Law Society Tribunal
Tribunal du Barreau

LAW SOCIETY TRIBUNAL
HEARING DIVISION

Citation: *Law Society of Ontario v. Bahimanga*, 2018 ONLSTH 60
Date: May 14, 2018
Tribunal File No.: LCN99/15

BETWEEN:

Law Society of Ontario

Applicant

- and -

Jacques James Bahimanga

Respondent

Before: Sophie Martel (chair), S. Margot Blight, Eva Krangle

Heard: February 27, 2018, in Toronto, Ontario

Appearances: Joshua Elcombe and Paul Le Vay, for the applicant
William Fuhgeh, for the respondent

REASONS FOR DECISION ON MOTIONS, PENALTY AND COSTS

[1] Sophie Martel (for the panel):– These are the panel's reasons in respect of two recusal motions brought by Mr. Bahimanga (the "Lawyer") and in respect of penalty and costs following our misconduct findings.

[2] The hearing in respect of the misconduct allegations proceeded in French, while the recusal motions and penalty hearing proceeded in English, at the Lawyer's request. These reasons are therefore being released in English.

RECUSAL MOTIONS

[3] The first recusal motion was argued on January 25, 2018. The Lawyer filed a motion record in advance of the penalty hearing seeking an Order that the panel recuse itself from continuing to hear this matter or, in the alternative, that panel member E. Krangle recuse herself from continuing to hear this matter.

[4] The second recusal motion occurred during the course of hearing evidence at the penalty hearing. The Lawyer sought an order seeking the recusal of the panel chair.

FIRST RECUSAL MOTION

Background

[5] The Law Society applied for an order that the Lawyer engaged in professional misconduct in respect of his representation of Client A and in respect of several Legal Aid certificates. The hearing on the merits was held on April 17, 18, 20, 21 and June 7, 2017. On September 27, 2017, the Tribunal released its decision, in which it found that many of the Law Society's allegations were proven and that the Licensee had engaged in misconduct: *Barreau du Haut-Canada c. Bahimanga*, 2017 ONLSTH 195.

[6] Prior to the scheduled penalty hearing, the Lawyer brought a motion for an order that the panel recuse itself or, in the alternative, that E. Krangle be recused. The Lawyer submits that panel member E. Krangle made a physical gesture that evinces her frustration with him and raises a reasonable apprehension of bias. He also submits that the panel's interferences during the hearing in respect of the misconduct allegations were excessive and one-sided against him. Finally, he submits that the physical gesture together with the panel's interferences demonstrate conscious or unconscious anti-black racism.

[7] The Law Society opposes the recusal motion.

Reasonable Apprehension of Bias

[8] There was no significant dispute regarding the applicable law on reasonable apprehension of bias. It was articulated by Grandpré J. in *Committee for Justice and Liberty et al. v. National Energy Board et al*., 1976 CanLII 2 (SCC):

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[9] The test was repeated in *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, [2015] 2 S.C.R. 282. The court further indicated at paras. 25 and 26:

> Because there is a strong presumption of judicial impartiality that is not easily displaced (*Cojocaru v. British Columbia Women's Hospital and Health Centre*, 2013 SCC 30, [2013] 2 S.C.R. 357, at para. 22), the test for a reasonable apprehension of bias requires a "real likelihood or probability of bias" and that a judge's individual comments during a trial not be seen in isolation: see *Arsenault-Cameron v. Prince Edward Island*, 1999 CanLII 641 (SCC), [1999] 3 S.C.R. 851, at para. 2; [*R. v.*] *S. (R.D.)* [[1997] 3 S.C.R. 484], at para. 134, per Cory J.
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> The inquiry into whether a decision-maker's conduct creates a reasonable apprehension of bias, as a result, is inherently contextual and fact-specific, and there is a correspondingly high burden of proving the claim on the party alleging bias: see *Wewaykum*, at para. 77; *S. (R.D.)*, at para. 114, per Cory J. As Cory J. observed in *S. (R.D.)*:
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> > . . . allegations of perceived judicial bias will generally not succeed unless the impugned conduct, taken in context, truly demonstrates a sound basis for perceiving that a particular determination has been made on the basis of prejudice or generalizations. One overriding principle that arises from these cases is that the impugned comments or other conduct must not be looked at in isolation. Rather it must be considered in the context of the circumstances, and in light of the whole proceeding. [Emphasis added; para. 141.]

April 20, 2017

[10] At approximately 3:29 p.m. on April 20, 2017, the third day of hearing, while the Lawyer was being cross-examined by the Law Society, the hearing was

interrupted when the Lawyer indicated:

> Une seconde. Je viens de constater que Mme Krangle faisait comme ça, comme si c'était… elle se tapait sur le front comme si je suis en train d'énerver le Tribunal. Je ne suis pas là pour vous énerver, madame.

[11] The panel subsequently decided to take a break. Upon returning to the hearing room, the panel addressed the Lawyer's comments and indicated:

> Je voudrais, d'abord, adresser les derniers commentaires de Me Bahimanga.
>
> Effectivement, un des membres de la formation a eu un moment de frustration. Mme Krangle, elle a une situation médicale dans sa famille cette semaine. Alors son niveau de patience n'est pas à son même niveau que d'habitude. Mais cela ne veut pas dire que nous ne sommes pas… que nous avons préjugé votre affaire, que nous ne sommes pas dédiées à ce que le processus soit… procède d'une façon objective et juste. Alors, nous sommes vraiment dédiées à ce que vous soyez entendu complètement.

[12] The hearing continued that day without further reference to this incident. The hearing was scheduled to continue the following day on April 21, 2017. Ms. Krangle was unable to attend due to the medical situation in her family. The remaining two panel members presented several options to the parties: adjourn until the three panelists were available, proceed before the remaining two panel members, or, proceed with the two panelists and provide a copy of the transcript of that day's hearing to the missing panelist. After speaking with Duty Counsel, the Lawyer opted to adjourn and proceed with the three panel members at a later date. The hearing continued before the three panel members on June 7, 2017, in the Lawyer's home town. On September 27, 2017, the panel issued its decision finding that most of the misconduct allegations were proven.

[13] Excluding the April 21, 2017 date, when the hearing was adjourned due to Ms. Krangle's absence, the hearing on the merits occurred over the course of four complete days. One of the panel members exhibited a moment of frustration on one occasion during the Law Society's cross-examination of the Lawyer, towards the end of the third day of hearing. While unfortunate, the gesture was isolated and occurred late in the day. It was a single incident. We agree with the Law Society's submission that an isolated expression of impatience or annoyance, by a decision-maker with counsel or a witness, does not of itself create unfairness or raise a reasonable apprehension of bias (see *Chippewas of Mnjikaning First Nation v. Chiefs of Ontario*, 2010 ONCA 47 at para. 243, *Kelly v. Palazzo* (2008), 89 O.R. (3d) 111, 2008 ONCA 82 (C.A.) at paras. 20-21, and *Yukon Francophone School Board*, above at para. 30).

[14] Furthermore, we also agree with the Law Society's submission that the Lawyer belatedly raised his motion for a reasonable apprehension of bias after the panel had issued its decision. For reasons related to the medical situation in her family, Ms. Krangle was unable to attend the scheduled hearing the day after the incident with the physical gesture. The remaining panel members presented the Lawyer with the option to proceed without Ms. Krangle but he chose not to do so. The Lawyer therefore had the opportunity to continue his hearing without Ms. Krangle, whom he now alleges was biased, and chose not do so. It was only after the panel released its decision on the misconduct findings that the Lawyer decided to bring his recusal motion. Having had the opportunity to proceed without Ms. Krangle on April 21, 2017 and the finding of misconduct having been made, it is too late to ask that she recuse herself. Parties against whom alleged bias is directed cannot be permitted to leave the bias unchallenged and continue with the hearing, secure in the knowledge that they can apply to have the result nullified should it go against them: *R. v. Curragh Inc.*, [1997] 1 S.C.R. 537 at paras. 108 and 113.

Panel Interventions

[15] The Lawyer submits that the panel chair overly interfered in his examination-in-chief and that the panel applied a double standard in respect of its interferences regarding opinion evidence.

[16] As a whole, the panel's interventions during the testimony of all of the witnesses were quite limited, as the transcripts show. The panel generally limited its intervention to ensuring it understood the evidence and keeping the evidence relevant to the issues before it.

[17] The Lawyer's main contention centres on the panel's comments about opinion evidence from non-expert witnesses. The Lawyer alleges that the panel applied a double standard. Contrary to what appears to be the Lawyer's understanding of the law regarding opinion evidence, it does not extend to evidence about one's own perceptions and feelings. The opinion evidence rule accordingly was no bar to Client A's testimony about the effect of the Lawyer's actions and omissions on her. The Law Society objected when the Lawyer asked Client A if he had prepared her well for her hearing before the Immigration and Review Board ("IRB"). The panel chair agreed with the Law Society that the Lawyer was asking for opinion evidence but made suggestions as to how the Lawyer could rephrase his inquiry:

> It is opinion evidence, but you can rephrase your questions if you want to ask the questions about what you were saying in terms of time spent preparing, but you can't ask her for an opinion as to whether you prepared her well.
>
> …

> You can ask her if she was satisfied with the level of service you had given her at the point. I think you asked those questions earlier and the answer was, I believe, there weren't any complaints up until after the hearing.[1]

[18] The Lawyer submits that the panel intervened when he provided opinion evidence but failed to do so when the Law Society's witness, Ms. Griffiths, did so. We disagree with this submission. There was no double standard and the panel intervened both when the Lawyer or Ms. Griffiths were either asked a question asking for an opinion or were about to provide opinion evidence.

[19] During the course of the Lawyer's cross-examination of Ms. Griffiths, he asked for her view of his electronic billing in respect of the young offender account, and whether it was seen as an intentional kind of fraudulent billing of Legal Aid. The chair interrupted and asked the Lawyer if he was asking for a legal conclusion. The Law Society then objected on that basis and also on the basis that this witness had already answered the question in respect of her investigation findings. The chair ultimately advised the Lawyer that he had to limit his questions to the irregularities Ms. Griffiths found during the course of her investigation. The chair further advised the Lawyer that this did not prevent him from making submissions in his closing arguments about the conclusions the panel should make about his Legal Aid billings. Of note is that it was the Lawyer who was asking for opinion evidence – not the Law Society. The panel intervened to assist the Lawyer regarding what he could properly ask Ms. Griffiths in respect of her investigation.[2]

[20] The Lawyer also referenced one of the questions the panel asked Ms. Griffiths. The panel chair asked Ms. Griffiths if Legal Aid would be concerned about a lawyer contracting privately with a client once Legal Aid made a decision refusing a further legal aid certificate. The panel specifically stated that it was not asking for a legal opinion [as to whether such was permitted by the legislation] but rather, whether Legal Aid itself would be concerned about such a situation.[3] As submitted by the Law Society, ultimately, whether the Lawyer contravened s. 95 of the *Legal Aid Services Act, 1998*, SO 1998, c. 26, and the *Rules of Professional Conduct* was a decision the panel had to make.

[21] Finally, the panel intervened when the Lawyer was giving his evidence in-chief. The Lawyer was then addressing the issue of the late-filed submissions in respect of Client A's IRB case. He testified that the IRB never sent him or his client a letter advising that it was still waiting for his submissions. He indicated that the IRB's decision to release its ruling without advising the client that it had not received submissions from her lawyer was against the principles of natural

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[1] Excerpt of Proceedings, April 17, 2017, at pages 74-75.
[2] Excerpt of Proceedings, April 18, 2017, at pages 145-146.
[3] Excerpt of Proceedings, April 18, 2017, at pages 158-159.

justice. At this point, the chair interrupted and advised the Lawyer that he was speaking as a witness but yet at the same time providing many of his submissions. The chair indicated that it was somewhat understandable because the Lawyer was self-represented and that it was at times difficult to differentiate between evidence and submissions. She asked him to try, as much as possible, to provide testimony and to leave his arguments to submissions. This interruption was made in a non-confrontational manner to simply remind the Lawyer to provide testimony when testifying and to leave his arguments for final submissions. The Lawyer in effect agreed that the chair should stop him if he was entering into his submissions.[4]

[22] In summary, the Panel did not adopt a double standard but rather intervened whenever a witness, whether called by the Law Society or the Lawyer, was asked or was about to provide opinion evidence.

Racial Bias

[23] The Lawyer submits that the panel member's physical gesture, together with the panel's interventions, amount to an outburst of conscious or unconscious anti-black racial bias. The Lawyer submits that one can infer racism from the gesture, made by a white panel member, in a hearing of three white panel members.

[24] The Lawyer's subjective belief, however strongly held, is not sufficient to support an allegation of racial bias. While we agree that direct evidence of racism is not necessary and that racism can be proved by circumstantial evidence, we disagree that there is any direct or circumstantial evidence to support an allegation of anti-black racism. The gesture had no racial connotations but rather, demonstrated some impatience explained by a personal situation.

[25] As was stated in *Peart v. Peel Regional Police Services Board*, 217 O.A.C. 269, 2006 CanLII 37566 at para. 39, an allegation of a reasonable apprehension of bias must overcome the strong presumption of judicial impartiality. Judicial partiality is also not a matter of personal perception, as stated in *Peart* at paras. 53-54:

> Judicial partiality is not a matter of personal perception. The personal characteristics of a litigant, such as race, may well affect the litigant's personal view of judicial partiality, but they cannot create a reasonable apprehension of bias where one would otherwise not exist. The outcome of a bias inquiry cannot turn on the perspective of the party advancing that claim. There either is or there is not a reasonable apprehension of bias.

[4] Excerpt of Proceedings, April 20, 2017, Pages 47-48.

> It is not unusual that a losing litigant honestly and, from his or her perspective, reasonably perceives the proceedings as unfair and the judge as partial. To equate that personal perception of bias with a reasonable apprehension of bias is to use a subjective and inherently partial perspective to decide whether a proceeding was conducted impartially. The ACLC did not argue that the perspective of the reasonable black person should be equated with the perception of the black appellants. Although the ACLC did not equate the hypothetical, reasonable black person with the appellants, it did not indicate how the court should determine whether the hypothetical, reasonable black person would perceive the proceedings as biased. In my view, for the purposes of the reasonable apprehension of bias inquiry, there can be no meaningful distinction between the perspective of a reasonable black person, and the perspective of a reasonable person of undefined race who is fully informed and cognizant of the relevant social context.

[26] There is no evidence, direct or circumstantial, in this case to show any indication of racism.

[27] Ultimately, the panel found that the Lawyer did not discharge the onus of establishing a reasonable apprehension of bias to support his first recusal motion.

SECOND RECUSAL MOTION

[28] During the course of the penalty hearing on January 30, 2018, while the Law Society was cross-examining one of the Lawyer's character witnesses, the Lawyer brought another recusal motion asking that the panel chair recuse herself. The motion followed a recess called by the panel after the Lawyer disrupted the proceedings by speaking out of turn, raising multiple objections and refusing to be brought to order.

[29] The Lawyer's reasons for this second recusal motion were fourfold: that the chair had unfairly put a limitation on the parties' time to make their final submissions on penalty, that the chair had responded sharply when the Law Society put the Lawyer on notice that it would be seeking an interlocutory suspension order if the penalty hearing was further adjourned, that the panel reached its decision too swiftly on the first recusal motion and, finally, that the chair unfairly intervened on January 25 and 30, 2018.

[30] This second recusal motion was also denied.

[31] The panel established a timeframe for final submissions on penalty after hearing submissions on the Lawyer's first recusal motion, which took up most of a day (January 25, 2018). Another day had already been scheduled for the

penalty hearing: January 30, 2018. Allowing one day to complete a penalty hearing is not unusual. In any event, the panel only established time limits for submissions and none on evidence. In the end, the panel allowed the Lawyer to present all of his proposed evidence on penalty, which took one full day. The panel agreed to reconvene at another date, in February 2018, to hear the parties' submissions on penalty within the already set guidelines of one hour for the Law Society (as per its expected duration of submissions), two hours for the Lawyer and 20 minutes in reply for the Law Society. The Tribunal has the power to control its own process. The panel is familiar with the law on penalty and only needed to hear focused legal submissions and how the law applies to the facts of this case. The allotted two hours for the Lawyer to make his submissions on penalty was not unreasonable and does not establish a reasonable apprehension of bias.

[32] Towards the end of the January 25, 2018 hearing, when it appeared that the penalty hearing might not finish on the following scheduled hearing day, counsel for the Law Society put the Lawyer on notice that the Law Society intended to bring a motion for an interlocutory suspension if the penalty hearing was not completed the following scheduled hearing day. The Lawyer's counsel rose to object. The chair interrupted to alert the Lawyer and his counsel that the Law Society was simply putting them on notice of its intentions. The chair intervened to avoid a prolonged debate on the merits of the Law Society's motion when such a motion had not been brought and in any event, would not be argued that day. This intervention was made as part of the Tribunal's power to control its process and to avoid engaging in a lengthy debate on an issue that was not before the panel. It does not indicate a reasonable apprehension of bias.

[33] The Lawyer also submits that the panel reached its decision on the first recusal motion too swiftly. The panel rendered its decision on the first recusal motion after at least a 20-minute recess once the parties had completed all of their submissions on the recusal motion. The panel did not render any oral reasons on the motion, preferring instead to issue an oral ruling with reasons to follow. Accordingly, the panel did not need a longer recess in order to set out its reasons. The length of time the panel took was reasonable in the circumstances and not indicative of any bias.

[34] Finally, the Lawyer submits that the chair unfairly intervened during the January 25 and 30, 2018 hearing. However, the Lawyer did not provide specific examples of what he alleged were unfair interventions. It should be noted that the Lawyer's witnesses were permitted to provide direct evidence with little to no objection from the Law Society. During the cross-examination of the witnesses by the Law Society, however, the Lawyer's counsel repeatedly made multiple objections. It was incumbent upon the chair to rule on these objections, which for the most part were without merit.

[35] None of the grounds, whether considered separately or together, establishes a reasonable apprehension of bias.

PENALTY

[36] Since there was some dispute between the parties regarding the severity of the panel's misconduct findings, we repeat some of them here. We found that the Lawyer failed to act to a standard of a competent lawyer by not filing submissions in a timely manner to the Immigration and Refugee Board (IRB) and by failing to submit an opinion letter to Legal Aid Ontario (LAO) in respect of client A.

[37] We also found that the Lawyer failed to conduct himself in such a way as to maintain the integrity of the profession in a number of ways. He simultaneously accepted a LAO certificate and a private retainer of $3,000, contrary to s. 95(1) of the *Legal Aid Services Act*, *1998*. We concluded that the Lawyer intentionally and deliberately billed LAO for services he did not render and did not intend to render. More specifically, he billed for the preparation of two LAO opinion letters that he never intended to send to LAO. In respect of three other LAO certificates, the Lawyer billed LAO for opinion letters that he never intended to send in a timely way, so as to permit LAO to decide whether additional services would be covered by the LAO certificates. Additionally, in respect of a young offender criminal matter, we found that the Lawyer billed and accepted payments for services he did not render. While it was not proven that he deliberately overbilled for such services, we found that the lawyer was grossly negligent in his LAO billing for this matter.

[38] We also find that the Lawyer misled client A to believe that he had filed submissions with the IRB when he had not yet done so.

Parties' Submissions

[39] The Law Society submits that the most serious findings concern the deliberate overbilling in respect of two LAO certificates, the misrepresentation to client A about having remitted his final submissions and the acceptance and billing of a private retainer while also accepting a LAO certificate for the same matter. The Law Society submits that in cases of dishonesty and lack of integrity, particularly in respect of deliberate overbilling, the presumptive penalty is revocation. Only in the event of exceptional circumstances is revocation not appropriate. The Law Society submits that there are no exceptional circumstances in the present case such that the Lawyer's licence should not be revoked.

[40] The Lawyer submits that this case is a "false document" case. He submits that he performed work in respect of the LAO certificates, even if the services rendered were not exactly the services for which he billed. The Lawyer submits

that the usual penalty in a false document case is a reprimand or short suspension. He therefore asks for a reprimand or a one-month suspension.

Analysis

[41] There are four objectives to consider when deciding on the penalty for professional misconduct or conduct unbecoming (*Law Society of Upper Canada v. Strug*, 2008 ONLSHP 88):

- The first is specific deterrence, to deter the particular lawyer from continuing in a course of conduct.
- The second purpose is general deterrence, by making an order that the entire membership should take into account. It is designed to deter the membership at large from engaging in a certain course of conduct.
- The third purpose can be directed towards such aspects as rehabilitation, restitution, and improving the competence of a particular lawyer.
- The fourth purpose is the most fundamental, and that is to maintain public confidence in the legal profession.

[42] The Law Society referred us to a number of cases in support of its submission that absent extraordinary circumstances, revocation is the presumptive penalty in cases of intentional misrepresentations and dishonest billings either for the LAO or a private client: *Bolton v. Law Society*, [1994] 1 W.L.R. 512 (C.A.), [1993] EWCA Civ 32; *Law Society of Upper Canada v. Walton*, 2015 ONLSTA 8; *Re Codina*, 2002 CanLII 41329; and *Law Society of Upper Canada v. Hamalengwa*, 2015 ONLSTH 57.

[43] The Lawyer, however, characterized the misconduct findings as akin to a false document case. With respect, we disagree. The LAO matters concern billings, not affidavits. In respect of two LAO certificates, the panel found that the Lawyer intentionally billed LAO for services that he did not render. He billed for opinion letters that he never drafted and never intended to send. The fact that the Lawyer may have done other work for these clients is not an answer to such serious allegations. Many lawyers who accept LAO certificates likely also perform work beyond that which is covered by the LAO certificate. Having performed another type of work, even if it was otherwise unbilled, is not an excuse for billing the LAO for services not rendered.

[44] The Lawyer also submits that the amounts were small and therefore less serious. The Lawyer billed about $336 in respect of each certificate for which he was found to have deliberately and intentionally billed for services he did not render. There were three other certificates in which the Lawyer billed for opinion letters that he never intended to send in a timely way, so as to permit LAO to decide whether additional services would be covered by the LAO certificates.

His total billings to the LAO in respect of these three clients were over $1,800. The Lawyer also billed about $15,000 in the young offender matter. The Panel concluded that the Lawyer was grossly negligent in respect of his billings in this certificate. Finally, the Lawyer accepted a private retainer of $3,000 while also accepting a LAO certificate. These amounts are not negligible. Furthermore, they pertain to vulnerable refugee clients and the LAO, which have limited resources. While the LAO recovered the Lawyer's billings in these certificates through a claw back of work done on other matters, it had to expend significant resources in its investigation of the Lawyer's billings.

[45] The Lawyer also makes several submissions regarding the *Law Society of Upper Canada v. Iglar*, 2004 ONLSAP 7, line of cases. He asks that the panel follow these cases since this is a false documents case. First, as noted above, we disagree that this is a "false document" case. Second, we note that a number of cases the Lawyer relies upon are cases where there was an agreed statement of facts and joint submission on penalty by the licensee and the Law Society. In such cases, the Panel accepts the joint submission unless it is truly unreasonable or unconscionable. We echo the comments made in a number of those cases that it is difficult, at best, to reconcile the false document cases involving dishonesty or fraudulent conduct with subsequent Tribunal jurisprudence in case of knowing assistance of fraud and misappropriation where revocation is the presumptive penalty. See for example, *Law Society of Upper Canada v. McQuaid*, 2017 ONLSTH 105. Given that we are of the view that this is not a false document case, it is not necessary for us to decide whether the penalty in a false document case involving dishonesty or fraudulent conduct should likewise presumptively be revocation. In the current case, the findings include deliberate and intentional billing for services not rendered. In such cases, revocation is the presumptive penalty absent exceptional circumstances.

Are There Exceptional Circumstances?

[46] To justify an exception to the presumptive penalty of revocation, mitigating factors must rise to the level where it would be obvious to other members of the profession, and to the public, that the underlying circumstances of the individual clearly obviated the need to provide reassurance of the integrity of the profession: *Bishop v. Law Society of Upper Canada*, 2014 ONSC 5057. This requires balancing the seriousness of the actions and their impact on the public and the legal profession against the mitigating factors.

[47] There are minimal mitigating factors in this case. The Lawyer has no previous disciplinary record. On the other hand, there is no evidence of a mental or physical health condition that may have played a part in the misconduct.

[48] There are no mitigating factors in respect of admitting errors, accepting

responsibility and expressing remorse. For example, when he testified during the penalty hearing, the Lawyer was asked what he would have done differently in his handling of Client A's matter. The Lawyer responded that he would have offered to file an appeal or judicial review of the IRB decision *pro bono*. The Lawyer continued to blame the IRB for not accepting his late-filed submissions and took no responsibility for not adhering to the time period, to which he had agreed, to file his submissions. The Lawyer also did not acknowledge his obligation to the client and to LAO to remit an opinion letter to the LAO and he did not acknowledge that he could not accept a LAO certificate and private retainer at the same time for the same matter. Rather, the Lawyer continued to submit that, in accordance with the Ontario *Human Rights Code*, he is free to contract privately as he wishes. The Lawyer also did not express any remorse for the way in which he completed his LAO billings nor did he point to any changes he has made in his practice as a result of this proceeding. While the failure to admit error, accept responsibility or express remorse is not an aggravating factor, there is no mitigating factor to consider in this regard either.

[49] We accept that the Lawyer repaid the overbilled amounts to LAO through a claw back from other LAO billings. The claw back, however, does not change the seriousness of the conduct. We also concluded that the Lawyer was grossly negligent in the way in which he billed for his services in the young offender case. The Lawyer, however, continues to be extremely upset that LAO clawed back the entire amount he billed LAO in the young offender case because he had performed a lot of work and the client had a successful outcome. In summary, the Lawyer continued not to accept responsibility for any of his billing issues with LAO. There is little, if any, mitigating effect to be taken into account in respect of the LAO billings.

[50] The Lawyer called four witnesses to provide character evidence. Two of these witnesses (a friend from his church and a priest at his church), however, questioned the panel's findings on misconduct and therefore provided character evidence in respect of how they viewed the case, rather than in respect of the actual misconduct findings and whether they were out of character. The friend in particular acted as an advocate who was unwilling to accept the panel's findings. Since these witnesses did not accept the panel's findings, they provided limited assistance as to whether the Lawyer's misconduct was out of character. A lawyer who also practises immigration and refugee law and a client also provided favourable character evidence. Ultimately, however, the evidence of the character witnesses did not overcome the presumptive revocation penalty in respect of dishonest billings.

[51] The Lawyer is a racialized licensee. The Law Society accepts that systemic racism may be a factor to take into account in determining an appropriate penalty. In this case, while the Lawyer agreed that he had a good articling position with a criminal lawyer, he lacked role models and experience in

immigration and refugee law when he first started practising as a sole practitioner. There is, however, no nexus between any systemic discrimination and the conduct in respect of dishonest billings. (See *Law Society of Upper Canada v. McSween*, 2012 ONLSAP 3, in which the Appeal Panel held that there must be a connection between systemic inequality and the particular offence and the offender, for systemic inequality to be relevant to penalty.)

[52] The Lawyer has continued to practise law during the lengthy misconduct proceedings. Other than the fact that he has been struck from the LAO registry and therefore no longer has LAO clients, he tendered no evidence in respect of any significant changes he has made to his law practice.

[53] We conclude that there are no exceptional circumstances to justify a penalty other than revocation.

Repayment of Legal Fees to Client A

[54] The Law Society also asks that the panel order the Lawyer to repay the $3,000 in legal fees he received from Client A. In our misconduct findings, we concluded that the Lawyer simultaneously accepted a LAO certificate and a private retainer of $3,000, contrary to s. 95(1) of the *Legal Aid Services Act*, *1998*, and therefore failed to conduct himself in such a manner as to maintain the integrity of the profession. Since the Lawyer was not entitled to bill his client for a private retainer of $3,000 after having accepted a LAO certificate, we agree that the Lawyer should repay $3,000 to Client A. Additionally, we note that the Lawyer failed to file his final submissions in a timely manner, which resulted in the client having to undergo further legal proceedings. We therefore order that the Lawyer repay the $3,000 he received in legal fees to Client A.

COSTS

[55] The Law Society submitted its Bill of Costs of $167,468.70. Accepting that there was some evidence of current financial difficulties, the Law Society asks that the Lawyer pay $70,000 in costs within five years.

[56] The Lawyer asks that we award costs of $10,000 or less.

[57] Tribunal jurisprudence has stated that the general principle is that the financial burden of prosecuting a licensee should not rest on the profession generally. The factors to be considered in awarding costs may include:

1. the complexity of the proceeding;
2. the importance of the issues;
3. the duration of the hearing;

4. the conduct of any party that tended to shorten or unnecessarily lengthen the duration of the proceeding;
5. whether any step in the proceeding was (i) improper, vexatious or unnecessary, or (ii) taken through mistaken or excessive caution;
6. the ability to pay a costs award;
7. the reasonable expectation of the parties;
8. proportionality; and
9. any other matter relevant to the assessment of costs.

See *Law Society of Upper Canada v. Kay*, 2008 ONLSAP 8 at para. 18, and *Gold v. Law Society of Upper Canada*, 2012 ONLSAP 16 at para. 12.

[58] The proceedings in this case were complex. They involved some fairly technical LAO billing matters. The issues were important as they involved allegations of lack of integrity. The hearing on the merits occurred over the course of four full days. There were a number of other hearing days, however, that had to be scheduled in order to consider the Lawyer's motions. The first hearing day was adjourned because the Lawyer wished to make a motion for the production of documents from third parties but had not followed the correct procedure, despite being advised of the correct procedure by the Law Society. Another day was then devoted to that motion, which the Lawyer lost. A full day was also devoted to the Lawyer's first recusal motion, which was denied.

[59] We accept that there is evidence of current financial difficulties. Furthermore, as a result of the revocation of his licence, the Lawyer will not be able to earn a living practising law. Nevertheless, we do not accept that the Lawyer should only be required to pay $10,000 or less in costs, which is completely disproportionate to the actual costs of these proceedings. The proceedings were lengthened as a result of two unsuccessful full-day motions brought by the Lawyer, which necessitated a response by the Law Society. There was no Agreed Statement of Facts. We order $55,000 in costs to be repaid within five years of the date of this decision.

ORDER

[60] We order the following:

1. The Lawyer's licence to practise law is revoked.
2. The Lawyer will repay the sum of $3,000 to Client A, within six months of the date of this Order.
3. The Lawyer will pay the Law Society its costs in the amount of $55,000 within five years of the date of this Order.

4. Commencing the day following the deadline for payment, interest shall accrue on any unpaid portion at a rate of 3% per year.

Sophie Martel,
on behalf of the panel