

2018 LSBC 12  
Decision issued: April 18, 2018  
Citation issued: May 5, 2016

**THE LAW SOCIETY OF BRITISH COLUMBIA**

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

**and a hearing concerning**

**LAWYER 17**

**RESPONDENT**

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**DECISION OF THE HEARING PANEL  
ON COSTS**

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Hearing date: February 6, 2018

Panel: Philip A. Riddell, Chair  
Don Amos, Public representative  
Shona Moore, QC, Lawyer

Discipline Counsel: Carolyn Gulabsingh  
Counsel for the Respondent: Richard Gibbs, QC

- [1] Before us is an application by the Respondent for an order that the Law Society's costs payable to the Respondent be assessed in an amount higher than provided by the tariff in Schedule 4.

**BACKGROUND**

- [2] This Panel dismissed a citation issued May 5, 2016 ("Citation No. 2") alleging that the Respondent committed professional misconduct when he failed to comply with

an order of another hearing panel (“2016 Order”) by failing to provide all the emails, as ordered.

- [3] The factual background that gave rise to Citation No. 2 and our decision on Facts and Determination is set out in 2017 LSBC 10. There we concluded in paras. 81 to 85:

On the face of the 2016 Order, read in context with the whole of Decision No. 1, we conclude that the Law Society has not proved on a balance of probabilities that the Law Society’s request of May 13, 2015 included emails that solely resided on AB’s ABLaw account.

The Respondent made full disclosure of all emails under his control to the Law Society on February 9, 2016.

The Law Society’s case is not that the Law Society did not receive from the Respondent all emails to and from the firm within the time required, but rather that the Respondent breached the 2016 Order by failing to access and produce all emails residing on AB’s ABLaw account, an account over which the Respondent has never had control or access.

We disagree.

The 2016 Order did not require the Respondent to provide to the Law Society emails that were not within his control. He did not control the ABLaw account, and the 2016 Order neither implicitly nor explicitly included the ABLaw account.

- [4] In our decision, we advised the parties that, if they were unable to agree on costs, they may make written submissions to this Panel within 30 days of the decision.
- [5] In fact, the Respondent made no proposal to the Law Society on the costs issues. Rather, the Respondent asked the Panel to convene a one-day hearing to address costs. We declined to order a hearing at that time and, instead, directed the parties to make written submissions.
- [6] After reviewing the written submissions, we issued a written decision 2017 LSBC 33 on the application for an oral hearing on costs. There we recorded the positions of the parties:

- [5] In his written submission, the Respondent suggests that the Panel make an order for special costs of about \$50,000 as “... [t]here are important costs issues to be determined.” The Respondent has not

provided us with a clear basis, either for his claim that special costs should be awarded against the Law Society in this case or for his submission that \$50,000 would be reasonable and appropriate in the circumstances of this case.

[6] Law Society counsel submits that the Tariff should be referred to, but as it was an atypical summary hearing, the Tariff should be applied as if it were a regular hearing.

[7] The Respondent, in his submission of July 31, 2017, states that he does not intend to call *viva voce* evidence on the issue of costs, subject to the proviso that it is unknown to him if the Law Society wishes to call *viva voce* evidence. In the Law Society submission of August 4, 2017 there was no indication that the Law Society intends to call *viva voce* evidence.

...

[9] When looking at an award for special costs one of the issues to be considered is the level of indemnity that is appropriate.

[10] The hearing of the citation consumed one and one-half days. It was a summary proceeding. The Respondent now asks that two hearing days be scheduled on the costs issue. The first day of the hearing to determine the issue of his entitlement to “special costs” and the second day to determine the quantum of costs be they “special” or tariff costs.

[7] We ordered a one-day oral hearing to deal with the Respondent’s entitlement to “special costs” and the quantum of costs. We described the issues to be addressed at the hearing in this way at paragraph 12:

...

(a) Whether an order for costs above the tariff is reasonable and appropriate in all of the circumstances; and,

(b) If so, the quantum of costs that should be ordered.

[8] At the hearing, counsel for the Respondent tendered documentary evidence and gave brief oral evidence in support of the Respondent’s claim for “special costs” in the amount of \$50,000, being the amount of counsel’s *quantum meruit* fee tendered to the Respondent.

## POSITION OF THE PARTIES ON COSTS

[9] The Respondent and the Law Society agree that, although Citation No. 2 was heard by summary procedure under Rule 4-33, costs should not be assessed on the tariff that applies to summary proceedings as this was not a typical summary proceeding, but rather one that required a one and a half day hearing, oral evidence from the Respondent and AB, and consideration of extensive documentary evidence.

[10] Our authority to order costs pursuant to Section 46 of the *Legal Profession Act* is set out in Rule 5-11 of the Law Society Rules that provides, in part:

...

- (3) Subject to subrule (4), the panel or review board must have regard to the tariff of costs in Schedule 4 to these Rules in calculating the costs payable by an applicant, a respondent or the Society.
- (4) A panel or review board may order that the Society, an applicant or a respondent recover no costs or costs in an amount other than that permitted by the tariff in Schedule 4 if, in the judgment of the panel or review board, it is reasonable and appropriate to so order.
- (5) The cost of disbursements that are reasonably incurred may be added to costs payable under this Rule.
- (6) In the tariff in Schedule 4,
  - (a) one day of hearing includes a day in which the hearing or proceeding takes 2 and one-half hours or more, and
  - (b) for a day that includes less than 2 and one-half hours of hearing, one-half the number of units applies.

[11] The parties also agree that we may award costs in an amount in excess of the tariff if we determine that it is “reasonable and appropriate” to do so.

### **The Respondent**

[12] The Respondent says that it is “reasonable and appropriate” to order costs above the tariff that would have applied had the matter not proceeded as a summary hearing and asks us to award costs in the amount of \$50,000 plus disbursements.

- [13] The Respondent submits that special costs in that amount are reasonable and appropriate for reasons which include:
- (a) the extent of counsel's preparation necessary to prepare a successful defence;
  - (b) the requirement that counsel review and assess the details of the "LC" file, the complaint that came out of that file leading to the original order for disclosure;
  - (c) counsel's review and assessment of a considerable volume of email records;
  - (d) counsel's interview and other meetings with AB and the Respondent to prepare their evidence; and,
  - (e) all other steps necessary to prepare for the hearing.
- [14] In addition to these steps necessary to prepare for the hearing itself, the Respondent says that research and preparing the submissions on costs required considerable research in light of the dearth of authorities that might guide this Panel on assessing costs in light of the tariff introduced in 2013.
- [15] The Respondent submits that he is entitled to compensation for the actual costs that the Law Society has cost him and the drain the citation, hearings and written submissions has had on the Respondent's energy and emotional health.
- [16] The Respondent also suggests that special costs are necessary in this case because of the capricious way in which the Law Society proceeded subsequent to the February 1, 2016 hearing and the issuance of the 2016 Order issued on April 1, 2016. On this point, the Respondent emphasizes that there is no evidence before us that the Law Society investigated whether or not the Respondent had, in fact, complied with the 2016 Order before issuing the citation alleging his non-compliance.
- [17] The Respondent also asks us to have regard to our finding of fact in paragraph 85 of our Decision on Facts and Determination:

The 2016 Order did not require the Respondent to provide the Law Society emails that were not within his control. He did not control the ABLaw account, and the 2016 Order neither implicitly nor explicitly including the ABLaw account.

[18] In his written submission, counsel for the Respondent argues:

There is no evidence whatsoever that anyone at the Law Society paused to question whether [the Respondent] might be correct in asserting that he had complied with the May 13, 2015, requests enforced by the April 1, 2016, order. Beginning the 2<sup>nd</sup> citation so precipitously, without any serious reflection or investigation, is itself conduct worthy of reproof and rebuke by this judicial arm of the benchers, this hearing panel.

[19] Finally, the Respondent says that it was reckless for the Law Society to continue with its prosecution of the citation after hearing the sworn evidence of the Respondent and AB at the hearing on September 12, 2016.

[20] The Respondent invites us to be guided by the principles established in the civil courts for the assessment of special costs. In particular, the Respondent advanced the proposition that the Law Society's prosecution of Citation No. 2, in the circumstances of this case, was akin to an unsuccessful attack on a lawyer's reputation that ought to attract special costs on the principles reviewed in *Grewal v. Grewal*, 2009 BCSC 376, and *Interstate Investment Ltd. v. Pacific International Securities* (1995), 10 BCLR (3d) 265, 1995 CanLII 2123 (SC).

[21] Further, the Respondent submits the prosecutorial arm of the Law Society must be held to the same standards of conduct required of Crown counsel, which includes a continuing duty to assess "and reassess whether any particular prosecution meets the standard of a reasonable likelihood of conviction." He submits that the Law Society's conduct in this case fell short of that standard. (Respondent Submission, June 20, 2017 at paragraph 57.)

[22] In the alternative, and if we decline to order special costs, the Respondent nevertheless urges us to award costs in excess of the tariff as the tariff does not adequately compensate a Respondent who has been forced to defend a citation and does so successfully.

### **The Law Society**

[23] As noted earlier, the Law Society concedes that costs based on a summary hearing proceeding may not be appropriate in this case and invites us to award costs as calculated under the tariff as if the citation had not proceeded under Rule 4-33. It suggests an award of \$6,600 plus reasonable disbursements would be appropriate.

[24] The Law Society says that there is no proper basis for an award of "special costs".

- [25] The Law Society submits that there were reasonable grounds to issue Citation No. 2 on the basis of its understanding of the scope of the 2016 Order. Further, the Law Society says that the role of the Law Society cannot be equated with a lawyer's impugning another lawyer's integrity during the course of civil or criminal proceedings. A citation is not analogous to a lawyer's attack on another lawyer's reputation. Rather, it is a proper exercise of the Law Society's statutory mandate set out in section 3 of the *Legal Profession Act* to ensure the integrity and honesty of lawyers and the regulation of their profession.
- [26] With respect to the Respondent's submission that special costs are warranted because of the nature and degree of the research and preparation of written submissions described by the Respondent's counsel, the Law Society urges us to conclude that a requirement to prepare written submissions for proceedings before a hearing panel, including on the issue of costs, is not exceptional and should not be a factor that attracts special costs. The Law Society reminds us that a hearing on costs was required, at least in part, because of the Respondent's counsel's failure to make any proposal on costs, which may have permitted a settlement on this issue or a narrowing of the issues.

## DECISION

- [27] After considering the written and oral submissions of the parties, this Panel concludes that an award of costs higher than that contemplated by the tariff is appropriate in this case. Having said that, we are not prepared to order costs based on the *quantum meruit* account tendered to the Respondent.
- [28] We agree that a strict application of the tariff is not appropriate in this case. The hearing of this citation required a proceeding that went well beyond what is usual in a summary hearing.
- [29] As detailed in our decision on Facts and Determination, the factual matters before us were somewhat complex. There was an honest difference between the Law Society and the Respondent as to the scope of the 2016 Order. A defence of this citation required the parties and this Panel to review and consider a significant amount of detailed evidence, particularly with respect to the nature of the various email accounts at issue in this proceeding.
- [30] In the specific circumstances of this case, we are satisfied that an order for costs based on the tariff that would have applied had this proceeding not gone by way of Summary Hearing would also not be reasonable or appropriate.

- [31] We are not, however, prepared to order “special costs” on the basis sought by the Respondent. In the case before us, we are not satisfied that the conduct of the Law Society was such as to require rebuke or reproof.
- [32] Having regard to the length of the hearing, the numbers of written submissions requested by the Hearing Panel and the factual complexity of the case, we conclude that costs in the amount of \$10,000 plus reasonable disbursements is reasonable and appropriate in all of the circumstances.