

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

RESPONDENT

DECISION OF THE CHAMBERS BENCHER

Pre-Review conference date: December 29, 2017

Benchers: Jeff Campbell, QC

Discipline Counsel: Henry Wood, QC

Appearing on his own behalf: Gary R. Vlug

BACKGROUND

[1] The Respondent, Gary Vlug, was found by a hearing panel to have committed professional misconduct with respect to a number of allegations set out in a citation issued on April 2, 2012. The hearing panel's decision was issued on February 26, 2014. The Respondent filed for a review of that decision pursuant to s. 47 of the *Legal Profession Act*. A review board issued a decision on December 31, 2015, setting aside certain findings by the hearing panel and upholding other findings.

[2] The review board's decision was the subject of an appeal to the British Columbia Court of Appeal by the Respondent and a cross-appeal by the Law Society. On May 2, 2017 the Court of Appeal allowed the appeal and cross-appeal of the review board decision on the basis that the review board had erred in its interpretation of the standard of review: *Vlug v. Law Society of BC*, 2017 BCCA 172. The matter

was remitted for a new s. 47 review hearing. The re-hearing of the s. 47 review is currently scheduled to proceed on February 22 and 23, 2018.

- [3] A pre-review conference was held by teleconference on December 29, 2017, pursuant to Rule 5-25 of the Law Society Rules. This was the second pre-review conference in this matter. At the first pre-review conference on September 19, 2017, the Respondent advised that he intends to bring an application to admit fresh evidence at the review hearing. It was ordered that the parties exchange materials related to the fresh evidence application by certain dates.
- [4] The Respondent subsequently filed the application to admit fresh evidence. The Respondent's application material consists of a Notice of Application with written submissions and attachments. In particular, the Respondent seeks to have admitted as fresh evidence a "Response to the Notice to Admit" that he had provided to Law Society counsel in May of 2013, prior to the discipline hearing in this matter.
- [5] As I understand it, the Respondent seeks to have this document admitted as fresh evidence as it relates to a transcript of the Court of Appeal proceedings that are relevant to certain allegations in the citation. The Respondent takes the position that the transcript of the court proceedings does not accurately reflect what occurred. He wishes to have his "Response to the Notice to Admit" admitted at the s. 47 review as it sets out his position that the transcript from the Court of Appeal proceedings is "not an admission of it being a complete record of what was done and said that day". He submits that the effect of this document was to create an agreement with the Law Society that the transcript of the court proceedings was incomplete, and that the Law Society is accordingly precluded from submitting that the transcript is a complete and accurate record.
- [6] In response to the fresh evidence application, the Law Society has filed materials consisting of a written argument and an affidavit of Law Society counsel who conducted the discipline hearing. Counsel for the Law Society opposes the Respondent's application on the basis that it does not meet the criteria for the admission of fresh evidence.

POSITION OF THE PARTIES

- [7] At the December 29, 2017 pre-review conference, the Respondent raised an objection to the Law Society filing an affidavit in this motion. The Respondent seeks to cross-examine the affiant and also seeks to file further material in response to the Law Society's material. The Respondent has submitted that the further material (which has not yet been described) would only be produced after cross-

examination of the affiant. Counsel for the Law Society is not opposed to the Respondent filing further material prior to the review hearing, but is opposed to the cross-examination of the affiant.

ANALYSIS

- [8] Under Rule 5-25(8) of the Law Society Rules, the following matters may be considered at a pre-review conference:
- (a) the simplification of the issues,
 - (b) any issues concerning the record to be reviewed,
 - (c) the possibility of agreement on any issues in the review,
 - (d) the exchange of written arguments or outlines of argument and of authorities,
 - (e) the possibility that privilege or confidentiality might require that all or part of the hearing be closed to the public or that exhibits and other evidence be excluded from public access,
 - (f) setting a date for the review, and
 - (g) any other matters that may aid in the disposition of the review.
- [9] Pursuant to Rule 5-25(9), the Bencher presiding at a pre-review conference may:
- (a) adjourn the conference or the hearing of the review generally or to a specified date, time and place,
 - (b) order the exchange of written arguments or outlines of argument and of authorities, and set deadlines for that exchange,
 - (c) set a date for the review, subject to Rule 5-24.1(3), and
 - (d) make any order or allow or dismiss any application consistent with this part.
- [10] Rule 5-25(8) provides broad authority for a Bencher to resolve procedural matters to aid in the efficient resolution of s. 47 reviews. It provides a forum for the parties to focus the issues to be determined at the review hearing, including the materials to be considered by the Review Board.

[11] The admission of fresh evidence in a s. 47 review is authorized by s. 47(4) of the *Legal Profession Act* and Rule 5-23(2) of the Law Society Rules. Pursuant to these provisions, the admission of fresh evidence is within the jurisdiction of the Review Board. Evidence that is not part of the record may be heard and admitted if the Review Board is of the opinion that “special circumstances” exist. In determining applications for the admission of fresh evidence, Review Boards have generally applied the criteria set out in *Palmer v. The Queen*, [1980] 1 SCR 759.

Admissibility of the Law Society affidavit

- [12] In objecting to the admission of the Law Society’s affidavit material, the Respondent submits that there is no authority for the Law Society to submit an affidavit in response to an application to adduce fresh evidence. The Respondent also submits that at the September 19, 2017 pre-review conference, it was ordered that the parties’ material be exchanged by certain dates but that the Law Society was not given specific leave to file evidence by affidavit.
- [13] While the filing of affidavit evidence may not have been specifically discussed at the September 19, 2017 pre-review conference, it is common for an application to admit fresh evidence to be supported by affidavit material setting out the fresh evidence that is sought to be admitted. An opposing party may also seek to introduce affidavit evidence relevant to the application.
- [14] In this case, Mr. Vlug has filed an application with written submissions attaching various documents but has not filed an affidavit. The written submissions include allegations against counsel who conducted the discipline hearing. The Law Society has provided an affidavit in response to the issues raised in the Respondent’s motion.
- [15] The ultimate admissibility of the evidence at issue in this motion, however, is clearly within the discretion of the Review Board pursuant to s. 47(4) of the *Legal Profession Act* and Rule 5-23(2) of the Law Society Rules. Accordingly, I do not consider that it would be appropriate for a Bencher presiding at a pre-review conference to make a ruling regarding the admissibility of fresh evidence, including the affidavit tendered by the Law Society.

Cross-examination of the affiant

- [16] The Respondent has sought leave to cross-examine the affiant of the Law Society’s affidavit and has also sought leave to file further material in reply to the Law

Society affidavit. The Respondent submits that any further material would only be produced following cross-examination of the affiant.

- [17] Given the provisions of s. 47(4) of the *Legal Profession Act* and Rule 5-23(2) of the Law Society Rules, it is my view that the question of whether to permit cross-examination should also be determined by the Review Board. Those provisions authorize the Review Board to determine whether evidence that is not part of the record should be heard. The cross-examination sought by the Respondent is not evidence that forms part of the record as defined in s. 47 of the *Legal Profession Act*, and it is accordingly the Review Board that should determine whether cross-examination should be permitted.
- [18] The Respondent has indicated that he wishes to provide further evidence in support of his motion in response to the Law Society affidavit. Counsel for the Law Society is not opposed to the Respondent filing further evidence. The admissibility of the evidence proffered by the parties will ultimately be determined by the Review Board. While the Respondent has suggested that any further material should not be filed until after cross-examination of the affiant, it is my view that any further material should be provided in advance of the s. 47 hearing. The application to adduce fresh evidence is the Respondent's application, and the Respondent's evidence in support of the application should be provided prior to the hearing of the application. Accordingly, if the Respondent wishes to file further material in reply to the Law Society's material, it must be filed by January 26, 2018.

Submissions regarding the affiant

- [19] At this pre-review conference, the Respondent has also raised an allegation against the affiant, who was counsel for the Law Society at the discipline hearing. As I understand it, he has suggested that it was not appropriate for counsel who conducted the discipline hearing to have taken the position that the transcript is an accurate record of the court proceedings given the proposed fresh evidence that the Respondent seeks to admit. The Respondent submits that this allegation against counsel should be considered at this pre-review conference.
- [20] It is my view that the allegation raised by the Respondent should not be adjudicated at a pre-review conference. It does not fall within the scope of matters that can be resolved at a pre-review conference as set out in Rule 5-25. Further, the Respondent's allegation is directly connected to his application to admit fresh evidence. It would not be appropriate for a Bencher presiding at a pre-review

conference to make any order regarding such an allegation, which is closely related to the substance of the application that is to be heard by the Review Board.

- [21] At the pre-review conference, counsel discussed the possibility of setting dates for exchange of written arguments with respect to the s. 47 review. If counsel cannot agree on dates for the exchange of arguments, then a further pre-review conference can be convened at the request of counsel.