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## SCC Upholds Costs Order Against Lawyer Personally

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Several years ago, in *Doré v. Barreau du Québec*<sup>1</sup>, the Supreme Court of Canada upheld the right of a regulatory body responsible for governing discipline and misconduct of lawyers to discipline a lawyer, in order to ensure proper civility within the legal profession. The Court was clear that any scrutiny of a lawyer's comments about the judicial system or judges could only be sanctioned after weighing the important interests of the lawyer's freedom of speech and the important goal of maintaining civility in the courts.

In the more recent decision of *Quebec (Criminal and Penal Prosecutions) v. Jodoin*<sup>2</sup>, the Supreme Court of Canada confirmed that a court may exercise control over egregious misconduct by a lawyer by making an order of costs against the lawyer personally. Together these cases demonstrate that serious misconduct by lawyers can be sanctioned by regulatory bodies as well as by courts. Both cases make the point that the misconduct must be reprehensible in order to justify sanctions.

In *Jodoin*, the subject lawyer was an experienced criminal lawyer representing 10 clients with respect to drinking and driving offences. Before a scheduled hearing in the Court of Québec relating to a disclosure matter, the lawyer presented a series of motions for Writs of Prohibition at the office of the Superior Court. The prohibition motions were based on alleged bias of the judge from the Court of Québec who was scheduled to preside over the hearing. It is important to note that the motions for Writs of Prohibition would result in an automatic suspension of the proceedings until the Superior Court had ruled on them. Before the lawyer was able to serve these motions, the parties learned that a different judge would, in fact, be presiding over the disclosure motions.

During the hearing of the disclosure motion, the replacement judge made a ruling that certain expert evidence presented by the Crown would be admitted, despite the lack of required notice. During the lunch break, the lawyer drew up a new series of motions for a Writ of Prohibition, challenging the replacement judge's jurisdiction and alleging bias on the judge's part. This resulted in the disclosure proceeding being adjourned.

The Superior Court eventually dismissed the motions for Writs of Prohibition based on bias and, at the request of the Crown Attorney, awarded costs against the lawyer personally.

When determining whether the award of costs should be upheld, the Supreme Court of Canada reviewed the appropriate factors to be considered in the context of costs against

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<sup>1</sup> 2012 SCC 12 (CanLII) [Doré]

<sup>2</sup> 2017 SCC 26 (CanLII) [Jodoin]



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a lawyer personally. A court must have the power to maintain respect for its proceedings, and this included an inherent power to control an abuse of process and prevent the use of procedure in a way that would be manifestly unfair to a party or which would bring the administration of justice into disrepute.

The ability to award costs against a lawyer personally is one of the methods that a court has at its disposal to supervise the conduct of a lawyer and discourage conduct which frustrates or interferes with the administration of justice. The discretion should be exercised sparingly for the purpose of insuring the integrity of the justice system. A lawyer has special duties as an officer of the court to respect the authority of the court. The Supreme Court of Canada held that the power to award costs personally against a lawyer was not limited to civil litigation, but was also available in criminal cases. However, in criminal cases, a defence lawyer must be given a fair amount of latitude to represent a client vigorously. Therefore, the ability to order costs against a lawyer personally should not be used to interfere with a criminal lawyer's ability to make full answer and defence on behalf of a client.

There is a high threshold for awarding costs against a lawyer personally, and such an order should only be made in exceptional circumstances. An order of costs against a lawyer personally may be justified where a lawyer's conduct has seriously undermined the authority of a court or seriously interfered with the administration of justice. The threshold is met where there is an unfounded, frivolous, dilatory or vexatious proceeding that amounts to a serious abuse of the judicial system by a lawyer, or where the misconduct on the part of a lawyer is deliberately dishonest or malicious.

In addition to allowing flexibility to defence counsel to present full answer and defence, a court should not consider external facts, such as a lawyer's disciplinary record, except for the limited purposes of determining the intention or *bona fides* of a lawyer, or whether a lawyer was aware that the proceeding was unfounded.

In addition to the high threshold for ordering costs against a lawyer personally, the Supreme Court of Canada also outlined a number of procedural safeguards to be met before a lawyer is faced with personal costs. There must be prior notice to the lawyer, with sufficient information so that the lawyer knows the allegations against him/her. The lawyer must be given enough time to prepare adequately, and must be allowed adduce any relevant evidence in response. The standard of proof is the standard on the balance of probabilities. A Crown's role in a criminal costs proceeding should be limited to objectively presenting the evidence and the arguments.

The Supreme Court of Canada determined that the order of costs against the lawyer personally in was justified in this exceptional case, as the lawyer's conduct was particularly reprehensible. It was clear that the lawyer's purpose in bringing the motions was postponement of the hearing, rather than a sincere belief that there was bias on the part of the judges. The sole objective was the deliberate obstruction of the orderly conduct of the judicial process. It was reasonable for the Court to conclude that the lawyer had acted in bad faith and in a manner that amounted to an abuse of process which seriously interfered with the administration of justice.

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