2015 LSBC 10
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THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

PETER KROGH JENSEN

RESPONDENT

DECISION OF THE HEARING PANEL
ON DISCIPLINARY ACTION

Hearing date:	January 23, 2015
Panel:	Kenneth Walker, QC, Chair John Hogg, QC, Lawyer Thelma Siglos, Public representative
Discipline Counsel:	Mark Skwarok
Counsel for the Respondent:	Ritchie Clark, QC

BACKGROUND

[1] We have earlier found that Peter Krogh Jensen failed to provide the caution to BF and DF that he was not protecting their interests in a share transaction. The caution then required was contained in Chapter 4, Rule 1 of the *Professional Conduct Handbook.* (This rule has been replaced by the *BC Code* but the "old" rule applies to these facts.)

[2] The rule is produced here:

> Chapter 4, Rule 1 of the *Professional Conduct Handbook*
>
> Dealing with unrepresented persons

1. A lawyer acting for a client in a matter in which there is an unrepresented person must advise that client and unrepresented person that the latter's interests are not being protected by the lawyer.

[3] This rule was replaced in the new *BC Code* at 7.2-9. We place the new rule here so that lawyers will not err by believing that only a caution is necessary after the *BC Code* was adopted. As was clear in our reasons, we considered only the caution in the *Professional Conduct Handbook*. However for completeness we have included the *BC Code*, which now governs such transactions. It reads:

> **7.2-9** When a lawyer deals on a client's behalf with an unrepresented person, the lawyer must:
>
> (a) urge the unrepresented person to obtain independent legal representation;
>
> (b) take care to see that the unrepresented person is not proceeding under the impression that his or her interests will be protected by the lawyer; and
>
> (c) make it clear to the unrepresented person that the lawyer is acting exclusively in the interests of the client.

[4] These reasons on disciplinary action deserve a short summary of the facts. The facts and determination contain all the relevant facts. The transaction that caused the difficulty was a $200,000 purchase of shares by BF from JN. BF and DF deposited this sum into the trust account of Peter Jensen. Mr. Jensen was known to act for JN. Mr. Jensen failed to caution BF and/or DF that he, Peter Jensen, was not representing their interests at the time of the share purchase or deposit of the funds. We found that BF knew that Mr. Jensen was not her lawyer but that she also believed that the money deposited into the trust account would be protected. As pointed out in our earlier reasons, Mr. Jensen ought to have made the caution. Had the purchase agreement proceeded, Mr. Jensen would have included his normal language confirming that he, the lawyer, was not representing BF or DF in the transaction, but the agreement was never drafted. However, the caution never occurred, the money was transferred from the trust account to JN and BF, and DF complained.

POSITION OF THE PARTIES

[5] The Law Society seeks a fine in the range of $5,000 to $10,000. They also seek costs in the amount of $28,000 plus disbursements in the amount of $9,514.89.

[6] Mr. Jensen seeks a reprimand, no fine and suggests that we could consider the tariff of costs, but reduce the costs in some amount reasonable to us.

ANALYSIS

[7] We are guided by the decision in *Law Society of BC v. Ogilvie*, [1999] LSBC 17, and the factors mentioned:

(a) The nature and gravity of the conduct proven

We find the conduct had potentially serious consequences, but we discuss this later. This is not minor conduct.

(b) The age and experience of the respondent

We find that the respondent is a senior, experienced lawyer very knowledgeable in this practice area.

(c) The previous character of the respondent including details of prior discipline

The Respondent has no prior discipline history. The Law Society and the Respondent agree that the Respondent has an exemplary background. The Respondent filed with us a book of 13 character references that confirm he is a man who is a leader among lawyers. He is a model for young lawyers. We refer to only one reference, but all were helpful. All confirmed he is an outstanding lawyer with strong ethics. Rose Low, an educator, counsellor and holder of a Master's Degree wrote:

> There seems to be a view of cynicism and distrust of lawyers. I have to admit that I have a tendency to be persuaded to that perspective. Peter Jensen has consistently demonstrated to me and to others who have come into contact with him the noblest aspect of being a lawyer. He is a person of integrity and compassion that he brings into his law practice. He is a unique lawyer who is not only skilled, but truly cares about people and the consequences of their actions; as well as his own. He has the ability to quietly and respectfully, without judgment, allow for differing points of views and decision making; and to respectfully offer information, advice, or another perspective to generate further thinking and problem solving.

> Peter is both a holistic thinker and a humanitarian. He is a consummate crusader for what is fair and right. ...

This is but one example of the letters of reference. All letters support our conclusion that the conduct in this case was out of the ordinary. However, the circumstances in this case were not ordinary either.

(d) The impact upon the victim

This is an interesting factor. Here BF and DF were convinced that this share purchase transaction with JN was in their interest. JN was motivated apparently by his friendship with BF and DF. He was selling the shares at a 50 per cent discount. In other words, if the transaction proceeded quickly, BF would have had a profit of $200,000 in a very short time. From the point of view of BF, not only did they not receive the profit, they are still in litigation concerning the original money $200,000. Counsel for the Respondent suggests the loss is at the foot of BF and DF and does not arise from the lack of a caution. His view is that, even if the caution had been given, the transaction would have proceeded, driven by the monetary considerations. This is a difficult factor to assess. We find that, had the caution been given as it should have been given, by a reasonable careful lawyer, there was the potential that BF and DF could have taken a step back realizing that the Respondent was not going to protect their interests if this money was deposited into his trust account. We have earlier heard the evidence and considered that the Respondent had said "enough," but not a caution, to make BF and DF cautious. As stated in the decision on Facts and Determination, what was said was not what was required. It is hard now to conclude that BF and DF would or would not have proceeded with the transaction had the caution been given. We conclude that, had the caution been given, it had the potential to prevent this loss and avoid this impact on BF and DF.

(e) The advantage gained, or to be gained, by the respondent

The Respondent acted on behalf of JN. He had a general retainer. JN gained in this transaction. The Respondent did not financially gain nor was any advantage gained. There was no personal or commercial advantage involved in this transaction. We find the Respondent was motivated to "help" BF and DF as friends of lawyers sometimes do. We have earlier commented that, when assisting friends, this requires more caution not less.

(f) The number of times the offending conduct occurred

It occurred once. This is not a factor.

(g) Whether the respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or absence of mitigating circumstances

The Respondent has consistently believed he made no error and what occurred did not amount to not professional misconduct. He is entitled to such belief. We came to a different conclusion. Although Mr. Jensen was obdurate and single minded, it was his belief. In these circumstances we do not consider this an aggravating factor. Sometimes there is a need for a hearing. In other words, the case was no so clear that the lawyer should be sanctioned for defending the citation.

(h) The possibility of remediating or rehabilitating the respondent

As stated earlier the Respondent is an exemplary lawyer who erred. Rehabilitation is not a factor here either.

(i) The impact upon the respondent of criminal or other sanctions or penalties

This is not a factor. However, we will discuss costs and their application in this case.

(j) The impact of the proposed penalty on the respondent

The amount of costs and penalty has been considered by us. The Respondent is a successful lawyer. We recognize the payment of costs will have a significant effect on the Respondent.

(k) The need for specific or general deterrence

The Respondent needs no deterrence. He is aware of the caution and normally uses it. However, lawyers need to be reminded of the importance of the cautions and its importance to self-represented individuals.

(l) The need to ensure the public's confidence in the integrity of the profession

Of all the factors, we believe this to be the most important factor. The public needs to know that lawyers do not act for everyone. They need to know that if a lawyer is not protecting their interest that caution will be given and clearly given.

(m) The range of penalties in similar cases

In *Law Society of BC v. Ebrahim*, 2010 LSBC 14, the fine was $3,000 and costs of $1,500 for a total of $4,500.

Law Society of BC v. Skogstad, 2009 LSBC 16, there were many deposits with about one million dollars involved. This was a scam case and is different from this case. In *Skogstad*, he received a three-month suspension and $20,000 in costs. The Law Society agrees *Skogstad* is not the same as these facts.

Law Society of BC v. Evans, 2001 LSBC 27, is a strange case and not helpful to us.

Law Society of BC v. Hops, 1999 LSBC 29, is the closest case in facts. The amount involved was more ($300,000). The bond received by the client was worthless. The review panel set the fine at $3,000 and costs at $3,000 for a total of $6,000. We note the case is 15 years old.

Cases from other Provinces were given to us for consideration:

(a) *Law Society of Alberta v. Taylor*, 2010 ABLS 28, [2010], LSDD No. 189. The amount involved was $100,000. The money was not recovered. It was a caution case. He received a fine of $10,000 and ordered to pay 2/3 costs actually incurred.

(b) *Law Society of Alberta v. Damm*, 2009 ABLS 20, [2009] LSDD No. 177. The amount involved was $50,000 and no written caution was given. A reprimand and costs of $1,500 were awarded.

(c) *Law Society of Manitoba v. Cherrett*, 2001 MBLS 3, [2001] LSDD No. 15. The lawyer failed to advise the shareholders that he acted only for the principals and not for the new shareholders. The panel ordered a fine of $3,000 and costs of $2,500 for a total of $5,500.

(d) *Law Society of Upper Canada v. Novak*, [1999] LSDD No. 88. The amount involved was $50,000. There was a finding that the

complainant would have proceeded with the transaction even if a caution had been given. The panel ordered a reprimand and a fine of $2,000.

[8] Costs are an important factor in this case. They are sizeable. There was disagreement on item 5, item 12 and item 14 of the costs as presented.

[9] We think the application to the Discipline Committee to rescind the citation is not a proper item for taxation on this hearing. We view that item to be part of the investigation and not an item for taxation. We are cognizant that we must consider the tariff of costs but continue to have residual discretion.

[10] 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.

[11] We find no bad conduct by either side. Sometimes cases need to be heard. Using our discretion, we set costs, including disbursements at $30,000.

[12] The maximum fine at the time of this conduct was $20,000.

[13] In result we conclude these circumstances require a reprimand, payment of a fine of $2,000 and costs of $30,000. The fine and costs must be paid on or before November 30, 2015.