this application.

[7] At the hearing in June 2013, an Agreed Statement of Facts, ("ASF") dated May 27, 2013 was marked as Exhibit 1. Neither the Notice to Admit, sent by the Law Society to the Applicant dated April 18, 2013, nor the Applicant's RNA were entered into evidence before the hearing panel.

[8] In his RNA, Mr. Vlug makes the following statement about the authenticity of a number of documents listed in the Notice to Admit, including, specifically, Tab 23 (sic):

> Clarification: So long as it is clarified that its admission is (pursuant to the definitions of Authenticity (f) admission that said transcript is a transcript and not an admission of it being a complete record of what was done and said that day, tab 23 can be admitted.

[9] Tab 23 is in fact an affidavit sworn by the Applicant's client, ES, on June 11, 2009 before the Applicant.

[10] The transcript that is the object of the clarification above is listed in the ASF at Tab 27. The transcript was a record of the proceedings in the Court of Appeal on June 22, 2009, which were the subject matter of allegation #6.

[11] Allegation #6 charged the Applicant with representing to the Law Society that the Court of Appeal had an "off record" discussion on June 22, 2009, with opposing counsel, William Storey, regarding his conduct, when the Applicant knew or ought to have known that this representation was not true.

[12] The Law Society's submissions as to allegation #6, are found at paragraphs 153-156 of its materials:

> 153. The Law Society's evidence about what occurred at the Court of Appeal was introduced in the ASF at paragraphs 37-39 and Tab 27 *(Record, Tab 6, pages 738- 739 and pages 900-972)* which included the transcript of proceedings. As set out in the ASF at paragraph 6(f), *(Record, Tab 6, page 728)* the transcript was admitted to prove the statements were made, and not for proof of the truth of the matters recorded in it. In other words, the transcript is proof of the statements made at the Court of Appeal, and not proof that the statements made were true.
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> 154. The Law Society also relied on the testimony of Mr. Storey, who confirmed no conversation took place at the Court of Appeal where he was chastised. The Hearing Panel accepted Mr. Storey's testimony over that of the Respondent by applying the principles in *Faryna* v *Chorny*, in consideration of the totality of the evidence, which included the transcript itself. If the Applicant argues the transcript is not accurate or complete, he must prove it and he did not argue (or prove) this at the F & D Hearing.
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> 155 At paragraphs 798 - 799 of his submissions, the Applicant referred to matters (a Notice to Admit and his partial response to it) that are not included in the record. This is not relevant to determining the allegations in the Citation and as the Review Board has made no order admitting fresh or new evidence, the Applicant's submissions on this issue should not be considered.
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> 156. Further, at paragraph 803 of his submissions, the Applicant suggested he is aware of a protocol of the Court of Appeal to not record in transcripts an "issue of conduct by professionals" but the Applicant did not tender any other evidence to support this assertion. As there is no other evidence in the record regarding the Court of Appeal's protocols, and as there is no order of this Review Board permitting the submission of new or fresh evidence,

> so the Applicant's submission on this topic should not be considered.

[13] The Applicant, in response to the Law Society's submissions, now seeks to adduce the RNA, which includes his statement that the transcript was not a complete record of the Court of Appeal proceedings of June 22, 2009.

[14] The Law Society opposes the application and argues that it does not meet the fresh evidence test set out in *Palmer v. The Queen*, [1980] 1 SCR 759, as set out in *Law Society of BC v. Kierans*, [2001] LSBC 6.

THE LAW

[15] The authority for the Benchers to admit evidence in addition to the evidence that forms part of the Record is set out in section 47(4) of the *Legal Profession Act* and Rule 5-17(2) of the Law Society Rules:

[16] Section 47(4) states:

> (4) If, in the opinion of the benchers, there are special circumstances, the benchers may hear evidence that is not part of the record.

[17] Rule 5-17(2) states:

> (2) If, in the opinion of the benchers, there are special circumstances, the benchers may admit evidence that is not part of the record.

[18] The Benchers considered the test for the admissibility of fresh evidence in *Law Society of BC v. Kierans*, [2001] LSBC 6. At paras. 13 and 14, the Benchers considered the tests for admissibility in the criminal and civil context:

> 13. The leading authority on the exercise of an appellate court of its discretion under the provisions of the *Criminal Code* to admit fresh evidence is *Palmer v. The Queen*, [1980] 1 SCR 759, in which the Supreme Court of Canada established the following tests:
>
> > The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial;
> >
> > The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;

> The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> It must be such that, if believed, it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

14. In a civil context, the test is established by the Court of Appeal decisions in *Cory v. Marsh* (1993), 77 BCLR (2d) 248 and *Appel (Public Trustee of) v. Dominion of Canada General Insurance Co.*, [1997] BCJ No. 1794 as being:

> That the evidence was not discoverable by reasonable diligence before the end of the trial;
>
> That the evidence is wholly credible;
>
> That the evidence will be practically conclusive of an issue before the court.

[19] The Benchers in *Kierans* adopted the tests set out in *Palmer* and held that, if the proffered evidence fails to meet any of the *Palmer* tests, it cannot be admitted.

THE NATURE OF THE FRESH EVIDENCE

[20] The nature of the fresh evidence sought to be admitted is the Applicant's RNA, dated May 8, 2013, to support his position that he had asserted, prior to the hearing on June 3-5, 2013, that the Court of Appeal transcript was not a complete record of the June 22, 2009 proceedings.

[21] In summary, we propose to consider the Applicant's application to adduce fresh evidence in the following manner:

1. Determine if the evidence could have been admitted ~~if~~ by due diligence, it could have been adduced at either the Facts and Determination or the Disciplinary Action phase.

2. Determine if the fresh evidence is admissible under the rules of evidence (e.g., no hearsay, speculation, opinion or mere argument).

3. Determine if the evidence is relevant in the sense that it bears upon a decisive or potentially decisive issue in the hearing.

4. If the fresh evidence complies with the rules of evidence and if it is apparent from the hearing record that the fresh evidence could not reasonably have affected the result (assuming the allegations of misrepresentation have been established), there is no miscarriage of justice and the application to adduce fresh evidence should be dismissed.

5. If that determination is not apparent and the fresh evidence in support of his position is relevant to that issue and credible, admit the fresh evidence for the limited purpose of determining the basis on which the Applicant agreed to admit the Court of Appeal transcript, an issue that was not adjudicated at trial. At this stage the fresh evidence will not be admissible to determine the substantive issue.

DISCUSSION

[22] We find that the RNA could have been admitted at the hearing as to Facts and Determination in June, 2013, or at the Disciplinary Action phase in September 2014. The Applicant was not denied the opportunity to put it forward.

[23] As to whether it is admissible, the RNA is the Applicant's statement of opinion on the transcript of the Court of Appeal proceedings of June 22, 2009. We do not see how his opinion would be admissible. It is not probative of the issue before the hearing panel.

[24] As to whether it is relevant, the RNA statement of opinion, that the transcript is incomplete, does not bear on the issue before the Review panel. The issue, as we have said earlier, ~~was~~ is whether allegation #6 was made out. That allegation charged the Applicant with representing to the Law Society that the Court of Appeal had an "off record" discussion on June 22, 2009 with opposing counsel, William Storey, regarding his conduct, when the Applicant knew, or ought to have known, that this representation was not true. His statement of opinion, as set out in his RNA, does not address this allegation.

[25] In the event that we are wrong and the fresh evidence complies with the rules of evidence and is admissible, the Applicant's statement of opinion that the Court of Appeal transcript was incomplete could not have affected the result as to whether allegation #6 as set out had been made out.

[26] In any event, the Applicant stated on June 3, 2013 in his opening to the hearing panel that it was his position that the Court of Appeal transcript was incomplete. (Record, VOL I, Tab 2, page 45). In his testimony on June 4, 2013, he continued to

assert that an “off record” discussion took place between the Court of Appeal and Mr. Storey. (Record, VOL 1, Tab 3, page 362.) Nothing is added by adducing the RNA which duplicates his opening statement and his testimony.

[27] The application is dismissed.