2019 LSBC 35
Decision issued: September 20, 2019
Citation issued: June 21, 2017

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

DANIEL BRUCE GELLER

RESPONDENT

DECISION OF THE HEARING PANEL ON DISCIPLINARY ACTION

Hearing date:	June 24, 2019
Written submissions:	July 29 and August 5, 2019
Panel:	Jennifer Chow, QC, Chair Eric V. Gottardi, Lawyer Lance Ollenberger, Public representative
Discipline Counsel:	Michael Shirreff and Elizabeth Allan
Appearing on his own behalf:	Daniel B. Geller

INTRODUCTION

[1] The Panel determined that, in 2015, the Respondent engaged in the unauthorized practice of law in Yukon while suspended by the Yukon Law Society. Accordingly, the Respondent breached Rule 2-24(4) of the Law Society Rules that require lawyers who practise law in another jurisdiction to comply with the requirements of that jurisdiction.

[2] As described in our decision at 2018 LSBC 40, the Respondent's conduct amounted to a serious, rather than a minor, breach of the Law Society Rules.

Based on the unique circumstances of the case, however, the Panel found that the Respondent's conduct fell short of professional misconduct.

POSITION OF THE PARTIES

[3] The Law Society submits that the appropriate discipline is a fine of $5,000, payable within 60 days. Additionally, the Law Society seeks costs and disbursements of $17,225.06 in accordance with Rule 5-11 and the tariff at Schedule 4 of the Law Society Rules, payable by the end of 2019. The total penalty sought is $22,225.06.

[4] The Respondent submits in essence that, since he was not found to have committed professional misconduct, the appropriate discipline is $1 with no costs payable.

[5] In June 2019, both the Law Society and the Respondent made submissions at a half-day hearing on discipline. In July 2019, the Panel requested supplementary written submissions from the parties regarding specific cost jurisprudence. In late July and early August 2019, the Panel received and considered written supplementary submissions from both parties.

DECISION

[6] The primary purpose of disciplinary hearings is to uphold and protect the public interest in the administration of justice (see *Legal Profession Act*, s. 3 (the "BC Act")).

[7] While the Law Society did not prove the Respondent committed professional misconduct, it did prove he breached Rule 2-24(4) of the Law Society Rules by practising law in Yukon while suspended. Our decision issued December 27, 2018 amounts to an adverse determination against the Respondent under s. 38(5) of the BC Act. The Respondent had notice of this possible outcome in the citation issued on June 21, 2017.

[8] Under s. 38(5) and (7) of the BC Act, an adverse determination requires the Panel to determine the appropriate disciplinary action including any terms and conditions. Section 38 of the BC Act provides as follows:

> (4) After a hearing, a panel must do one of the following:
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> (a) dismiss the citation;
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> (b) determine that the respondent has committed one or more of the following:
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> (i) professional misconduct;
>
> (ii) conduct unbecoming the profession;

(iii) a breach of this Act or the rules;

(iv) incompetent performance of duties undertaken in the capacity of a lawyer;

(v) if the respondent is an individual who is not a member of the society, conduct that would, if the respondent were a member, constitute professional misconduct, conduct unbecoming the profession, or a breach of this Act or the rules.

(5) If an adverse determination is made under subsection (4) against a respondent other than an articled student or a law firm, the panel must do one or more of the following:

(a) reprimand the respondent;

(b) fine the respondent an amount not exceeding $50 000;

(c) impose conditions or limitations on the respondent's practice;

(d) suspend the respondent from the practice of law or from practice in one or more fields of law

(i) for a specified period of time,

(ii) until the respondent fulfills a condition imposed under paragraph (c) or subsection (7) or complies with a requirement under paragraph (f) of this subsection,

(iii) from a specified date until the respondent fulfills a condition imposed under paragraph (c) or subsection (7) or complies with a requirement under paragraph (f) of this subsection, or

(iv) for a specific minimum period of time and until the respondent fulfills a condition imposed under paragraph (c) or subsection (7) or complies with a requirement under paragraph (f) of this subsection;

(e) disbar the respondent;

(f) require the respondent to do one or more of the following:

(i) complete a remedial program to the satisfaction of the practice standards committee;

(ii) appear before a board of examiners appointed by the panel or by the practice standards committee and satisfy the board that the respondent is competent to practise law or to practise in one or more fields of law;

(iii) appear before a board of examiners appointed by the panel or by the practice standards committee and satisfy the board that the respondent's competence to practise law is not adversely affected by a physical or mental disability, or dependency on alcohol or drugs;

(iv) practise law only as a partner, employee or associate of one or more other lawyers;

(g) prohibit a respondent who is not a member but who is permitted to practise law under a rule made under section 16 (2) (a) or 17 (1) (a) from practising law in British Columbia indefinitely or for a specified period of time. ...

(7) In addition to its powers under subsections (5), (6) and (6.1), a panel may make any other orders and declarations and impose any conditions or limitations it considers appropriate.

[9] The leading case, *Law Society of BC v. Ogilvie*, 1999 LSBC 17, [1999] LSDD No. 45, sets out the principles and factors to be considered when deciding a fair and reasonable penalty. In *Ogilvie,* the panel acknowledged the similarities between the disciplinary and the criminal sentencing processes. The panel considered the sentencing principles including the need for specific deterrence, general deterrence, rehabilitation and punishment or denunciation. The panel considered the disciplinary process, including the principle of maintaining the public's confidence in the Law Society's regulation of lawyers' conduct.

[10] Regarding the factors, the *Ogilvie* panel explained at paragraph 10:

> While no list of appropriate factors to be taken into account can be considered exhaustive or appropriate in all cases, the following might be said to be worthy of general consideration in disciplinary dispositions:
>
> (a) the nature and gravity of the conduct proven;
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> (b) the age and experience of the respondent;
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> (c) the previous character of the respondent, including details of prior discipline;
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> (d) the impact upon the victim;
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> (e) the advantage gained, or to be gained, by the respondent;
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> (f) the number of times the offending conduct occurred;
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> (g) whether the respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or absence of other mitigating circumstances;
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> (h) the possibility of remediating or rehabilitating the respondent;
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> (i) the impact on the respondent of criminal or other sanctions or penalties;
>
> (j) the impact of the proposed penalty on the respondent;
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> (k) the need for specific and general deterrence;
>
> (l) the need to ensure the public's confidence in the integrity of the profession; and

(m) the range of penalties imposed in similar cases.

[11] Recently, the trend has been to focus on select *Ogilvie* factors rather than attempt to apply the factors equally to all cases. As a result, this Panel will select and give more weight to the *Ogilvie* factors that are particularly relevant (see *Law Society of BC v. Dent*, 2016 LSBC 5, paras. 16-19; and *Law Society of BC v. Lessing*, 2013 LSBC 29, para. 56).

[12] In this case, we agree with the Law Society that the following five *Ogilvie* factors are particularly relevant:

(a) the nature and gravity of the conduct;

(b) the Respondent's character and professional conduct record;

(c) the Respondent's lack of acknowledgement of the misconduct and remedial action;

(d) overall public confidence in the legal profession including public confidence in the disciplinary process; and

(e) the range of sanctions imposed in prior similar relevant cases.

The nature and gravity of the conduct

[13] The unauthorized practice of law by the Respondent while suspended is a serious breach of the *Legal Profession Act,* RSY 2002, c. 134 (the "Yukon Act"). Section 1(4)(a) of the Yukon Act provides that a person who is suspended must not practise law, for a fee or for free, if that person is a member or former member of the society.

[14] The unauthorized practice of law by a suspended lawyer is also a serious breach of professional ethics. Lawyers have the privilege of belonging to a self-governing profession that promotes the rule of law. The public interest is not served and is given the wrong message when lawyers do not follow the requirements of their own law societies.

[15] A further aggravating circumstance is that, in 2014, the Respondent gave the Law Society of Yukon an undertaking that precluded him from applying for a Certificate of Permission from, or membership in, the Law Society of Yukon for three years (the "Undertaking"). Since the Respondent had previously practised in Yukon as a member of the law society and under various Certificates of Permission, the Respondent knew and acknowledged that the Undertaking essentially prohibited him from practising law in Yukon (Exhibit 1, Tab 39, page 10). A Certificate of

Permission from the Law Society of Yukon allows a visiting lawyer to practise on a particular file or for a particular client.

[16] After he signed the Undertaking in 2014, the Respondent did not actually apply for membership in or a Certificate of Permission from the Law Society of Yukon. Accordingly, the Panel did not find that the Respondent breached the wording of the Undertaking. Nor did the Law Society seek a finding that the Respondent breached the wording of the Undertaking. Ultimately, however, the Respondent did not comply with the spirit of the Undertaking, which was to bar him from practising law in the Yukon.

[17] The Respondent's breach of the Yukon Act is serious, as he created confusion within the criminal justice system over whether he was JR's Yukon lawyer. We agree with the Law Society that the Respondent did not take steps a prudent lawyer would have taken to ensure that he complied with his suspension and the spirit of the Undertaking. That the Respondent did not act as a prudent lawyer in these circumstances is a serious finding no matter how altruistic the Respondent's intentions were to help his client.

The Respondent's character and professional conduct record

[18] The Respondent was admitted as a member of the Law Society of British Columbia in 1974. Since then, he has practised law in British Columbia primarily as a criminal defence lawyer for over 44 years. He is now 70 years old and currently a practising lawyer in British Columbia.

[19] The Respondent's professional conduct record with the BC Law Society consists of the following:

(a) January 1999: a conduct review was ordered regarding a complaint about the Respondent's statement made in regard to a motor vehicle accident;

(b) July 2002 to February 2005: a practice review and two follow-up practice reviews were conducted regarding client complaints and various bookkeeping, records and accounting issues;

(c) July 2004: a citation hearing was held regarding various breaches of various Law Society Rules regarding bookkeeping, records and accounting arising from an audit of the Respondent's books. The Respondent admitted to breaches of four accounting rules over a two-year period. He was fined $2,000 and required to have a chartered

accountant report on his books to the Law Society every six months (*Law Society of BC v. Geller,* 2004 LSBC 24 and *Law Society of BC v. Geller,* 2006 LSBC 04);

(d) July 2005: a conduct review was ordered regarding a client's complaint over a partial refund of a retainer;

(e) September 2005: as a result of the Practice Review and follow-up Practice Reviews to February 2005, the Respondent gave an undertaking to have all clients sign a retainer agreement;

(f) December 2008: a conduct review was ordered regarding the Respondent's failure to comply with the practice restrictions imposed as part of the penalty in 2004 LSBC 24; and

(g) June 2017: a conduct review was ordered regarding the Respondent's breach of the terms of an undertaking to the BC Law Society that required written retainer agreements with all clients.

[20] The Respondent's professional conduct record with the Law Society of Yukon consists of the following:

(a) (a)January to April 2014: a conduct review was ordered regarding a complaint that the Respondent was holding himself out to be a practising lawyer while he was administratively suspended. As a result, the Respondent signed the Undertaking.

[21] The Respondent's prior disciplinary record is an aggravating factor. The principle of progressive discipline means that the Respondent will be subject to a more significant disciplinary sanction than someone without any prior discipline (*Law Society of BC v. Batchelor*, 2013 LSBC 9, paras. 49-50). The principle applies to a lawyer who has a prior disciplinary record, whether for the same or different conduct and whether the conduct is joined in one proceeding or by successive proceedings.

[22] This is the second complaint about the Respondent practising law in Yukon while administratively suspended. In 2014, the Respondent dealt with the first complaint by giving the Undertaking (Exhibit 1, Tab 6). It is a serious matter that, after giving the Undertaking, the Respondent's conduct led to another complaint of practising law while suspended. Accordingly, the Panel considers that the Respondent's professional conduct record shows a failure by the Respondent to

comply with the Law Society of Yukon's regulation of his practice (*Batchelor,* para. 47).

The Respondent's acknowledgement of the misconduct and remedial action

[23] While emphasizing that he was found not to have committed professional misconduct, the Respondent reluctantly acknowledged that he breached the Law Society Rules. The Respondent tended to minimize his conduct by suggesting the Panel's decision was a "scholarly parsing of the facts" and a "nuanced" decision. At the disciplinary hearing, the Respondent made other concerning remarks that suggests he neither understands nor believes that his conduct has undermined public confidence in the legal profession. For example:

> And I honestly don't believe that the Yukon Law Society was concerned about preserving the integrity or the public or anything else other than themselves. How that would be, I don't know. And I honestly thought that the Law Society of BC would see that and we wouldn't be here today.

[24] The Respondent minimized the Panel's finding that his "BC client" ("JR") himself viewed the Respondent as his Yukon lawyer. The Respondent explained that "not a single client ... was hurt or was mistreated or the case was not handled properly by me, not one." Although JR was deceased at the time of these hearings, the Panel was provided with JR's evidence through his fiancée, a prosecutor, JR's legal aid lawyer and a written record of an interview conducted with JR by a senior lawyer. We accepted their evidence that JR's fiancée sold a truck to give the Respondent $5,000 and that JR and his fiancée viewed the $5,000 as a retainer regarding the Yukon criminal charges.

[25] The Respondent minimized the Panel's finding that the Whitehorse Correction Centre ("WCC") viewed the Respondent as JR's Yukon lawyer. The Respondent admitted that he confirmed with WCC staff that his name should be added to JR's lawyer call list because he wanted privileged calls with JR. The Respondent also allowed the WCC to assume he was JR's Yukon lawyer when he signed in as a BC lawyer and obtained privileges normally accorded to a practising Yukon lawyer. The Respondent did not explain to the WCC staff when he signed in that he was not representing JR regarding his Yukon criminal matters. If he had, the WCC staff may not have accorded the Respondent privileges as a Yukon lawyer, such as access to a private interview room or being shown video evidence of JR's jail assault at the WCC.

[26] In whole, the Respondent did not treat his suspension seriously enough. Nor did he treat the Undertaking as a serious matter to be strictly and scrupulously fulfilled as

required by section 5.1-6 of the Code of Professional Conduct of the Law Society of Yukon. While the Respondent advised several people that he was not JR's Yukon lawyer, he did not clearly advise all those with whom he had contact, including JR and the WCC staff. The Respondent suggests that it was not his fault if others assumed that he was JR's Yukon lawyer. That suggestion misses the mark. If the Respondent had been clear in all his interactions with JR and the WCC staff, they may not have treated him as JR's Yukon lawyer. The Respondent held the responsibility of ensuring that others knew he was not authorized to practise law in Yukon.

[27] The Respondent did not take reasonable steps to avoid confusion over whether he was practising law in Yukon. To the contrary, he generated confusion over his status as a practising Yukon lawyer. To be clear, a lawyer who is suspended cannot practise law or give even the appearance that the suspended lawyer is practising law or is capable of practising law. To the Respondent's benefit, he did not appear in court on JR's behalf, he told the prosecutor that he was not JR's Yukon lawyer, and he made several attempts to find JR a Yukon lawyer. The Respondent also did not know that giving JR advice on the phone in BC about JR's Yukon charges meant the Respondent was practising law in Yukon. However, the Respondent did expressly allow his name to be added to the WCC's lawyer's list; he visited the WCC as JR's lawyer and was accorded the privileges given to a lawyer; he accepted a retainer that, at least in part, dealt with JR's Yukon criminal matter and he gave JR advice regarding his Yukon criminal matter.

[28] The Respondent made disparaging remarks at the hearing and in submissions about the Law Society of Yukon and counsel for the Law Society of BC. To be clear, we do not agree with those remarks. We agree with counsel for the Law Society that appropriate guidance was readily available to the Respondent had he made any inquiries about his suspension or the Undertaking. If the Respondent had made the appropriate inquiries, the Law Society likely would have provided him with advice or the available Information Sheet that a suspended lawyer must take the utmost care not to give even the appearance of being capable of practising law. The Information Sheet provides helpful recommendations such as not attending the office during business hours to avoid giving the public any perception that a suspended lawyer is capable of practising law.

Overall public confidence in the legal profession including public confidence in the disciplinary process

[29] The public is entitled to assume that a lawyer is authorized to practise law unless expressly advised otherwise by that lawyer. Public confidence in the legal

profession is diminished whenever a lawyer engages in the unauthorized practice of law. In this case, the public interest required the Respondent to refrain from giving any appearance of practising law. The protection of the public also meant that the Respondent should not have caused or contributed to any confusion over whether he was practising law in Yukon. For example, in this case, the Respondent accepted funds, which gave others the perception he was able to practise law in Yukon.

[30] Practising lawyers have the privilege of belonging to a self-regulated profession. Self-regulation means that a practising lawyer is governed by a law society as a regulator. The public has an interest in lawyers complying with the rules, regulations and codes of professional conduct required by a law society. That is the essence of a self-regulated profession.

[31] The purposes of disciplinary action against a lawyer are twofold: generally, to promote public confidence in the integrity of the legal profession; and specifically, to provide penalties that are consistent with similar cases (*Dent,* 2016). Disciplinary penalties promote public confidence in the profession by communicating to the profession and the public the standards required of lawyers and the consequences for any failure to abide by those standards (James Casey QC, *The Regulation of Professions in Canada,* c 14.2 Sentencing at 14-7; *Lessing*, para. 60). Protection of the public means "the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness" (*Law Society of BC v. Dent,* 2014 LSBC 4, para 33).

[32] In this case, the Respondent did not maintain the high standards of the profession. As set out in the *Code of Professional Conduct for BC*, the Respondent owes ethical duties not only to his clients, but also to the state, to courts and tribunals, to other lawyers and to himself in maintaining the highest standards of the profession. The BC Code explains that a lawyer is a minister of justice, an officer of the courts, a client's advocate and a member of an ancient, honourable and learned profession and is required to act accordingly.

[33] To be clear, when a lawyer is barred from practising law, either by a suspension (administrative or disciplinary) or an undertaking, the lawyer holds the responsibility of ensuring that he or she complies with the requirements of that suspension or undertaking. The lawyer must police his or her own conduct and not take any risks that he or she may be practising law or give the appearance of being capable of practising law. Additionally, when a lawyer gives an assurance to another person (such as a potential or actual client, other lawyers or those in the

justice system) that he or she is qualified to assist with a legal problem, that person is entitled to assume that the lawyer is authorized to practise law.

[34] We also have a lingering concern as to whether the Respondent also put JR at risk that their communications over the phone and in person at the WCC would not be protected by solicitor-client privilege.

The range of sanctions imposed in prior similar relevant cases

[35] As this case is unique, the jurisprudence is limited.

[36] In a case involving the Respondent, 2004 LSBC 24, the Respondent was found to have committed a breach of the Law Society Rules when he failed to comply with various accounting requirements. The Respondent was fined $2,000 and ordered to comply with certain accounting conditions.

[37] In *Law Society of BC v. Barton,* 2008 LSBC 25, the panel concluded that Mr. Barton had engaged in the unauthorized practice of law while he was a non-practising member, contrary to the BC Act. The panel found that Mr. Barton's course of dealings amounted to the practice of law. The panel could not determine the exact amount of Mr. Barton's retainer as no formal accounting was kept. Additionally, the panel expressed concern over the risk that solicitor-client privilege would not have applied to the client's discussions with the respondent. Mr. Barton was ordered to pay a fine of $1,500 plus $7,500 in costs.

[38] In *Law Society of BC v. Smith,* 2004 LSBC 29, Mr. Smith was found to have breached the Law Society Rules by incurring trust shortages and accounting issues. Based on a joint penalty submission, an agreed statement of facts and his own admission, Mr. Smith was ordered to pay a fine of $2,000 plus $7,500 in costs. He was also referred to the Practice Standards Committee.

[39] In *Law Society of BC v. Van Twest,* 2011 LSBC 20, Mr. Van Twest was found to have breached the no-cash rule after accepting $7,500 or more in a single transaction. Mr. Van Twest was ordered to pay a fine of $2,000 plus costs of $1,000.

[40] In *Law Society of BC v. Boles,* 2018 LSBC 3, the panel accepted that Ms. Boles was unaware that she was required to report judgments to the Law Society and that she did not act in bad faith. Ms. Boles was fined $7,500. The issue of costs was not submitted to the panel for determination. The parties appear to have settled the costs issue between them.

DISCIPLINARY ACTION

[41] Applying the principle of progressive discipline, we order that the Respondent pay a fine of $5,000, payable by November 30, 2019.

COSTS

[42] The purpose of a costs award is to ensure that a lawyer against whom an adverse determination is made bears some or much of the hearing cost rather than the profession as a whole (*Re Applicant 6*, 2014 LSBC 62). The Law Society has advised the Panel that the Bill of Costs submitted amounts to only a partial indemnity of its actual legal costs.

[43] Rule 5-11 of the Law Society Rules grants the Panel discretion to make an order requiring the Respondent to pay the costs of the hearing and giving time to pay. In calculating the amount of costs payable, Rule 5-11(3) requires the Panel to have regard to the tariff of costs in Schedule 4. If it is reasonable and appropriate to do so, Rule 5-11(4) provides that the Panel may order costs in an amount different than that set out in the tariff.

[44] In *Law Society of BC v. Tungohan*, 2017 BCCA 423, the Court of Appeal set aside a costs award on the basis that the review board's decision failed to address Mr. Tungohan's financial information or his ability to pay. The review board had allowed Mr. Tungohan to file his financial information and make submissions on his ability to pay, which Mr. Tungohan declined to do before the disciplinary panel. The Court of Appeal also inquired as to whether the high amount of costs ($29,200) had punitive effects compared to the fine of $3,000 and whether the amount imposed a severe financial burden on a single practitioner. After noting that costs awards are particular to every case, the Court remitted the issue of costs to the review board for reassessment. In its reassessment, *Law Society of BC v. Tungohan*, 2018 LSBC 15, the review board addressed Mr. Tungohan's financial information and ability to pay and reduced the costs amount to $12,500 payable within six months.

[45] We note that, in *Tungohan*, the review board relied on the non-exhaustive factors set out in *Law Society of BC v. Racette*, 2006 LSBC 29, to support its order for costs. We propose to do so here as well.

Seriousness of the conduct

[46] As discussed in these and our earlier reasons, the Panel found that, in the unique circumstances of this case, the Respondent's conduct did not rise to the level of

professional misconduct. However, that finding does not mean the Respondent's conduct was excusable. To the contrary, the Respondent's conduct amounted to a serious rather than a minor breach of the Law Society Rules.

[47] As discussed earlier, based on the Respondent's professional conduct record, we have applied the principle of progressive discipline. In addition to his past professional conduct records in BC and Yukon, the Panel is concerned that, after giving the Undertaking, the Respondent faced another complaint of practising law in the Yukon while suspended.

Financial circumstances of the Respondent (or ability to pay)

[48] We are mindful of the panel's comments in *Law Society of BC v. Jensen,* 2015 LSBC 10. In that case, the Law Society sought a fine in the range of $5,000 to $10,000 and costs in the amount of $28,000 plus $9,514.89 in disbursements. The panel made an order of a fine of $2,000 plus costs of $30,000. In making its costs decision, the panel, at para. 10, explained the following:

> One consideration of costs is the actual size of costs. Sometimes, for whatever reason, the costs are just too large. Awards of sizeable costs could become a deterrent to lawyers defending citations where they have a reasonable defence or some answer to the allegation. Further, costs that reach a high level become punitive, particularly when compared with the misconduct alleged in the citation. Finally, hearing panels should not be blind to the simple fact that costs can be a more severe burden on single practitioners. Costs always must remain discretionary, flexible and proportional to the matter in question. The ability to pay is always a key factor. At the end of the case, the panel should look at the size of the proposed costs in view of the entire hearing, considering all factors and decide if, taken as a whole, the costs proposed are appropriate or should be adjusted.

[49] The Respondent did not submit any evidence of his ability to pay despite having received the Bill of Costs several months before the disciplinary hearing. The Respondent submitted that he was at the "end" of his career and any income from his practice would be "negligible or non-existent." During the hearing, the Respondent also made a statement that he did not need the money from practising law whether it be $5,000, $50,000 or $500,000.

[50] We consider the amount of costs sought, namely $17,225.06, to be a high amount. However, since the Respondent chose not to provide the Panel with evidence of his financial information or ability to pay, we have placed little weight on this factor.

Total effect of the penalty and costs (or proportionality)

[51] Combining the amount of costs with a fine of $5,000, the Law Society is seeking a total payment of $22,225.06.

[52] We have considered that the total amount may act as a deterrent to a lawyer defending a citation where the lawyer has a reasonable defence or some answer and that the total amount may have a punitive effect on single practitioners. The Respondent is a sole practitioner, likely near the end of his practising career. We find that the total effect of the penalty with costs is disproportionate to the Panel's finding that the Respondent committed a serious breach of the Law Society Rules, rather than professional misconduct.

[53] In this case, the Respondent did have an answer to the allegation of professional misconduct as the Panel found that his conduct did not rise to that level, although we found the Respondent to have committed a serious breach of the Law Society Rules.

The extent to which the parties' conduct affected the length or conduct of the hearing

[54] The three-day hearing on facts was required to address key issues. We do not agree with the Respondent that he "completely cooperated" with the Law Society by "agreeing to a complete list of agreed upon facts drawn up" by counsel. Although the Respondent admitted to an agreed statement of facts, he did so only for the fact that the statements were made and not for the truth of their contents. The Respondent's position meant a hearing was required in order for the Law Society to prove the facts.

[55] The Respondent submitted that counsel "proceeded to call viva voce evidence without … illuminating or expanding the facts in any way." We do not agree. The hearing was required since the Respondent disagreed with the Law Society's interpretation of a key piece of evidence, a Statement of Account dated April 20, 2015 (Exhibit 1, Tab 18). Since the Respondent did not agree that this Statement of Account referred to JR's Yukon criminal matter, that issue required the Law Society to call various witnesses, including JR's fiancée and his legal aid lawyer. At the hearing, the Respondent explained that the express wording of the disputed portion of the Statement of Account was simply "boilerplate" and invited the Panel to interpret that wording differently than how it was phrased. As a result, the Panel was required to parse the meaning of the Statement of Account's express wording that referred to "the numerous and lengthy discussions" regarding JR's "current situation."

[56] Further, after questioning by the Panel, the Respondent produced a previous Statement of Account dated September 4, 2014 (Exhibit 10) that was not previously produced to the Law Society of Yukon or counsel for the Law Society of BC in the course of their investigations.

[57] The hearing was originally set for five days, but the parties required only three days to address the parties' differing factual interpretations. The witnesses' testimony at the hearing was required to help the parties explain their side of the story and illuminate the contentious facts. At the hearing, the Respondent took several opportunities to pose cross-examination questions to the witnesses called by the BC Law Society.

[58] In reviewing the Bill of Costs, we find that the amounts claimed generally reflect the low end of the units allowed. The parties saved travel costs by agreeing to have the Yukon witnesses attend by teleconference. We note that the Bill of Costs did not include the parties' attendance at the hearing on disciplinary action, but only the three days of hearing on the facts.

COSTS ORDER

[59] We have considered the principles of flexibility, proportionality, ability to pay and the unique circumstances of this case, including our finding that the Respondent committed a serious breach of the Law Society Rules. Accordingly, in our view, an order of costs amounting to two-thirds of the Bill of Costs is reasonable and appropriate in this case.

[60] We order the Respondent pay costs to the BC Law Society in the amount of $10,335, representing approximately two-thirds of the tariff costs sought, payable by March 31, 2020.

TOTAL PENALTY

[61] Accordingly, the Respondent is ordered to pay a total of $15,335, consisting of a fine of $5,000 payable by November 30, 2019 and a costs order of $10,335 payable by March 31, 2020.