

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a s. 47 Review concerning

KEVIN ALEXANDER MCLEAN

RESPONDENT

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

Submissions: February 2, 2017

President's Designate: Dean Lawton, QC

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

BACKGROUND

- [1] The decision under review resulted from a citation issued on October 7, 2014.
- [2] The hearing panel conducted a hearing on May 26, 2015.
- [3] The Respondent Mr. McLean did not attend the hearing.
- [4] The hearing panel reserved its determination to August 24, 2015, and made findings of professional misconduct on various allegations in the citation.
- [5] The hearing panel conducted a further hearing on December 7, 2015 to determine the disciplinary action. Mr. McLean did not attend the hearing.
- [6] On February 12, 2016 the hearing panel disbarred Mr. McLean on the ground he is ungovernable.

- [7] This was the second order by a hearing panel disbaring Mr. McLean. The earlier disbarment order was made on June 29, 2015.
- [8] In the decision now under review the hearing panel held that non-membership in the Law Society at the time of the citation did not protect Mr. McLean from a review of the conduct that was the subject of the second discipline citation, and the sanction of a second order of disbarment.
- [9] Mr. Mclean delivered a notice of review under s.47 of the *Legal Profession Act* on March 11, 2016. He has taken no further steps to advance the review.

THE APPLICATION TO DISMISS THE REVIEW

- [10] By a letter dated January 27, 2017 addressed to the President of the Law Society and to Mr. McLean, Geoffrey Gomery, QC, counsel for the Law Society, applied for a an order dismissing the review (the “dismissal application”).
- [11] The dismissal application relies on Rule 5-28 which states:

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 Benchler to make a determination under subrule (3).

- [12] Having been designated by the President to make a determination on the dismissal application, I was provided with an affidavit of delivery stipulating that the dismissal application was delivered to Mr. McLean on January 27, 2017 at his address for delivery in this proceeding. I am satisfied that a copy of the dismissal application was delivered to Mr. McLean.
- [13] On February 8, 2017 I gave a memorandum of directions (“memorandum of directions”) of the procedure for determination of the dismissal application as follows:
- (a) Mr. McLean shall have until March 15, 2017 to deliver any responding material to the dismissal application to the attention of Michelle

Robertson, the Hearing Administrator at the Law Society, and Mr. Gomery;

- (b) Mr. Gomery shall have 14 days following delivery of any responding material from Mr. McLean to provide any reply material to Ms. Robertson and Mr. McLean; and
- (c) The address for delivery to Mr. McLean in this dismissal application shall be 400-525 Seymour Street, Vancouver, BC.

[14] By a letter dated February 15, 2017, Ms. Robertson delivered a copy of my memorandum of directions to Mr. McLean at his address for delivery. In an affidavit sworn February 21, 2017 Ms. Robertson confirmed the steps she took to deliver a copy of my memorandum of directions to Mr. McLean, and I am satisfied it was delivered to him at his address for delivery.

[15] By a letter dated March 27, 2017 addressed to both Mr. McLean and Ms. Robertson, Mr. Gomery stated that he had not received any responding material from Mr. McLean.

[16] By a memorandum to me dated April 3, 2017, Ms. Robertson stated that she had not received any responding material from Mr. McLean.

[17] I am satisfied that Mr. McLean has delivered no responding material in accordance with my memorandum of directions.

ANALYSIS

[18] 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.

[19] On September 27, 2016 I issued reasons in the first application to dismiss a s.47 review concerning Mr. McLean. Those reasons are cited as 2016 LSBC 33. At paragraphs [22], [23] and [25] in those reasons I observed the following:

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)

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."

...

In my opinion, although the third factor in *Edmond* is not applicable in 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.

[20] The extracted observations above are, in my opinion, applicable to the present dismissal application. I find that Mr. McLean has taken no steps to advance the review since March 11, 2016. In my view this unexplained delay amounts to inordinate delay. I emphasize in this context that Mr. McLean has provided no communication of any kind to Mr. Gomery or the Law Society since commencing the review on March 11, 2016.

[21] Upon considering the circumstances in this matter I am satisfied that it is in the public interest to dismiss the review and that it is not unfair to Mr. McLean to do so.

[22] The dismissal application is granted. The review is dismissed.