2024 LSBC 20
Hearing File No.: HE20180041
Decision Issued: April 26, 2024
Citation Issued: May 15, 2018

THE LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL

HEARING DIVISION

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

AND:

VALORIE FRANCES HEMMINGER

RESPONDENT

DECISION OF THE HEARING PANEL ON RECUSAL APPLICATION

Hearing dates:	July 4, 2023 January 31 and February 21, 2024
Panel:	Jennifer Chow, KC, Chair Monique Pongracic-Speier, KC, Lawyer
Discipline Counsel:	Angela R. Westmacott, KC Alandra Harlingten
Counsel for the Respondent:	Richard G. Gibbs, KC

OVERVIEW

[1] By notice of motion filed May 31, 2023, the Respondent applied to have the Panel recuse itself. The application is based on decisions made by the Panel on January 20 and 22, 2021, relating to the Respondent's application to reopen her case to present further evidence. The Respondent says that the Panel's decisions give rise to a reasonable apprehension of bias at common law and because they infringed her *Charter* rights. After careful consideration of all the evidence, submissions and the legal test for recusal, the Panel has determined that a reasonable person would not conclude that the Panel is likely biased against the Respondent. Accordingly, we dismiss the Respondent's motion for recusal.

THE CONTEXT AND KEY FACTS

[2] This proceeding arises from a citation issued on May 15, 2018 alleging that between 2011 and 2015, the Respondent engaged in professional misconduct or breached the Law Society Rules (the "Rules") regarding her management of trust funds (the "Citation"). The Citation alleges that on various occasions, the Respondent failed to deposit client trust funds as soon as practicable, failed to report trust shortages, misappropriated or improperly withdrew trust funds and failed to prepare timely trust reconciliation reports.

[3] These proceedings are at the facts and determination stage. The evidentiary portion of the hearing closed on December 15, 2020. On December 17, 2020, the day before the parties were to make final submissions, the Law Society served the Respondent with lengthy written submissions. On December 18, 2020, at the Respondent's request, final oral submissions were adjourned to January 25, 2021. The parties also agreed to a schedule for written submissions: the Respondent would file and serve her submissions by January 13, 2021 and the Law Society would file any reply by January 20, 2021.

The Respondent's Motion to Reopen

[4] After the close of business on the evening of January 13, 2021, the Respondent delivered to the Tribunal and served the Law Society with a motion to re-open the hearing ("Motion to Reopen") to be heard on January 25, 2021. The Respondent did not file her written submissions on facts and determination.

[5] The Motion to Reopen sought four orders: three orders to allow the Respondent to call evidence from Dr. AO, Dr. MR, and MJ and an order to amend the timetable for written submissions, once the disposition of the other relief sought was known. The Respondent sought to introduce the evidence to show that she was suffering from adult

attention deficit hyperactivity disorder ("Adult ADHD"), generalized anxiety disorder and substance use disorder, and to describe the effect of those disorders "on the issues to be address at Facts and Determination".

[6] The Respondent did not file any evidence with the Motion to Reopen, although her evidence on this motion is that she was diagnosed with Adult ADHD before mid-December 2020 and that by January 13, 2021, she had a letter from her treating psychologist, Dr. MR, which briefly described the impact of ADHD on her, in relation to the proceedings. The Motion to Reopen suggested that she planned to present the evidence at the hearing.

[7] The Motion to Reopen said, in part, as follows:

1. As a result of a pre-hearing interview with Dr. MR in September 2020, Dr MR made observations of the Respondent that concerned her, as a result of which the Respondent consulted MJ, R. Psych., in October 2020 and Dr AO, a Mental Health and Addictions Specialist, beginning October 30, 2020.

2. Dr. AO diagnosed the Respondent as suffering Adult ADHD, Generalized Anxiety Disorder with obsessive features, and Substance Use Disorder which in turn caused Dr. MR to revise her diagnoses and opinion.

3. The Respondent seeks to put in opinion evidence from Drs AO and MR and Mr. MJ, R. Psych., by way of written opinions and oral evidence, with respect to the issues on Facts and Determination.

4. As a result of her mental illnesses the Respondent has not been able to bring herself to properly review the Law Society's written submission so as to assist and instruct her counsel in a timely and meaningful way which, in the opinion of Dr. MR, is a consequence of the Respondent's mental illnesses, as a result of which the Respondent requires accommodation over the timing of delivery of her written submissions, quite apart from the disposition of Paragraphs 1-3 of this Notice of Application.

The Law Society's Response to the Motion to Reopen

[8] On January 18, 2020, the Law Society wrote to the Tribunal opposing the Motion to Reopen. Counsel said:

> I am writing in response to the application which Mr. Gibbs filed *on the evening* of January 13, 2021. …

> On December 18, 2020, the Panel granted Mr. Gibbs' last minute application for an extension to file and present his closing submission that he had earlier agreed to provide submissions by that date. The Panel directed Mr. Gibbs to file his written submission by January 12, 2021 [sic] and the Law Society to file any reply submission by January 20, 2021.
>
> Rather than file a closing submission on January 13, 2021, Mr. Gibbs filed an application to re-open his case without supporting materials. … Mr. Gibbs is suggesting that we should proceed with his application rather than closing submissions on January 25, 2021.
>
> The Law Society opposes the application. The evidence which Mr. Gibbs seeks to introduce is irrelevant on facts and determination as it does not speak to whether Ms. Hemminger engaged in professional misconduct. It is also a collateral attack on the Panel's prior ruling that [Dr. MR]'s evidence is irrelevant and inadmissible. Moreover, it is contrary to the public interest in concluding citation hearings in a timely manner. This is the latest of several adjournment requests by Ms. Hemminger which should not be accommodated at this late stage after her case has been closed.
>
> [emphasis added]

[9] The reference in the Law Society's submissions to a "prior ruling" concerns the admissibility ruling on a report by Dr. MR, dated June 7, 2020, which the Respondent sought to tender into evidence on December 15, 2020. The Law Society objected to the evidence and the Panel sustained the Law Society's objection. The prior ruling was as follows:

> The panel's ruling is based on the following three grounds:
>
> First, the date of [Dr. MR]'s report of May 25, 2020 and her psychological diagnosis of anxiety, depression and adjustment disorder are tendered as a diagnosis made in 2020. This current diagnosis does not assist the panel in determining whether any of the psychological conditions were relevant factors at the time the conduct between 2011 and 2015 occurred as set out in the citation.
>
> Second, the panel does not accept the respondent's argument that [Dr. MR]'s report is relevant to the assessment of the respondent's credibility. It is up to this panel, not an expert, to solely assess the respondent's credibility and the credibility of any witnesses. It would be an improper delegation of the panel's function to rely on an expert to assess the respondent's credibility as a witness.

> Finally, based on the counts set out in the citation, [Dr. MR]'s psychological opinion, in our view, is not relevant to the legal test the Law Society must meet to establish the counts set out in the Citation.
>
> Based on all of the above and the *Ahuja* and *Gellert* cases cited by both counsel, we find that [Dr. MR]'s report dated May 25, 2020 is not admissible on the basis that it does not meet the test for relevance as set out in *Mohan*.

The January 20, 2021 Decision

[10] The Motion to Reopen and the Law Society's letter were forwarded to the Panel on January 18, 2021. On January 20, 2021, the parties were provided with a decision from the Panel ("January 20, 2021 Decision"). The Panel decided:

1. The Respondent's application to reopen the evidentiary portion of the hearing to adduce further evidence is denied, with reasons to follow.

2. The Panel will hear closing submissions on January 25, 2021 as previously agreed to by the parties.

3. All written submissions are to be delivered to the Panel by 9 a.m. on January 25, 2021.

4. The Panel will set a date for any Reply Submissions at the hearing on January 25, 2021.

[11] On the evening of January 20, 2021, counsel for the Respondent sent an email to the Tribunal hearing administrator confirming that he was instructed to apply for judicial review of the January 20, 2021 Decision, on the grounds of breach of the duty of procedural fairness and reasonable apprehension of bias.

The January 22, 2021 Reversal Decision

[12] On January 22, 2021, the Panel reversed the January 20, 2021 Decision ("January 22, 2021 Decision"):

> The Panel has reconsidered its decision of January 20, 2021 to dismiss the Respondent's application to reopen the evidentiary portion of the hearing to adduce further evidence. The Panel has decided to hear the Respondent's application *de novo* on Monday as requested in the Notice of Application.

[13] On January 25, 2021, the Respondent filed an application for judicial review of the January 20 and 22, 2021 Decisions. The application sought orders quashing those

decisions and prohibiting the Panel from proceeding with the hearing, on the grounds that the Panel had denied the Respondent natural justice and was biased against her. The Respondent did not raise any *Charter* issues on judicial review.

The Judicial Review and Appeal Decisions

[14] On January 11, 2022, the Supreme Court of British Columbia dismissed the Respondent's application for judicial review on grounds of prematurity: *Hemminger v. The Law Society of British Columbia*, 2022 BCSC 30 ("*Hemminger BCSC"*). Before determining that the application should be dismissed, the Court considered whether exceptional circumstances would warrant judicial intervention before the conclusion of the administrative process. The Court considered the conventional criteria to establish exceptional circumstances – hardship to the applicant, including urgency; waste; delay; fragmentation; strength of case and statutory context – and concluded that none weighed in favour of early judicial intervention: *Hemminger BCSC* at paras. 40 to 62. The Court considered the Respondent's allegations of bias in analyzing the strength of the case. It concluded that when the January 20, 2021 Decision was viewed in the context in which it was issued and in light of the fact that it was hastily reconsidered, the allegations of bias were not so clear as to amount to exceptional circumstances that would justify mid-proceeding judicial intervention: *Hemminger BCSC* at para. 58. The Court described the context for the January 20, 2021 Decision as follows, at para. 57:

> In this case, after seven days of hearing time, Ms. Hemminger was granted an adjournment to complete her final submissions and a date was set for final oral argument. Instead of filing her written submissions when due, she filed the Application seeking to re-open the evidentiary phase of the Hearing and for an extension of time for the filing of her submissions, and she unilaterally set the Application for hearing on the day that had been set for final oral argument. Her timing effectively circumvented the schedule that had been established by the Hearing Panel. None of the evidence she sought to rely on was submitted with the Application, and some of it appeared to be similar in nature of the evidence that the Hearing Panel had already ruled inadmissible.

[15] The Court of Appeal dismissed the Respondent's appeal from the Supreme Court's decision on January 25, 2023: *Hemminger v. Law Society of British Columbia,* 2023 BCCA 36 ("*Hemminger BCCA"*).

The Respondent's Motion for Recusal

[16] The Motion for Recusal contends that the January 20, 2021 Decision demonstrated that the Panel was so biased against the Respondent that the Panel could not make any

further decisions about her with an open mind. It also argues that the January 22, 2021 Decision did not alleviate the concerns arising from the January 20, 2021 Decision but only served to compound them.

[17] The Respondent says the actions of the Panel are "simply beyond the pale, completely outside the bounds of acceptable behaviour, totally unprecedented, and a disgrace to the Law Society's attempts to address mental illness in the legal profession and de-stigmatize it."

[18] The Respondent further argues that the January 20 and 22, 2021 Decisions infringed Ms. Hemminger's liberty and security of the person interests, as protected by s. 7 of the *Charter*, and that the January 20, 2021 Decision infringed or denied the Respondent's equality rights and her right not to be discriminated against on the basis of mental disability, contrary to s. 15 of the *Charter*.

The March 19, 2021 Memo Declining to Provide Reasons for the January 20, 2021 Decision

[19] On March 8, 2021, the Respondent wrote to the Tribunal seeking reasons for the Panel's January 20, 2021 decision, as she wished to include those reasons in the record in her judicial review application.

[20] On March 19, 2021, the Panel responded by Memo ("March Memo") as follows:

> On January 20, 2021, the Panel deliberated and denied the Respondent's application. That decision was communicated to the parties.
>
> However, on January 22, 2021, the Panel reconsidered and determined that, to ensure the highest degree of procedural fairness in the proceeding, the Respondent's application would be considered *de novo* on January 25, 2021 …
>
> Counsel for the respondent has requested reasons for the January 20, 2021 decision. We decline to give reasons for the January 20, 2021 decision, as it was overridden by the Panel's January 22, 2021 decision.

[21] The Respondent characterizes the March Memo as a "decision". We disagree with this characterization. The March Memo simply explained why reasons for the January 20, 2021 Decision had not been, and would not be, provided, following the January 22, 2021 Decision

The Respondent's Evidence and Admissibility Rulings

[22] The Respondent filed 13 affidavits with the Motion for Recusal. One was her affidavit made May 31, 2023 ("Respondent's Affidavit"); 12 were affidavits made by other people. The Law Society objected to the admissibility of all 13 affidavits.

[23] On February 16, 2024, the Panel ruled that the affidavits made by people other than the Respondent were inadmissible but reserved our ruling on the Respondent's Affidavit (reported at 2024 LSBC 7). We gave the Respondent liberty to rely on the Respondent's Affidavit on this motion but, due to potential admissibility concerns with statements made in her affidavit, directed the Respondent to identify the particular statements on which she sought to rely and the purposes for which each statement were tendered. We also ruled that the Law Society remained at liberty to object to the admissibility of any part of the Respondent's Affidavit.

[24] At the hearing on February 21, 2024, the Law Society withdrew objections to 26 paragraphs of the Respondent's Affidavit. The Law Society objects to the balance of the Respondent's Affidavit, on various grounds, including irrelevance to the recusal application including any *Charter* issues, inadmissible statements of opinion, inadmissible statements of belief and speculation, and inadmissible hearsay statements. In the Respondent's written submissions, she relies on the whole of the Respondent's Affidavit and declines to identify the purpose for which she tenders the evidence, despite the direction in our February 16, 2024 ruling (2024 LSBC 7, at para. 56).

[25] After considering the parties' submissions, the Panel now rules on the admissibility of the Respondent's Affidavit, on this motion, as follows. We rule that paragraphs 1-3, 6-10, 20-21, 29-38, 41 and 46-50 of the Respondent's Affidavit are admissible for the purpose of providing context to this motion for recusal or as evidence relevant to the allegations that the Respondent's *Charter* rights were breached by the January 20 and 22, 2021 Decisions. The balance of the Respondent's Affidavit is not admissible on this motion. This Panel considered the law relating to the admissibility of evidence, and that the Tribunal is not bound by the rules of evidence, in our prior decision on evidentiary objections (2024 LSBC 7). We adopt that analysis here. We agree with the Law Society's objections to the remaining paragraphs of the Respondent's Affidavit and find that they are either not relevant to the questions currently before this Panel or contain statements of opinion, statements of belief, speculation or hearsay statements. We find they should not be admitted as evidence on the motion.

ISSUES

[26] The two issues are:

(a) Should the Panel recuse itself due to a reasonable apprehension of bias at common law or because of an infringement of ss. 7 and 15 *Charter* interests arising from the January 20 and 22, 2021 Decisions?

(b) Should the Panel make an order as to costs?

SHOULD THE PANEL RECUSE ITSELF DUE TO A REASONABLE APPREHENSION OF BIAS AT COMMON LAW?

The Respondent's Argument

[27] The Respondent's allegations of bias on judicial review were succinctly described by the Court of Appeal in its decision at para. 20, as follows:

> … Ms. Hemminger contended that the panel's conduct on January 20 was such that it "shocks ordinary, reasonable people with knowledge of the facts" and that the panel should have "resigned on the spot" when the injustice of their conduct was brought to their attention. In her factum, she asserted that the panel had "telegraphed … that it has disdain for the appellant and her complaints that she lives and practices with the handicap of mental illnesses and disabilities". Further, Mr. Gibbs decried the events of January 20 and 22 as "outrageous", unprecedented and exceptional. Any reasonable bystander with a knowledge of the facts, he said, would conclude the panel was biased against his client and would agree that this panel should not be permitted to continue with the hearing – especially since findings of credibility would likely be required at this stage of the citation proceeding.

[28] During this hearing, the Respondent repeated the same submissions she made before the courts, namely that only a biased panel would have dismissed the Motion to Reopen without giving her notice and the opportunity to be heard.

[29] The Respondent's argument is fairly straightforward. The Respondent argues that "the only reasonably inference" to be drawn from the January 20, 2021 Decision is that the Panel acted with apparent bias towards her. She argues that the Panel realized on January 22, 2021 that it "had got caught" in relation to the "apparent bias" and "would have no defence to being judicially reviewed and prohibited", and so "made an 'about face'." The Respondent maintains that the January 22, 2021 Decision was arbitrary and unfair, as she was not given an opportunity to address the Panel before it was made.

[30] The Respondent's motion for recusal elaborates the argument at para. 34:

> This is an 'own goal' by the hearing panel: in choosing to call this matter forward on January 20, 2021, relying only on the submissions of the Law Society, not bothering to call for or consider the evidence Ms. Hemminger referred to in her Notice of Application of January 13, 2021, not bothering to permit Ms. Hemminger's counsel to make submissions, not being prepared to even consider accommodation of Ms. Hemminger's mental illness on the timetable for submissions, this hearing panel disgraced the Law Society's hearing processes, and made a decision that is unparalleled in the nearly 140 years the Law Society has been judging lawyers …
>
> [T]here is simply no comparable precedent in hundreds and hundreds of decisions for the secrecy, for failing to hear the other party, or for covering up by reneging on its commitment to given [sic] reasons and attempting to whitewash its bias by purporting to offer a 'rehearing' when notified that it would be judicially reviewed. … There is no fairness in this hearing panel's actions, no appearance of fairness in this hearing panel's actions, it cannot continue, and it is disgraceful that it didn't resign 2+ years ago and let Ms. Hemminger have a fair hearing before an unbiased Panel.

The Law Society's Argument on Bias at Common Law

[31] The Law Society argues that the allegation of bias rests on nothing more than a concern that the January 20, 2021 ruling was tainted by procedural unfairness. The Law Society argues that the law is clear that the January 20, 2021 Decision must be considered in the context of the proceedings as a whole. The Law Society says, in this regard, that the January 20, 2021 Decision was made against a backdrop of proceedings which had already occupied eight days of hearing time and in which the parties had already closed their cases. The Law Society also points to the fact that the Respondent had received an extension of time to file her closing submissions and that, instead of filing submissions, she sought to reopen the evidentiary portion of her case to adduce fresh medical evidence, including a diagnosis of Adult ADHD, which was apparently known to her in October 2020.

[32] The Law Society says that the Motion to Reopen was focused largely on the same types of arguments which the Panel had rejected in finding that Dr. MR's opinion was inadmissible.

[33] The Law Society argues that there is no evidence to ground an apprehension of attitudinal or personal bias towards the Respondent. The Law Society argues that attitudinal or personal bias arises when a decision-maker takes actions towards a party prior to or during a hearing that suggest that the decision-maker has prejudged the case

and not kept an open mind to the decision-making process. The Law Society says that there is no evidence of a pattern of animosity, hostility or aggressiveness on the part of the Panel, or other conduct that "crossed the line from permissibly managing the proceedings to improperly interfering with the case".

[34] The Law Society also points to the fact that the January 20, 2021 Decision was quickly reversed. The reversal of the ruling on the Panel's own motion, says the Law Society, was clearly permitted at law and cured the procedural unfairness, as recognized in *Hemminger BCCA*.

[35] The Law Society argues that when the history of the proceedings is viewed contextually and through an objective lens, it cannot be said that a well-informed objective bystander would reasonably apprehend that the Panel was biased against the Respondent, on the grounds of disability or otherwise.

Discussion: Should the Panel Recuse Itself Due to a Reasonable Apprehension of Bias at Common Law?

[36] An allegation of bias is a serious matter. Such an allegation, if proven, would displace the presumption of the Panel's integrity and impartiality. The presumption is that the Panel will carry out its sworn duty to deliver an impartial decision in this proceeding: *Cojocaru v. British Columbia Women's Hospital and Health Centre,* 2013 SCC 30 (CanLII), [2013] 2 SCR 357 ("*Cojocaru*"), at paras. 15 to 18. The essence of impartial decision-making is an open mind: *Wewaykum Indian Band v. Canada,* 2003 SCC 45 (CanLII), [2003] 2 SCR 259 ("*Wewaykum*"), at paras. 58 and 59.

[37] The Respondent bears the onus of displacing the presumption of integrity and impartiality. The threshold for displacing that presumption is high: *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25 ("*Yukon*"), at para. 25. The law requires a cogent evidentiary foundation to establish a reasonable apprehension of bias: *Hemminger BCCA,* at para. 17. Suspicion is not enough to displace the presumption of integrity and impartiality: *Adams v. British Columbia (Workers' Compensation Board),* [1989] BCJ No. 2478 (BCCA), at para. 13; *Cojocaru,* at paras. 20 and 27.

Test for reasonable apprehension of bias

[38] The test for reasonable apprehension of bias is grounded in the concern that public confidence in the impartiality of adjudicative decisionmakers must be upheld: *Committee for Justice and Liberty et al. v. National Energy Board et al.,* 1976 CanLII 2 (SCC),

[1978] 1 SCR 369 ("*Committee of Justice*"). The objective of the test is to ensure "not only the reality, but the appearance of a fair adjudicative process": *Yukon*, at para. 22.

[39] The Supreme Court of Canada in *Wewaykum* at para. 60, adopted the *Committee of Justice* description of the test for reasonable apprehension of bias as follows:

> What would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.

[40] The test for reasonable apprehension of bias is "inherently contextual and fact-specific" imposing a "correspondingly high burden of proving the claim on the party alleging bias": *Yukon,* at para. 26.

[41] The Respondent's motion for recusal refers to the criteria for recusal of an arbitrator set out in the *Arbitration Act,* SBC 2020, c. 2, s. 17, as well as the test from *Wewaykum*. This proceeding is not an arbitration under the *Arbitration Act,* and we find it unnecessary to consider that statute. The Panel applies the common law test for reasonable apprehension of bias as set out in *Wewaykum* and other jurisprudence.

[42] The Panel agrees with the Respondent that if the test for a reasonable apprehension of bias as set out in *Wewaykum* is met, then the Panel should recuse itself from this proceeding.

Does the January 20, 2021 Decision give rise to a reasonable apprehension of bias at common law?

[43] The January 20, 2021 Decision is the crux of the Respondent's case. The parties' characterizations of the January 20, 2021 Decision sit on opposite ends of a spectrum. At one end of the spectrum is the Respondent's view that the January 20, 2021 Decision was an egregious decision that "shocks ordinary, reasonable people with knowledge of the facts" and that the Panel should have "resigned on the spot." At the other end of the spectrum is the Law Society's view that the January 20, 2021 Decision was a "relatively minor procedural misstep which was quickly remedied."

[44] The Court in *Hemminger BCSC* at paras. 49 and 58 found that there was "obvious merit" to the Respondent's allegation of procedural unfairness in respect of the January 20, 2021 Decision, but noted that it was "hastily reconsidered".

[45] The Court of Appeal in *Hemminger BCCA* commented at para. 24, as follows:

> In this instance, of course, a mistake was evidently made by the decision-maker. It may well be that the panel was misinformed, or misapprehended the state of the proceedings on January 20, 2021 – we do not know and likely never will know. But to infer *from this mis-step alone* that the panel "did not care" or was "disdainful" of Ms. Hemminger's psychological difficulties, as Mr. Gibbs forcefully submitted, would not in my respectful view be justified at this stage. ...
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> [emphasis in original]

[46] The Court of Appeal also noted at para. 23 of *Hemminger BCCA* that counsel for the Respondent had cited no authority for the proposition that the mere fact that the flawed January 20, 2021 procedural ruling was made is indicative of bias on the decision-maker's part. We likewise were not referred to any authority that supports the proposition that a procedurally unfair decision necessarily indicates bias on the part of the decision-maker.

[47] The parties discussed paras. 23 and 24 of *Hemminger BCCA* at the hearing of the motion. When the Panel suggested that the Court of Appeal did not appear to be concerned over the absence of reasons for the January 20, 2021 Decision, counsel for the Respondent submitted that a reasonable person would not agree with the Court of Appeal, and that the Panel's lack of reasons was unreasonable. Counsel for the Respondent also did not agree with the Court of Appeal's statement that one should not infer from the January 20, 2021 Decision alone that the Panel "did not care" or was "disdainful" of the Respondent's mental health issues. The Respondent instead sought to have the Panel conclude that a reasonable person would infer from the January 20, 2021 Decision that we "did not care" or are/were "disdainful" of the Respondent's mental health issues in issuing the decision.

[48] To confirm, the question arising from the Respondent's argument concerning the January 20, 2021 Decision is whether a properly informed and reasonable person would find that the decision gives rise to a reasonable apprehension of bias on the part of the Panel.

[49] The January 20, 2021 Decision was a procedurally flawed decision. In the hurly-burly of receiving a last-minute motion, without the supporting evidence, when submissions on facts and determination ought to have been filed, and under time pressure, the Panel erred in its understanding and assessment of the motion and denied it without a hearing. The pre-emptive denial failed to afford the Respondent procedural fairness. As such, the January 20, 2021 Decision could not stand.

[50] It does not follow from the flawed decision-making, however, that a reasonable person would infer that the Panel was led into error because it was "disdainful" of or had

disregard for the Respondent's mental health, or that it was otherwise actuated by bias, conscious or unconscious. The argument assumes that the denial of procedural fairness that occurred could only have arisen from bias or discrimination. The proposition is not supported at fact or law.

[51] Having regard to the facts and the law, we do not agree that a properly informed reasonable person viewing the matter realistically and practically in context and in light of the whole proceeding would view the January 20, 2021 Decision, or the absence of reasons for the decision, as giving rise to a reasonable apprehension of bias on the part of the Panel.

What of the January 22, 2021 Decision?

[52] The Supreme Court described the January 22, 2021 Decision as curative of the procedural unfairness flowing from the January 20, 2021 Decision: *Hemminger BCSC* at para. 50; see also *Hemminger BCCA* at paras. 26 and 27. The Respondent disagrees with the Courts' conclusions. She says that the January 22, 2021 Decision was not only *not* curative, but that the decision (and the March 19, 2021 memo) were issued arbitrarily and unfairly and so aggravated the situation. The Respondent says that the January 22, 2021 Decision, and the facts that it was made unbidden and without first soliciting submissions from her, offers further evidence that the Panel is likely biased against her.

[53] With respect, the Respondent's arguments are without merit. The January 22, 2021 Decision restored to the Respondent the ability to argue the Motion to Reopen *precisely as she had requested*. As explained in our March 19, 2021 Memo, the Panel reversed the January 20, 2021 Decision to ensure the highest level of procedural fairness in the proceeding.

[54] There is nothing untoward in an administrative decision-maker taking steps on its own motion to rectify procedural unfairness in a proceeding. As the Supreme Court recognized, "[a]n administrative body can correct a breach of procedural fairness by reopening a decision": *Hemminger BCSC* at para. 50; see also *Hemminger BCCA* at paras. 26 and 27. There is, moreover, no unfairness involved in a decision-maker reopening a decision to cure procedural unfairness although a party would prefer that a decision-maker not do so because, as in this case, the party was seeking judicial review in the Supreme Court.

[55] We do not agree that a properly informed person would reasonably view the January 22, 2021 Decision, or its timing, as giving rise to a concern about bias on the part of the Panel. A properly informed, reasonable person would not leap to the conclusion that the January 22, 2021 Decision was probably motivated by bias or, as the Respondent alleges, was a perfunctory attempt to cover up bias in earlier decision-making.

The Respondent's *Charter* Arguments

[56] The Respondent argues that the Panel breached her *Charter* rights or failed to respect *Charter* values in deciding the Motion to Reopen. This argument supplements the Respondent's position on common law bias. That is, as we understand the argument, the Respondent says that a reasonable person would find that the Panel was biased because the Panel infringed *Charter* protections in issuing the January 20 and 22, 2021 Decisions.

[57] In oral argument, the Respondent confirmed that she does not seek a remedy under s 24(1) of the *Charter* for the alleged *Charter* breaches in the January 20 and 22, 2021 Decisions. She says, instead, that she relies on the analysis set out in *Doré v. Barreau du Québec*, 2012 SCC 12 ("*Doré*"), and as more recently elaborated in *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31 ("*Commission Scolaire*"). The Respondent argued that in applying the *Doré* analysis, the Panel should realize that on a proportionate balancing of *Charter* interests and the Panel's statutory mandate, it must exercise its discretion to recuse itself for *Charter* non-compliance.

[58] As discussed in further detail below, the *Doré* analysis provides that where *Charter* interests are engaged by an administrative decision-maker's discretionary decision, the decision-maker must balance *Charter* interests with the decision-maker's statutory mandate, so as to proportionately protect the *Charter* interests at issue. Despite the Respondent's argument that her *Charter* interests were affected by the January 20 and 22, 2021 Decisions, the Respondent did not in her submissions address the Tribunal's statutory mandate or how the Panel should balance the statutory objectives set out in the *Legal Profession Act*, SBC 1998, c. 9 with the *Charter* interests she says were engaged by the January 20 and 22, 2021 Decisions. We understand the Respondent's position to be that recusal is the necessary outcome on any proportionate balancing of her *Charter* interests and the Tribunal's statutory mandate.

The Law Society's Position on the *Charter* Arguments

[59] The Law Society's position is that the Panel's January 20 or 22, 2021 Decisions do not engage any *Charter* rights or values. The Law Society also argues that the focus of the Respondent's argument is misplaced, in the sense that the proper object of a *Charter* values analysis is not the January 20 and 22, 2021 Decisions, but the current motion for recusal.

[60] If, however, the Panel considers the January 20 and 22, 2021 Decisions through the lens of a *Charter* values analysis, the Law Society emphasizes that the *Doré* analysis has two steps. The Panel must first determine whether a decision engages a *Charter* value by limiting its protections. If so – and only if so – the Panel must then consider how best to

protect the *Charter* interest by proportionately balancing it with the Tribunal's statutory mandate. The Law Society argues that the Respondent has not shown that her *Charter* rights were limited in 2021 so as to engage *Charter v*alues. Accordingly, the proportionate balancing exercise does not come into play.

[61] The Law Society says, in relation to s. 7 *Charter* values, that the Respondent has not shown that the Panel's January 20 and 22, 2021 Decisions limited her life, liberty or security of the person at all, let alone in a manner that would not accord with the principles of fundamental justice. With respect to s. 15 equality values, the Law Society says that the dismissal of the Motion to Reopen did not involve the drawing of a distinction based on the Respondent's mental disability, and did not have the effect of perpetuating stigma or stereotypes against those with mental disabilities. Moreover, the dismissal of the Motion to Reopen did not mean that the Panel violated the Respondent's right to equal treatment before and under the law. The Law Society argues that there is "simply no evidence to support an argument that the Panel discriminated against [the Respondent] on the basis of her mental disability."

Discussion of the *Charter* Issues:

The law

[62] The Panel acknowledges that as an administrative decision-maker we must act consistently with the values underlying the grant of discretion, including *Charter* values, and that we must respect *Charter* rights: *Doré*, at paras. 24 and 35; *Blencoe v. British Columbia (Human Rights Commission),* 2000 SCC 44 ("*Blencoe*"), at para. 35; and *Law Society of British Columbia v. Zoraik*, 2015 BCCA 137 at para. 37.

[63] In *Doré*, the Supreme Court of Canada set out the general legal framework that must be applied by decision-makers when an administrative decision stands to affect a *Charter* right or *Charter* values. The decision-maker must first determine whether one or more *Charter* interests – rights or values – is engaged by the decision: para. 55. If so, the decision-maker must proportionately balance the *Charter* interest at issue with the decision-maker's statutory mandate, so as to ensure that the *Charter* interests are not unduly limited. The proportionate balancing exercise is undertaken by first considering the statutory objectives and then asking how the *Charter* interests will be best protected in view of the statutory objectives: *Doré* at paras. 55 and 56.

[64] The analysis was summarized in *Loyola High School v. Quebec (Attorney General),* 2015 SCC 12, as follows at para. 39:

> The preliminary issue is whether the decision engages the *Charter* by limiting its protections. If such a limitation has occurred, then "the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play": *Doré*, at para. 57. A proportionate balancing is one that gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate. …

[65] In *Commission Scolaire,* the Court expressly confirmed that the *Doré* analysis applies regardless of whether *Charter* rights or *Charter* values are at stake in discretionary administrative decision-making. The Court explained the relationship between *Charter* rights and *Charter* values at para. 75: *Charter* values "are those that 'underpin each right and give it meaning' [and are] … inseparable from *Charter* rights; which 'reflect' them" (citations omitted). At para. 77, the Supreme Court continued:

> …administrative decision makers must always consider the values relevant to the exercise of their discretion. The manner in which *Charter* values are dealt with is thus adapted to the specific context of administrative law … In this sense, these values engage the *Doré* framework, even in the absence of any infringement of a right. Where a Charter right is infringed, the values "help determine the extent of any ... infringement" of that right "and, correlatively, when limitations on that right are proportionate in light of the applicable statutory objectives" …

Preliminary issue: which decision(s) attract a *Charter* analysis?

[66] The Law Society argues that the *Charter* values analysis is not retrospective and that the Respondent is mistaken to ask the Panel to apply the *Doré* analysis to the January 20 and 22, 2021 Decisions. The Respondent, on the other hand, says that we ought to apply the *Doré* analysis to those decisions.

[67] We will address the Respondent's arguments that the January 20 and 22, 2021 Decisions infringed *Charter* interests. We will do so for the purpose of determining whether those purported *Charter* breaches disclose bias that should lead the Panel to recuse itself. We do not find it otherwise necessary or appropriate to review the January 20 and 22, 2021 Decisions for *Charter* compliance. The appropriate forum for the Respondent to advance arguments that the decisions involve *Charter* infringements apart from the bias allegations is an application for judicial review, not this application for the Panel to recuse itself.

[68] We will then consider whether *Charter* values are engaged by a decision not to recuse ourselves and whether it is necessary to undertake the proportionate balancing exercise mandated by *Doré*.

Section 7 of the *Charter*

[69] There are two steps to the s. 7 analysis. A person who, like the Respondent, contends that their rights are breached must first show that a law or state action deprives them of their life, liberty or security of the person. They must then show that the deprivation is not in accordance with the principles of fundamental justice: *Canadian Council for Refugees v Canada (Citizenship and Immigration)*, 2023 SCC 17 ("*Canadian Council for Refugees*"), at para. 56. A "sufficient" causal connection must be established between the state action and the deprivation of the right claimed: *Canadian Council for Refugees,* at para. 60.

[70] The strands of the Respondent's s. 7 arguments are somewhat difficult to follow. To the best of our understanding, she advances three separate arguments in support of the contention that the January 20 and 22, 2021 Decisions (and the March Memo) infringed her s. 7 rights. She says, first, that arbitrariness and unfairness in the decisions undermine her ability to work in her chosen field, which she contends is a security and liberty interest protected by s. 7 of the *Charter*. Second, relying on *Blencoe*, the Respondent argues that the January 20 and 22, 2021 Decisions had a serious and profound effect on her psychological integrity and so interfered with her liberty and security of the person, which effect is not in accordance with the principles of fundamental justice. Third, the Respondent argues that the Decisions were inconsistent with basic procedural fairness requirements, including a legitimate expectation that she would be notified of any Tribunal hearing, pursuant to Rule 5.4.1 of the Rules, and so breached the principles of fundamental justice.

[71] The Respondent's first argument may be addressed summarily: a person's ability to pursue their chosen profession is not an interest protected by s. 7 of the *Charter*: *Shaulov v. Law Society of Ontario*, 2023 ONCA 95, at para. 12; *Mussani v. College of Physicians and Surgeons of Ontario,* 2004 CanLII 48653*,* [2004] O.J. No. 5176 (ONCA). The argument cannot succeed as a matter of law. But there is a secondary defect in the argument: it is premature. At this stage of the proceedings, the Respondent's ability to practise her profession has not been engaged. The Panel has not made a determination on the allegations set out in the Citation and has not taken any action that may restrict her from practising law.

[72] As for the Respondent's second argument, we agree that proceedings before the Tribunal are capable of affecting a lawyer's liberty and security of the person interests. In this case, however, the Respondent makes the bare assertion that "the actions of the Hearing Panel have had a serious and profound effect on her psychological integrity", without offering any particulars. The Respondent's affidavit evidence does nothing to illuminate the bare claim. She says, at paragraph 10 of the Respondent's Affidavit: "To

say the citation proceedings have been and continue to be, a significant source of stress and concern for me is an understatement". However, the Respondent also goes on to say that the proceedings were "a culmination of many years of stress and fear that had all started in 2009" when the Respondent made what she now considers "poor" decisions. She deposes that by the time the proceedings began, "I was still living with the fallout of previous poor decisions". There is no evidence from the Respondent that the January 20 and 22, 2021 Decisions caused or contributed to psychological or other disability, or that they in any way interfered with her ability to make important, personal life choices.

[73] The argument and evidence offered by the Respondent is insufficient to show engagements of the s. 7 liberty or security of the person interests. As Bastarache J. explained in *Blencoe* at paras. 49, 57, 82 and 83:

> 49 The liberty interest protected by s. 7 of the Charter is no longer restricted to mere freedom from physical restraint. Members of this Court have found that "liberty" is engaged where state compulsions or prohibitions affect important and fundamental life choices. This applies for example where persons are compelled to appear at a particular time and place for fingerprinting (*Beare*, *supra*); to produce documents or testify (*Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, 1990 CanLII 135 (SCC), [1990] 1 S.C.R. 425); and not to loiter in particular areas (*R. v. Heywood*, 1994 CanLII 34 (SCC), [1994] 3 S.C.R. 761). In our free and democratic society, individuals are entitled to make decisions of fundamental importance free from state interference. …
>
> …
>
> 57 Not all state interference with an individual's psychological integrity will engage s. 7. Where the psychological integrity of a person is at issue, security of the person is restricted to "serious state-imposed psychological stress" (Dickson C.J. in *Morgentaler*, *supra*, at p. 56). … The words "serious state-imposed psychological stress" delineate two requirements that must be met in order for security of the person to be triggered. First, the psychological harm must be <u>state imposed</u>, meaning that the harm must result from the actions of the state. Second, the psychological prejudice must be <u>serious</u>. Not all forms of psychological prejudice caused by government will lead to automatic s. 7 violations. …
>
> …
>
> 82 The quality of the injury must therefore be assessed. In my opinion, all of the cases which have come within the broad interpretation of "security of the person" outside of the penal context differ markedly from the interests that are at issue in

> this case. Violations of security of the person in this context include only serious psychological incursions resulting from state interference with an individual interest of fundamental importance.
>
> 83 *It is only in exceptional cases where the state interferes in profoundly intimate and personal choices of an individual that state-caused delay in human rights proceedings could trigger the* s. 7 *security of the person interest.* While these fundamental personal choices would include the right to make decisions concerning one's body free from state interference or the prospect of losing guardianship of one's children, *they would not easily include the type of stress, anxiety and stigma that result from administrative or civil proceedings*. [emphasis in italics added.]

[74] The Respondent's evidence and argument do not meet the thresholds set out in *Blencoe* to establish an interference with her liberty interest, or to establish serious state-imposed psychological stress, implicating her security of the person interest.

[75] We turn, then, to the argument that the January 20 and 22, 2021 Decisions involve a constitutionally cognizable breach of the Respondent's right to natural justice and fairness in the proceedings.

[76] There is merit to the argument that the January 20, 2021 Decision did not afford the Respondent procedural fairness. In determining whether there has been a violation of the principles of fundamental justice in this proceeding, however, the January 20, 2021 Decision must be considered in connection with the January 22, 2021 Decision. The essence of the Respondent's *Charter* arguments is that the alleged fairness breaches indicate bias. The risk of bias is not assessed by evaluating rulings in an atomistic fashion. Rather, an impugned decision must be assessed in the context and in light of the proceeding as a whole: *Hemminger BCSC,* at para. 55. As Cory J. held in *R. v. S. (R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 SCR 484 at para. 141:

> …allegations of perceived judicial bias will generally not succeed unless the impugned conduct, taken in context, truly demonstrates a sound basis for perceiving that a particular determination has been made on the basis of prejudice or generalizations. One overriding principle that arises from these cases is that the impugned comments or other conduct must not be looked at in isolation. Rather it must be considered in the context of the circumstances, and in light of the whole proceeding.

[77] The January 22, 2021 Decision cured the procedural unfairness arising from the January 20, 2021 Decision. As found in *Hemminger BCSC*, at para. 51, "*the Hearing*

Panel discharged its duty of fairness when it quickly recognized its error and decided to reconsider the Application [i.e., the Motion to Reopen] [emphasis added]".

[78] The Respondent's claim that the January 20 and 22, 2021 Decisions engaged s. 7 interests and infringed principles of fundamental justice cannot succeed when the proceedings in January 2021 are evaluated holistically, as they must be.

[79] While it is not necessary to address the Respondent's legitimate expectations argument to decide the s. 7 claim based on denial of procedural fairness, we would observe that this claim is apparently based on the premise that the Panel held a "secret hearing" in advance of the January 20, 2021 Decision. We do not find that conception of what happened in the proceedings to be apt. The breach of procedural fairness was not that a "secret hearing" was held but that the Respondent was deprived of a hearing before a decision was made.

Section 15(1) of the *Charter*

[80] Section 15(1) of the *Charter* provides that everyone is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination, including without discrimination based on mental disability. The Respondent argues that the January 20, 2021 Decision discriminated against her by perpetuating disadvantage that she experiences as a result of mental illness. The Respondent stresses the seriousness of such discrimination, given that people who live with mental illness historically have been subject to abuse, neglect and marginalization, and have suffered the scourge of disability-related negative stereotyping.

[81] The "animating norm" of s. 15(1) of the *Charter* is the protection of substantive equality: *Fraser v Canada (Attorney General)*, 2020 SCC 28 ("*Fraser*"), at para. 42. A claim that a state action or a law discriminates contrary to s. 15(1) of the *Charter* therefore calls on the decision-maker to address two questions. First, does the action or law, on its face or in its impact, draw a distinction based on an enumerated or analogous ground (like mental disability)? The objective of this inquiry is to determine whether the impugned action or law creates a disproportionate impact on a claimant, based on a protected ground. Second, if the state action or law does draw a distinction with a disproportionate impact, based on a protected ground, does it also have the effect of imposing a burden or denying a benefit that reinforces, perpetuates or exacerbates historic or systemic disadvantage? See: *R. v. Sharma*, 2022 SCC 39 at paras. 28 and 31; *Ontario (Attorney General) v. G,* 2020 SCC 38, at para. 40; *Fraser,* at para. 27; and *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, at paras. 19 to 21.

[82] Both questions must be answered in the affirmative to establish a breach of s. 15(1) of the *Charter: R. v. Sharma,* at para. 38.

[83] Accordingly, to establish an infringement of her s. 15(1) rights as alleged, the Respondent must show that the Panel's decision on its face or in its impact created a distinction between her and others that was based on mental disability; and that the decision imposed a burden or denied a benefit that had the effect of reinforcing, perpetuating or exacerbating disadvantage against people who experience mental disabilities.

[84] The Respondent's s. 15(1) argument focuses exclusively on the January 20, 2021 Decision. It ignores the January 22, 2021 Decision. This approach is unsound. Even if we accepted the Respondent's position that the January 20, 2021 Decision could be construed as drawing a distinction based on mental disability that was disproportionate in nature, any possible benefit denied or burden imposed by the Panel in making the decision was obviated by the January 22, 2021 Decision. As we have pointed out above, the January 22, 2021 Decision restored to the Respondent the ability to present evidence and argument in the Motion to Reopen in precisely the forum, and at precisely the time, she sought to do so. This result cannot be said to reinforce, perpetuate or exacerbate disadvantage against people experiencing mental disability or illness. As such, it does not constitute an affront to substantive equality.

[85] Thus, when all relevant facts are taken into account, the Respondent has not established an infringement of s. 15(1) of the *Charter*, or otherwise shown an impairment of substantive equality norms.

The *Doré* analysis does not come into play in relation to the January 20 and 22, 2021 Decisions

[86] In the absence of an established infringement of s. 7 or s. 15(1) of the *Charter*, and in the absence of a basis to conclude that *Charter* values were otherwise engaged by the January 20 and 22, 2021 Decisions, there is no basis for the Panel to proceed with the *Doré* analysis, in relation to those Decisions.

It is unnecessary to engage in the *Doré* balancing exercise in connection with non-recusal

[87] The Respondent has not shown that her *Charter* rights, or any *Charter* interests, are engaged by the Panel's decision that the January 20 and 22, 2021 Decisions do not give rise to a reasonable apprehension of bias and that it would not be appropriate for the Panel to recuse itself. It is therefore unnecessary to engage in the *Doré* analysis in connection with the Motion to Recuse.

[88] The Respondent's Motion to Recuse is dismissed.

DECISION: SHOULD THE PANEL MAKE AN ORDER AS TO COSTS?

[89] Neither party has made substantive submissions as to costs, although the Respondent seeks them.

[90] The Panel declines to address the issue of costs at this time. The parties may address the issue of costs including the costs of this Motion for Recusal in their respective final submissions at the end of this facts and determination hearing.