2020 LSBC 46
Decision issued: September 24, 2020
Citation issued: September 12, 2017

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

MICHAEL MURPH RANSPOT

RESPONDENT

DECISION OF THE HEARING PANEL ON AN APPLICATION TO SET ASIDE A DECISION

Hearing date:	January 13, 2020
Panel:	Michelle D. Stanford, QC, Chair Thelma Siglos, Public representative Sandra Weafer, Lawyer
Discipline Counsel:	Kieron G. Grady
Counsel for the Respondent:	Patrick F. Lewis

ORDER SOUGHT

[1] The Respondent seeks an order setting aside the Decision on Facts and Determination issued by the Hearing Panel on May 21, 2019 (2019 LSBC 17, the "Decision").

BACKGROUND

[2] On September 12, 2017, a citation was issued against the Respondent in accordance with Section 38 of the *Legal Profession Act*. The citation contained two allegations

of misconduct that arose while the Respondent was in a personal relationship with CC, who was also his client:

1. On or about December 31, 2015, you assaulted CC, and on or about November 9, 2016, you pled guilty to assault causing bodily harm on CC.

   This conduct constitutes conduct unbecoming a lawyer, pursuant to s. 38(4) of the *Legal Profession Act*; and

2. Between approximately March 2013 and December 31, 2015, when you represented CC in family law proceedings, you acted in a conflict of interest contrary to one or more of the rules 3.4-26.1, 3.4-28 and 3.4-34 of the *Code of Professional Conduct for British Columbia* because you:

   (a) were in a personal romantic relationship with CC from approximately April 2012 until December 31, 2015; and

   (b) loaned funds to CC between approximately May 2013 and October 2014, without ensuring CC had independent legal advice regarding the loans.

   This conduct constitutes professional misconduct, pursuant to s. 38(4) of the *Legal Profession Act.*

[3] Service of the citation was acknowledged by then counsel for the Respondent and a hearing date scheduled; however, neither the Respondent nor his counsel at the time ("Former Counsel") attended the hearing scheduled for December 19, 2018 (the "December Hearing").

[4] The Panel granted the Law Society's application pursuant to s. 42(2) of the *Legal Profession* Act to proceed in the Respondent's absence. The Panel was satisfied, based on evidence that the Respondent has been served with notice of the December Hearing. On the morning of the hearing, the Law Society made many attempts to contact Former Counsel by phone, email and through his assistant to no avail. Given that those attempts were made and a significant period of time had elapsed (six years) since the start of events giving rise to the proceeding, the Panel granted the application to proceed in the Respondent's absence.

[5] The Panel gave its Decision on May 21, 2019, finding that all allegations set out in the citation had been proven with a resulting finding of conduct unbecoming related to allegation 1 and professional misconduct related to allegation 2.

[6] The Respondent now applies to set aside the Decision on the basis that he was not informed of the December hearing and therefore was denied his right to participate in the hearing.

[7] Counsel for the Law Society consents to the relief sought by the Respondent. New counsel for both parties argued jointly that the Decision should be set aside based on the principles of procedural fairness and natural justice.

FACTS

December hearing

[8] As neither the Respondent nor Former Counsel appeared for the December Hearing, the Panel granted the application and the hearing proceeded in the Respondent's absence.

[9] Following the publication of the Panel's findings of discipline violations in this matter, new counsel for the Respondent applied to set aside the Decision.

Hearing to set aside the Decision

[10] At the present hearing, the Respondent did not testify but filed an affidavit in support of his application and made submissions through his new counsel.

[11] In his Affidavit (marked as Exhibit 1 in this proceeding), the Respondent swore that he had been working with his Former Counsel to come to some resolution of the citation that would not require an oral hearing. He did not contest the allegations of conduct unbecoming or professional misconduct, but indicated that he had hoped to arrive at a "consent resolution" in terms of disciplinary action.

[12] Although the Notice of Hearing had been served on Former Counsel, the Respondent was never informed that a hearing had been set for December 19, 2018. In response to the messages left with his staff, Former Counsel contacted the Law Society on the morning of December 19, 2018. He was informed that the December Hearing was proceeding in the absence of the Respondent. Former Counsel did not at that time ask that the hearing be stood down. At no time between the December Hearing and the release of the Decision, did Former Counsel contact the Law Society, inform the Respondent that a hearing date had been set, or that the December Hearing had proceeded in the absence of the Respondent and Former Counsel.

[13] The Respondent's Affidavit, provided in support of this application established that:

(a) The Respondent was actively engaged in the disciplinary proceedings, but had difficulty at times reaching his Former Counsel. The Respondent swore that "… unusually long periods passed at times without his answering my emails or updating me on the status of the matter." [para. 11];

(b) The Respondent was not consulted on the Notice to Admit that the Law Society provided to his Former Counsel. The Respondent indicated that the failure of Former Counsel to communicate with him included critical input on the Notice to Admit, such that the response to the Notice to Admit "would have been different" had his Former Counsel consulted him. [para. 8];

(c) The Respondent was unaware that his Former Counsel had participated in a prehearing conference in November 2018 and that his Former Counsel had been served a Notice of Hearing for December 19, 2018. Curiously, his Former Counsel had contacted the Respondent by email the day before the hearing and suggested "they meet that week in order to 'bring this matter to conclusion.'" [para. 13];

(d) Had he known at the outset that a hearing had been scheduled, the Respondent would have attempted to prevent a full hearing. And secondly, that if a hearing was required, he would have prepared and attended in person along with his Former Counsel, who also would have been prepared. [para. 16]; and

(e) The Respondent was prepared to accept the consequences of his misconduct, including its publication. However, the emotional impact on the Respondent was far greater upon learning about the Decision after the fact. He felt a deeper stigma and humiliation because the Decision made it appear that he did not care to attend his disciplinary hearing, express remorse or provide any explanation for his conduct to the Law Society. [para. 27]

[14] A witness statement from Former Counsel was also attached as an exhibit to the Respondent's Affidavit. In it, Former Counsel took full responsibility for his and the Respondent's non-attendance at the December Hearing. Former Counsel confirmed he did not advise the Respondent of the prehearing conference he attended, nor the date of the December Hearing. [Exhibit "T"].

[15] In the witness statement, Former Counsel explained that his lack of communication with the Respondent arose from "personal, family challenges he was undergoing at that time and the stress and anxiety that they caused." He indicated that he had a conversation with a senior staff member of the Law Society on December 19, 2018, the morning of the December Hearing, in an attempt to "stop" the hearing from proceeding. It is clear that Former Counsel spoke to someone at the Law Society on the morning of December 19, 2018 and was told that the hearing was proceeding. Notes of that conversation from the Law Society do not indicate that he asked that the hearing be stood down or adjourned in order for him to appear. [Exhibit "T" to Ranspot affidavit]

[16] What is clear is that Former Counsel confirmed he did not advise the Respondent about the December Hearing or about the hearing proceeding in the absence of either the Respondent or Former Counsel, as he was "unable to deal with it." He stated unequivocally the Respondent was "entirely blameless" for the failure to attend the December Hearing. [Exhibit "T" to Ranspot affidavit]

[17] The Panel accepts the submissions of the Respondent in their entirety and has considered the Law Society's consent to the relief sought by the Respondent to set aside the Decision. In doing so, this Panel accepts the following:

(a) that Former Counsel for the Respondent acted contrary to his instructions in scheduling a hearing;

(b) the Respondent was unaware the December Hearing was scheduled to take place on December 19, 2018; and

(c) the Respondent's lack of knowledge was not due to any act or omission on his part, but due to a failure of his Former Counsel to advise him.

[18] Ultimately, the failure of the Respondent or his Former Counsel to attend the hearing resulted in the Decision being made by the Panel based on the evidence before it and with no input from the Respondent. His right to be heard at the December Hearing was breached, even though both parties agreed that the Panel did not err in proceeding based on the information they had available at the time.

ISSUES

[19] The issues the Panel must now consider are as follows:

1. Does the Panel have jurisdiction to reconsider and/or set aside the Decision?

2. If so, should the Panel exercise that jurisdiction?

3. If yes, is the Panel seized of the matter if the Decision is set aside?

ANALYSIS

Does the Panel have jurisdiction to reconsider and/or set aside the Decision?

[20] The *Legal Profession Act* is silent regarding the ability of a panel to revisit its decisions and is silent regarding the procedural aspect of setting aside a decision and reopening a hearing. Accordingly, it falls within common-law principles, in particular, the principles of natural justice and procedural fairness to protect an individual's right to make full answer in a tribunal proceeding and to remedy or cure a procedural defect. Additionally, the doctrine of *functus officio* holds that once a tribunal has exercised its jurisdiction, that jurisdiction has been spent.

[21] Both counsel provided a number of helpful authorities where it was held that tribunals have a common-law power to reopen or set aside a decision where there has been a breach of procedural fairness.

[22] To begin, Lord Hodson succinctly states in *Ridge* v. *Baldwin*, [1963] UKHL 2, [1964] AC 40, at p. 42:

> No one, I think, disputes that the three features of natural justice stand out – (1) the right to be heard by an unbiased tribunal, (2) the right to have notice of charges of misconduct, (3) the right to be heard in answer to those charges.

[23] In Canada, the leading authority on this point is found in *Chandler v. Alberta Association of Architects*, [1989] 2 SCR 848. The court recognized that an administrative tribunal has a common-law jurisdiction to reopen proceedings and hear additional evidence where the original proceedings have not been carried out on a proper basis.

[24] In *Chandler*, a board acted outside of its jurisdiction in making specific findings of professional misconduct of a number architects and architectural entities, rendering their order a nullity. The issue on appeal to the Supreme Court was whether the board was *functus* or whether it could revisit its own final decision to correct the error.

[25] The majority held at paragraphs 76 – 83:

As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in *Paper Machinery Ltd. v. J. O. Ross Engineering Corp*., [1934] SCR 186.

To this extent, the principle of *functus officio* applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. *For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.*

…

Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task. …

…

In this proceeding the Board conducted a valid hearing until it came to dispose of the matter. It then rendered a decision which is a nullity. It failed to consider disposition on a proper basis and should be entitled to do so. The Court of Appeal so held.

On the continuation of the Board's original proceedings, however, either party should be allowed to supplement the evidence and make further representations which are pertinent to disposition of the matter in accordance with the Act and Regulation. This will enable the appellants to address, frontally, the issue as to what recommendations, if any, the Board ought to make.

[emphasis added]

[26] The *Law Society of Upper Canada v. Purewal*, 2008 ONLSHP 25, is also instructive as an instance where a Canadian law society has applied the common-law jurisdiction to correct a procedural defect of a panel.

[27] Here the panel had imposed a penalty under the mistaken belief that full submissions had been put forward on that issue. Both counsel agreed that an error had been made and that the finding of disbarment should be set aside. However, counsel for Ms. Purewal additionally sought that the panel recuse itself on the re-hearing on penalty. Counsel for the Law Society argued that the panel should remain seized and could keep an "open mind" with respect to their previous finding of disbarment.

[28] Relying on *Chandler* (among other authorities), the panel agreed that the procedural mistake could be rectified by setting aside the order of disbarment and "affording the Society and the member a full opportunity to call evidence and make submissions in relation to penalty" (para. 20). Notably, the panel agreed with the Law Society and refused to recuse itself for the reopening of the hearing for submissions on penalty stating it would "… undertake this process with an open mind as directed by the authorities" (para. 20).

[29] Accordingly, given the clear line of authorities, this Panel concludes firstly, that administrative tribunals enjoy considerable discretion in determining their own procedure in the absence of statutory provisions to the contrary. Secondly, where there has been a clear procedural error and the enabling legislation is silent, a panel has common-law jurisdiction to set aside the decision and reopen a proceedings for the hearing of evidence and full submissions. Context and circumstances will dictate the tribunal's application of that administrative discretion.

[30] We find there has been a clear breach of natural justice primarily due to the failure of Former Counsel to give the Respondent notice of the December Hearing, resulting in the hearing proceeding in the Respondent's absence and the Panel rendering an adverse decision.

If so, should the Panel exercise that discretion?

[31] Under the circumstances of this Respondent and the supporting authorities, we find this Panel can, and should, exercise its common-law jurisdiction to set aside that Decision and reopen the December Hearing.

If yes, is the Panel seized of the matter when the Decision is set aside?

[32] Again, the authorities are helpful in determining the factors a panel can consider when exercising the discretion to set aside a decision. The panel in *Purewal* determined at para. 8 that it had three options available to it:

> … It can grant the motion to recuse, set aside the Order for disbarment, and direct that there be a hearing *de novo* before a new panel. It can grant the motion to recuse, set aside the Order for disbarment and direct that there be a panel struck to hear the evidence and submissions in relation to penalty, having regard to the findings of professional conduct already made. Or it can dismiss the motion to recuse, set aside the Order for disbarment, and hear evidence and submissions on the issue of penalty.

[33] In a petition under a Judicial Review involving a dismissal of a teacher, Mr. Justice Macfarlane cited with approval passages from de Smith, Judicial Review of Administrative Action, 3d ed. (1973), pp. 209-10:

> … there is a substantial body of recent judicial decisions to the effect that breach of the *audi alteram partem* rule goes to jurisdiction (or is akin to a jurisdictional defect) and renders an order or determination void.
>
> ... appellate proceedings in respect of decisions 'void' for want of jurisdiction or breach of natural justice are not inevitably nugatory. Nevertheless, the present weight of authority appears to support the view that a breach of natural justice in the first instance can be rectified only by a full and fair *de novo* hearing given either (i) by the body perpetrating the original breach, or (if possible) a differently constituted body with the same powers and status."
>
> (*Lange v. School District No. 42 (Maple Ridge)* (1978) 9 BCLR 232, 1978 CanLII 343 (SC) at para. 22)

[34] And further, citing from 1 CED (Ont. 3d Administrative Law, para. 94 and 95 under the heading "Curing Procedural Deficiencies – (a) Rehearing":

> When a decision has been reached in a manner contrary to the rules of natural justice, or there has been a failure to comply with statutory procedural requirements the breach can be cured if the decision-maker involved holds a reconsideration of the whole matter with a fair and open mind and corrects the errors of natural justice or other deficiencies which occurred at the first hearing. The mere fact that the tribunal may have

> already once determined the matter in issue contrary to the affected persons' interests, does not prevent subsequent fair consideration."
>
> (*Lange, at* para. 23)

[35] Accordingly, this Panel finds that, where there has been a determination that a procedural error renders a decision a nullity, the panel can determine the appropriate remedy to cure the defect. It can set aside the order and :

(a) direct a hearing *de novo* before a new panel;

(b) direct a hearing before a new panel on a matter at issue only; or

(c) schedule a hearing before the same panel giving the parties the full opportunity to call evidence and make submissions on the issue.

[36] In determining how to reopen the hearing, the panel can consider the context and circumstance of the facts before it, including the nature and degree of the breach and the number of days of evidence already before the panel, the number of witnesses called and the nature of the evidence.

[37] In determining whether or not this Panel is seized, the Panel has considered the following factors:

(a) Both parties are currently represented by new counsel;

(b) Both the Respondent and the Law Society advanced a joint submission on this application to set aside the Decision;

(c) The Respondent did not contest the alleged misconduct in his application;

(d) The Respondent had instructed his Former Counsel that he did not want to proceed with a hearing;

(e) the original hearing was a single day without witnesses; and

(f) The only issue remaining is one of penalty.

[38] This Panel has determined that a clear breach of natural justice occurred due to the procedural defect of the Respondent, through no fault of his own, not being given the opportunity to speak to his citation. The Respondent was hoping to resolve this matter without the need for a full hearing. That option was taken away from him by the actions of Former Counsel resulting in an adverse decision that made it appear the Respondent did not care enough to attend his hearing.

[39] This defect renders the Decision a nullity. Accordingly, we accede to the Respondent's application to set aside the Decision. By setting aside the entire Decision, the option of a resolution remains open to him or it allows a new panel to consider the matter afresh, with whatever material or evidence the Respondent wants to put before a new panel.

[40] Further, we find that this Panel is not seized and order a hearing *de novo* before a new panel.

DECISION

[41] The Panel directs that the Decision be set aside and a hearing *de novo* be held before a new panel.