

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a section 47 review concerning

PETER KROGH JENSEN

RESPONDENT

DECISION OF THE BENCHERS ON COSTS

Submissions received: December 12, 2016
December 19, 2016
January 6, 2017

Panel: Gregory Petrisor, Chair
John S. Hayes
Jamie Maclaren
C.E. Lee Ongman
Elizabeth Rowbotham
Sarah Westwood

Counsel for the Law Society: Craig P. Dennis, QC
Counsel for the Respondent: H.C. Ritchie Clark, QC

- [1] In a decision dated November 4, 2016, we reversed the decision of the Hearing Panel, and dismissed the citation issued against the Respondent. We allowed the parties liberty to make written submissions regarding costs if they could not resolve costs by agreement. Although the Hearing Panel determined costs of the citation hearing, upon the completion of the review, the parties seek resolution of costs of the citation hearing and of the review hearing. The Respondent has submitted a draft Bill of Costs, and the Law Society has provided its submissions in response. The Respondent has submitted his reply to the Law Society's submissions.

- [2] Rule 5-11(1) of the Law Society Rules provides that a hearing panel may order costs in respect of a hearing of a citation. Rule 5-11(2) provides that a review board may order costs in respect of a review. Rules 5-11(3) and (4) provide that a hearing panel or review board, in determining costs, must have regard for the tariff of costs in Schedule 4 of the Law Society Rules, but may award no costs or may award an amount of costs different than that prescribed by the tariff.
- [3] Accordingly, we are to have regard to the tariff, but we may exercise discretion in deciding what is most appropriate, and may decide not to make an order for costs, or may award an amount different than that prescribed by the tariff.
- [4] The hearing of the citation by the hearing panel took six days to conclude. Written submissions were exchanged. Numerous pre-hearing applications were made. This was a strongly contested proceeding.
- [5] In our consideration of the costs claimed by the Respondent, we have in general awarded the Respondent his costs where he was successful. Where the Respondent was not successful, or where the Law Society was successful, we have in general not awarded costs. The Law Society submitted that the costs in respect of unsuccessful applications of the Respondent should be deducted from the costs awarded to the Respondent. Our doing so would in essence award the Law Society costs for those applications in any event of the cause, which is a remedy usually reserved for applications without any significant merit. Except for an application which was made to the Discipline Committee, an award of costs in respect of each application, regardless of the eventual outcome of the proceeding, could have been made at the time of each such application by the hearing panel, but was not. We decline to make such a determination in the absence of any evidence that the applications were without any significant merit.
- [6] Neither counsel submits that a determination of costs as prescribed by the tariff of costs is inappropriate. Counsel for the Law Society suggests an overall amount for costs and disbursements of \$20,100, which appears to be very close to the amount prescribed by the tariff, with adjustments as submitted by the Law Society. The Respondent claims a total of \$41,829.18. Counsel differ in their views of how units under the tariff should be calculated, and in respect of some disbursements claimed. In our view, the calculation of costs in accordance with the tariff of costs is appropriate.
- [7] Counsel for the Respondent, in his submissions, advises that he has, with minor exceptions, claimed the same number of units for the same items as Law Society counsel did in the Law Society's draft Bill of Costs following the citation hearing in this proceeding.
- [8] In respect of each item claimed by the Respondent:
- a. Item 1 (general preparation)

The Respondent has claimed the maximum 10 units. As we have noted, these were protracted and vigorously contested proceedings. 10 units as claimed by the Respondent is reasonable, and we allow 10 units.

b. Item 5 (applications to adjourn)

The Respondent has claimed costs for four adjournment applications, three of which were successful. It is appropriate and reasonable that the Respondent should have his costs of those three successful applications, for a total of five units.

c. Item 6 (pre-hearing conferences)

The Respondent has claimed three units in total for two pre-hearing conferences. Given the length of the hearing, we consider the claim reasonable and we allow the three units claimed.

d. Item 8 (preparation of affidavits)

The Respondent claims 10 units for the preparation of affidavits that were not used in the proceedings. We cannot conclude that the affidavits were reasonably necessary and we do not allow any units for the item.

e. Item 10 (response to notice to admit)

The Respondent claims 10 units. The tariff allows from five to 20 units. Law Society counsel did not express any criticism of the units claimed. We consider the number of units claimed to be reasonable and allow 10 units.

f. Item 12 (contacting, interviewing, issuing summonses to witnesses)

The Respondent has claimed five units. The tariff allows from two to 10 units. Law Society counsel has expressed no criticism. We consider the number of units claimed to be reasonable and allow five units.

g. Item 14 (interlocutory or preliminary motions)

The Respondent claims 60 units for three unsuccessful applications. We do not consider the Respondent's claim for costs in respect of those applications reasonable. As stated above, we do not consider it appropriate to subtract costs in respect of those applications from the Respondent's costs overall. We award no costs to either party in respect of those applications.

h. Item 15 (attendance at hearing)

As previously noted, the hearing of the citation required six days. The Respondent claims 30 units for each day, for a total of 180, as prescribed by the tariff. We consider that claim reasonable and award 180 units.

- i. Item 16 (written submissions where no oral hearing is held)

From five to 15 units is allowed under the tariff.

The Respondent claims five units in respect of an unsuccessful application made to the Discipline Committee for rescission of the citation. We do not consider the claim reasonable and award no costs in respect of those submissions.

The Respondent claims five units for closing submissions and reply submissions. Law Society counsel expresses no criticism of the number of units claimed. We consider the claim reasonable and allow the five units claimed.

- j. Item 17 (giving notice of review)

The tariff allows from one to three units. Law Society counsel has expressed no criticism of the number of units claimed. We consider the claim reasonable and allow the three units claimed.

- k. Item 18 (settlement of hearing record)

The tariff allows between five and 10 units. The Law Society takes exception to the claim, as it is the Law Society that assembles the hearing record. The Respondent, or counsel, must review and consent to the record, and the five units claimed is the minimum. We consider the number of units claimed reasonable, and allow five units.

- l. Item 19 (pre-review conference)

The tariff allows between one and five units. The Respondent has claimed three units. This item does not appear to be in dispute. We consider the number of units claimed reasonable, and allow three units.

- m. Item 22 (written submissions)

The tariff allows five to 15 units. Law Society counsel has expressed no criticism of the number of units claimed. We consider the number of units claimed reasonable and allow 15 units.

- n. Item 23 (attendance at review)

The review took a day to conclude, and the tariff allows for 30 units. We consider the claim reasonable, and allow 30 units.

In summary, of the 350 units claimed, we allow 274 units, for a total of \$27,400 in respect of fees.

[9] In respect of disbursements claimed:

- a. It appears, based on Mr. Clark's reply, that the actual cost of transcripts was \$1,836.98. We allow that amount.
- b. Photocopies are claimed in the amount \$1,598.25. The Law Society disputes the amount claimed, and submits the claim is excessive. Mr. Clark submits that copies are tracked electronically and calculated at \$.35 per page. We rely on counsel's representation regarding the number of photocopies, and we do not find \$.35 per page is unreasonable. We allow the disbursement as claimed.
- c. Disbursements to West Coast Title Search in the amount of \$360 are not further specified by the Respondent. The amount is not disputed by the Law Society. We allow the amount as claimed.
- d. Courier costs of \$27.15 are claimed. The amount is not disputed by the Law Society. We allow the amount as claimed.
- e. Scanning costs of \$65 are claimed. The amount is not disputed by the Law Society. We allow the amount as claimed.
- f. Printing costs of \$391.50 are claimed. The Law Society disputes the overall amount for photocopying and printing as excessive. No breakdown of the amount claimed per page is offered by Mr. Clark. Nor does Mr. Clark provide any indication as to how the number of pages printed are tracked or counted. We do not have a sufficient basis upon which to conclude that the number of pages printed or the amount claimed per page is reasonable, and accordingly, we do not allow any amount for printing.
- g. Colour printing costs of \$24 are claimed. That amount is not disputed by the Law Society. We allow the amount as claimed.

In summary, we allow disbursements in the amount of \$3,846.38.

[10] We allow costs and disbursements in the total amount of \$31,246.38.