

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a Section 47 Review concerning

KEVIN ALEXANDER MCLEAN

RESPONDENT

**DECISION OF THE PRESIDENT'S DESIGNATE
ON
AN APPLICATION TO DISMISS THE REVIEW**

Submissions: July 15, 2016

President's Designate: Dean Lawton

Discipline Counsel: Geoffrey Gomery, QC
No-one appearing on behalf of the Respondent

BACKGROUND

- [1] On October 21, 2014 a citation was issued against the Respondent, Mr. McLean, containing seven allegations of professional misconduct.
- [2] A hearing of the citation took place on December 17, 2014 and January 13, 2015. Alison Kirby appeared for the Law Society. Mr. McLean did not attend on either of the hearing dates, and no-one appeared on his behalf.
- [3] No materials were delivered by or on behalf of Mr. McLean in response to the Law Society's allegations in the citation.
- [4] On March 20, 2015 the hearing panel issued its reasons on Facts and Determination (2015 LSBC 09). The panel determined that Mr. McLean was guilty of

professional misconduct in respect of the seven allegations against him in the citation. The panel dismissed an ancillary allegation relating to Mr. McLean's failure to meet daily with his practice supervisor.

- [5] On May 14, 2015 the panel held a Disciplinary Action hearing in respect of their findings of professional misconduct committed by Mr. McLean. Alison Kirby appeared for the Law Society. Mr. McLean did not attend the hearing, and no-one appeared on his behalf.
- [6] No materials were delivered by or on behalf of Mr. McLean in respect of the hearing on Disciplinary Action.
- [7] On June 29, 2015 the hearing panel issued its reasons on Disciplinary Action (2015 LSBC 30). The hearing panel determined that Mr. McLean was ungovernable by the Law Society, and ordered that he be disbarred.
- [8] On July 27, 2015 Mr. McLean delivered a notice of review under s. 47 of the *Legal Profession Act*. Since that time he has taken no steps to advance the review proceeding.
- [9] The Law Society prepared the Record under Rule 5-23. Mr. McLean was served with the Record on November 6, 2015.
- [10] On December 14, 2015, Michelle Robertson, the Law Society hearing administrator, sent a letter dated that day to Mr. McLean informing him of a January 14, 2016 pre-review conference and providing him with particulars for the pre-review conference.
- [11] The pre-review conference conducted by Bencher Lynam Doerksen proceeded on January 14, 2016. Geoffrey Gomery, QC attended the pre-review conference on behalf of the Law Society. Mr. McLean did not attend the pre-review conference, and no-one appeared on his behalf. Mr. Doerksen proceeded in the absence of Mr. McLean pursuant to Rule 5-25, having been satisfied that Mr. McLean had been notified of the pre-review conference.
- [12] On January 14, 2016 Mr. Doerksen issued a memorandum outlining what transpired at the pre-review conference. In that document he stated that, given the inaction on the part of Mr. McLean to advance the review, it was consequently placed into abeyance. The memorandum recorded Mr. Gomery having advised that if no steps were taken by Mr. McLean, the Law Society would apply for dismissal for want of prosecution.

[13] On January 15, 2016 Ms. Robertson sent a copy of Mr. Doerksen's memorandum to Mr. McLean by regular post to two addresses for Mr. McLean. In this context Rule 10-1(1) deems service of a document effected by sending it to the last known address of the addressee.

THE APPLICATION TO DISMISS THE S. 47 REVIEW

[14] By a letter dated July 15, 2016 addressed to the President of the Law Society and to Mr. McLean, Mr. Gomery applied for an order dismissing the review (the "dismissal application").

[15] The dismissal application relies on Rule 5-28, which states (subrule (2) having been rescinded):

Inactive reviews

- 5-28** (1) If no steps have been taken for 6 months or more, a party may apply for an order dismissing a review by delivering to the President and the other party a notice in writing that sets out the basis for the application.
- (3) If it is in the public interest and not unfair to the respondent or applicant, the President may dismiss the review.
- (4) The President may designate another Bencher to make a determination under subrule (3).

[16] Having been designated by the President to make a determination on the dismissal application, I provided a memorandum on July 27, 2016 to Ms. Robertson with directions concerning the procedure for the determination of the dismissal application. In that memorandum I requested that Mr. Gomery file Mr. McLean's admission of delivery of notice, or provide other proof of notice, of the dismissal application being delivered to Mr. McLean.

[17] My memorandum also directed that:

- (a) Mr. McLean had until August 31, 2016 to deliver any responding material to the dismissal application to the attention of Michelle Robertson, and to Mr. Gomery; and
- (b) Mr. Gomery would have 14 days following delivery of any responding material from Mr. McLean in which to provide any reply material to Ms. Robertson and to Mr. McLean.

- [18] In a letter dated August 8, 2016 to Michelle Robertson, Mr. Gomery provided an affidavit of service from Rachel Rabey attesting that she arranged for a courier to deliver a copy of Mr. Gomery's July 15, 2016 dismissal application to Mr. McLean's Vancouver business address. The exhibit to Ms. Rabey's affidavit was a copy of the way-bill from the courier confirming delivery to the address for Mr. McLean indicated in her affidavit.
- [19] Mr. McLean has not provided any responding material to Ms. Robertson in the context of my memorandum of July 27, 2016.

ANALYSIS

- [20] Rule 5-28 imposes two obligations on the President and hence me as his designate. First I must determine if it is in the public interest to dismiss the review, and second, that the dismissal is not unfair to Mr. McLean.
- [21] In addition, I must be satisfied that there has been procedural fairness in respect of the dismissal application; in particular that Mr. McLean has been notified of the dismissal application and has been given an opportunity to respond to it. Based on the information I have been provided as outlined in these reasons, I think it is clear that Mr. McLean has been provided with both the notice of the dismissal application and an opportunity to deliver responding material.
- [22] The courts have provided guidance to administrative decision-makers in recognizing obligations to parties and, in this case, the public interest when exercising discretionary powers. In particular, decision-makers must be mindful of the importance of timely resolutions of disputes and proceedings, proportionality of costs, and the principle of finality. In this context I acknowledge the helpfulness of authorities referred to in Mr. Gomery's dismissal application. (See: *British Columbia Workers' Compensation Board v. Figliola*, 2011 SCC 52 at paras. 24-25 and 27; and *The Law Society of Upper Canada v. Igbinosun*, 2009 ONCA 484 at para. 48.)
- [23] I think it is useful in this case to consider the approach our courts take in considering applications for orders for dismissal of civil proceedings for want of prosecution. Such orders are discretionary in nature and turn on the particular facts and circumstances of each case. In *Edmond v. British Columbia*, 2013 BCSC 1102, the court mentioned three factors that should be considered on an application to dismiss for want of prosecution, namely whether:

- (a) there has been an inordinate delay, given the facts of the case;

- (b) the inordinate delay is inexcusable; and
- (c) the defendant(s) are likely to be seriously prejudiced by the delay.

In *Edmond*, Abrioux, J. went on to say, after considering these factors, “If each of these factors is demonstrated, the court must go on to consider whether or not the balance of justice demands that the action should be dismissed: *Irving v. Irving* (1982), 140 DLR (3d) 157 (BCCA) at 162.”

- [24] In the present dismissal application, I find that Mr. McLean has taken no steps to advance the review since July 27, 2015. I find Mr. Mclean’s failure to take any steps in 14 months amounts to inordinate delay given other facts in the case, including his failure to attend both the hearing of the citation and the hearing on disciplinary action following the findings of professional misconduct against him, and his failure to attend the pre-review conference. I find that, in the present case and in these circumstances, the inordinate delay is inexcusable. In this context Mr. McLean has provided no communication whatsoever to explain the inordinate delay.
- [25] In my opinion, although the third factor in *Edmond* is not applicable to this case, the question of the public interest most certainly is relevant. The public interest is protected and served by a structure of sound governance of lawyers in the province and the assurance that the Law Society addresses discipline of lawyers in a fair, complete and timely manner.
- [26] In all the circumstances I am satisfied that it is not unfair to dismiss Mr. McLean’s s. 47 review, and that it is in the public interest to do so.

DETERMINATION

- [27] The dismissal application is granted. The review is dismissed.