

2018 LSBC 29  
Decision issued: September 26, 2018  
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 section 47 review concerning**

**KEVIN ALEXANDER MCLEAN**

**RESPONDENT**

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

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Written submissions: June 21, 2018

Bencher: Sarah Westwood

Discipline Counsel: Alison Kirby

No one appearing on behalf of the Respondent

**BACKGROUND**

- [1] The decision under review resulted from a citation issued on November 19, 2013.
- [2] The hearing panel conducted a two-day hearing on July 29 and September 24, 2014.
- [3] The Respondent, Kevin McLean, did not attend the hearing.
- [4] The hearing panel reserved judgment and, on January 12, 2015, made findings of professional misconduct contained in the citation (2015 LSBC 01, the "F&D Decision").
- [5] The Respondent filed a Notice of Review of the F&D Decision on February 10, 2015.

- [6] On April 7, 2015, the Benchler presiding over a pre-review conference directed that the parties make preliminary written submissions to the Review Board on the question of whether the Board had jurisdiction to review the F&D Decision before a decision on disciplinary action was made. The Respondent did not attend the pre-review conference, nor did he file submissions on the jurisdictional issue.
- [7] On January 27, 2016, the Notice of Review dated February 10, 2015, was quashed and the Respondent was ordered to pay costs within 60 days; the Respondent has not paid the costs order.
- [8] On March 6 and June 5, 2015, the hearing panel conducted a further two-day hearing to determine the appropriate disciplinary action. The Respondent did not attend the hearing.
- [9] On November 3, 2015, the hearing panel ordered the Respondent to pay a fine of \$10,000 and costs of \$15,912.50, on or before December 31, 2015 (2015 LSBC 47, the “DA (disciplinary action) Decision”).
- [10] On November 3, 2015, a copy of the DA Decision was sent to the Respondent by ordinary mail at his last known business address and personal address in accordance with Rule 10-1(1)(a) of the Law Society Rules. Pursuant to Rule 10-1(5), the Respondent is deemed to have been served seven days after the materials were sent to him. The Respondent did not pay the fine or costs ordered by the hearing panel.
- [11] The Respondent delivered a Notice of Review under s.47 of the *Legal Profession Act* on September 5, 2017, almost two years after the DA Decision was rendered.
- [12] On September 13, 2017, discipline counsel wrote to the Respondent stating that the 30-day time limit within which to initiate a review under s.47 of the *Legal Profession Act* had expired, and that the Respondent would need to apply under Rule 5-12 of the Law Society Rules for leave to extend the time within which to apply for a review. In the same letter, discipline counsel also informed the Respondent of the 60-day time limit for filing the Review Record.
- [13] On September 14, 2017, the Hearing Administrator wrote to the Respondent, reiterating the information provided by counsel.
- [14] The Respondent has not applied for leave to extend the time within which to file a notice of review, did not prepare a review record within 60 days of filing the Notice of Review, and has contacted neither discipline counsel nor the Hearing Administrator since filing the Notice of Review.

[15] The Respondent has taken no further steps to advance the review.

### **THE APPLICATION TO DISMISS THE REVIEW**

[16] By letter dated June 21, 2018, addressed to the President of the Law Society and to the Respondent, counsel for the Law Society applied for an order dismissing the review (the “Dismissal Application”).

[17] The Dismissal Application relies on Rule 5-28 which states:

#### **Inactive Reviews**

(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).

[18] Having been designated to make a determination on the Dismissal Application, I reviewed an affidavit of delivery specifying that the Dismissal Application was delivered to the Respondent on June 21, 2018, at both the address for service provided by the Respondent and two email addresses previously used by the Respondent to communicate with the Law Society. I am satisfied that a copy of the Dismissal Application was delivered to the Respondent.

[19] By a memorandum to me dated July 3, 2018, the Hearing Administrator stated that neither she, nor discipline counsel, had received any further materials from the Respondent regarding the Respondent’s Notice of Review.

[20] I am satisfied that the Respondent has delivered no further materials in relation to the September 5, 2017 Notice of Review, nor has he provided any materials in response to the September 13 and 14, 2017 letters from discipline counsel and the Hearing Administrator.

[21] This is the third time discipline counsel have applied under Rule 5-28 to have a review brought by the Respondent dismissed on the basis of inaction. The reasons

in the previous two dismissal actions are cited as 2016 LSBC 33 and 2017 LSBC 13.

## ANALYSIS

[22] Rule 5-28 imposes two obligations on the President, and hence on me as her 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 the Respondent.

[23] In 2016 LSBC 33, in relation to another application to dismiss, for inaction, a review brought by the Respondent, the President's designate wrote at paras. 22 through 25:

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 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.

- [24] The extracted observations above are equally applicable to the present Dismissal Application. It is now over a year since the Respondent delivered the Notice of Review, and almost three years since the original DA Decision. The Respondent has taken no steps to advance the review since delivering the Notice of Review on September 5, 2017. I am of the opinion that this unexplained delay amounts to inordinate delay. I note, particularly, that the Respondent has provided no communication of any kind either to discipline counsel or the Law Society, in relation to the Notice of Review or in response to letters sent in response to that notice, since delivering the Notice of Review in September of 2017.
- [25] 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 the Respondent to do so.
- [26] The dismissal application is granted. The review is dismissed.