

Jinnah v Alberta Dental Association and College, 2022 ABCA 336

In *Jinnah v Alberta Dental Association and College* the Alberta Court of Appeal (the “Court”) set out the legal test that a hearing tribunal or council (the “Regulator”) must use to justify ordering costs against a member disciplined for unprofessional conduct. This decision is a significant change that affects all professional regulators established under the *Health Professions Act*, RSA 2000, c H-7.¹ Although Regulators’ decisions to order costs have always been reviewable by courts, *Jinnah* is the first case where the courts have established a starting presumption that Regulators should bear most, if not all costs of the proceedings arising from disciplinary action taken against its members.²

A Regulator must justify ordering costs against a member disciplined for unprofessional conduct according to a two-step test:³ (1) whether costs should be ordered against the disciplined member;⁴ and (2) if so, how much.⁵

(1) Whether the Regulator should order costs

A Regulator must consider the following factors to justify its decision to order costs against a member disciplined for unprofessional conduct:⁶

- Whether the Regulator succeeds in the outcome;
- The seriousness of the charges;
- The conduct of the parties; and
- The reasonableness of the amounts.⁷

(2) How to calculate costs

Once the Regulator decides to order costs, it must show a compelling reason to justify imposing a significant portion of the costs on the disciplined member.⁸ A compelling reason may exist in four scenarios:

	Scenario	Cost amount that <i>may</i> be justifiable
1	Member knowingly engaged in <i>serious</i> professional misconduct (see comments below)	substantial portion or all of the Regulator’s expenses ⁹

¹ *Jinnah v Alberta Dental Association and College*, 2022 ABCA 336 at para 140.

² *Ibid* at section F.3.

³ *Ibid* at paras 145-46.

⁴ *Ibid* at paras 132 and 154.

⁵ *Ibid* at paras 130, 132 138-39.

⁶ *Ibid* at para 130 and F.2.

⁷ *Ibid* at para 129, citing *K.C. v. College of Physical Therapists of Alberta*, 1999 ABCA 253 at para 94.

⁸ *Ibid* at paras 138-39.

⁹ *Ibid* at para 141

	Scenario	Cost amount that <i>may</i> be justifiable
2	Member is a "serial offender" disciplined for unprofessional conduct on two or more occasions: ¹⁰	
	(a) Both are serious breaches	substantial portion or all of the Regulator's expenses
	(b) Neither breach is serious	less than 25% of the Regulator's costs
	(c) Only the first breach was serious and incurred substantial costs	small portion of the Regulator's costs
	(d) Only the second breach was serious	substantial portion or all of the Regulator's expenses <i>would</i> be appropriate
3	Member failed to cooperate with the Regulator's disciplinary investigators such that the Regulator expended more resources than necessary to ascertain the facts	an amount roughly equal to the unnecessary expenditures attributable to the member's intransigence ¹¹
4	Member engaged in hearing misconduct that unnecessarily prolonged the hearing and increased the costs of prosecution	substantial portion or all of the unnecessary hearing expenditures ¹²

The Court stated that "*serious* unprofessional conduct" is conduct that a member knew or ought to have known is unprofessional,¹³ such as sexual assault on a patient, fraud perpetrated on an insurer, practicing while suspended, or performing a procedure in a manner that is a marked departure from the ordinary standard of care.¹⁴

Note: footnotes are included for the purpose of review and will not be included on the website post.

¹⁰ *Ibid* at para 142.

¹¹ *Ibid* at para 143.

¹² *Ibid* at para 144.

¹³ *Ibid* at paras 119, 122 and 141.

¹⁴ *Ibid* at para 141.