2018 LSBC 27
Decision issued: September 24, 2018
Citation issued: April 2, 2012

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

APPLICANT

DECISION OF THE BENCHER PANEL ON AN APPLICATION TO INTRODUCE FRESH EVIDENCE

Review dates: April 10 and 11, 2018

Benchers: Sarah Westwood, Chair
Jasmin Ahmad
Jeff Campbell, QC
Barbara Cromarty
Lisa Hamilton, QC
Steven McKoen
Mark Rushton

Discipline Counsel: Henry Wood, QC
Appearing on his own behalf: Gary R. Vlug

BACKGROUND

[1] Mr. Vlug (the "Applicant") has applied for the admission of fresh evidence in this review under s. 47 of the *Legal Profession Act.* The review arises from the decision of the hearing panel on Facts and Determination issued February 26, 2014 (2014 LSBC 09) and the decision of the hearing panel on Disciplinary Action

issued September 5, 2014 (2014 LSBC 40) regarding three complaints totalling ten allegations (originally 11 allegations) of professional misconduct.

[2] The *Legal Profession Act* requires that reviews are "on the record". The "record" consists of material described in Rule 5-23:

> (1) Unless counsel for the respondent and for the Society agree otherwise, the record for a review of a discipline decision consists of the following:
>
> (a) the citation;
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> (b) a transcript of the proceedings before the panel;
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> (c) exhibits admitted in evidence by the panel;
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> (d) any written arguments or submissions received by the panel;
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> (e) the panel's written reasons for any decision;
>
> (f) the notice of review.

[3] A review board may admit evidence that is not part of the record pursuant Rule 5-23(2) and s. 47(4) of the *Legal Profession Act* if, in the opinion of the review board, there are "special circumstances" to justify its admission.

THE FRESH EVIDENCE

[4] The Applicant seeks to admit as fresh evidence a document that he provided to counsel for the Law Society in response to the Law Society's request for admissions prior to the initial hearing in this matter (the "Response to Notice to Admit").

[5] Pursuant to what was, at the relevant time, Rule 4-20.1 of the Law Society Rules (now Rule 4-28), either the Law Society or a respondent may seek admissions of fact or admissions regarding the authenticity of a document by serving the opposing party with a Notice to Admit. A party that is served with a Notice to Admit has a duty to respond within a prescribed time by either agreeing to or disputing the proposed admission. If a party does not respond in accordance with the Rule, the party is deemed to have admitted the truth of the fact or the authenticity of the document.

[6] Prior to the hearing of the citation, the Law Society served the Applicant with a Notice to Admit dated April 18, 2013, consisting of 37 pages of proposed admissions along with numerous attachments. The Notice to Admit included references to a transcript of proceedings in the Court of Appeal on June 22, 2009 (the "Transcript"). During those court proceedings, the Court questioned the

Applicant about whether he had received certain correspondence from opposing counsel. His statements to the Court and other aspects of that proceeding underlie allegations 4, 5 and 6 in the citation in this matter.

[7] The Applicant sent a "Response to the Notice to Admit" dated May 8, 2013 to counsel for the Law Society. In responding to the various requests for admissions, he stated that he would admit the "authenticity of the documents attached at tabs to the Notice to Admit" (which included the Transcript) with the following "clarification" regarding the Transcript:

> So long as it is clarified that its admission is (pursuant to the definitions of Authenticity (f) admission that said transcript is a transcript and not an admission of it being a complete record of what was done and said that day, tab 23 can be admitted.

[8] At the outset of the hearing of this s. 47 review, the Applicant sought to add to the record as proposed fresh evidence, a letter dated May 9, 2013 from counsel for the Law Society to the Applicant, which stated that counsel for the Law Society had attempted to incorporate the Applicant's suggested changes into the Agreed Statement of Facts and Notice to Admit.

[9] As a result of the Notice to Admit process, counsel for the Law Society and the Applicant signed an Agreed Statement of Facts dated May 27, 2013 (the "ASF"). The ASF described the proceedings in the Court of Appeal on June 22, 2009 and included the Transcript as an attachment. The ASF was filed at the initial hearing before the hearing panel. Counsel for the Law Society did not seek to admit either the Notice to Admit or the Response to the Notice to Admit.

[10] The Applicant says that the proposed fresh evidence is relevant to an issue that he has raised in this s. 47 review regarding whether the Transcript is a complete record of the court proceedings. During the hearing of the citation, the Applicant testified before the hearing panel that the Transcript was not complete, in that there was an "off the record" exchange between the Court and opposing counsel that was not reflected in the Transcript. He suggested that opposing counsel was chastised by the Court and that the exchange had either been removed or edited from the Transcript (possibly by direction of the Court) or that it occurred "off the record" as it related to the conduct of counsel (Record, Vol. II, pp. 322-331). He suggested that this missing exchange was important in considering the context of the Court's questions to him and his responses, which are the subject of allegation 4 in the citation. The issue of an "off the record" exchange is also the subject of allegation 6, which alleges that the Applicant committed professional misconduct by making

misrepresentations regarding this matter to the Law Society in the course of the Law Society investigation.

[11] The hearing panel considered the testimony of the Applicant regarding an "off the record" exchange with counsel that the Applicant acknowledged was not reflected in the Transcript. The hearing panel noted that, although the Transcript included references to breaks and adjournments in the proceedings, there was no reference to the Court going off record. The hearing panel also considered the evidence of opposing counsel from that proceeding, who denied that there had been any chastisement of him either on or off the record. The hearing panel accepted that the Transcript was complete and found that the alleged "off the record" exchange had not occurred. The Applicant has argued in this s. 47 review that the hearing panel erred in relying on the Transcript as a complete record.

[12] We understand the Applicant's argument for the admission of fresh evidence to be as follows. The Applicant says that the effect of the Response to Notice to Admit was to create an agreement with counsel for the Law Society that the Transcript was not complete or accurate. He says that the fresh evidence should be admitted as the Law Society is submitting in this s. 47 review that the Transcript is a complete record of the Court of Appeal proceedings. He says that, based on the alleged agreement, counsel for the Law Society is prohibited from taking the position that the Transcript represents a complete record of the proceedings. He suggests that the proposed fresh evidence be admitted as evidence of an agreement by the Law Society that the Transcript is incomplete.

[13] The Applicant also says that, given that the Law Society accepted his Response to the Notice to Admit (in which he stated his view that the Transcript was not a complete record), then the Law Society was required to prove "the authenticity of the transcript as representing a complete record of what had happened that day."

[14] Counsel for the Law Society is opposed to the application to admit fresh evidence, on the basis that the evidence does not meet the test for the admission of fresh evidence.

[15] In response to the Applicant's motion, the Law Society produced an affidavit sworn by Law Society counsel who had conduct of the initial hearing (the "Law Society Affidavit"). The Law Society Affidavit refers to excerpts from the proceedings and includes a denial by the affiant that there was any agreement between counsel that the Transcript was incomplete.

APPLICATION TO CROSS-EXAMINE

[16] The Applicant applied to cross-examine the affiant of the Law Society Affidavit at a pre-review conference that was held pursuant to Rule 5-25(8) of the Law Society Rules. The Chambers Bencher ruled that he did not have the authority to hear the application and that any question of leave to cross-examine should be determined by the Review Board: *Law Society of BC v. Vlug*, 2018 LSBC 1. The Applicant indicated at the pre-review conference that he wished to produce further information in response to the Law Society Affidavit. The Chambers Bencher directed that any further material in support of the motion should be filed by January 28, 2018. The Applicant did not provide any further information by that date.

[17] At the hearing of this s. 47 review, the Applicant did not raise his request to cross-examine the affiant of the Law Society Affidavit until the conclusion of the hearing. At that time, the Applicant initially stated that he was not pursuing his application to cross-examine. He then referred to his written submissions in which he submitted that the Review Panel should direct cross-examination of the affiant and confirmed that he was seeking to cross-examine on the Law Society Affidavit. The Applicant's written submissions assert that he has a right of cross-examination and that, if refused, "it is unconstitutional and not saved by s. 1 of the Constitution of Canada." He has not filed any application or provided notice pursuant to the *Constitutional Question Act* and did not pursue this application at the hearing.

[18] There is no absolute right of cross-examination on an affidavit and the decision to allow cross-examination is discretionary. In the context of civil litigation, the question is whether cross-examination may yield evidence that might be of assistance in determining an issue: *Greater Vancouver Water District v. SSBV Consultants Inc.*, 2014 BCSC 1148 at para. 41. We accept that a review board or hearing panel could grant leave to cross-examine on an affidavit given the broad discretion in Rule 5-6 of the Law Society Rules to determine procedure and decide what forms of evidence may be admitted. There are some circumstances where it may be appropriate to grant leave to cross-examine, if there is some useful purpose to the cross-examination such as eliciting relevant evidence that would assist in determining the issues in the proceeding.

[19] The Applicant did not make any submissions as to how cross-examination would assist the Review Panel in deciding the fresh evidence application. It is our view that there is no useful purpose to granting leave to cross-examine counsel on the Law Society Affidavit. As set out below, we do not consider that the evidence relied upon by the Applicant establishes that the Law Society was bound by any

agreement regarding the Transcript. We do not consider it necessary to place any weight on the assertions in the Law Society Affidavit in reaching that conclusion. Further, we do not consider that cross-examination could elicit any evidence that would assist the Applicant in his application or that would assist the Review Board in determining the issues in this application. For these reasons, we do not find that it is appropriate to grant leave for the Applicant to cross-examine.

LAW ON THE ADMISSION OF FRESH EVIDENCE

[20] The test for the admissibility of fresh evidence in the context of criminal appeals is set out in *Palmer v. The Queen*, [1980] 1 SCR 759:

1. The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial;

2. The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;

3. The evidence must be credible in the sense that it is reasonably capable of belief, and

4. It must be such that, if believed, it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[21] The *Palmer* criteria have been applied in a number of Law Society decisions, including *Law Society of BC v. Kierans*, 2001 LSBC 6, *Law Society of BC v. Perrick,* 2018 LSBC 7 and *Law Society of BC v. Sas*, 2017 LSBC 08. We will apply these criteria to the question of whether the proposed fresh evidence is admissible in this Review.

ANALYSIS

[22] We find that the Applicant has not established that the *Palmer* criteria are met in his application to adduce fresh evidence. First, it is our view that the requirement of due diligence is not met as the Applicant could have sought to admit the evidence at the initial hearing. The Applicant did not assert that there was any agreement at the initial hearing, although it was clear from the position taken by the Law Society that counsel were not in agreement that the Transcript was incomplete. Counsel for the Law Society stated in her opening submissions at the hearing of the citation that "the Law Society … will rely on the Transcript as evidence that the Court didn't ask to go off the record at any time" (Record, Vol. 1, p. 27). It was

clear that the Law Society was relying on the Transcript as a record of what had transpired in the Court of Appeal. If the Applicant wished to assert that there was an agreement regarding the completeness of the Transcript, he could have raised it at the initial hearing.

[23] The documents that the Applicant seeks to admit as fresh evidence were available to him and he could have sought to admit them at the initial hearing. Further, if the Applicant believed that the Law Society had agreed that the Transcript was incomplete, it should have been clearly set out as an agreed fact in the ASF. There is nothing in the ASF with respect to an "off the record" exchange or any issues with the accuracy of the Transcript. The ASF simply states at para. 6(f) that any documents attached to the ASF are admitted into evidence to prove that the statements were made.

[24] The *Palmer* criteria also include a requirement that the fresh evidence could reasonably be expected to have affected the result. We do not accept that the proposed fresh evidence establishes any agreement between counsel as alleged by the Applicant, and we do not consider that it could have affected the result at the initial hearing.

[25] In support of his argument that there was an agreement with counsel for the Law Society that the Transcript was incomplete, the Applicant relies on his statement in the Response to Notice to Admit that the transcript "is a transcript and not an admission of it being a complete record of what was done and said that day." We do not accept that this unilateral statement in the Response to Notice to Admit created any agreement between counsel. It is clear from the position taken by the Law Society throughout these proceedings that the Law Society did not agree with the Applicant that there was any "off the record" exchange. This was also clear from the citation itself, which alleged that the Applicant misrepresented that there was an "off the record" exchange in his response to the Law Society investigation. The Applicant's statement in the Response to the Notice to Admit that the admission of the Transcript cannot be taken as an admission that it was a "complete record of what was done and said that day" did not in any way bind the Law Society to accept that the Transcript was incomplete.

[26] In considering the admissibility of fresh evidence, the relevance and probative value of the evidence is important to the *Palmer* analysis. The fresh evidence must carry sufficient probative force that it could have affected the result of the proceedings. In this case, the fresh evidence is simply a unilateral statement of the Applicant's position regarding the Transcript. In this regard, it is consistent with the Applicant's testimony before the hearing panel in which he provided his

version of the events, including his recollection of an exchange with the Court that is not reflected in the Transcript. The fresh evidence does not add anything to the Applicant's testimony. It is our view that it would not have assisted the Applicant in proving that there was any agreement with the Law Society and would not have been admissible for this purpose.

[27] The hearing panel considered the Applicant's testimony regarding the alleged "off the record" exchange, the testimony of opposing counsel denying that there was any such exchange and the Transcript itself. The hearing panel found that the alleged "off the record" exchange had not occurred. The proposed fresh evidence would not have affected this finding of fact.

[28] We do not accept that the fresh evidence bound the Law Society to the Applicant's position that the Transcript was incomplete. We do not accept that it would have assisted the Applicant in advancing his position that the Transcript was incomplete. We find that the proposed fresh evidence could not have affected the decision at the initial hearing.

[29] The application to admit fresh evidence is dismissed.