2017 LSBC 27
Decision issued: July 31, 2017
Citation issued: February 11, 2015

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

GERHARDUS ALBERTUS PYPER

RESPONDENT

DECISION OF THE HEARING PANEL ON PRELIMINARY APPLICATION REGARDING JURISDICTION AND BIAS

Hearing date:	February 10, 2016
Panel:	Nancy Merrill, QC, Chair Joost Blom, QC, Lawyer Robert Smith, Public representative
Discipline Counsel:	Kieron Grady
Appearing on his own behalf:	Gerhardus A. Pyper

BACKGROUND

[1] This is our decision on the Respondent's preliminary application in a disciplinary proceeding. The proceeding concerns the quality of service that the Respondent provided to his client in a civil litigation matter and related allegations of failure to give prompt notice of the client's claim to the Lawyers Insurance Fund and to advise the client to obtain independent legal advice. This Panel has not yet heard evidence on the merits of the allegations in the citation. The hearing held on February 10, 2016 was concerned solely with the Respondent's application.

[2] The preliminary application, dated February 4, 2016, sought an order that:

1. The hearing panel lacks jurisdiction to conduct the hearing.

Alternatively,

2. The allegations set out in the citation authorized on February 11, 2015 be dismissed, or stayed;

3. A declaration that the Law Society as an institution is biased *vis-à-vis* the Respondent;

4. Such other relief as the hearing panel may deem just.

[3] Ours was the third proceeding in which the Respondent has made this application or one similar to it.

[4] The first proceeding concerned a citation against the Respondent for having practised law while he was suspended under an order of May 23, 2014. The panel in that proceeding (the "first panel") held hearings in October 2015 and issued its decision on January 11, 2016 (2016 LSBC 01). The first panel found that the Respondent had committed professional misconduct. As part of its decision the panel dismissed a preliminary application (motion) that was described in its decision as follows:

> [3] At the commencement of the hearing, Mr. Pyper advised he wished to bring a preliminary motion that the Panel lacked jurisdiction to conduct the hearing. In the Notice of Motion presented he did not set out the legal basis on which he asserted the Panel lacked jurisdiction. It became clear that part of what he wanted to argue was that the order suspending him was the result of a process that was unfair, including bias of the prior panel, and as a consequence, this Panel lacks jurisdiction to enforce the suspension order.

[5] The first panel concluded on this application that, to the extent the Respondent was challenging the process leading to the order of May 23, 2014, the proper course was to take the appeal and review procedures available to him in respect of that order (at para. 13).

[6] In the same decision the first panel considered the Respondent's argument that the Law Society was biased against him, to which, it noted at para. 15, most of the Respondent's argument in that proceeding was directed. He described this as "institutional bias" and submitted that, as a consequence, the citation should be dismissed. The first panel described the focus of Mr. Pyper's evidence and

argument as being "that the investigators and/or prosecutors of the Law Society were biased against him, not that this Panel was biased" (at para. 38).

[7] On the "institutional bias" argument, the first panel reviewed a series of alleged acts and omissions by the Law Society and its staff that were said to display bias. The first panel concluded:

> [52] We find there was no evidence that the Law Society staff have been biased against Mr. Pyper or that they were motivated by malice. We can find no basis in the evidence to suggest that the issuance of this citation was motivated by bias or malice.

[8] The second proceeding in which the Respondent raised similar arguments to those raised before the first panel was a hearing held on January 25, 2016 on a citation on a matter separate from that before the first panel and from that before us. At our hearing, two weeks later, we were advised that the panel at the January 25 hearing (the "second panel") had adjourned a decision on the Respondent's application because the Respondent had informed them that he intended to appeal the first panel's decision, that of January 11, 2016, to the Court of Appeal. The second panel's written reasons for the adjournment were issued on February 17, 2016 (2016 LSBC 08). The second panel considered that the similarities between the application before them and that being appealed to the Court of Appeal made it appropriate, on the balance of fairness, to adjourn the hearing of the application pending the outcome of the appeal.

[9] At a telephone conference on February 3, 2016, we (this panel) agreed with the Respondent and Law Society counsel that we would hear submissions on the application as well as on the question of the impact of the two earlier proceedings on the way we should deal with the application.

[10] At our hearing on February 10, 2016, the Respondent introduced written and oral evidence, including that of one witness, in support of his application before us. He also argued that we should adjourn our decision on the application until his appeal to the Court of Appeal was concluded. The Law Society introduced evidence on some of the facts relied upon by the Respondent. The Law Society further submitted that we should not adjourn our decision on the application and that we should dismiss the application as had the first panel on January 11, 2016. We decided, essentially for the same reasons as the second panel, that it would not be appropriate to decide on the Respondent's application when the first panel's dismissal of a similar application was to be reviewed by the Court of Appeal.

[11] The Respondent did appeal the first panel's decision to the Court of Appeal under s. 48 of the *Legal Profession Act*, SBC 1998, c. 9. The Court of Appeal issued its decision on March 3, 2017: *Law Society of British Columbia v Pyper*, 2017 BCCA 113. The court dismissed the appeal on the ground that the first panel's findings of fact were entitled to deference and its decision was reasonable. Two of the grounds of appeal do not have a direct bearing on the application before us. An argument that the first panel did not give him a fair hearing was dismissed as unsupported by the facts, as was an argument that the first panel was biased against him.

[12] Worth quoting in full is the Court of Appeal's decision on the argument of "institutional bias". Saunders JA, for the court, said:

> [32] Likewise I do not consider that there is any basis on which to find there is a reasonable apprehension of institutional bias. The appellant made several specific complaints against the Law Society. The decision of the [first] panel from paragraphs 38 through 51 outlines, and responds to, the appellant's complaints of particular instances he says would lead a reasonable person to apprehend bias on the part of the Law Society or individuals towards him. I see no error of fact in the panel's conclusions, or an erroneous approach brought to these issues by the panel. Although the appellant continues to make some of the same complaints, he has not shown how the panel's conclusions on them is [*sic*] fatally flawed.
>
> [bracketed insertion is ours]

[13] The Court of Appeal's decision resolves the reason for our adjournment on February 10, 2016, and we now decide on the Respondent's preliminary application in our proceeding.

EVIDENCE AND SUBMISSIONS ON THE PRELIMINARY APPLICATION

[14] In his written submissions to us at the hearing, the Respondent said that "the LSBC and members of its staff have conducted themselves in a fashion which clearly shows discriminatory and biased conduct *viz-a-viz* [*sic*] the Applicant" and lists a series of acts and omissions. These are:

> (1) conducting a hearing concerning the Respondent in May 2014 without prior notice to him;
>
> (2) placing the Respondent on an interim suspension without taking into consideration the interest of the Respondent and the clients/public;

(3) "hackling [*sic*] and taunting the [Respondent] for the [Respondent's] audacity to state to the LSBC that the [Respondent] is consulting God if the [Respondent] has issues he can not resolve by himself";

(4) conducting multiple practice reviews without reason or justification;

(5) declining to process the Respondent's payment for annual dues and subsequently revoking his licence as a member of the LSBC;

(6) "lying to lawyers/the public and clients/ex-clients why the [Respondent] has ceased to be a member of the LSBC";

(7) ignoring the Respondent when he approached the Law Society for help on a personal level;

(8) ignoring the Respondent's application for reinstatement as a member of the LSBC;

(9) deliberately allowing clients/ex-clients to defame the Respondent in the media and on the Internet;

(10) instituting frivolous and false complaints against the Respondent;

(11) intentionally implementing a scheme to cause extreme financial hardship to the Respondent; and

(12) the investigators and custodians who also acted as investigators clearly lacked objectivity and neutrality, which is a breach of the principles of natural justice and Fair Play.

[15] The Respondent submitted his own affidavit, dated February 4, 2016, stating facts relating to some of the points listed in the previous paragraph. He also amplified on these alleged instances of unfairness and bias in his oral submissions. His witness, a former client, testified as to the adverse consequences for him of the Respondent's suspension at a time when the Respondent was representing him in litigation. He also testified as to his communications with the Law Society concerning the Respondent's status.

[16] The Respondent said he was not contending that the Law Society was actuated by an animus against him personally. Rather, he said, the prosecution is biased. He

said the custodianship during his suspension had destroyed his practice and the Law Society had acted without reason in treating him as it did throughout.

[17] The Law Society argued that it was unclear what the first part of the application (see para. [2]) meant when it said that the hearing panel "lacks jurisdiction" to conduct the hearing.

[18] The Law Society's main argument was that the application was essentially the same application that had been dismissed by the first panel on January 11, 2016. It submitted that the Respondent's attempt to relitigate, before our Panel, the first panel's decision should be dismissed either as an abuse of process, or on the ground of issue estoppel because the earlier decision made the issues that were sought to be relitigated *res judicata*.

[19] The fact that, since our hearing, the first panel's decision has been upheld by the Court of Appeal is obviously a circumstance that we must take into account when deciding on the application that is before us. We (this Panel) sent a memo dated June 21, 2017, to the Respondent and Law Society counsel, asking the Respondent whether he wished to make any written submissions regarding the effect of the Court of Appeal decision on his application before us. The memo set a deadline of July 7, 2017, for such submissions to be received by us. No submissions were received by that date.

IS THE APPLICATION BEFORE US ESSENTIALLY THE SAME APPLICATION?

[20] The first question we must decide is whether the Respondent's application as made before us is relevantly different from the application that the first panel dismissed. We do not think that it is.

[21] As counsel for the Law Society noted at our hearing, of the 12 items of fact put forward in the Respondent's written submissions, which are listed in para. [14], six essentially replicate arguments that were made to the first panel and dealt with in its decision of January 11, 2016. These are (the numbering follows that in the full list in para. [14]):

(1) conducting a hearing concerning the Respondent in May 2014 without prior notice to him (found to be unsubstantiated, 2016 LSBC 01 at paras. 4, 7-8);

(2) placing the Respondent on an interim suspension without taking into consideration the interest of the Respondent and the

clients/public (found to be a collateral attack on an earlier order that was not appealed, at paras. 3, 9-13);

(4) conducting multiple practice reviews without reason or justification (the first panel found that Respondent provided no evidence that the reviews were inappropriately conducted, at paras. 35(f), 48);

(5) declining to process the Respondent's payment for annual dues and subsequently revoking his licence as a member of the LSBC (applying the payment first to other debts to the Law Society was required by the Law Society Rules, paras. 35(e), 46-47);

(9) deliberately allowing clients/ex-clients to defame the Respondent in the media and on the Internet (the first panel found the Respondent provided no authority that the Law Society was under an obligation to respond to public statements about him, at paras. 35(c), 44); and

(10) instituting frivolous and false complaints against the Respondent (the first panel found that the Respondent provided no evidence to support the allegation of improper making or handling of complaints, at paras. 35(f), 49-51).

[22] None of the remaining five factual allegations made in support of the application before us seem to us to provide any new support for the argument that the Law Society acted improperly or with bias against the Respondent. Nor does any of the evidence contained in the Respondent's affidavit of February 4, 2016, or the oral evidence presented at the hearing.

[23] To take the remaining allegations listed in the Respondent's oral submissions to us, the first was the Law Society's (3) "hackling [*sic*] and taunting the Applicant for the Applicant's audacity to state to the LSBC that the Applicant is consulting God if the Applicant has issues he can not resolve by himself." This was not supported by written or oral evidence and, even if it were, would show only the conduct of an individual, not institutional bias.

[24] The Respondent said the Law Society had been (6) "lying to lawyers/the public and clients/ex-clients why the Applicant has ceased to be a member of the LSBC." We were given no evidence of a misrepresentation, let alone deliberate misrepresentation, by the Law Society as to the reasons for the Respondent's ceasing to be a member.

[25] Likewise, we were offered no evidence to show that the Law Society had been (7) ignoring the Respondent when he approached the Law Society for help on a personal level. Even if there were such evidence, it would show at most that the Society should have been more helpful on a particular occasion. It would not be evidence of institutional bias.

[26] The evidence does not support (8) ignoring the Applicant's application for reinstatement as a member of the LSBC. Copies of three letters to him from Lesley Small, Manager, Credentials and Licensing, were put into evidence. A letter of June 24, 2015 acknowledges his application for reinstatement and itemizes certain information that he was required to provide before the Credentials Committee could consider his application. A follow-up letter of October 22, 2015 notes he had not submitted the necessary information. A letter of February 4, 2016, notes that the Respondent had not replied to the earlier letters and states that the Respondent would be taken to have elected not to pursue his application for reinstatement at that time. The Respondent provided us with no evidence that he had complied at any time with the request for information in support of his application.

[27] No evidence was presented to support the assertion that the Law Society was (11) intentionally implementing a scheme to cause extreme financial hardship to the Respondent.

[28] The last point made in the Respondent's written submissions to us, as stated in para. [14], was that (12) the investigators and custodians who also acted as investigators clearly lacked objectivity and neutrality, which is a breach of the principles of natural justice and Fair Play. To the extent this alleges improper conduct by the custodians of his practice, it overlaps with allegations made to the first panel, who noted that the custodian of his files during his suspension was appointed by the court and the Respondent made no application to the court, as he could have, to replace the custodian or compel him or her to act appropriately. In any event the allegation that both investigators and custodians had lacked objectivity and neutrality in his case was, in our view, not made out by any evidence presented to us.

[29] We are therefore dealing with a preliminary application that relies upon essentially the same grounds as the application dismissed by the first panel, whose decision was upheld by the Court of Appeal.

ANALYSIS

[30] Even if we disagreed with the first panel's decision, which we do not, we think the Respondent should not be permitted to reopen, in the present proceeding, the issues covered by that decision.

[31] For the present purpose it is immaterial whether relitigating a decision on a particular issue that was decided in a previous disciplinary proceeding should be characterized as an abuse of process, or as barred by issue estoppel (*res judicata*). Both grounds were relied upon by the Law Society at our hearing, and we think that both apply.

[32] At the hearing, counsel for the Law Society referred us to *Toronto (City) v. CUPE, Local 79*, 2003 SCC 63, in which a recreation instructor, who had been dismissed for sexually assaulting a boy, grieved his dismissal. He had been criminally convicted of the assault after a trial. The union sought to introduce evidence that he had not committed the assault. This was held to be an abuse of process. Arbour J., for seven of the nine judges, said at para. 37:

> ... Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nevertheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.

[33] That description, of when abuse of process applies, seems to us to apply squarely to this case. As a general rule, it is incompatible with the efficient and effective conduct of disciplinary proceedings to allow a fully reasoned decision of an earlier panel on essentially the same factual and legal issues to be relitigated before a panel in a later disciplinary proceeding. It is possible to imagine circumstances where reopening the issue might be appropriate, as where the earlier decision was made *per incuriam* (under a manifest misapprehension of the facts or the law). For all practical purposes, the Court of Appeal's judgment upholding the first panel's decision forecloses any such argument in this case.

[34] As for issue estoppel, it can apply if three elements are present. As set out in *Danyluk v Ainsworth Technologies Inc.*, 2001 SCC 44 at para. 25, these are:

> (1) that the same question has been decided;

(2) that the judicial decision which is said to create the estoppel was final; and

(3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[35] Although these requirements were initially developed in the context of prior court proceedings, as the court said in *Danyluk* at para. 21:

> They have since been extended, with some necessary modifications, to decisions classified as being of a judicial or quasi-judicial nature pronounced by administrative officers and tribunals. In that context the more specific objective is to balance fairness to the parties with the protection of the administrative decision-making process, whose integrity would be undermined by too readily permitting collateral attack or relitigation of issues once decided.

[36] In this case the three elements of issue estoppel are all present and, in our view, the balance is solidly in favour of applying the doctrine. The Respondent made a full argument for his application, or one essentially similar to it, before the first panel. He appealed to the Court of Appeal and was unable to persuade the court that the first panel's decision was unreasonable. The first panel's decision covered off essentially the whole of the grounds put forward by the Respondent for his application in the present proceeding. We see no unfairness to the Respondent in holding that he cannot reopen the same issues before us. On the contrary, we think that allowing him to do so would bring the conduct of the Law Society's disciplinary proceedings into disrepute because it would expend time and resources on relitigating an application on which the Respondent has already had a full hearing, a fully reasoned decision by the first panel, and an appeal to the Court of Appeal.

DECISION

[37] For the above reasons, we dismiss the Respondent's preliminary application, as set out in para.[2], in its entirety.