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Alberta's Top Court Re-Writes Rules for Costs Orders in Professional Discipline

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The Alberta Court of Appeal has significantly changed the approach to costs order in professional discipline cases. In *Jinnah v Alberta Dental Association and College, 2022 ABCA 336*, the Court set aside an order for a dentist to pay \$37,500 in investigation and hearing costs¹ and referred the issue back to be reconsidered using a new framework. The Court described a new “presumption” that “[t]he College should bear the costs associated with the privilege and responsibility of self-regulation unless a registrant has committed serious unprofessional conduct, is a serial offender, has failed to cooperate with investigators, or has engaged in hearing misconduct.”²

Background

The investigation and subsequent hearing stemmed from a dispute over the dentist's billing and collection practices. The Hearing Tribunal found the dentist to have committed unprofessional conduct and imposed sanctions. The Tribunal also ordered the dentist to pay \$50,000 in investigation and hearing costs. The *Health Professions Act* permitted the Tribunal to order the dentist to pay “all or part of the expenses of, costs of and fees related to the investigation or hearing or both...”³

The dentist appealed. The College's appeal panel varied the sanctions and reduced the costs order to \$37,500 but added 25% of the costs of appeal.⁴ The dentist appealed again to the Alberta Court of Appeal.

The Court of Appeal allowed the appeal in part. It upheld one finding of unprofessional conduct and a reprimand but overturned the other findings and sanctions. The issue of costs was remitted to the appeal panel for reconsideration in accordance with the new framework described by the Court.

The New Costs Framework

The Court of Appeal found the costs award in this case, involving one allegation, by a single patient, unrelated to patient care, and at the low end of the seriousness scale, was so large it became the primary sanction.⁵ The Court referenced its previous decision in *K.C. v. College of Physical Therapists of Alberta* and held that costs in professional discipline cases are discretionary and must be “reasonable”.⁶ They are intended to fully or partially indemnify the College for its investigation and hearing costs, but they should not be ordered in every case. They are not intended to be punitive.

awarding costs. Justice Knaflitz stated that a tribunal should first determine whether a costs award is warranted, keeping in mind the factors in *K.C.* including the registrant's success or failure, the seriousness of the charges, the conduct of the parties and the reasonableness of the amounts.⁹ Tribunals should then consider how to calculate the amount of any costs order including which expenses should be included and whether it should be the full or a partial amount. Tribunals should also consider whether the final amount is reasonable.¹⁰

In the present case, the Court of Appeal described a new "presumption" that no costs should be ordered in most cases, holding: "**the profession as a whole should bear the costs in most cases of unprofessional conduct**".¹¹ The Court listed several propositions that it said support this new presumption:

1. The presumption will force regulators to carefully evaluate their investigative and procedural options and select the best course of action while keeping in mind that the registrants as a whole will often ultimately bear the costs incurred.¹²
2. Registrants will know in advance the likely costs of an unsuccessful defence and will not need to plead guilty to avoid a burdensome costs order.¹³
3. Most members found guilty of unprofessional conduct will no longer be subject to a costs order, which, in effect, "levels the playing field" since the legislation does not allow registrants who successfully defend themselves to receive costs. The Court said that this "one-sided norm is of questionable merit".¹⁴
4. The Court suggested that, like other types of regulatory prosecutions, professional regulators engage in "selective enforcement", because only some cases are subject to professional discipline. The Court held it is important to ask whether it is fair to burden only offenders who happen to be prosecuted.¹⁵
5. The Court then concluded that this new presumption would have marginal, if any, impact on dentists' registration fees. The Court appears to have based this conclusion on its review of the College's annual reports, financial statements and the discipline decisions published on the College's website.¹⁶
6. The Court also said that this new presumption would be relatively easy to follow. It simplifies the process, saves time and money, and increases the likelihood the parties will be able to predict the ultimate outcome.¹⁷

How Should Alberta Regulators Approach Costs?

It remains to be seen whether *Jinnah* will be appealed to the Supreme Court of Canada. For now, the law in Alberta appears to be that significant costs should not be ordered against a registrant found guilty of unprofessional conduct without a **compelling reason**.¹⁸

The Court of Appeal set out four scenarios where it said that a compelling reason exists. Costs may be justified where a registrant has committed "serious" unprofessional conduct, is a serial offender, has failed to cooperate with investigators, or has engaged in hearing misconduct:

1. A member who engages in "serious" unprofessional conduct *must have known* their behaviour was unacceptable and unprofessional and can be ordered to pay "a substantial portion or all of" the costs. The Court gave four examples of serious unprofessional conduct: sexual assault of a patient; fraud on an insurer; practicing while suspended; or a marked departure from the ordinary standard of care.¹⁹
2. A serial offender who engages in unprofessional conduct on two or more occasions may also be ordered to pay "some" costs. The Court cautioned that registrants who have been sanctioned once should be extra vigilant in their practices to avoid a second sanction. The Court then offered that repeated offences that were not "serious" might justify something less than 25% of the costs.²⁰
3. A registrant who fails to cooperate with College investigators forces the regulator to expend more resources than necessary. They may justifiably be ordered to pay the costs of those additional expenditures.²¹
4. A registrant who engages in hearing misconduct, by unnecessarily prolonging the hearing or otherwise unjustifiably increasing the costs of prosecution may be ordered to completely or largely indemnify the College for those increased costs.²²

The Court of Appeal held that this new framework applies to all of the health professions regulated under the Alberta *Health Professions Act*.²³ The Court did not mention any other Alberta professions, but the *Health Professions Act* provisions at issue are very similar to those in many other regulatory statutes. The Court's reasoning in *Jinnah* is likely applicable to those other professions.

Takeaways

Regulators should carefully consider their approach to costs in professional discipline cases in light of *Jinnah*. Where the governing statute permits a tribunal to order investigation or hearing costs, regulators must consider whether a costs order would be justified

¹ Plus 25% of the costs of an internal appeal to the College's appeal panel

² *Jinnah v Alberta Dental Association and College*, 2022 ABCA 336 at para 21 ("Jinnah").

³ *Health Professions Act*, RSA 2000, c. H-7, s. 82(1)(j)

⁴ *Jinnah*, *supra* note 1 at paras 57, 61.

⁵ *Ibid*, at para 124.

⁶ *K.C. v College of Physical Therapists of Alberta*, 1999 ABCA 253 at para 94 ("KC"); See also *Health Professions Act*, *supra* at note 2, ss. 82(1)(j), 89(6).

⁷ *Alsaadi v Alberta College of Pharmacy*, 2021 ABCA 313

⁸ *Ibid* at para 93.

⁹ *KC*, *supra* note 4 at para 94.

¹⁰ *Ibid* at para. 120.

¹¹ *Jinnah*, *supra* note 1 at para 145-146.

¹² *Ibid*, at para 147.

¹³ *Ibid*, at para 148.

¹⁴ *Ibid*, at para 149.

¹⁵ *Ibid*, at para 150.

¹⁶ *Ibid*, at para 151.

¹⁷ *Ibid*, at para 152.

¹⁸ *Ibid*, at para 138.

¹⁹ *Ibid*, at para 141.

²⁰ *Ibid*, at para 142.

²¹ *Ibid*, at para 143.

²² *Ibid*, at para 144.

²³ *Ibid*, at para 140.

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Authors

Gregory Sim, Partner
gsim@fieldlaw.com

Zachary Bliss, Lawyer
zbliss@fieldlaw.com