

2018 LSBC 15
Decision issued: June 4, 2018
Citation issued: May 29, 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

LEONIDES TUNGOHAN

RESPONDENT

**DECISION OF THE REVIEW BOARD
ON COSTS**

Written submissions: April 9, 2018
April 23, 2018 and May 7, 2018

Review Board: Greg Petrisor, Chair
Don Amos
Jeff Campbell, QC
John Hogg, QC
Woody Hayes
Carol Hickman, QC
Linda Michaluk

Discipline Counsel: Graham MacLennan
Appearing on his own behalf: Leonides Tungohan

BACKGROUND

[1] This hearing involves a s. 47 review of the costs order imposed by the hearing panel following the disciplinary proceeding. There is a lengthy history to this matter. The Respondent was cited in 2013 for conduct related to his billing and accounting practices and for failing to notify the Law Society of a judgment against

him. The hearing panel found that the Respondent had committed professional misconduct, and he was ordered to pay a fine in the amount of \$3,000 and costs in the amount of \$29,200: *Law Society of BC v. Tungohan*, 2015 LSBC 2 and 2015 LSBC 26.

- [2] The Respondent filed a review of both the decision on Facts and Determination and the Disciplinary Action decision pursuant to s. 47 of the *Legal Profession Act*. The Respondent raised 13 grounds in his Notice of Review, including that the hearing panel erred in making the order for costs. Following the review hearing, this Review Board dismissed the review and confirmed the decisions of the hearing panel: *Law Society of BC v. Tungohan*, 2016 LSBC 45.
- [3] The Respondent subsequently appealed to the Court of Appeal for British Columbia. The Court of Appeal upheld the Review Board's decision confirming the finding of professional misconduct. The Court of Appeal allowed the appeal with respect to the issue of costs on the basis that the reasons of the Review Board did not include a consideration of the evidence of the Respondent's limited financial circumstances in affirming the hearing panel's order for costs. The Court of Appeal remitted the matter to this Review Board for reconsideration of the costs order: *Law Society of BC v. Tungohan*, 2017 BCCA 423.

THE HEARING PANEL'S DECISION ON COSTS

- [4] At the initial hearing, the Law Society submitted a bill of costs in the amount of \$29,736.53, inclusive of disbursements. The costs were based on calculations pursuant to the tariff of costs in Schedule 4 of the Law Society Rules. Most of the costs were arrived at by application of the tariff of costs, in that there are certain fixed costs pursuant to the tariff for items such as attendance at each day of hearing. The hearing required six days to conclude. Based on the length of the proceedings, the costs were significant.
- [5] The Respondent opposed the costs order requested by the Law Society. The Respondent did not take issue with the calculations according to the tariff, but submitted that the costs sought by the Law Society were not reasonable and advised that the costs order would be a financial burden to him. He did not provide evidence of his financial circumstances.
- [6] The hearing panel noted in their reasons that, because the Respondent had not provided any evidence of his finances, the panel was unable to assess the impact of the costs order on his ability to pay. The hearing panel found that the bill of costs

submitted by the Law Society was reasonable and ordered that the Respondent pay costs in the amount of \$29,200 within one year from the date of the decision.

FRESH EVIDENCE AT THE REVIEW HEARING

[7] The Respondent's s. 47 review was heard on March 16 and 17, 2016. At the review hearing, this Review Board granted leave for the Respondent to admit fresh evidence regarding his financial circumstances. He provided personal tax return documents and accounting records from his law practice. The tax records indicate that his income during the years 2010 to 2015 was modest. The accounting records for his law practice indicate that his billings were declining during those years and he did not have a significant income from the practice of law. He testified that he had significant equity in his personal home and an investment account holding retirement savings associated to his former career as an executive of a large corporation.

POSITION OF THE PARTIES

- [8] We received further written submissions from the parties regarding the reconsideration of the costs order in light of the Court of Appeal decision.
- [9] The Respondent submits that the costs order was unreasonable and should be set aside. The Respondent submits that his financial circumstances are an important factor to consider in assessing costs. He submits that the issue of costs must not be considered in isolation from the penalty. The penalty in this case was a relatively modest fine in the amount of \$3,000, and the Respondent submits that the costs order was disproportionate to the fine.
- [10] The Respondent relies upon a number of Law Society decisions where no costs were ordered or where lower costs were ordered. He has proposed in his submissions that the costs order should be reduced or that a no costs order is appropriate given his financial circumstances.
- [11] The Law Society submits that, although this matter was remitted for reconsideration by the Court of Appeal, it is open to this Review Board to confirm the hearing panel's order for costs provided that appropriate factors are considered. The Law Society submits that the evidence of the Respondent's financial circumstances does not support a revision of the costs order. The Law Society concedes that it is appropriate to consider the disparity between the amount of the fine and the amount of costs but submits that the escalated costs are attributable to the manner in which the Respondent conducted the hearing. The Law Society

submits that the order for costs in the amount of \$29,200 was appropriate and should be confirmed.

THE LAW

[12] In 2012, the Law Society Rules were amended to introduce a tariff of costs to assist in determining orders for costs in Law Society proceedings. Prior to 2012, the Law Society would generally seek to recover a percentage of the costs incurred in the proceedings: *Law Society of BC v. Kirkhope*, 2012 LSBC 5 at para. 60. In cases since the tariff was introduced, Rule 5-11 of the Law Society Rules requires hearing panels to “have regard” to the tariff in assessing costs, although the costs order can deviate from the tariff where it is “reasonable and appropriate” to do so:

Costs of hearings

5-11 (1) A panel may order that an applicant or respondent pay the costs of a hearing referred to in Rule 5-1 [*Application*], and may set a time for payment.

...

(3) Subject to subrule (4), the panel or review board must have regard to the tariff of costs in Schedule 4 [*Tariff for hearing and review costs*] to these Rules in calculating the costs payable by an applicant, a respondent or the Society.

(4) A panel or review board may order that the Society, an applicant or a respondent recover no costs or costs in an amount other than that permitted by the tariff in Schedule 4 [*Tariff for hearing and review costs*] if, in the judgment of the panel or review board, it is reasonable and appropriate to so order.

(5) The cost of disbursements that are reasonably incurred may be added to costs payable under this Rule.

[13] While a hearing panel is required to have regard to the tariff of costs, there is a broad discretion to fix costs based on the circumstances of the proceedings. A non-exhaustive list of the factors that may be considered in determining an order for costs are set out in *Law Society of BC v. Racette*, 2006 LSBC 29:

- (a) The seriousness of the offence;
- (b) The financial circumstances of the respondent;

- (c) The total effect of the penalty, including possible fines and/or suspensions; and
- (d) The extent to which the conduct of each of the parties has resulted in costs accumulating or conversely, being saved.

ANALYSIS

- [14] The standard of review in a s. 47 review is correctness, except where the hearing panel has heard *viva voce* evidence, in which case the review board should show deference to the hearing panel's findings of fact. In this case, however, this Review Board received evidence that was not before the hearing panel. The decision of the hearing panel must be reviewed in consideration of all the evidence, including the fresh evidence with respect to the Respondent's financial circumstances.
- [15] Financial circumstances are one of the factors to be considered in assessing an order for costs. Where the evidence of financial circumstances establishes that a respondent has no ability to pay, this will be a significant consideration in the calculation of a fine or costs order. Where there is a genuine inability to pay and no possibility of making future payment, it may be appropriate to make no costs order at all. Where the evidence establishes financial hardship falling short of an inability to pay, it may be appropriate to reduce the costs order or to provide a reasonable time to pay.
- [16] At the initial hearing, the Respondent made submissions regarding his financial circumstances but did not provide any financial statements. At the s. 47 review hearing, the Respondent was granted leave to admit fresh evidence regarding his financial circumstances. In the financial documents tendered as fresh evidence by the Respondent, he did not disclose that he owned any assets. In response to questions from the Review Board, the Respondent acknowledged that he owned assets at the time of the s. 47 review hearing, including investments and real property. The Respondent had significant equity in real property. This evidence is properly considered in calculating a fine or an order for costs order: see for example *Law Society of BC v. Wesley*, 2015 LSBC 6 at paras. 34-35.
- [17] Given the evidence of the Respondent's assets, including his savings and home equity, we do not consider that the evidence establishes an inability to pay an order for costs. However, we do accept that the order for costs imposed by the hearing panel is a financial hardship for the Respondent given his income in recent years. Based on the Respondent's evidence at the time of the hearing, his payment of

costs in any significant amount will likely have to be drawn from savings or home equity.

- [18] Another factor to be considered in assessing costs is the seriousness of the misconduct. We consider this to mean that, if the amount of costs is disproportionately high relative to the seriousness of the misconduct, then the panel may exercise its discretion to reduce the order for costs. The misconduct in the Respondent's case primarily relates to billing practices and trust accounting. It is not the most serious form of misconduct that can arise from a lawyer's financial obligations, but it is noteworthy that the hearing panel, this Review Board and the Court of Appeal have all expressed concern that the Respondent continues to demonstrate a lack of appreciation for the obligations to maintain proper accounting records.
- [19] One of the factors to be considered in assessing an order for costs is the extent to which the party's conduct of the hearing was responsible for escalating costs (or conversely, saving costs). Based on a review of the record from the initial hearing, it is clear that the proceedings were unnecessarily protracted because of the manner in which the Respondent conducted the hearing. An example of this is the Respondent's application to revoke his admissions. This occurred on the third day of the hearing after the Law Society had closed its case. A review of the transcript of this application is illustrative of why the hearing required several days to complete.
- [20] It is our view that this proceeding could have been resolved in a much more efficient manner. In making this observation, it is not suggested that the Respondent should be penalized for exercising his right to a hearing, but it is our view that the escalated costs were the inevitable result of how the proceedings were litigated by the Respondent.
- [21] The Respondent has cited a great number of Law Society decisions where lower costs or no costs were awarded. Most of those cases, however, were not as lengthy as the Respondent's proceedings and accordingly involved lower costs. In many of the cases relied upon by the Respondent, there were admissions of liability or the parties were able to agree on key issues including a costs order. Several of the cases relied upon by the Respondent involved conditional admissions pursuant to then Rule 4-22, which have different tariff rates than contested hearings.
- [22] We take into consideration that the costs pursuant to the tariff in this case were significantly higher than the amount of the fine. The total amount of the fine combined with the costs order is a significant penalty. We accept that an order for costs can be punitive, particularly for lengthy proceedings where costs pursuant to

the tariff can escalate quickly. High costs may become a deterrent for lawyers defending citations where they may have a viable defence: *Law Society of BC v. Jensen*, 2015 LSBC 10.

- [23] However, we also accept as a general principle that the burden of funding disciplinary hearings should not be placed entirely on the members of the Law Society. If a lawyer has been involved in misconduct that results in disciplinary proceedings and a finding of liability, an order for costs is appropriate to offset the costs to the profession. Costs ordered pursuant to the tariff are not intended to allow the Law Society to fully recover its actual costs, but it does to some degree offset the costs of these proceedings to the members of the Law Society.
- [24] As noted above, it is our view that the escalation of costs in this case was largely based on the way that the Respondent conducted the hearing. However, we have also considered the Court of Appeal's comments regarding the hardship of a costs order for sole practitioners and others with limited means to pay. Further, we consider the evidence of financial hardship to the Respondent, which was not before the hearing panel.
- [25] Given all the circumstances, we conclude that the costs order in this case should be set aside. We exercise our discretion pursuant to Rule 5-11(4) to make an order for costs less than the bill of costs based on the tariff.
- [26] We order that the Respondent pay costs in the amount of \$12,500, payable within six months of this decision.
- [27] This Review Board previously made an order for costs of the s. 47 review. That order was based on its earlier decision in which the hearing panel's decisions were confirmed and the s. 47 review was dismissed. Given that these s. 47 review proceedings have now resulted in the costs order from the initial hearing being set aside, the parties may wish to make submissions on the costs for the s. 47 review. While the Respondent was unsuccessful with respect to the decision on Facts and Determination, the decision on costs has been substituted. If either party wishes to make submissions on the costs for the s. 47 review in light of this result, then the parties may make submissions in writing pursuant to the following schedule:
- (a) The Respondent's submissions are to be filed within 30 days of this decision;
 - (b) the Law Society's submissions are to be filed no later than 15 days after the Respondent's submissions are filed; and

- (c) any reply submissions are to be filed no later than seven days following the Law Society's submissions.