

**BPB Complaint No. C2-01244**

**IN THE MATTER OF**

Under the Building Act 2004 (the Act)

A complaint to the Building Practitioners' Board under section 315 of the Act

**AGAINST**

Cecil Sinclair, Licensed Building Practitioner  
No. BP 109572

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**COMPLAINT DECISION OF THE BUILDING PRACTITIONERS' BOARD**

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**Introduction**

- [1] [The Complainant] lodged a complaint with the Building Practitioners' Board (the Board) on 21 August 2015 in respect of Cecil Sinclair, Licensed Building Practitioner (the Respondent).
- [2] The complaint alleged the Respondent had, in relation to building work at [omitted] Christchurch:
- (a) been convicted, whether before or after he or she is licensed, by any court in New Zealand or elsewhere of any offence punishable by imprisonment for a term of 6 months or more and the commission of the offence reflects adversely on the person's fitness to carry out or supervise building work or building inspection work (s 317(1)(a) of the Act);
  - (b) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act); and
  - (c) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).
- [3] The Respondent is a Licensed Building Practitioner with a Carpentry Licence issued 22 May 2014.
- [4] The Board has considered the complaint under the provisions of Part 4 of the Act and the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Regulations).
- [5] The following Board Members were present at the hearing:
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|--------------------|--------------------------|
| Richard Merrifield | Deputy Chair (Presiding) |
| Mel Orange         | Board Member             |
| Robin Dunlop       | Board Member             |
| Dianne Johnson     | Board Member             |
| Catherine Taylor   | Board Member             |
| Bob Monteith       | Board Member             |

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[6] The hearing was held in Wellington on 11 May 2016 in accordance with the Act, the Regulations and the Board's Complaints Procedures.

[7] The following other persons were also present during the course of the hearing:

Greg La Hood Counsel for the Registrar

Gemma Lawson Board Secretary

Members of the public were not present.

[8] No Board Members declared any conflicts of interest in relation to the matters under consideration.

### **Board Procedure**

[9] The "form of complaint" provided by the Complainant satisfied the requirements of the Regulations.

[10] On 7 December 2015 the Registrar of the Board prepared a report in accordance with reg 7 and 8 of the Regulations. The purpose of the report is to assist the Board to decide whether or not it wishes to proceed with the complaint.

[11] On 21 December 2015 the Board considered the Registrar's report and in accordance with reg 10 it resolved to proceed with the complaint that the Respondent has been convicted, whether before or after he or she is licensed, by any court in New Zealand or elsewhere of any offence punishable by imprisonment for a term of 6 months or more and the commission of the offence reflects adversely on the person's fitness to carry out or supervise building work or building inspection work (s 317(1)(a) of the Act).

[12] On 15 February 2016 a pre-hearing teleconference was convened by Board Member Mel Orange. The Respondent and Counsel for the Registrar were both present. The hearing procedures were explained and the Respondent's attendance at the substantive hearing on 9 March 2016 was discussed. The Respondent indicated he might require an adjournment.

[13] On 1 March 2016 the Respondent sought an adjournment by way of email citing health issues. The adjournment was granted. An amended Notice of Hearing was issued setting the matter down for 11 May 2016.

[14] On 10 May 2016 the Respondent was contacted to ascertain if he would appear. He indicated he would not.

### **Function of Disciplinary Action**

[15] The common understanding of the purposes of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom<sup>1</sup>.

[16] In New Zealand the High Court noted in *Dentice v Valuers Registration Board* :

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<sup>1</sup> *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

*Although, in respect of different professions, the nature of the unprofessional or incompetent conduct which will attract disciplinary charges is variously described, there is a common thread of scope and purpose. Such provisions exist to enforce a high standard of propriety and professional conduct; to ensure that no person unfitted because of his or her conduct should be allowed to practise the profession in question; to protect both the public and the profession itself against persons unfit to practise; and to enable the profession or calling, as a body, to ensure that the conduct of members conforms to the standards generally expected of them.*

- [17] It must also be noted that the Board only has jurisdiction with regard to “the conduct of a licensed building practitioner” and with respect to the grounds for discipline set out in s 317 of the Act. It cannot investigate matters outside of those grounds, does not have any jurisdiction over contractual matters and cannot deal with or resolve disputes between a complainant and the person who is the subject of the complaint.

### **The Hearing**

- [18] The hearing commenced at 9.40 a.m.
- [19] At the hearing the Board was assisted in the presentation of the case by Counsel for the Registrar.
- [20] The Respondent did not appear.

### **Substance of the Complaint**

- [21] The allegation before the Board was that the Respondent had been convicted of an offence punishable by imprisonment for a term of 6 months or more and the commission of the offence reflects adversely on the Respondent’s fitness to carry out or supervise building work.

### **Evidence**

- [22] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed. The relevant authority is *Z v Dental Complaints Assessment Committee*<sup>2</sup> where Justice McGrath in the Supreme Court of New Zealand stated:

*[102] The civil standard has been flexibly applied in civil proceedings no matter how serious the conduct that is alleged. In New Zealand it has been emphasised that no intermediate standard of proof exists, between the criminal and civil standards, for application in certain types of civil case. The balance of probabilities still simply means more probable than not. Allowing the civil standard to be applied flexibly has not meant that the degree of probability required to meet the standard changes in serious cases. Rather, the civil standard is flexibly applied because it accommodates serious allegations through the natural tendency to require stronger evidence before being satisfied to the balance of probabilities standard.*

*[105] The natural tendency to require stronger evidence is not a legal proposition and should not be elevated to one. It simply reflects the*

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<sup>2</sup> [2009] 1 NZLR 1

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*reality of what judges do when considering the nature and quality of the evidence in deciding whether an issue has been resolved to “the reasonable satisfaction of the Tribunal”. A factual assessment has to be made in each case. That assessment has regard to the consequences of the facts proved. Proof of a Tribunal’s reasonable satisfaction will, however, never call for that degree of certainty which is necessary to prove a matter in issue beyond reasonable doubt.*

- [23] Prior to the hearing the Board sought:
- (a) a written statement from the Registrar or delegate as to what (if any) previous criminal convictions the Respondent disclosed when he applied to become a licensed building practitioner; and
  - (b) a criminal conviction history from the Ministry of Justice.
- [24] These were provided to the Board and were admitted into the evidence and in this respect the Board notes the comments of the High Court in *Domb v Real Estate Agents Authority*<sup>3</sup> with regard to the availability of “criminal histories” and “records of criminal convictions” and their accepted relevance to the assessment of a person’s fitness to practice.
- [25] The Registrar’s statement was that the file had been reviewed and there was no information on it as regards the Respondent’s convictions.
- [26] The Criminal and Traffic History disclosed 91 convictions for evading tax spanning a period of 10 years (2001 to 2011) with the convictions having been recorded on 5 May 2012. The Respondent was sentenced to 8 months home detention and 150 hours of community service on all of the charges. These were the criminal matters which were brought to the Board’s attention in the complaint.
- [27] The Board was provided with copies of articles in The New Zealand Herald<sup>4</sup> in relation to the convictions noting:
- (a) the Respondent owed more than \$80,000;
  - (b) he was also ordered to repay \$10,000 at \$50 per week;
  - (c) the evasion related to failure to deduct PAYE from employees’ wages or register for GST or refund GST to Inland Revenue; and
  - (d) he had also built up a total debt to Inland Revenue of over \$170,000 over a period of five years and had given the department misleading information.
- [28] The article also noted the sentencing Judge’s comment that the Respondent “(did) not seem to understand the seriousness and importance of meeting (his) tax obligations”.
- [29] The Criminal and Traffic History further disclosed other criminal and traffic history dating back to 1967 with the most recent conviction being one in 1996 for taking, obtaining or using a document for a pecuniary advantage. In total a further 11 convictions were disclosed by the report including five dishonesty offences and four traffic offences.

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<sup>3</sup> [2016] NZAR 47

<sup>4</sup> 20 June 2012 and 8 November 2012

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### Board's Conclusion and Reasoning

- [30] The disciplinary provision in s 317(1)(a) of the Act requires two matters to be satisfied. The first is whether the Respondent “*a licensed building practitioner has been convicted, whether before or after he or she is licensed, by any court in New Zealand or elsewhere of any offence punishable by imprisonment for a term of 6 months or more*”.
- [31] Tax evasion offences under s 143B(4) of the Tax Administration Act 1994 are punishable by:
- (a) *Imprisonment for a term not exceeding 5 years; or*
  - (b) *A fine not exceeding \$50,000; or*
  - (c) *Both.*
- [32] The first element of the disciplinary provision is therefore satisfied. The Board also notes that many of the other 11 convictions on the Criminal and Traffic History would also satisfy the requirements in s 317(1)(a)(i).
- [33] The second element of the disciplinary charge is “*Does the commission of that offence(s) reflect adversely on the person's fitness to carry out or supervise building work or building inspection work*”.
- [34] This element requires consideration by the Board of the interrelationship between the convictions and the Respondent's fitness to be a licensed person.
- [35] Unlike other licensing regimes the licensed building practitioner regime does not contain any provisions which require an assessment of an applicant's character or fitness to hold a licence at the time they apply<sup>5</sup>. Rather, in the Building Act, there is an ability to assess this subsequent to a person being licensed by way of s 317(1)(a) and it does not matter that the criminal offending predated the person being licensed.
- [36] Other licensing regimes have similar post licensing provisions as regards fitness to be a licensee. For example the misconduct provisions in s 73(d) of the Real Estate Agents Act under which a ground of misconduct is where conduct “*constitutes an offence for which the licensee has been convicted, being an offence that reflects adversely on the licensee's fitness to be a licensee*” and s 100(1)(c) of the Health Practitioners Competence Assurance Act 2003 where “*the practitioner has been convicted of an offence that reflects adversely on his or her fitness to practise*”.
- [37] Counsel for the Registrar brought several cases within the Health Practitioners regime to the Board's attention. In *Professional Conduct Committee v Dr Y*<sup>6</sup> the practitioner had a conviction for excess breath alcohol. The Tribunal determined that not all convictions for offences will reflect adversely on a practitioner's fitness to practise. It stated further, that “fitness to practise” will bear some relationship with competence. However, that fitness to practise is not simply a reference to competence. In *Professional Conduct Committee v Martin*<sup>7</sup> the court stated:
- "Fitness' often may well be something different to competence. Aspects of general deterrence as well as specific deterrence remain relevant. So too, is*

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<sup>5</sup> Compare with the licensing provisions in s 91(d) of the Electricity Act 1992 and s 36(d) of the Plumbers, Gasfitters, and Drainlayers Act 2006 both of which have a requirement to be a fit and proper person for registration

<sup>6</sup> *registered practitioner of X TAU* (June 2015)

<sup>7</sup> High Court WN 2007

*the broader consideration of the public or community's confidence and the upholding the standards of the nursing profession”.*

- [38] Within the legal profession s 241(d) of the Lawyers and Conveyancers Act 2006 provides for a charge of “*has been convicted of an offence punishable by imprisonment and the conviction reflects on his or her fitness to practise, or tends to bring his or her profession into disrepute*”. In *Hart v Auckland Standards Committee 1 of The New Zealand Law Society*<sup>8</sup> the High Court stated:

*[185] As the Court noted in Dorbu, the ultimate issue in this context is whether the practitioner is not a fit and proper person to practise as a lawyer. Determination of that issue will always be a matter of assessment having regard to several factors.*

*[186] The nature and gravity of those charges that have been found proved will generally be important. They are likely to inform the decision to a significant degree because they may point to the fitness of the practitioner to remain in practice. In some cases these factors are determinative, because they will demonstrate conclusively that the practitioner is unfit to continue to practice as a lawyer. Charges involving proven or admitted dishonesty will generally fall within this category.*

*[187] In cases involving lesser forms of misconduct, the manner in which the practitioner has responded to the charges may also be a significant factor. Willingness to participate fully in the investigative process, and to acknowledge error or wrongdoing where it has been established, may demonstrate insight by the practitioner into the causes and effects of the wrongdoing. This, coupled with acceptance of responsibility for the misconduct, may indicate that a lesser penalty than striking off is sufficient to protect the public in the future.*

*[188] For the same reason, the practitioner's previous disciplinary history may also assume considerable importance. In some cases, the fact that a practitioner has not been guilty of wrongdoing in the past may suggest that the conduct giving rise to the present charges is unlikely to be repeated in the future. This, too, may indicate that a lesser penalty will be sufficient to protect the public.*

*[189] On the other hand, earlier misconduct of a similar type may demonstrate that the practitioner lacks insight into the causes and effects of such behaviour, suggesting an inability to correct it. This may indicate that striking off is the only effective means of ensuring protection of the public in the future.*

- [39] Applying the tests and factors outlined above the Board notes:

- (a) Nature of the charges:

Tax evasion is a dishonesty offence. The Respondent also has other convictions for dishonesty. Carrying out or supervising building work is an undertaking which often involves the handling of client funds or entering into credit arrangements and as such there is a correlation between the nature of the charges and fitness to be licensed.

- (b) Gravity of the charges:

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<sup>8</sup> [2013] 3 NZLR 103

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The Respondent has, most recently been convicted of 91 charges of tax evasion. The charges spanned 10 years and showed a systematic pattern of evasion and the sentencing judge noted the Respondent did not seem to understand the seriousness and importance of meeting his tax obligations. It is clear to the Board, given the number of convictions, the substantial sums of tax evaded and the maximum penalty of five years imprisonment the convictions are serious in nature.

(c) Acceptance of responsibility:

The comments from the sentencing judge indicate the Respondent may not have accepted responsibility. The offending follows earlier dishonesty convictions and this pattern may of itself shows the Respondent may not have accepted responsibility for his criminal actions.

(d) Previous history:

The Respondent does not have a history with the Board. Having said this, he has only been licensed since May 2014 and it is a new regime. The Respondent does, however, have a long criminal history dating back to 1967.

(e) The effect on public confidence:

The Board considers a person with a long criminal history and a sustained pattern of dishonesty and tax evasion could have an effect on public confidence in the licensing regime.

[40] Given the above factors the Board finds that the second element of s 317(1)(a) has been established in that the convictions reflect adversely on the Respondent's fitness to carry out or supervise building work or building inspection work.

### Board Decision

[41] The Board has decided that the Respondent has been convicted, whether before or after he or she is licensed, by any court in New Zealand or elsewhere of any offence punishable by imprisonment for a term of 6 months or more and the commission of the offence reflects adversely on the person's fitness to carry out or supervise building work or building inspection work and should be disciplined.

### Disciplinary Penalties

[42] The grounds upon which a Licensed Building Practitioner may be disciplined are set out in s 317 of the Act. If one or more of the grounds in s 317 applies, then the Board may apply disciplinary penalties as set out in s 318 of the Act<sup>i</sup>.

[43] As stated earlier the purposes of professional discipline is to uphold the integrity of the profession; the focus is not punishment, but the enforcement of a high standard of propriety and professional conduct.

[44] The *High Court in Patel v Complaints Assessment Committee*<sup>9</sup> has, however, commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times, necessary to uphold professional standards:

*[27] Such penalties may be appropriate because disciplinary proceedings inevitably involve issues of deterrence. They are designed in part to deter*

<sup>9</sup> HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

*both the offender and others in the profession from offending in a like manner in the future.*

*[28] I therefore propose to proceed on the basis that, although the protection of the public is a very important consideration, nevertheless the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty to be imposed.*

- [45] Deterrence was also referenced in *Hart* and in *Dorbu v New Zealand Law Society (No 2)*<sup>10</sup> the High Court when discussing penalty stated:

*[35] The principles to be applied were not in issue before us, so we can briefly state some settled propositions. The question posed by the legislation is whether, by reason of his or her conduct, the person accused is not a fit and proper person to be a practitioner. Professional misconduct having been established, the overall question is whether the practitioner's conduct, viewed overall, warranted striking off. The Tribunal must consider both the risk of reoffending and the need to maintain the reputation and standards of the legal profession. It must also consider whether a lesser penalty will suffice. The Court recognises that the Tribunal is normally best placed to assess the seriousness of the practitioner's offending. Wilful and calculated dishonesty normally justifies striking off. So too does a practitioner's decision to knowingly swear a false affidavit. Finally, personal mitigating factors may play a less significant role than they do in sentencing.*

- [46] Cancellation of a license is the equivalent of striking off within the licensed building practitioner regime.
- [47] The Board notes the disciplinary provision in s 317(1)(a) is that the conviction reflects adversely on the persons fitness and the court statements that it need not relate to the competence of the person. If the disciplinary charge has been upheld it would seem to the Board that it would follow that the appropriate penalty is that of cancellation as this provides the ultimate protection for the public. Other penalties may also have an effect but to a lesser degree.
- [48] The question for the Board then is whether cancellation is warranted. In this respect the Board notes its findings above that there were a high number dishonesty related convictions which were of a serious nature and that there has been a pattern of dishonesty and little acceptance of responsibility by the Respondent. Whilst the most recent offending was in 2011 the Board still considers there is a high risk of reoffending.
- [49] Given these factors the Board considers cancellation under s 318(1)(a) of the Act is the appropriate penalty as it is necessary to protect members of the public. The Board further considers that cancelling the Respondent's licence also creates an element of deterrence.
- [50] Deterrence is considered to be appropriate as one of the reasons why the licensed building practitioner regime was brought into being was to increase standards. As was stated in the first reading of the Building Amendment Bill (No 3):

*The bill will amend the Act to be explicit about the standard of behaviour expected from people working in the sector. This is the culture change I*

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<sup>10</sup> [2012] NZAR 481



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*mentioned earlier. Good standards of behaviour will help restore confidence in the sector.*<sup>11</sup>

- [51] Under s 318(1)(a) the Board must also order a period during which the Respondent may not reapply to be licensed. The Board considers three years to be a reasonable period.

### Costs

- [52] Under s 318(4) the Board may require the Respondent “to pay the costs and expenses of, and incidental to, the inquiry by the Board.”

- [53] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case. The judgement in *Cooray v The Preliminary Proceedings Committee*<sup>12</sup> included the following:

*“It would appear from the cases before the Court that the Council in other decisions made by it has in a general way taken 50% of total reasonable costs as a guide to a reasonable order for costs and has in individual cases where it has considered it is justified gone beyond that figure. In other cases, where it has considered that such an order is not justified because of the circumstances of the case, and counsel has referred me to at least two cases where the practitioner pleaded guilty and lesser orders were made, the Council has made a downward adjustment.”*

- [54] The judgment in *Macdonald v Professional Conduct Committee*<sup>13</sup> confirmed the approach taken in *Corray*. This was further confirmed in a complaint to the Plumbers, Gasfitters and Drainlayers’ Board, *Owen v Wynyard*<sup>14</sup> where the judgment referred with approval to the passages from *Corray* and *Macdonald* in upholding a 24% costs order made by the Board.

- [55] In *Collie v Nursing Council of New Zealand*<sup>15</sup> where the order for costs in the tribunal was 50% of actual costs and expenses the High Court noted that:

*But for an order for costs made against a practitioner, the profession is left to carry the financial burden of the disciplinary proceedings, and as a matter of policy that is not appropriate. It is not hard to see that the award of costs may have imposed some real burden upon the appellant but it is not fixed at a level which disturbs the Court’s conscience as being excessive. Accordingly it is confirmed.*

- [56] The Board notes the above principles and has decided that, in all the circumstances of the case an order of \$2,500 is fair and reasonable contribution towards of the costs of and incidental to the inquiry.

<sup>11</sup> Hon Anne Tolley (Minister of Education) on behalf of the Minister for Building and Construction, Hansard Volume: 669; Page: 16053

<sup>12</sup> HC, Wellington, AP23/94, 14 September 1995

<sup>13</sup> HC, Auckland, CIV 2009-404-1516, 10 July 2009

<sup>14</sup> High Court, Auckland, CIV-2009-404-005245, 25 February 2010

<sup>15</sup> [2001] NZAR 74

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### Publication of Name

- [57] As a consequence of its decision the Respondent's name and the disciplinary outcomes will be recorded in the public register maintained as part of the Licenced Building Practitioners' scheme as is required by the Act.
- [58] The Board is also able, under s 318(5) of the Act, to order publication over and above the public register:
- In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit.*
- [59] As a general principle such further public notification may be required where the Board perceives a need for the public and/or the profession to know of the findings of a disciplinary hearing.
- [60] The Board considers publication of the Respondent's name is necessary to give effect to its order. Such publication will be made in the Code Words publication and on the Board's website and by way of such other means as is considered necessary to effectively inform the public.

### Penalty, Costs and Publication Decision

- [61] For the reasons set out above, the Board directs that:

**Penalty:** Pursuant to s 318(1)(a)(i) of the Building Act 2004, the Respondent's licence is cancelled and pursuant to s 318(1)(a)(ii) the Respondent may not apply to be relicensed before the expiry of 3 years from the date of this order .

**Costs:** Pursuant to s 318(4) of the Act, the Respondent is ordered to pay costs of \$2,500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

**Publication:** The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with s 301(1)(iii) of the Act.

In terms of section 318(5) of the Act, there will be action taken to publicly notify the Board's action in addition to the note in the register.

### Right of Appeal

- [62] The right to appeal Board decisions is provided for in s 330(2) of the Act<sup>ii</sup>.

Signed and dated this 10<sup>th</sup> day of June 2016



**Richard Merrifield**  
Presiding Member

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**<sup>i</sup> Section 318 of the Act**

- (1) *In any case to which section 317 applies, the Board may*
- (a) *do both of the following things:*
    - (i) *cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and*
    - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
  - (b) *suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
  - (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:*
  - (d) *order that the person be censured:*
  - (e) *order that the person undertake training specified in the order:*
  - (f) *order that the person pay a fine not exceeding \$10,000.*
- (2) *The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).*
- (3) *No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.*
- (4) *In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.*
- (5) *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit."*

**<sup>ii</sup> Section 330 Right of appeal**

- (2) *A person may appeal to a District Court against any decision of the Board—*
- (b) *to take any action referred to in section 318.*

**Section 331 Time in which appeal must be brought**

*An appeal must be lodged—*

- (a) *within 20 working days after notice of the decision or action is communicated to the appellant; or*
- (b) *within any further time that the appeal authority allows on application made before or after the period expires.*