2024 LSBC 07
Hearing File No.: HE20180041
Decision Issued: February 16, 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 EVIDENTIARY OBJECTIONS

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

INTRODUCTION

[1] The Respondent, Valerie Hemminger, alleges that events in this proceeding have given rise to a reasonable apprehension of bias on the part of the Panel. She applies to have the Panel recuse itself (the "Recusal Application"). The Respondent has sought to rely on 13 affidavits in support of the Recusal Application. One of these is the Respondent's own affidavit; the remainder are affidavits made by individuals who attest to various statements and express views about the proceeding. The Law Society objected to the affidavits being tendered into evidence; it argued that none of the affidavits is admissible.

[2] On January 31, 2024, the Panel allowed the Law Society's objection against the 12 affidavits made by individuals other than the Respondent. We did not decide the admissibility of the Respondent's affidavit but gave the parties leave to make further submissions on that question at the hearing of the merits of the Recusal Application. We confirmed that written reasons for our decision to allow the Law Society's objection to 12 of the affidavits would follow. These are the Panel's reasons. We are providing these reasons on an expedited basis, so that the parties have them before the continuation of the hearing of the merits of the Recusal Application, scheduled for February 21, 2024.

BACKGROUND TO THE OBJECTIONS

[3] We begin with some background information on the proceeding, to provide context.

[4] A five-paragraph Citation was issued against the Respondent on May 15, 2018. The Citation alleges that, from time to time between 2011 and 2015, the Respondent engaged in professional misconduct or breached Law Society Rules by failing to properly handle, administer and account for trust funds, and by failing to report trust fund shortages exceeding $2,500.

[5] The facts and determination hearing of the Citation (the "F & D Hearing") commenced in September and continued in December 2020. In mid-December 2020, the Law Society objected to the admissibility of a medical report tendered by the Respondent. The Panel sustained the objection. The Respondent then closed her case. No reply evidence was led by the Law Society, and the F & D Hearing moved to the submission stage. Deadlines were set for the exchange of written submissions. The Law Society delivered a lengthy written submission on December 17, 2020; the Respondent was given until January 12, 2021 to deliver written submissions, and the Law Society was given a right of written reply by January 20, 2021. Oral argument was scheduled for January 25, 2021.

[6] On January 13, 2021, the Respondent filed an application seeking two species of relief (the "Reopening Application"). First, the Respondent sought to adduce further evidence in the proceeding related to the Respondent consulting a physician at the North Shore Mental Health and Addiction Clinic (the "Physician"). The Physician reportedly had diagnosed the Respondent with Adult ADHD, Generalized Anxiety Disorder with obsessive features, and Substance Use Disorder.[1] Second, the Respondent sought to postpone the deadline for submissions in the F & D Hearing until after a decision on the application to adduce further evidence. The Law Society opposed the Reopening Application.

[7] On January 20, 2021, the LSBC Tribunal hearing administrator advised the parties that the Reopening Application was denied, with reasons for the decision to follow. The hearing administrator also confirmed that oral argument in the F & D Hearing would proceed as scheduled, but that the Tribunal would permit written submissions to be filed by 9:00 am on the morning of the Hearing.

[8] On January 21, 2021, Respondent's counsel advised the Tribunal that the Respondent intended to seek judicial review of the Panel's decision denying the Reopening Application.

[9] On January 22, 2021, the parties were advised that the Panel had reconsidered its decision dismissing the Reopening Application and would hear the application *de novo* on January 25, 2021. In light of the reconsideration, the Panel did not provide reasons for the decision communicated on January 20, 2021.

[10] On January 25, 2021, Respondent's counsel wrote to the Tribunal to advise that the Respondent would not appear at the F & D Hearing scheduled for that day but that she intended to proceed to judicial review. This is what she did.

[11] On January 11, 2022, the Supreme Court held that the Respondent's application for judicial review was premature, and dismissed it.[2] An appeal from that decision was dismissed on January 25, 2023.[3]

[12] The Respondent opposed attempts to schedule the hearing of the Reopening Application while the judicial review and appeal were in process. She advised that she did not "attorn to any continuing jurisdiction" of the Panel. The Tribunal sought, and received, submissions on its jurisdiction in the proceeding in 2021 and, on May 10, 2021,

---

[1] No opinion evidence was filed with the application materials; the notice of application stated that the Respondent intended to file affidavit evidence, yet to be settled and sworn, from the Physician at the North Shore Mental Health and Addiction Clinic, and letters from another physician and a psychologist.
[2] *Hemminger v Law Society of British Columbia*, 2022 BCSC 30.
[3] *Hemminger v Law Society of British Columbia*, 2023 BCCA 36.

the Panel ruled that it retained jurisdiction. The Panel invited submissions in the Reopening Application but, due to the Respondent's reluctance to proceed, agreed to defer the hearing of the Reopening Application until after the judicial review was decided. In the event, no fresh steps were taken in the proceeding until the spring of 2023.

[13] On May 31, 2023, the Respondent applied for an order that the Panel recuse itself due to a reasonable apprehension of bias against the Respondent and for costs (the "Recusal Application").[4] The crux of the Recusal Application is that the Panel's initial dismissal of the Reopening Application, without a hearing, gave rise to a reasonable apprehension of bias. The Respondent argues that the reconsideration of the decision to deny the Reopening Application only served to compound the apprehension of bias.

[14] The Respondent says that the reasonable apprehension of bias is demonstrated by affidavit evidence from 12 reasonable people, properly informed about the facts, plus her own affidavit evidence. As noted above, the Law Society objected to the admissibility of all 13 affidavits.

THE AFFIDAVITS

[15] The affidavits to which the Law Society objected are summarized in our reasons below.

The Respondent's Affidavit

[16] The Respondent's affidavit, made May 31, 2023, has 79-paragraphs and is wide-ranging in its content. The Respondent attests to the impact on her of the Citation and the disciplinary proceeding. She gives evidence as to her personal history, comments on the evidence given by witnesses in the F & D Hearing, attests to the diagnoses of psychological conditions between September and December 2020, affirms past use of illicit substances and more recent medically supervised use of prescription medications, discusses her medical treatment, and discusses interactions with the Practice Standards Committee and a Law Society investigator (presumably, with respect to matters unrelated to the Citation). The Respondent exhibits a January 24, 2021 affidavit from one of her physicians. She also discusses the context of, and motivations for, the Reopening Application. The Respondent speculates as to the Panel's reasons for denying the Reopening Application and attributes to the Panel discriminatory and other malign motives for the denial, including actual bias. The Respondent makes statements about the

[4] The public representative retired from the Tribunal in 2022. In July 2022, the Acting Tribunal Chair ordered that the Panel continue with the remaining members.

reactions of unidentified other people to the Panel's dismissal of the Reopening Application.

Affidavit of RM

[17] The affidavit of RM was made May 29, 2023. The deponent is a retired lawyer and former Supreme Court Master, and a former Bencher of the Law Society. RM provides evidence as to his professional history and attests that the Respondent is unknown to him but that he received an unsolicited email from Respondent's counsel requesting his views on: whether he, the deponent, is a reasonable person; whether the Panel appears to be biased against the Respondent; and his appreciation of whether there are justifiable doubts as to the impartiality of the Panel. The email exhibited to the affidavit shows that Respondent's counsel asked the deponent to familiarize himself with the facts concerning the conduct of the Panel, as revealed in the Supreme Court's 2022 decision and the Court of Appeal's 2023 decision in the judicial review proceedings, and to gather in any other information required to properly inform himself.

[18] The deponent makes statements about his knowledge of proceedings of hearing panels and reflects on his experience with *ex parte* applications as a Master. He describes his own experience as a decision-maker, including circumstances in which he offered to recuse himself from a proceeding. The deponent summarizes content from the First Interim Report of the Law Society's Mental Health Task Force and provides the opinion that in deciding "a matter of admissibility" without notice – in particular, where the evidence "relates to the affected party's mental health and addiction issues" – it raises apprehensions that the panel will be biased, and that these apprehensions are not relieved by the Panel agreeing to a rehearing.

Affidavit of BL

[19] The affidavit of BL was made May 26, 2023. The deponent is a lawyer. He exhibits to his affidavit a letter which provides his opinion, solicited by Respondent's counsel, as to whether the Panel's decisions and actions "give rise to a reasonable apprehension of bias, and/or justifiable doubts as to the Hearing Panel's impartiality". The deponent states that the Respondent is unknown to him. The affidavit quotes from case law consulted by the deponent to inform himself about the issue of disqualification for perception of bias. It also states the questions posed to him by Respondent's counsel.

[20] The deponent states that he considers himself a reasonable and right-minded person who has thought through the relevant facts and applicable law to arrive at his conclusions, and he explains why. He opines that the Panel's decisions and actions give rise to a reasonable apprehension of bias. He gives reasons for his opinion.

Affidavit of MM

[21] The affidavit of MM was made May 29, 2023. The deponent is a lawyer. The affidavit exhibits a letter from the deponent in which he explains that he is a friend and colleague of the Respondent and has been asked to comment on whether there was an appearance of bias or doubt as to the impartiality of the Panel. The deponent states that he has read the decisions in the judicial review proceedings. The deponent also states that he is "familiar with the facts and circumstances considered by the courts in those decisions", although no further explanation is offered as to the meaning of this comment, or the basis for his knowledge. The deponent opines that he is left with an "inescapable apprehension of bias" from the denial of the Reopening Application, and perceives a "real danger of continuing bias" by the lack of reasons for the decision. The deponent offers conclusions of law about the Panel's obligation to offer reasons for the decision that do not demonstrate bias.

Affidavit of GM

[22] The affidavit of GM was made May 26, 2023. The deponent is a lawyer. The affidavit exhibits a letter written by the deponent, "in support of" the Recusal Application. The deponent offers that in light of his experience in criminal and administrative law he is "well-placed to make a few comments in support of Ms. Hemminger's position". The deponent affirms that he has read the decisions in the judicial review proceedings. He analogizes between the denial of the Reopening Application, and the reconsideration of that decision, and a criminal case within his knowledge. The affiant deposes that, in his view, for justice to be seen to be done, a new panel is required.

Affidavit of GC

[23] The affidavit of GC was made May 26, 2003. The deponent is a lawyer. His affidavit was taken by the affiant DD. GC states that he has known the Respondent since the early 1990s and would describe their relationship as "casual friends". He attests that he believes himself to be a reasonable person. The deponent affirms that he has read the decisions in the judicial review proceedings. He confirms that he was asked to provide an opinion on whether he, as a reasonable person, would reasonably apprehend bias on the part of the panel. He states that he has considered *Wewaykum Indian Band v Canada*, 2003 SCC 45 and the standard for challenging an arbitrator over impartiality, pursuant to the *Arbitration Act*, SBC 2020, c 2, s 17. The deponent offers the opinion that the Panel is consciously or unconsciously biased against the Respondent and that the "January 20, 2021 decision is appalling and offensive" and cannot be cured by proceeding to hearing

on the Reopening Application. The deponent describes the proceedings as "something out of a Monty Python sketch".

Affidavit of DD

[24] The affidavit of DD was made May 27, 2023. The deponent is a lawyer, whose affidavit was taken by the affiant GC. DD states that she has known the Respondent since the mid to late 1990s. She describes their relationship as "colleagues who have great respect for one another". She deposes that she believes herself to have a good professional reputation. She affirms that she has read the decisions in the judicial review proceedings, certain paragraphs of which were specifically drawn to her attention by the Respondent. She states that the Respondent has asked her to provide her opinion on any apprehension of bias, or lack thereof, on the part of the Panel. The deponent states her understanding of the legal test for bias and the standard for challenging an arbitrator's impartiality, pursuant to the *Arbitration Act*. The deponent opines that the Panel is either consciously or unconsciously biased against the Respondent and describes the January 20, 2021 decision as "frankly, appalling". She offers that "it is obvious that the hearing panel has already made their decision and having the same panel at an actual hearing, on an issue they have already determined, is ridiculous", although it is not clear from the affidavit which is the "decision" in issue.

Affidavit of MF

[25] The affidavit of MF was made May 31, 2023. The deponent is an accountant. His affidavit was taken by the Respondent and exhibits a letter written by him. In the letter, MF states that he is a "close friend" of the Respondent and that the Respondent has been a client of his accounting firm. He discusses the nature of his accounting practice and certain accounting standards. The deponent states that he considers himself to be a reasonable person and that he has read the decisions in the judicial review proceedings. The deponent opines that the Panel appears to be biased against the Respondent and has engaged in the ill-treatment of a disabled member of the Law Society.

Affidavit of RG

[26] The affidavit of RG was made May 30, 2023. The deponent is a former lawyer who completed articles with the Respondent in 2011 but left the profession in 2018. He is now a treaty negotiator and a business person. His affidavit was taken by the Respondent. RG states that he has provided the affidavit at the Respondent's request. He attests that he believes himself to be a reasonable person. The deponent gives evidence about events said to have occurred during a Law Society investigation of the Respondent's conduct in 2015. He states that he has reviewed the decisions in the judicial

review proceedings, and states the information provided to him about the Tribunal proceedings, about the Respondent's diagnosis of ADHD, the F &D Hearing, and the Respondent's mental state in December 2020. The deponent offers the view that the Panel's actions "demonstrate bias, and a total lack of natural justice", and are inconsistent with "the Law Society's publicly declared mandate as to the treatment of mental illness". The deponent opines that the Panel was dismissive of the Respondent's mental illness and her request for accommodation to submit evidence that was not available at the start of the F & D Hearing, and "only changed its mind … when it was caught demonstrating clear bias towards her".

Affidavit of ED

[27] The affidavit of ED was made May 31, 2023. The deponent is employed in sales and business development. Her affidavit was taken by the Respondent. ED deposes that she has known the Respondent since 1998. The deponent opines that it is ironic that the Respondent was not diagnosed with ADHD until after the commencement of the proceedings in the Citation and that she has seen the positive impact of medication for the Respondent. The deponent states that she has reviewed the decisions in the judicial review proceedings, including paragraphs which the Respondent particularly drew to her attention. She states that she is a reasonable person. The deponent states her understanding of the facts surrounding the Reopening Application and opines that the Panel's actions demonstrate "shocking" bias towards the Respondent and disregard for the Law Society's publicly declared mandate as to the treatment of mental illness, as displayed on the Law Society's web site. The deponent also offers observations on her understanding of the work of the Multidisciplinary Association for Psychedelic Studies in Canada ("MAPS").

Affidavit of RV

[28] The affidavit of RV was made May 30, 2023. The deponent is a policy analyst with the provincial government. Her affidavit was taken by the Respondent and exhibits a letter in which RV states that she has known the Respondent since 2009, when their children became friends. RV characterizes the current relationship between she and the Respondent as "friends". RV states in the letter that she is a reasonable person and has read the decisions in the judicial review proceedings. She opines that the Panel appears to be biased against the Respondent because it decided not to admit evidence from the Respondent's doctor and psychologists regarding her mental condition. RV states that she believes the information to be relevant to the case and that there would be a duty to accommodate a member of the Law Society with a disability.

Affidavit of BC

[29] The affidavit of BC was made May 29, 2023. The deponent is a foreign lawyer and a legal assistant at the Respondent's firm. The Respondent took his affidavit. BC's affidavit exhibits a letter, written to the Respondent, in which BC describes his personal history and opines that he is a "healthy-minded, reasonable person". The deponent states that he has read the decisions in the judicial review proceedings and has reviewed the law in Canada relating to bias and the reasonable apprehension of bias. BC opines that the Panel acted with "serious bias" toward the Respondent by not agreeing to hear the Reopening Application and by not providing reasons for the decision. The deponent opines that "the whole bias issue becomes more evident" when the circumstances are viewed in light of the mandate of the Law Society's Mental Health Task Force in 2018. The deponent expresses views as to the Panel's duties to the Respondent and opines that the Panel's decision reconsidering the initial dismissal of the Reopening Application "makes the appearance of bias look worse, not better". BC also expresses his opinion as to what he expects the legal consequences would be in his original jurisdiction of a denial of proper notice or the opportunity to be heard.

Affidavit of DV

[30] The affidavit of DV was made May 31, 2023. The deponent is a marketing and project management professional. The Respondent took her affidavit. The affidavit exhibits a letter to the Law Society in which DV states that she considers herself a reasonable person who is informed of the facts stated in the judicial review decisions. The deponent states that she knows the Respondent because she has worked for her in the past year managing her digital presence. She summarizes her understanding of events surrounding the Reopening Application and states that the Panel's actions raise "serious concerns about the panel's impartiality and commitment to a fair evaluation". She goes on to state that "the Panel's treatment of Ms. Hemminger, in my view, indicates bias and a departure from what is fair and just". The deponent also states that she has spent some time reviewing materials on the Law Society's website while preparing her letter, and opines that the dismissal of the application appears to contradict the Law Society's commitment to addressing mental health issues.

THE PARTIES' SUBMISSIONS

[31] The Law Society argued that the affidavit evidence was inadmissible on multiple grounds. The Law Society said that, generally, the affidavits are objectionable due to:

(a) irrelevant content;

(b) hearsay statements;

(c) impermissible personal opinion, argument, commentary and gratuitously inflammatory remarks; and

(d) opinion evidence which does not meet the requirements for expert evidence set out in *R v Mohan,* [1994] 2 SCR 9 and *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23, [2015] 2 SCR 182 ("*White Burgess*").

[32] At a more granular level, the Law Society objected to the admissibility of the affidavits of RV, MF, BC, ED and DV because the affiants have personal relationships with the Respondent and none is properly qualified to offer expert opinion evidence in the proceeding.

[33] The Law Society also objected to the admissibility of the affidavits of BL, RM, CG, DD, RG, GS and MM on the grounds that the opinions expressed in those affidavits are not relevant or necessary to the proceeding but amounts to legal argument and, if admitted, would tend to usurp the Panel's function. The Law Society argued that the Panel is competent to reach its own conclusion on reasonable apprehension of bias and does not require opinion evidence from other lawyers or former lawyers to reach a decision on this matter. The Law Society also argued that statements by some of the lawyers show that they are influenced by their pre-existing relationships with the Respondent and they do not offer objective and non-partisan evidence.

[34] The Law Society objected to the Respondent's affidavit, arguing that its content is largely inadmissible and otherwise irrelevant. It says that the Respondent's affidavit is replete with inadmissible expressions of opinion, conjecture, hyperbole, inflammatory language, bald assertions and conclusory statements.

[35] The Respondent argued that the 12 affidavits made by people other than herself are admissible lay opinion evidence, as each deponent offers observations within the affiant's personal knowledge and which the affiant has the experiential capacity to make those observations. The Respondent said that in some cases – for example, in connection with the affidavit of ED – the deponent is in a better position than the Panel with respect to the personal knowledge and evidence. With respect to the seven affidavits made by lawyers or former lawyers, the Respondent argued that she did not advance the affidavits as expert opinion but as lay opinion. She argued that the deponents have the "experiential knowledge to draw the conclusions" asserted in the affidavits "and their evidence provides relevant background and contextual information".

[36] The Respondent argues that her own evidence is admissible.

ANALYSIS

The Law of Reasonable Apprehension of Bias

[37] A person contending there is a reasonable apprehension of bias on the part of a decision maker must show that a reasonable and informed person, who has applied themself to the question realistically and practically, would reasonably conclude that the decision-maker does not have an open mind. The analysis is necessarily contextual and fact-specific. The standard is objective. The burden of persuasion is heavy: "substantial" or "serious" grounds are required, and the party contending that there is a reasonable apprehension of bias must show "a real likelihood or probability of bias". Suspicion alone is not sufficient. The burden on the applicant is onerous because there is a strong presumption at law that public decision-makers will act fairly and impartially in discharging their adjudicative responsibilities.[5]

Relevant Principles of the Law of Evidence

[38] The Tribunal is not bound by the formal rules of evidence. A hearing panel may exercise its discretion to admit evidence that would not be admissible in a superior court.[6] By the same token, the Panel's discretion to depart from the rules of evidence in determining the admissibility of a statement which a party wishes to lead in evidence does not imply that the rules of evidence should be avoided in the proceeding. As the BC Court of Appeal has said, albeit in the context of a judicial proceeding, "The rules of evidence in proceedings such as these play a critical role in protecting procedural fairness for the various parties involved; they must not be ignored or relaxed in favour of judicial economy or expediency".[7] The Panel agrees with the applicability of this statement to the proceeding. The Panel finds the rules of evidence useful in determining the admissibility of the affidavits as these rules indicate if the evidence is reliable or relevant. We detect no reason to depart from the rules of evidence generally applicable in British Columbia in evaluating the admissibility of the affidavits in the circumstances of this application.

---

[5] *Wewaykum*, at paras 59 - 61, 67, 73; *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25, [2015] 2 SCR 282 at paras 20 – 21 and 25 – 26; *Cojocaru v British Columbia Women's Hospital and Health Centre*, 2013 SCC 30, [2013] 2 SCR 357 at para 27; *University of British Columbia v University of British Columbia Faculty Association,* 2007 BCCA 201 at paras 84 – 85; *Adams v Workers Compensation Board* (1989), 42 BCLR (2d) 228 (CA) at para 12; *Independent School Authority v Parent*, 2022 BCSC 570 at paras 3 – 32; *Ball v Beacham*, 2024 BCSC 21 at para 78; *Robertson v Edmonton (City) Police Services (#10)*, 2004 ABQB 519 at para 53.
[6] Law Society Rules, 2015, Rule 5-6(6); Practice Direction 10.7(1)(i).
[7] *JP v British Columbia (Children and Family Development*, 2017 BCCA 308 at para 148.

Affidavit evidence

[39] Affidavit evidence should be limited to statements of fact within the deponent's personal knowledge or, if a proper foundation for them is laid, admissible statements on information and belief or admissible statements of opinion. Affiants should not be invited to offer, and should not include in an affidavit, inflammatory statements. "Affidavits should not be 'larded with adjectives' expressing opinions about the conduct of others", or include "self-serving protestations of surprise, shock, disgust or other emotions". Such gratuitous comments are inadmissible.[8]

Opinion evidence

[40] Opinion evidence offered by a lay witnesses is presumptively inadmissible in legal proceedings.[9] A lay witness may be permitted to give opinion evidence where:

(a) the witness is in a better position than the decision-maker to form the conclusion;

(b) the conclusion is one that a person of ordinary experience is able to draw;

(c) the witness, though not an expert, has the experiential capacity to make the conclusion; and

(d) the expression of opinion is a compendious way of stating facts (*e.g.*, "the injured person was bleeding out").[10]

[41] Opinion evidence offered by an expert on a matter requiring specialized knowledge – "specialized" in comparison to the decision-maker – may be admissible, if the evidence meets certain threshold conditions. The expert opinion evidence must be:

(a) relevant;

(b) necessary to assist the trier of fact;

(c) offered by a properly qualified expert who is fair, objective and non-partisan; and

[8] *LMU v RLU*, 2004 BCSC 95 at paras 40 – 41; see also *Carpino v Carpino*, 2022 BCSC 2237 at para 35.
[9] *White Burgess*, at para 14; see also *R v. DD*, 2000 SCC 43, [2000] 2 SCR 275 at para 49.
[10] *Graat v R*, [1982] 2 SCR 819 at p. 835 – 837.

(d) must not be barred by an exclusionary rule, or by a likelihood that its admission would have an overwhelming prejudicial effect in the proceedings.[11]

[42] Generally, opinion evidence on domestic legal issues is not admissible.[12]

Hearsay evidence

[43] Hearsay evidence (evidence of statements made outside the hearing room) may be unreliable and inadmissible, unless an exception to the rule against hearsay evidence applies that suggests such evidence should be admitted and weighed. This is because it generally is not possible to test the reliability of hearsay statements.[13]

Discussion

The affidavits made by persons other than the Respondent

[44] The fundamental difficulty with the affidavits of the persons not party to this proceeding is that they offer unnecessary, and therefore inadmissible, opinion evidence. The gist of each deponent's evidence is "I have read the reasons for decision in the judicial review proceedings, and here are my concerns about the possible state of mind of the members of the Panel, and the consequences of that possible state of mind".

[45] Like the proverbial Victorian on the Clapham omnibus, the "reasonable person" in the test for reasonable apprehension of bias is not a person at all, but a metaphorical fiction used to express a legal standard. As such, the decision-maker's task in determining reasonable apprehension of bias is not to ask whether some real individual matches the standard and, if so, to consider or accede to that person's views, but to directly apply the legal standard to the facts of the case. In this case, the salient facts are the facts of what happened in the proceedings in early 2021.

[46] The opinions of some set of people about implications that may be drawn from the salient facts, no matter how considered, how earnestly held or how ardently expressed, are not themselves relevant facts and are not necessary for the decision-maker to apply

---

[11] *White Burgess*, above, at paras 10, 15, 19, 21, 23, 26 – 27, 46 – 50 and 53; *R v Mohan*, above; see also *R v DD*, above, at para 46.
[12] *Graat v R*, above, at 839. For recent applications of the principles, see: *Rogers v Rogers Communications Inc.,* 2021 BCSC 2184 at paras 112 – 115 and *Law Society of BC v Guo*, 2021 LSBC 20, aff'd 2022 BCCA 154 at paras 107 – 108.
[13] *R v Khelawon*, 2006 SCC 57, [2006] 2 SCR 787 at paras 2, 3, 42 and 59.

the legal standard to the relevant facts. Such statements of opinion are not admissible in the Recusal Application.[14]

[47] Relatedly, we agree with the Law Society's observation that statements of opinion in the affidavits are statements of subjective belief, while the reasonable person standard is an objective standard. The subjective views of a given set of people are legally irrelevant to the analysis the Panel must undertake. Indeed, the objective nature of the legal test signals that the decision-maker should refrain from, not move toward, deciding the issue by a poll of self-professed reasonable people.

[48] In addition, the 12 affidavits are inadmissible because they do not meet the criteria for admissible lay witness opinion evidence. We do not accept the Respondent's argument to the contrary. The witnesses are not in a better position than the Panel to draw conclusions about the Law Society's statements on mental health concerns among members of the profession, or whether there exists a reasonable apprehension of bias in the proceedings. Moreover, the affiants' opinion evidence manifestly does not fit within the category of compendious statements of fact. To the extent they are relevant, the deponent's statements are not evidence about what the affiants observed but are better characterized as airing views and perceptions.

[49] We turn to the subset of affidavits offered by lawyers and former lawyers. The Respondent does not contend that these affidavits offer expert evidence but the Law Society objected to them on the ground that they do not offer admissible expert evidence. For certainty, we confirm that we agree with the Law Society's contentions. The opinions expressed in the affidavits of BL, RM, CG, DD, RG, GS and MM are not admissible as expert opinion. The deponents are not expert on any matter on which they express an opinion, relative to the Panel. As such, their opinions are unnecessary.

[50] In addition, these affiants express opinions that are either plainly or effectively legal opinion. This defect is most patent in the affidavit of BL, who, in the letter attached to his affidavit, engages in a legal analysis and states a conclusion of law, but it is also a prominent thread woven through the affidavits of the other lawyers or former lawyers, including those who take it upon themselves to draw the panel's attention to the *Arbitration Act*, or who express views as to the Panel's obligations to the Respondent, as a matter of procedural fairness or human rights principles. The Panel's obligations to the Respondent are a matter of law for the Panel.[15]

[51] In light of our conclusion that the affidavits of the lawyers and former lawyers are inadmissible because they offer unnecessary evidence, we will not engage in a full

---

[14] *Robertson,* above, at para 53; *Commission scolaire de Yukon #23 v Attorney General of the Yukon Territory*, 2011 YKSC 1 at para 22.
[15] See, *e.g., Woods v BDO Dunwoody LLP*, 2013 BCSC 14563 at para 27.

analysis of the deponent's qualifications under the approach set out in *White Burgess*. Suffice it to say that in some instances, the affiants do not bear the hallmarks of objectivity but embarrass their evidence by hyperbole or passionate statements of emotion.

[52] There is a range of other admissibility problems with statements made in the 12 affidavits tendered from persons other than the Respondent.

[53] First, some of the affidavits purport to give evidence on matters that are irrelevant to the Recusal Application. Examples of the evidence in this category include RG's evidence about events said to have occurred when the Law Society commenced an investigation of the Respondent in 2015, ED's evidence about the Multidisciplinary Association for Psychedelic Studies in Canada and BC's opinion of the probable legal consequences of denial of natural justice in his original jurisdiction.

[54] Second, the affidavits are replete with hearsay statements. We will not scrutinize the hearsay statements one by one, as we have concluded that the 12 affidavits made by persons other than the Respondent are otherwise inadmissible. Engaging in a detailed analysis of the hearsay would not serve a useful purpose. Nonetheless, the fact that the hearsay concern is overtaken by other fundamental defects in the evidence does not obviate the hearsay concern.

The Respondent's Affidavit

[55] As noted above, the Respondent's affidavit is wide-ranging in its content. It contains apparently irrelevant content, hearsay statements (including unattributed hearsay), statements of argument, statements of opinion and a range of statements that may be objectionable on other grounds. However, the Respondent's affidavit also contains statements about her own experience, some of which may be admissible in the proceedings, depending on the purpose for which they are tendered.

[56] As it is not obvious that all statements in the Respondent's affidavit are inadmissible, the Respondent is at liberty to seek to rely on her affidavit in the hearing of the Recusal Application. In so doing, she is directed to identify each statement in the affidavit that is relied on and the purpose for which that evidence is tendered. The Law Society is at liberty to object to the affidavit evidence tendered by the Respondent. The Panel will decide any objections to the Respondent's affidavit evidence as the occasion requires.

CONCLUSION

[57] The 12 affidavits made by persons other than the Respondent are not admissible in the Recusal Application. The Respondent may seek to rely on her affidavit in the application. The admissibility of any of her own statements that she seeks to tender into evidence will be decided as the occasion requires.