2016 LSBC 46
Decision issued: December 22, 2016
Citation issued: September 8, 2009

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a s. 47 Review concerning

ROBERT COLLINGWOOD STROTHER

APPLICANT

DECISION OF A REVIEW PANEL OF BENCHERS ON AN APPLICATION TO INTRODUCE FURTHER EVIDENCE

Written submissions:	July 29, 2016 August 29, 2016 September 17, 2016
Benchers:	Thomas Fellhauer, Chair Pinder Cheema, QC Craig Ferris, QC Steven McKoen Philip Riddell Elizabeth Rowbotham Sarah Westwood
Discipline Counsel:	Henry C. Wood, QC
Counsel for the Applicant:	Robert W. Grant, QC

INTRODUCTION

[1] On February 26, 2015, a hearing panel found that the Applicant committed professional misconduct (*Law Society of BC v. Strother*, 2015 LSBC 07). In the

decision of the hearing panel on disciplinary action (2015 LSBC 56), the panel summarized their decision as follows:

> … the Respondent's actions in failing to advise his client M Corp. that he had a financial interest in a potential commercial enterprise in the unique circumstances pertaining to his financial interest, failing to advise M Corp. that his previous negative legal opinion concerning an amendment to the *Income Tax Act* should be reconsidered and failing to advise M Corp. of a favourable tax ruling constituted professional misconduct.

[2] The circumstances that gave rise to the hearing had previously led to a 42-day trial before the Supreme Court of British Columbia. The decision of that court (2002 BCSC 1179) was overturned by the British Columbia Court of Appeal (2005 BCCA 35). Leave was then granted to appeal the case before the Supreme Court of Canada, and that court overturned the appellate decision (2007 SCC 24).

[3] At the outset of the hearing of the proceedings before the hearing panel, the Applicant objected to a proposal by the Law Society that, in addition to relying upon evidence tendered and the findings of fact made in the BCSC, BCCA and SCC decisions, the Law Society be permitted to lead further evidence on points that were not deliberated upon in those courts.

[4] The Applicant argued that to permit such additional evidence would have been an abuse of process and that the hearing panel should be restricted to the evidence adduced at trial. Further, the Applicant stated in his written submissions to the hearing panel that allowing such additional evidence would be a "… challenge to the findings of fact of the trial judge … which were adopted by the Supreme Court of Canada."

[5] The hearing panel decided, in a decision released in January of 2012 (2012 LSBC 01), that it would not be an abuse of process to allow such additional evidence to be adduced.

[6] On May 12, 2014, the hearing panel received a joint proposal related to the presentation of evidence from the Law Society and the Applicant in a letter from counsel to the Law Society. That agreement covered the evidence that would be relied upon at the hearing. Notably, while it left room for additional evidence to be led, the Law Society's initial evidence was sourced from extracts of the transcript of the evidence several witnesses gave at trial.

[7] The agreement also provided a mechanism whereby the Law Society's counsel would provide the Applicant with reasonable notice if he intended to adduce any

new evidence to be relied upon. Similarly, the Applicant's counsel agreed to give the Law Society's counsel reasonable notice if he intended to adduce any new evidence.

[8] At the hearing on May 26, 2014, after the Law Society presented its evidence in chief by entering specific portions of the trial transcript into evidence, the Applicant sought to have the entire transcript of the trial entered as evidence. The chair of the hearing panel expressed concerns that "bulking in" all of the trial transcripts would not serve the needs of the hearing panel, nor the Law Society or the Applicant, because the panel needed to be directed to relevant evidence that responded to the Law Society's submissions and the issues that were before the hearing panel.

[9] The hearing panel ruled that, while the trial transcripts would not go into evidence in their entirety, the Applicant would have an opportunity to put in front of the hearing panel, in both reply and in sur-reply, those portions of the transcripts that the Applicant felt were necessary to put the appropriate context around the evidence that had previously been put in the record.

[10] On May 27, 2014, the Applicant gave oral evidence at the hearing. No other witnesses were called to give oral evidence by either the Applicant or the Law Society.

[11] On May 28, 2014, the Applicant confirmed that he had no further extracts from the trial transcripts that he wished to enter into the record, but asked to be able to reconsider that decision after the Law Society's submissions in final argument. The chair did not make a ruling but indicated that the Applicant could apply to lead such evidence should he find himself in that position.

[12] On August 21, 2014, written submissions were exchanged and final oral submissions were made. The facts and determination phase of the hearing completed, and the Applicant did not apply to submit any additional evidence from the trial transcripts or otherwise.

POSITION OF THE APPLICANT

[13] The Applicant has applied to:

> … admit, as part of the record in this proceeding, all of the transcripts of testimony in the trial between M Corp. and Mr. Strother which dealt with the same issues as the disciplinary hearing …

[14] The Applicant argues that:

(a) the failure to admit all of the trial transcripts led to an inherently unfair process for Mr. Strother;

(b) the excerpts of the trial transcripts that were in evidence omitted challenges or contradictions that were present in the trial transcripts and thus gave an incomplete account of the evidence as a whole; and

(c) the exclusion of the complete transcripts led the hearing panel to make findings that incorrectly assume that no evidence was available on certain issues if that evidence was not present in the excerpts that were put into evidence at the hearing.

[15] The Applicant argues that the excerpts did not include the evidence necessary to establish the credibility of the various witnesses and, if the hearing panel was going to admit any of the trial transcripts, it should have admitted all of the trial transcripts.

[16] The Applicant argues that failure to admit the full trial transcripts led the hearing panel to make findings that "are either inconsistent with or go beyond the findings of the trial judge."

[17] The Applicant also submits that the trial transcripts are required for an effective presentation of many of the arguments the Applicant intends to make on this review.

[18] Further, the Applicant argues in his submissions on this application that the effect of refusing to admit the trial transcripts in bulk was that:

> … the parties were restricted to those bits and pieces of evidence from the M Corp. litigation that the Law Society wanted to put forward, and Mr. Strother anticipated might be relevant to the issues raised by the Law Society.

[19] The Applicant also argues that the applicable case law establishes that there are circumstances where the typical rule that a review of a decision-maker's decision is done solely on the basis of the record that was before the decision maker should be less rigid (*Hartwig v The Commission of Inquiry into Matters Relating to the Death of Neil Stonechild)*, 2007 SKCA 74; *SELI Canada Inc. v. Construction and Specialized Workers' Union, Local 1611*, 2011 BCCA 353). The Applicant argues that those circumstances include cases where the basis for the review is that the applicant is arguing that there has been a denial of procedural fairness or natural

justice and cites the following cases in support of that proposition: *Kinexus Bioinformatics Corp. v. Asad*, 2010 BCSC 33 at paragraphs 17-20; *Ross v. British Columbia (Human Rights Tribunal)*, 2009 BCSC 1969 at paragraphs 26-27.

[20] The Applicant also argues that this Review panel should adopt the approach of the Saskatchewan Court of Appeal in *Saskatchewan (Workers' Compensation Board) v. Grjerde*, 2016 SKCA 30, in which the court recognized a new exception to the rule that the record on review is limited to the evidence before the original decision-maker. That court indicated that there will be exceptions to that general rule, including evidence used "to highlight a complete absence of evidence before the administrative decision maker when making a particular finding" and went on to add an exception "where, in appropriate circumstances, evidence may be received by a reviewing court to elucidate the record upon which the administrative body's reasons were based."

POSITION OF THE LAW SOCIETY

[21] The Law Society argues that the Applicant's application should be viewed as an application under section 47(4) of the *Legal Profession Act* to introduce evidence that is not part of the record, and the Law Society opposes that application.

[22] The Law Society acknowledges that section 47(4) permits this Review Board to hear evidence that is not part of the record if, in the opinion of this Review Board, there are special circumstances.

[23] The Law Society argues that the applicable test for whether the full trial transcripts should be permitted to be added to the record was set out in *Palmer v. The Queen*, [1980] 1 SCR 759, which sets out a four-part test for whether new evidence should be permitted to be introduced after the completion of an initial hearing. The Law Society argues that none of the four tests in *Palmer* are met and thus this application should be dismissed.

[24] Further, the Law Society argues that the process followed by the hearing panel for the introduction of evidence from the trial transcript did not result in an unfair hearing and that the Applicant has not demonstrated any prejudice to his right to a fair hearing. The Law Society particularly argues that the entirety of the trial transcripts was not admitted because the hearing panel wished only relevant portions to be introduced and that the Applicant had ample opportunity to introduce any portions he considered relevant.

[25] The Law Society notes that the Applicant was provided several opportunities to introduce additional evidence, including additional excerpts from the trial transcripts, and failed to do so. The Law Society argues that not seeking to introduce any additional evidence was a strategic decision of the Applicant and thus does not engage the principles of procedural fairness or a denial of natural justice. Further, the Law Society points out that issues of procedural fairness or perceived unfairness were not raised at the hearing.

[26] The Law Society also argues that additional evidence is not necessary to address what it perceives as the main element of the Applicant's grounds of review, namely that the findings of the hearing panel go beyond or are inconsistent with the trial decision. The Law Society points out that the trial decision and the decisions of the hearing panel are all part of the record and no additional evidence would be required to assess that issue.

[27] With respect to the specific case law raised by the Applicant, the Law Society notes that the circumstances of the *Hartwig* decision paralleled an Alberta decision that was considered this year in British Columbia in *Sobeys West Inc. v. College of Pharmacists of British Columbia*, 2016 BCCA 41. In that decision, the BC Court of Appeal declined to follow an expansive rule for admitting additional evidence and stated that evidence that could or should have been before a tribunal, but was not before it, is generally not admitted on a judicial review.

[28] The Law Society argues that, because section 47(4) of the *Legal Profession Act* requires "special circumstances" to exist before additional evidence is permitted to be adduced in this proceeding, a similarly restrictive principle should be adopted by this Review Board.

[29] With respect to the *Asad* and *Ross* decisions, the Law Society argues that, in addition to its position that no denial of natural justice or fairness occurred here, the court in *Asad* observed at paragraph 20 that, even if it was determined that additional evidence should be introduced in a review proceeding, that evidence must be restricted to the evidence that identifies alleged factual errors and the evidence required to demonstrate those errors because evidence should not be admitted if it invites a re-evaluation or re-weighing of the evidence.

[30] With respect to the *Gjerde* decision, the Law Society argues that case is not applicable here because there the court was dealing with a void in the record that arose from purely administrative actions at the Workers' Compensation Board and not during the course of a hearing, which it argues makes that decision inapplicable in the current circumstances.

RESPONSE OF THE APPLICANT

[31] In response, the Applicant argues that the *Palmer* case applies only to "fresh evidence," which it describes as situations where a party never attempted to have the applicable evidence entered into the record in the first instance. Specifically, the Applicant argues that the obligation to act diligently, which is one of the four tests to be met in *Palmer*, only applies where a party to a proceeding did not attempt to have the evidence in question entered at the hearing. Here, where the attempt to enter the evidence was refused, the Applicant argues that a consideration of "due diligence" does not have any meaning.

[32] The Applicant also argues that, to the extent the Law Society's position is based upon a notion that the Applicant can only succeed on this preliminary application if it can identify evidence in the record that demonstrates the alleged factual errors made by the hearing panel, then the Law Society is incorrect. The Applicant's position is that those errors can only be identified by reference to excluded evidence, and therefore the entire transcripts must be before this Review Board if it is to be able to properly assess whether factual errors were made.

DISCUSSION

[33] The determination this Review panel must make is whether evidence that was not entered into the record of the proceeding before the hearing panel should be heard by this Review panel.

[34] We acknowledge that the Applicant did not himself characterize this application as an application under section 47(4) of the *Legal Profession Act* to introduce evidence that is not part of the record, but we agree with the Law Society that section 47(4) is the appropriate framework in which to consider this application.

[35] The Act is clear as to the limits of this Review Board's authority to hear evidence that is not part of the record: the Review Board must determine that special circumstances exist before evidence that is not on the record can be heard.

[36] Section 47(4) states:

> (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.

[37] Rule 5-23(2) of the Law Society Rules states:

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

[38] The application of these provisions have been considered numerous times, including recently in *Law Society of BC v. Vlug*, 2015 LSBC 59, which cites the *Law Society of BC v. Kierans*, 2001 LSBC 6, in which a Bencher review panel, when determining whether special circumstances existed, followed the test articulated in *Palmer*.

[39] In *Palmer*, the Supreme Court of Canada laid out four principles that are applicable when determining if there are special grounds that justify an appellate court exercising its power to admit evidence that is not on the record it is reviewing. The first principle is directly relevant to this application: "The evidence should generally not be admitted, if by due diligence, it could have been adduced at trial …" (p. 775).

[40] This principle was considered by the BC Court of Appeal in *Spoor et al v. Nicholls et al.*, 2001 BCCA 426, where the court stated a paragraph 16:

> ... It is fundamental to allowing a party to adduce additional evidence after closing their case (other than proper reply or surrebutal evidence) that the additional evidence be of such a nature that, when they initially prepared and presented their case, the evidence was not known to the party or not discoverable on reasonable enquiry. ...

[41] Further, the Supreme Court of Canada in *Palmer* noted that allowing these applications should be approached cautiously because "… it was not in the best interest of justice that evidence should be so admitted as a matter of course." (p. 775)

[42] This case is not one where there is a complete absence of evidence on an issue, such as in *Gjerde*. Here, any additional relevant evidence that may be in the trial transcripts was available to the Applicant at all times during the hearing. Further, we do not find that we should adopt the more expansive approach to admitting additional evidence the Applicant seeks. We accept the BC Court of Appeal reasoning and decision in *Sobeys* that the reasoning in the *Hartwig* case is not consistent with the law of British Columbia as it now stands.

[43] The Applicant argues that the evidence it now seeks to enter into the record must be permitted because failing to do so will not allow the Applicant to demonstrate that evidence exists that supports its case and is contrary to findings made by the hearing panel. This Review panel finds that the mere allegation that additional

evidence exists is not sufficient to establish the "special circumstances" required by section 47(4), nor does it meet the tests laid down in *Palmer* and *Spoor*.

[44] Applying *Spoor* to the facts before us, it is clear that the transcripts were available to the Applicant at all relevant times and that the Applicant knew of their content. As such, a fundamental test for whether this panel should allow the Applicant to adduce additional evidence has not been met. It is not sufficient for the Applicant merely to state that relevant evidence that is not on the record exists. The Applicant must also show that such evidence was not known or discoverable on reasonable inquiry at the time of the hearing. The Applicant has not met that test.

[45] The Applicant argues that it is contrary to the principles of fairness and natural justice as articulated in the *Asad* and *Ross* decisions to fail to allow additional evidence to be adduced. However, in the *Asad* decision, the BC Supreme Court noted at paragraph 24 that:

> … the common law approach to questions of procedural fairness and natural justice, ... as stated by the Court in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para. 22, is concerned with ensuring that:
>
> > ... administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

[46] We find that the Applicant was given ample opportunity to adduce all relevant evidence in the trial transcripts in both reply and sur-reply evidence. The Applicant also was permitted to make application to admit any additional evidence it felt was relevant after the Law Society completed its closing argument. The Applicant chose, at all of these opportunities, not to enter the evidence it now seeks to enter.

[47] We find that the refusal of the hearing panel to allow the entirety of the trial transcripts was not unfair or in violation of the principles of natural justice. The hearing panel determined that it would be inappropriate to admit large volumes of evidence, the relevance of which had not been established. It was open to the Applicant to raise issues of fairness and natural justice at the time the ruling was made. The Applicant did not do so. Rather, the Applicant acquiesced to the ruling and participated in the remainder of the hearing on that basis, the Law Society presented its case in that context, and the hearing panel assessed the evidence on that understanding.

[48] We find that the decisions the hearing panel made with respect to the trial transcripts created a fair and open process in all of the applicable circumstances and the Applicant had ample opportunity to put forward his views and evidence fully for consideration by the hearing panel.

[49] Section 47(4) of the *Legal Profession Act* allows a review board to hear new evidence in special circumstances. In the application before us, we find that there are no special circumstances that compel or allow us to hear evidence that is not part of the record.

DECISION

[50] For the reasons set out above, we dismiss the Applicant's application. The parties are at liberty to make submissions regarding costs.