2005 LSBC 02
Report issued: January 14, 2005
Citation issued: February 20, 2003

The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and a hearing concerning

Alexander Jeletzky

Respondent

Decision of the Hearing Panel on Penalty

Hearing date: November 18, 2004

Panel: James D. Vilvang, Q.C., Single Bencher Panel

Counsel for the Law Society: James Doyle
Counsel for the Respondent: Christopher E. Hinkson, Q.C.

[1] The citation in this matter was heard on April 8th and 27th, 2004.

[2] The Verdict was issued on May 19, 2004. The Panel found that the Respondent had professionally misconducted himself by breaching his undertaking.

[3] On November 18, 2004, the Panel reconvened to hear submissions as to Penalty. Both counsel made submissions and asked for the opportunity to make written submissions on the subject of costs. The requests were granted.

[4] Written submissions were delivered to the Panel by both counsel.

ANALYSIS AND LEGAL REASONING

[5] Both counsel submitted that the appropriate penalty in this case would be a reprimand, together with a fine and an order for costs.

[6] Having considered the submissions of counsel, the Professional Conduct Record of the Respondent, the authorities cited: *The Law Society of B.C. v. Heringa* [2004] BCJ No. 377 (BCCA); *Elizabeth Eu See Lee*, No. 02/14 Oct 2002 Discipline Case Digest; *Jeffrey Peter Andrews* No. 03/18 - Aug 2003 Discipline Case Digest; *Keyvan Shojania* No. 04/12 - Sept. 2004 Discipline Case Digest; *Stephen Grant Price* 1998, No. 11, October Discipline Case Digest; *Raymond William Barton* No. 03/2002 Discipline Case Digest; *James Galt Martin*, No. 20-99/20 Discipline Case Digest; *Andrew Stephen Berna* No. 16 - 93/2 Discipline Case Digest; and *Victor Albert George Simpson* 93/2 No. 2 - Discipline Case Digest; and the reference letters provided, the Panel concludes that a reprimand and a fine in the amount of $2,000 are warranted.

[7] The remaining issue is: What is the appropriate order with respect to costs?

[8] Counsel for the Law Society has submitted a bill of costs in the amount of $16,494.59 and has

argued that full indemnity should be paid. In support of his argument he quotes extensively from the decision of the Benchers in *McNabb* (December 12, 1998):

> **Costs**
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> 91. Mr. Davies contended for, and cited cases in support of, a cap on costs at a modest level. Certainly, precedents for such an approach do exist. We do not mean any disrespect to the Panels who made such orders in the cases cited, but we do not find that approach appropriate to the assessment of costs here. It is our opinion that the approach of the present-day Benchers of the Law Society is towards full costs recovery, within the limits of our Rules.
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> 92. The costs have been incurred: it is only a question of attributing the payment to one party or the other. In this case, either Mr. McNabb must pay them or they will be borne by the lawyers of British Columbia collectively. It is plain that Mr. McNabb is at fault in causing this proceeding while the other lawyers in British Columbia are blameless.
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> 93. The costs of civil cases in British Columbia, in the Supreme Court Rules, are consciously calculated to produce less than full recovery. A similar result would occur if we acted on the submission to cap the costs of this proceeding at an amount lower than provided for in the Rules. A public policy of encouraging the compromise of civil claims by denying the successful litigant, in ordinary circumstances, full indemnity for costs has been adopted in British Columbia. There is no ready equivalent policy considered in Law Society disciplinary proceedings: the Law Society is obliged to prosecute in cases such as this, to protect the public interest, and would be abdicating its responsibility if it compromised to keep costs down. As the Law Society compels an explanation from the member at the investigatory stage, it takes proceedings in face of a denial of misconduct at its peril. The differences between ordinary civil litigation and professional disciplinary proceedings militate in favour of a fuller cost recovery by either side. Costs should ordinarily follow the event in cases of professional discipline.
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> **Submissions of Law Society, pp. 4-5**

[9] Counsel for the Law Society also made the following submissions in response to the question posed by the Panel as to whether the issue of costs should be dealt with in isolation from the penalty:

> 18. The Panel has asked for submissions on whether the Panel is entitled to look at the totality of Penalty plus Costs. That is, whether there is a connection between the two, such that costs may be lowered if the Penalty is higher, or a lower Penalty may give rise to an order for full recovery of costs.
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> 19. There is no, and ought not to be, any connection between the two.
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> **Law Society Submissions, p. 7**

[10] Counsel for the Respondent submitted that the issue of costs should not be considered in isolation from the penalty. He referred to the decision of the Court of Appeal in *Shpak v. Institute of Chartered Accountants of British Columbia* 2003 BCCA 149:

> In coming to these conclusions, I note that high levels of costs imposed by administrative tribunals exercising their disciplinary functions, may have a chilling effect on members who are charged with misconduct under their Constituting Act. Such members should not be deterred form defending

themselves by the spectre of prohibitive costs in the event they are unsuccessful. In my view, all members of the Institute have a shared interest in ensuring that their Act and Rules do not operate in a punitive manner. To the extent this means that all members must share the costs of ensuring that these proceedings are conducted according to law through the employment of panel counsel, the result is justifiable. (emphasis added)

Submissions of Respondent, p. 2

[11] I have concluded that the issue of costs must not be considered in isolation from the issue of penalty.

[12] Counsel for the Law Society submitted in paragraph 17 of its Reply Submissions on Costs that: " The Law Society is not seeking costs to penalize the member" . I accept that the purpose of the Law Society in seeking costs is not to penalize the Respondent, but the effect of any award of costs is, inevitably, an aspect penalty for the Respondent.

[13] In the *McNabb* case, the Panel found Mr. McNabb to be " fundamentally dishonest" , that he had provided " deceptive and misleading written explanations for his conduct" , and presented " contrived testimony" to the Panel. In awarding full costs recovery to the Law Society, the Panel recognized that there were precedents for caps on costs at a modest level but said, " we do not find that approach appropriate to the assessment of costs here" . (paragraph 91, underlining mine). I do not take that to mean that capping costs is no longer to be done in any case. The findings against Mr. McNabb were far more serious than the finding against the Respondent. Mr. McNabb was found to be deserving of the most severe of all penalties, disbarment. The Respondent was only found to be deserving of a reprimand. In Mr. McNabb's case it makes sense that the most severe award of costs, full recovery, would be awarded because it is in fitting with the whole of the penalty. In the Respondent's circumstances, full recovery is simply not fitting as it would result in a total burden on the Respondent disproportionate to the other aspects of the penalty, i.e., the reprimand and the fine.

[14] The overriding principle in all cases involving the issues of costs is that costs must be reasonable.

[15] In *McNabb* and *Ewachniuk* it was reasonable that lawyers deserving severe penalties would have substantial orders for costs made against them.

[16] In *Taschuk* [1999] LSBC 04, the majority held:

> 14. Another distinction may be found in Rule 5-9(1)(h) which allows a Panel to include as costs the reasonable fees and disbursements of counsel. This provision requires the Panel to determine, in each case, the reasonableness of the account presented to the Society by counsel and does not permit the Panel to merely adopt its legal bill as a cost item chargeable to the member, without due consideration. As the Saskatchewan Court of Appeal indicated in *Barik*, this power must be exercised reasonably and any such assessment is subject to judicial review on the basis of whether it is reasonable. *In certain cases, a full indemnity may be both appropriate and reasonable*. (italics mine)

I conclude that I am entitled to consider the reasonableness of the amount of costs as a whole and that I am not restricted to considering the reasonableness of the amount of time spent and the hourly rate charged.

[17] In both the *Shpak* case and in the case of *Roberts v. College of Dental Surgeons of British Columbia*, 1999 BCCA 103, the Court of Appeal concluded that it was an error in law for the chambers judges not to have considered the reasonableness of the Bill of Costs presented. Since I clearly have

jurisdiction to consider reasonableness of costs in the broad sense I conclude that it would be wrong for me not to do so.

[18] In proceeding to assess the appropriate amounts of costs I proceed on the basis that:

(a) the allegation against the Respondent by the Law Society was completely proper and well-founded;

(b) the time spent by the Law Society counsel and the hourly rates charged were not unreasonable;

(c) there was no waste of panel time by either party;

(d) the Law Society was completely successful. Success was not divided.

[19] In all of the circumstances of this case, I conclude that it would be appropriate for me to order that the Respondent pay the following costs pursuant to Rule 5-9 of the Law Society Rules:

(a)	5-9(1)(e) and (f) court reporters fees and transcript costs	$2,757.40
(b)	5-9(1)(g) panel fees of $750/day	$2,250.00
(c)	5-9(1)(h) disbursements of counsel including GST	$ 100.00
TOTAL:	$5,107.40	

[20] My conclusion is not to be interpreted as in any way suggesting that counsel fees are not an appropriate part of an award of costs. In some cases they certainly are, but in this case I find that the result of awarding them would make the total amounts of costs disproportionately high.

[21] It is of great importance to the public of British Columbia that incidents of professional misconduct by lawyers should be thoroughly investigated and vigorously prosecuted by the Law Society. This costs money. In many cases the money must come from blameless members of the profession, but it is money well spent if it achieves the goals of protection of the public and fairness to the individual lawyer.

[22] The public interest is always the primary consideration, but it is not automatically served by full cost recovery. If the costs are too onerous, members may be more reluctant to report misconduct of others. By insuring that costs are kept predictable, reasonable and proportionate to the level of misconduct, we insure that members will admit guilt in appropriate circumstances, but will not suffer the " chilling effect" in which they feel they cannot risk the costs of defending themselves even when there may be legitimate questions as to whether the conduct is unprofessional or unbecoming.

[23] Obviously early admissions of guilt by a member is in the public's best interest.

[24] Less obvious is the concept that only by having cases in which the issue of whether conduct is unprofessional or unbecoming is vigorously argued, can the law develop. The development of a body of precedents is in the public's best interest because it will, in the long run, make the disciplinary work of the Law Society more efficient.

Conclusion

[25] The Panel orders that the Respondent:

a) be reprimanded;

b) be fined $2,000; and

c) pay costs in the amount of $5,107.40.

[26] If counsel cannot reach agreement with respect to time to pay, they may appear before me to make submissions.