

Does the Punishment Fit the “Crime”?

By Alice Woolley

Cases Considered:

[*Bishop v. Alberta College of Optometrists*](#), 2009 ABCA 175

A hearing tribunal of the Alberta College of Optometrists found Dr. Donald Bishop guilty of professional misconduct due to billing infractions. Dr. Bishop appealed the decision to a panel of the Council of the Alberta College of Optometrists (the “Council”) and to the Court of Appeal, both of which upheld the decision, largely on factual grounds.

Legally speaking, therefore, not much flows from the decision. An interesting aspect of it, however, is the sanction that was imposed on Dr. Bishop. For the professional misconduct he was fined \$8,750. He was also charged with the costs of the investigation and hearings held into the matter, which after the appeal to the Council panel (and prior to the appeal to the Court) amounted to \$73,227.41. The Court noted with respect to this amount that the *Health Professions Act*, R.S.A. 2000, c. H-7, authorizes both the hearing tribunal and the Council to require an investigated person to pay such costs; as a result “the Council had jurisdiction to make a full costs order and there was no need to provide specific reasons for doing so” (para. 33).

Given this legislative authority, the Court’s decision seems reasonable. However, I question whether this approach to regulatory sanction - which I think is very common - is a desirable one. It essentially uncouples the nature of the sanction from the nature of the offence. In this case it seems that the offence was viewed as only meriting an \$8,750 fine; but the effective penalty imposed was in fact over \$80,000. This means either that the original fine was artificially decreased to account for the risk that Dr. Bishop was going to have to pay for the cost of the hearing (which means that the denunciatory effect of the sanction is diluted) or the actual sanction was wildly disproportionate to the seriousness with which the offence was viewed. Either result seems dubious.

I do understand the attraction of the argument that those who commit professional offences should be the ones to pay for the costs of professional regulation. On the other hand, this argument seems out of keeping with modern administrative and government regulation. The regulatory apparatus that governs professionals should not have to rely for its operating budget on the variable financial resources of those who commit such offences. And regulation should be focused carefully on the task at hand - identifying and regulating professional misconduct - not

on attempting to finance itself through the process. Finally, and perhaps most importantly, an individual facing an allegation of professional misconduct is an individual with significant personal interests and rights at stake, potentially his ability to pursue his profession and earn a livelihood. Moreover, the individual faces that risk against the apparatus of the state. His ability to exercise his legal rights - in this case, an appeal to the Council panel - should not be set at so high a price, here some \$60,000 (of the \$73,227.41 noted above, \$8892.51 was the cost of the initial decision-making process and investigation, the remainder was associated with the appeal).