

2014 LSBC 38
Decision issued: September 3, 2014
Oral reasons: June 2, 2014
Citation issued: November 19, 2013

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

KEVIN ALEXANDER MCLEAN

RESPONDENT

**DECISION OF THE HEARING PANEL ON
THE APPLICATION OF THE RESPONDENT FOR
DISQUALIFICATION OF DISCIPLINE COUNSEL**

Hearing date: June 2, 2014

Panel: W. Martin Finch, QC, Chair
Ralston Alexander, QC, Lawyer
Woody Hayes, Public Representative

Counsel for the Law Society: Alison Kirby
Appearing on his own behalf: Kevin A. McLean

BACKGROUND

[1] The Respondent, at the date of the hearing herein, was the subject of two matters scheduled for hearing:

- (a) a citation issued on November 19, 2013 and scheduled for hearing on June 2 and 3, 2014; and
- (b) an application to vary an Order made on January 29, 2014 pursuant to Rule 3-7.1 of the Law Society Rules scheduled for hearing on July 3, 2014.

- [2] Prior to the commencement of the citation hearing, the Respondent, by Notice of Application dated May 23, 2014, sought orders that:
- (a) Ms. Kirby, Barrister and Solicitor for the Law Society, be removed forthwith from any and all files involving Mr. McLean;
 - (b) the hearing set for June 3 and 4, 2014 [sic] be adjourned to be heard before August 30, 2014 on a date mutually acceptable to new counsel; and
 - (c) costs in favour of Mr. McLean in an amount to be determined by the adjudicator.
- [3] In his written submission dated June 2, 2014, the Respondent, in a document titled “Submissions of the Plaintiff”, summarized the orders sought as those aforementioned, and also “an order that the proceedings are stayed pending the investigation against Ms. Kirby.”
- [4] The Respondent’s application was referred to this Panel by the President’s Designate pursuant to Rule 4-26.1 to be determined before the hearing begins.
- [5] The Respondent states in Part 3 of his application the basis for his application in part is the reasonable apprehension of bias.
- [6] The Respondent supports his allegation by way of his own affidavit dated May 23, 2014. That affidavit asserts facts related to the conduct of Alison Kirby.

ISSUE

Should Ms. Kirby, Barrister and Solicitor for the Law Society, be removed forthwith from any and all files involving Mr. McLean?

FACTS

- [7] The Panel makes no findings of fact in this decision. The Panel finds it unnecessary to make such findings as a result of its analysis and legal reasoning.

ANALYSIS AND LEGAL REASONING

- [8] The Panel was appointed pursuant to Rule 4-28 of the Law Society Rules to conduct a hearing.

- [9] The Panel obtains its power by virtue of that appointment and is restricted to statutory powers granted to it pursuant to the *Legal Profession Act* and Law Society Rules.
- [10] Beyond the ultimate decision on a citation, the Panel's authority is limited to the determination of questions of practice and procedure relating to the citation.
- [11] A hearing panel is structured according to specific provisions of Rule 5-2 and is given specific powers such as the compulsion of witnesses and the production of documents. Importantly, practice and procedure to be followed at a hearing is provided to the Panel by Rule 5-5(1).
- [12] The ultimate judicial *vires* of the Panel is restricted to that provided for in the *Legal Profession Act* and Law Society Rules. The Panel is not similar to a court of general jurisdiction. It has no power, other than that granted in Rule 5-5, to control its own process or to make orders beyond that for which it was constituted.
- [13] In Law Society hearings, disciplinary agents such as Ms. Kirby are appointed to prosecute, and panels are appointed to address the prosecution. There is necessarily an independence that must operate between the prosecution and the Panel in order that procedural fairness not only exist, but is seen to exist.
- [14] While the Panel may have the capacity to determine the method of procedure in the conduct of the hearing, it has no power to control the general conduct of the prosecutor. To suppose otherwise would be to violate the fundamental notion of independence that must operate between the prosecution and the Panel. In consequence, we find that we do not have the authority to make an order prohibiting discipline counsel, Alison Kirby, from acting in "any and all files involving Mr. McLean."
- [15] The Respondent was unable to refer us to any authority in support of the proposition that the Panel could have such a power. He cannot ground jurisdiction on the suggestion of a reasonable apprehension of bias. Reasonable apprehension of bias may support an ultimate finding on the fairness of a hearing. It would, however, be an error of law to suppose that a preliminary finding of bias, which has not been made in this application in any event, could then ground a basis for the order of exclusion sought by the Respondent. The conduct alleged may ultimately influence the basis for a decision on the substantive issues. It cannot, however, grant powers to this Panel that the Panel does not otherwise have. The Panel can rule on substantive issues and procedural matters, but to suppose that the Panel would have the power to order the Law Society's properly appointed counsel to be

discharged from her prosecutorial duties has not been demonstrated in any way by the Respondent. The Panel knows of no authority in support of the application.

RESULT

- [16] The Panel finds, with respect to the orders sought, that the Panel has no jurisdiction to order Ms. Kirby removed from any and all files involving Mr. McLean, or to stay the proceedings pending the investigation concerning Ms. Kirby. Accordingly, the orders sought are refused.
- [17] As a result of its review of the information provided in support of the Respondent's application, this Panel does recuse itself on the basis of having received prejudicial information in the hearing of the preliminary question referred to us by the President's Designate. Accordingly, the hearing scheduled for June 2 and 3, 2014 is adjourned generally.
- [18] The Panel makes no order as to costs.