

2016 LSBC 04
Decision issued: January 27, 2016
Citation issued: November 19, 2013

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a section 47 review concerning

KEVIN ALEXANDER MCLEAN

RESPONDENT

**DECISION OF THE REVIEW BOARD ON
JURISDICTION TO REVIEW**

Written submissions: August 28, 2015

Review Board: Lee Ongman, Chair
Satwinder Bains, Bencher
Dean Lawton, Bencher
John Lane, Public representative
Graeme Roberts, Public representative
John Waddell, QC, Lawyer
Sandra Weafer, Lawyer

Discipline Counsel: Alison Kirby
No-one appearing on behalf of the Respondent

INTRODUCTION

[1] On January 12, 2015, the panel hearing the citation in this matter issued its written reasons in the facts and determination phase of the hearing (the “F&D Decision”) pursuant to section 38(4) of the *Legal Profession Act*.

[2] The disciplinary action phase of the citation hearing commenced on March 6, 2015 and was scheduled to continue on June 5, 2015. At the time of writing this

decision, the hearing panel had not yet rendered its decision on sanction pursuant to section 38(5) or (7) of the *Legal Profession Act*.

- [3] The Respondent delivered a Notice of Review of the F&D Decision on February 10, 2015 stating that he did so pursuant to section 47 of the *Legal Profession Act* and Rules 5-13 and 5-15 of the Law Society Rules.
- [4] On February 10, 2015, the Law Society communicated to the Respondent its position that there was no jurisdiction for a section 47 review of the F&D Decision at this stage of the proceedings.
- [5] On April 7, 2015, the Benchers presiding over a pre-review conference, directed that the parties make preliminary written submissions to the Review Board on the jurisdictional issue.

ASSUMPTIONS FOR THE PURPOSE OF THIS DECISION

- [6] This decision is intended to address the question of jurisdiction only. It does not address the merits of the Respondent's Notice of Review.
- [7] References to the Rules refer to the Law Society Rules in effect prior to July 1 2015, unless otherwise stated.
- [8] References to a Section 47 review means a "review on the record" pursuant to Section 47 of the *Legal Profession Act*.
- [9] References to sections 22(3), 38(4), 38(5), 38(6) or 38(7) refer to sections of the *Legal Profession Act*.

ISSUE

- [10] The issue to be determined on this preliminary application is whether the Respondent is entitled to a section 47 review of the hearing panel decision made pursuant to section 38(4) and prior to the hearing panel making its determination on both: (a) facts and determination; and (b) any disciplinary action.

CONCLUSION

- [11] The Review Board finds that the Respondent is not entitled to a section 47 review of the facts and determination decision issued January 12, 2015 by the hearing

panel, prior to issuance of both the determinations on: (a) facts and determination; and (b) any decision on disciplinary action.

ANALYSIS

- [12] The Board considered the application of section 47(1) of the *Legal Profession Act*, (the “Act”) and Rule 5-13 of the Law Society Rules as they govern the initiation of a “review on the record”.
- [13] Section 47(1) provides that, 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. Sections 38(4) 38(5), 38(6) and 38(7) of the Act are reproduced and included on Appendix “A”, attached for convenience.
- [14] Section 22(3) applies to credential hearings. This Review Board is dealing with a disciplinary matter, and therefore section 22(3) is not applicable to this matter.
- [15] The events that trigger jurisdiction for a review of a disciplinary matter under the Act are set out in subsections 38(5), (6) or (7) of the Act.
- [16] Section 38(5) of the Act empowers the panel to impose disciplinary action upon the respondent following an adverse decision under section 38(4). The disciplinary options are listed in section 38(5). The hearing panel had not issued its decision as to the appropriate sanction pursuant to section 38(5) at the time of the Respondent’s delivery of the Notice to Review, and therefore section 38(5) is not applicable to this application.
- [17] Section 38(6) only applies to specified listed discipline against articulated students and is not applicable to this matter as the Respondent is not an articulated student.
- [18] The Law Society submits that section 38(7) is not applicable to this Notice of Review because it contains more general wording than sections 38(5) and (6) and is intended to apply to “orders,” “declarations” and “the imposition of conditions and limitations” related to disciplinary actions imposed by hearing panels at the conclusion of the disciplinary action phase of the citation.
- [19] Section 38(7) expands on the powers a panel can utilize when imposing discipline measures. It provides flexibility to a panel to tailor the sanction to suit the circumstances. Section 38(7) considerations will not arise until the hearing on disciplinary action is completed.

[20] The Board relies on two case authorities in coming to its conclusion, namely: *Law Society of BC v Berge*, 2006 LSBC 19, and *Law Society of BC v. Strother*, 2013 LSBC 01.

[21] In *Berge*, the respondent applied for a review of the decision of the hearing panel made pursuant to section 38(4) of the Act that the respondent had engaged in conduct unbecoming a lawyer. The Law Society argued that the respondent could only review a decision made under section 38(5), not a decision under section 38(4). The review panel held that the respondent had the ability to appeal any decision on the record but that the right of the respondent to a review under section 47(1) only arose “after both the verdict and the penalty phase are complete.” The review panel held that the rationale for this was twofold:

- (a) review of verdict and penalty should occur at the same time, and;
- (b) the respondent should know the penalty before deciding whether or not to appeal.

[22] The review panel in *Berge* considered the meaning of the words “review on the record” under section 47(1) and concluded that there was only one record, “not a record for the verdict phase and a separate and different record for the penalty phase.”

[23] In *Strother* the respondent sought a review under section 47 of a preliminary ruling of a hearing panel allowing the amendment of the citation. The respondent submitted that the review was permitted because the ruling was made under section 38(7). The review panel concluded that the intention of the legislature was to restrict section 38(7) to the imposition of a disciplinary sanction. The review panel stated at paragraph 25 as follows:

We are of the view that the intention of the legislation was to restrict section 38(7) to the imposition of a disciplinary sanction. This section must be read in conjunction with section 38(5) and (6), which provide for penalties once there has been an adverse determination. Section 38(7) is not to be provided broad interpretation as suggested by counsel for the Respondent, but rather is meant to supplement penal sanctions. Section 38(5) and (6) were not meant to be exhaustive, and the purpose of section 38(7) was to provide further flexibility for the panel in taking disciplinary action in respect of a respondent. It was not intended to be used as a basis for an appeal on an interlocutory ruling.

- [24] In the *Strother* case, the review panel clarified that the respondent had no right to a review under section 47, but that there was a right to appeal the facts and determination decision to the Court of Appeal under section 48 of the Act, which permits a respondent who is affected by a decision, determination or order of a panel to appeal that decision to the Court of Appeal.
- [25] Following the reasoning and the decisions in the *Strother* and *Berge* cases, we conclude that section 38(7) expands on the powers a panel can utilize when imposing discipline measures. It provides flexibility to a panel to tailor the sanction to suit the circumstances. The use of the optional powers described in section 38(7) will be included as a component of the disciplinary determination and therefore will not arise as a consideration for a review until the disciplinary action is completed.
- [26] Given our findings that sections 22(3) or 38(5), (6) or (7), referred to in section 47(1) are not applicable in this case, we conclude that the Review Board has no jurisdiction under Section 47(1) to conduct a review on the record initiated by the Respondent prior to the hearing panel making its decisions on both: (a) the facts and determination; and (b) the disciplinary sanction.

RULE 5-13

- [27] Rule 5-13(2.2) provides as follows:

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.

- [28] Rule 5-13(2.2) applies to the 30 day period after the disciplinary action described in Rule 4-35(1) is completed. That has not happened in this case.
- [29] Rule 4-35(1) describes the process immediately following the facts and determination stage of the hearing of a citation. It states that, following a determination under Rule 4-34 adverse to the respondent, the hearing panel must take certain further steps including the following, that are quoted and relevant to this analysis, namely:
- (a) invite the respondent and discipline counsel to make submissions as to disciplinary action,

- (b) take one or more of the actions referred to in section 38(5) or (6) of the Act,
- (c) include in its decision under this Rule any order declaration or imposition of conditions under section 38(7) of the Act, and any order under Rule 5-9 on the costs of the hearing, including any order respecting time to pay.

This means that, since these 4-35(1) steps had not happened at the time of delivery of the Notice of Review, due process under Rule 5-13(2.2) is not yet appropriate.

- [30] It is clearly indicated in the combined provisions of Rules 5-13 and 4-35(1) that Rule 5-13(2.2) does not provide the respondent an entitlement to a review until such time as both the adverse determination under Rule 4-34 is made and the disciplinary actions described in 38(5) or 38(6) are determined. Inclusive additional options described in 38(7) and Rule 5-9 (costs) are contemplated at the disciplinary stage only.
- [31] The Panel finds that the Respondent is premature in his application for review as there is no authority to initiate a review under either Section 47(1) or Rule 5-13, and therefore a review board has no jurisdiction to act upon the Notice of Review.

ORDER

- [32] This Review Board hereby orders that:
- (a) The Notice of Review delivered February 10, 2015 is quashed;
 - (b) The Respondent must pay, within 60 days of the issuance of this decision, the costs of this Review in the amount of \$1,300, in accordance with the Schedule 4 Tariff of Costs.

APPENDIX A

Excerpts from the *Legal Profession Act*:

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.

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.

Discipline hearings

- 38** (1) This section applies to the hearing of a citation.
- (2) A hearing must be conducted before a panel.
- (3) A panel must
- (a) make a determination and take action according to this section,
 - (b) give written reasons for its determination about the conduct or competence of the respondent and any action taken against the respondent, and
 - (c) record in writing any order for costs.
- (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 articulated student, under subsection (4), the panel must do one or more of the following:
- (a) reprimand the respondent;
 - (b) fine the respondent an amount not exceeding \$50 000;
 - (c) impose conditions or limitations on the respondent's practice;
 - (d) suspend the respondent from the practice of law 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;
 - (e) disbar the respondent;
 - (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 articulated student, the panel may do one or more of the following:
- (a) reprimand the articulated student;
 - (b) fine the articulated student an amount not exceeding \$5 000;
 - (c) extend the period that the articulated student is required to serve under articles;
 - (d) set aside the enrollment of the articulated 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.