

# Law Society's misguided prosecution drives stern rebuke and adverse costs award

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## Introduction

On January 20 2017 the Law Society Tribunal Appeal Division finally released its decision on the appeal of the costs award in *LSUC v Beth DeMerchant*, (1) and ordered the Law Society of Upper Canada – the professional regulator for lawyers in Ontario – to pay C\$1.3 million in costs to the two lawyers, who were cleared of conflict of interest allegations in relation to their work for various Hollinger entities. The costs appeal itself was held on December 9 2015. The wait exceeded a year due to the desire of the appeal panel to review the transcript of the 138 day-long hearing, given that the costs appeal was focused on the manner in which the hearing was conducted.

This decision will affect both the Law Society's approach to professional misconduct hearings and the Law Society Tribunal's approach to costs. However, perhaps the most interesting part of the decision was the appeal panel's comments about prosecutorial discretion and proportionality in professional disciplinary proceedings. These comments should be reviewed by counsel appearing before other professional disciplinary bodies in Ontario.

## Facts

The Law Society initiated an investigation into the two lawyers in December 2005. In November 2008, after an investigation by Law Society staff, the Law Society's Proceedings Authorisation Committee (PAC) authorised the commencement of a conduct proceeding and hearing against the lawyers based on allegations of conflict of interest. The allegations asserting that the lawyers had acted in a conflict of interest contrary to the Rules of Professional Conduct governing lawyers were dismissed against the lawyers after a hearing which spanned 138 days over three years and was unsuccessfully appealed by the Law Society in 2014.

Under Rule 25.01(1)(a) of the Law Society's Hearing Division Rules of Practice and Procedure, the Law Society can be required to pay costs in conduct proceedings only where:

- the proceeding was unwarranted and should not have been brought; or
- the Law Society "caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default". (2)

## Decision on costs at first instance

The panel at first instance awarded a total of C\$250,000 in costs to each of the lawyers. It held that while the proceeding was not unwarranted at the beginning, the proceeding became unwarranted

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after the lawyers' expert witnesses gave evidence that the lawyers were following standard practice among the corporate bar and the Law Society failed to call expert evidence to contradict that evidence. The panel reasoned that 30% of the hearing time occurred after the point at which the hearing became unwarranted and, as a consequence, awarded each lawyer 30% of their costs on a partial indemnity basis.

The panel at first instance did not analyse the Law Society's conduct under the second branch of the costs test, on the basis that those factors were considered as part of the analysis leading to the finding that the proceeding became unwarranted.

### **Decision on costs by appeal panel**

The appeal panel began by explaining the key values that inform the interpretation of the costs test:

- the protection of the public interest;
- prosecutorial discretion; and
- proportionality.

On the issue of public interest, the appeal panel noted that those who make decisions about prosecutions must be focused primarily on the public interest and not be hampered by concerns about costs awards. At the same time, however, the public interest is also concerned with fairness and justice to the licensee, which includes an interest in timely and proportionate proceedings.

The appeal panel noted the "considerable discretion" **(3)** given to the Law Society in commencing and prosecuting disciplinary matters. Prosecutorial discretion is exercised by the PAC, which must have reasonable grounds for believing that a licensee has contravened the Law Society Act **(4)** and Rules of Professional Conduct before authorising the commencement of a conduct proceeding and hearing. The appeal panel noted that the PAC has "a wide berth to make decisions", but this "does not mean unlimited power, free from scrutiny". **(5)**

Regarding proportionality, the appeal panel noted that Law Society disciplinary proceedings must be concluded in a timely matter and the process and costs involved must be proportionate to the issues at stake. While all parties are responsible for ensuring proportionality, the Law Society's obligation to act in the public interest gives it a particular responsibility to advocate for and ensure that proportionality is achieved.

### **Conduct proceeding warranted at the outset**

Under the first branch of the costs test, the appeal panel agreed that the proceeding was not unwarranted at the outset. There is a high threshold for finding that a proceeding is 'unwarranted', which requires establishing that either the proceeding was brought for reasons other than fulfilling the Law Society's public interest mandate or the proceeding was doomed to fail. The appeal panel held that, as the legal test for a conflict of interest was unclear at the material time and the fact situation itself was complex, the PAC was warranted in deciding that the central issues of fact and law should be decided by a hearing panel following the commencement of a conduct proceeding.

However, the appeal panel held that it was an error for the hearing panel to find that the proceeding was warranted at the outset based on the opinion of a forensic accountant that there may have been a conflict of interest, as the existence of a conflict of interest is a legal issue on which an accountant's views are not determinative. In addition, the appeal panel held that concerns about how the hearing was carried out by the Law Society were more appropriately considered under the second branch of the costs test.

### **Law Society's unreasonable conduct**

The appeal panel conducted its own analysis of the second branch of the costs test and based its award of costs on its findings under this branch.

Under the second branch of the costs test, the licensee must show that the Law Society has caused costs to be incurred unreasonably or wasted through its own fault. This is again a high threshold,

which requires that the Law Society has taken procedural steps and pursued the proceeding in a manner falling "outside the bounds of reasonableness". (6) The appeal panel found that the lawyers had met this test. (7)

The appeal panel determined that the Law Society should have focused on proving the legal elements of the test for a conflict of interest. Instead, the Law Society engaged in an analysis of how it alleged the work performed by the lawyers relating to the various Hollinger entities should have been done, which was presented entirely through cross-examination without expert evidence of standards of practice or applicable legal theory. The lawyers did not waiver under cross-examination by external counsel retained by the Law Society.

This approach to the hearing by the Law Society led to serious issues with proportionality of the proceedings, having regard to the allegations against the lawyers. The appeal panel noted that if the conflict of interest allegations were ultimately proven, in all likelihood this would have resulted in no more than a short suspension for the lawyers.

The appeal panel found that had the Law Society properly focused on the key issues, the hearing would have taken no more than 25 days. Therefore, the lawyers were each awarded costs of C\$650,000, representing approximately 110 wasted hearing days based on 17 hours of billable time per hearing day (ie, seven hours for the actual hearing and 10 hours of research time per day at an hourly rate of C\$350), including the costs associated with attending and preparing for those wasted days.

The appeal panel also awarded costs of the appeal in the amount of C\$17,500, as although the appeal was not warranted, it was made more complicated by the "unnecessarily voluminous factual record and transcripts". (8)

## Conclusion

This unprecedentedly significant cost award was driven by both the length of the proceeding and its lack of focus. While these facts are unlikely to recur, the principles underlying the appeal panel's award of costs should be borne in mind by counsel appearing before professional disciplinary tribunals which provide for costs awards against the regulator.

As of the date of publication, the Law Society has not yet indicated whether it plans to appeal this decision.

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## Endnotes

(1) 2017 ONLSAT 5 [*DeMerchant*].

(2) Amended June 25 2009, available [here](#).

(3) *DeMerchant*, at para 18.

(4) RSO 1990, c L8.

(5) *DeMerchant*, at para 24.

(6) *DeMerchant*, at para 35.

(7) *DeMerchant*, at para 78.

(8) *DeMerchant*, at para 111.

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