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Professional Regulation Newsletter

Summer 2020

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Divisional Court sheds light on 'palpable and overriding error' standard of appellate review in professional discipline context

In *Miller v. College of Optometrists of Ontario*, 2020 ONSC 2573, one of the first cases in the professional discipline context to apply the recent Supreme Court of Canada decision, *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 ("*Vavilov*"), the Divisional Court (the "Court") set aside a decision of the Discipline Committee of the College of Optometrists of Ontario (the "College") which had found an optometrist guilty of professional misconduct, and in doing so, clarified the application of the 'palpable and overriding error' standard of appellate review for professional discipline decisions.

Background

Mr. Miller, an optometrist, was accused of having committed sexual abuse of a patient by taking her hand during a routine eye examination and placing it on his genital area twice. These allegations were reported to the College more than 10 years later by the office of a psychiatrist to whom the patient had disclosed this information as a traumatic experience.

At his disciplinary hearing, Mr. Miller denied the allegations. He submitted that he had no independent recollection of the patient's visit, and relied on his records and a description of how he normally carries out a routine eye examination.

The Discipline Committee concluded that it preferred the evidence of the patient to that of Mr. Miller, and found that the College had proven its case on a balance of probabilities based on clear and cogent evidence, and thus found Mr. Miller guilty of professional misconduct. The Discipline Committee ordered that his certificate of registration be revoked, that he be reprimanded, and that he

reimburse the College up to $16,060.00 for funding which was provided to the patient, as well as for part of the College's costs in the amount of $37,000.00.

Mr. Miller appealed both the Discipline Committee's misconduct findings and its penalty decision.

Divisional Court Decision

Mr. Miller advanced three grounds of appeal arguing that the Discipline Committee erred by (1) finding that the patient's evidence was reliable; (2) assessing Mr. Miller's evidence, demeanour, and presentation at the hearing in an unfair way; and (3) applying a higher standard of scrutiny to Mr. Miller's testimony than it did to the patient's testimony.

The Court determined that the first two issues, which related to the Discipline Committee's assessment of the evidence and were questions of fact, were subject to the standard of review of palpable and overriding error, whereas the third issue, which would constitute an error of law, was reviewable on the correctness standard. In doing so, the Court followed *Vavilov*, which established that where there is a statutory right of appeal from an administrative decision, appellate standards of review now apply.

With respect to the first ground of appeal, Mr. Miller argued that the Discipline Committee unreasonably concluded that the patient's evidence was reliable, by characterizing only the fact of the touching itself as the central issue and characterizing the other aspects of the encounter, of which the patient had numerous memory gaps and inconsistencies in her evidence, as insignificant or peripheral. The Court dismissed this argument, finding that while a different trier of fact might have reached different conclusions, there was no palpable and overriding error in the Discipline Committee's assessment of the patient's credibility. The Discipline Committee methodically addressed each of the gaps and inconsistencies in the patient's evidence and explained why they were not important, and it was open to the Discipline Committee to find that the patient could provide reliable evidence regarding the core components of the encounter despite not remembering the preceding and succeeding details.

Secondly, Mr. Miller argued that the Discipline Committee was unfairly critical of his demeanour at the hearing, characterizing it as defensive and argumentative, and thereby preferring the patient's evidence to that of Mr. Miller. The Court concluded that there were indeed several serious issues with the Discipline Committee's assessment of Mr. Miller's credibility:

- The Discipline Committee failed to appreciate that Mr. Miller was contradicting the patient's evidence;
- The Discipline Committee's assessment of Mr. Miller's credibility was informed by factors that were extraneous to the allegations and would not have made any difference to the issues the Discipline Committee had to decide;
- The Discipline Committee placed inappropriate reliance on demeanour evidence and erroneously inferred from Mr. Miller's lack of eye contact with the patient during her testimony that he seemed to have little interest in what she was saying;
- The Discipline Committee found that Mr. Miller's argument and demonstrative evidence, for example, his attempt to show through photographs that the alleged acts could not physically have happened, undermined his credibility.

The Court held that while some of these findings, taken in isolation, may not support appellate intervention, the cumulative effect of multiple findings by the Discipline Committee is a viable route to finding a palpable and overriding error in the Discipline Committee's assessment of the evidence. Moreover, the Court stressed that

the palpable and overriding error standard of appellate review, including its 'functional equivalents' such as 'clearly wrong', 'unreasonable' and 'not reasonably supported by the evidence', should not be conflated with or draw its meaning from a comparison to the reasonableness standard of judicial review of the decisions of administrative tribunals.

The Court concluded that finding a palpable and overriding error in the Discipline Committee's assessment of the evidence through the cumulative effects of its findings would be more likely if the Discipline Committee also erred in other respects, for example by subjecting the evidence of the parties to different levels of scrutiny.

On this issue, which was the third ground of appeal, the Court held that the Discipline Committee applied an uneven approach and made an error of law by subjecting Mr. Miller's defence to a higher level of scrutiny. For example, the Discipline Committee criticized Mr. Miller's evidence as detracting from his credibility even with respect to peripheral matters that had no bearing on the core incident; took a negative view of his asking for clarification of what certain questions meant during cross-examination; and regarded Mr. Miller as argumentative and defensive when he became upset during his testimony. On the other hand, the Discipline Committee did not apply this same level of scrutiny to the patient. This error of law, combined with the Discipline Committee's other errors, resulted in an unfair proceeding.

The Court therefore allowed the appeal, set aside the Discipline Committee's findings of misconduct, and remitted the matter for a new hearing by a differently constituted panel of the Discipline Committee.

Takeaways

This decision confirms that following *Vavilov*, a discipline committee's findings of fact in the context of a statutory appeal are subject to the appellate standard of review of palpable and overriding error, which is different from and should not be conflated with the standard of reasonableness that applies on judicial reviews.

As well, this decision, also confirms that it is an error of law for a Discipline Committee to subject one party's evidence to a different level of scrutiny than another's.

Christopher Wirth, Partner
Shamim Fattahi, Articling Student

— KC —

Discipline Committee Rejects Joint Submission on Penalty

In *Ontario (College of Physicians and Surgeons of Ontario) v. Khan*, 2020 ONCPSD 24, a Discipline Committee Panel (the "Panel") of the Ontario College of Physicians and Surgeons of Ontario (the "College") made a rare decision to depart from a joint submission on penalty and instead ordered no penalty for a doctor who pled guilty to sexually assaulting a 16-year-old boy.

Background

In 2015, Dr. Khan pled guilty to and was found guilty of sexual assault under s. 271(1)(b) of the *Criminal Code*. He was granted an absolute discharge based on a joint submission on penalty.

The facts underlying the criminal charge centred around an incident that occurred in 2009, when Dr. Khan was 24 years old and had just finished medical school. At the time of the incident, Dr. Khan was sharing a bunk bed with a 16-year-old boy ("AB"). During the night, Dr. Khan went down to the bottom bunk and fondled AB's genitals while masturbating, believing AB to be asleep. When AB made a noise, Dr. Khan withdrew his hand and returned to the top bunk. AB then ran out of the room and told others what happened.

In disciplinary proceedings which occurred in April 2018, Dr. Khan admitted to these facts and was found to have engaged in professional misconduct under s. 51(1)(a) of the *Health Professions Procedural Code*. College counsel initially argued that the new Ontario Regulation 262/18, required a mandatory penalty of revocation of Dr. Khan's certificate of registration for this type of offence. However, College counsel withdrew that argument after further development in the law made clear that this Regulation does not apply retroactively and in August 2019, College counsel and Dr. Khan made a joint submission on penalty to the Panel, in which they proposed a penalty consisting of a 12-month suspension, a reprimand, and $20,550.00 in costs.

The Panel's Decision

The Panel provided an overview of the agreed statement of facts and oral evidence on penalty. Expert evidence noted that the offence was a single, impulsive act which took place when Dr. Khan was a young man struggling with his repressed sexual identity. Dr. Khan consistently showed remorse and took responsibility for his actions following the incident, writing an apology to AB shortly after the incident took place in 2009 and admitting to the allegations in the subsequent criminal and disciplinary proceedings. He underwent extensive psychological assessments which indicated that he presented a low risk for re-offending. He was continuing to actively participate in therapy, and had since become comfortable with his sexual identity.

In considering the mitigating factors, a majority of the Panel noted that the assault took place when Dr. Khan "was a young gay man struggling to express his identity". While the majority also noted that this did not excuse Dr. Khan's conduct and that no one "gets off the hook" for criminal activity because of their sexual orientation, it considered this background for the purpose of contextualizing the offence.

The majority made a rare decision to reject the parties' joint submission on penalty and instead order no penalty of any kind, finding that the proposed 12 month suspension, reprimand, and costs were so excessive and disproportionate to the conduct at issue that such an order would be contrary to the public interest and would bring the administration of justice into disrepute.

In deciding to reject the joint submission on penalty, the majority distinguished numerous prior cases cited by both College counsel and Dr. Khan, finding that those cases generally involved repeated offences, a lack of remorse, a lack of remedial efforts, or "grooming" of the victim, none of which were present in this case. The majority considered the relevant penalty principles, finding that they supported the view that the proposed penalty was excessive. For example, the majority noted that Dr. Khan presented no greater risk to the public than any other physician and he had already been sufficiently deterred and rehabilitated. The majority also found that suspending a competent member of the profession for a single transgression that occurred 10 years ago would not foster public confidence in the College's ability to regulate the profession in the public interest. Accordingly, the majority concluded that there should be no costs or penalty of any kind imposed on Dr. Khan.

Two members of the Panel wrote brief dissenting reasons, stating that they would have accepted the 12-month suspension, reprimand, and costs proposed in the joint submission on penalty. The dissenting panel members agreed with the majority's findings regarding Dr. Khan's "significant insight and rehabilitation" since the offence, but emphasized that there is a "very high bar to meet" in order to depart from a joint submission on penalty.

The College has subsequently served notice that it is appealing the majority's decision to the Divisional Court.

Takeaways

While it remains to be seen whether the majority's decision will be overturned on appeal, the decision provides an opportunity to re-examine the circumstances in which a joint submission on penalty may be rejected. As noted in the decision, joint submissions on penalty are typically accepted and may only be rejected in rare circumstances where accepting them would be contrary to the public interest and would bring the administration of justice into disrepute. The majority's decision has been the subject of controversy and criticism in the media, including for the apparent consideration of Dr. Khan's repressed sexual orientation as a mitigating factor that helped contextualize the offence, as well as for allegedly creating a perception of the College as favouring the interests of its members over the public interest by ordering no penalty of any kind, despite the parties' agreement to a 12 month suspension, reprimand, and costs. The College's appeal will provide an opportunity for the Divisional Court to address these issues and clarify the test for rejecting joint submissions on penalty.

Alex Smith, Associate

— KC —

Decision Overturned as Findings Based Upon Allegations not in Notice of Hearing

In *Shamess v. College of Physicians and Surgeons of Ontario*, 2020 ONSC 4108, the Ontario Divisional Court overturned a decision of the Discipline Committee of the College of Physicians and Surgeons of Ontario (the "College") because its findings of professional misconduct were based on allegations not set out in the Notice of Hearing and on a theory of liability not advanced by the College.

Background

In its Notice of Hearing, the College alleged that Dr. Shamess engaged in the sexual abuse of a patient, as well as disgraceful, dishonourable or unprofessional conduct based on allegations that he engaged in inappropriate sexual and physical contact with a patient and that he made inappropriate comments to the patient.

In its decision, the Discipline Committee found that the allegations were unfounded. Specifically, it found that Dr. Shamess's evidence of what occurred during the examination at issue was credible, while the patient's evidence was not credible.

However, the Discipline Committee went on to make a finding of professional misconduct against Dr. Shamess on the basis that he had a professional obligation to conduct the examination in a manner that had more regard for the patient's privacy concerns. These allegations were not set out in the Notice of Hearing, nor were they raised at the hearing.

The Discipline Committee imposed a penalty consisting of a reprimand and $5,090.00 in costs. Dr. Shamess appealed both the finding of professional misconduct and the penalty decision to the Divisional Court.

The Divisional Court's Decision

The College conceded that the Discipline Committee made an error and accordingly consented to the appeal. The Divisional Court agreed with the parties and allowed the appeal, finding that it was not open to the Discipline Committee to make a finding of professional misconduct against Dr. Shamess based on the patient's privacy concerns when this was not an issue raised in the Notice of Hearing and was not pursued by the College at the hearing.

The Court agreed that the Discipline Committee's decision was procedurally unfair because Dr. Shamess did not have notice of the issue of the patient's privacy interest and did not have an opportunity to address it at the hearing. Given that the Discipline Committee based its decision on

allegations that were not included in the Notice of Hearing and were not raised at the hearing, Dr. Shamess did not have notice of the theory of liability on which the finding of professional misconduct was made, and he did not have an opportunity to present a defence against this finding.

Accordingly, the Court allowed the appeal and quashed both the liability and penalty decisions.

Takeaways

This case serves as a reminder that discipline tribunals can only make findings of professional misconduct based on the allegations set out in the Notice of Hearing. Accordingly, it is crucial for counsel to ensure that the Notice of Hearing is drafted such that all of the allegations are laid out in sufficient detail, so that the tribunal has a basis on which to make its decision. Furthermore, if the tribunal identifies an issue during the hearing that the parties have not addressed, it must be raised with the parties, so that they have an opportunity to respond and make submissions on it before the tribunal makes its decision.

Alex Smith, Associate

— KC —

Law Society Ordered to Pay Costs to Lawyer

In *Law Society of Ontario v. Rothman*, 2020 ONLSTH 60, a Hearing Division Panel (the "Panel") of the Law Society of Ontario (the "LSO") ordered the LSO to pay $46,000.00 in costs to a lawyer after finding that 65% of the costs of the proceeding were attributable to unfounded allegations.

Background

The LSO initiated a professional misconduct proceeding against the lawyer (Mr. Rothman) based on allegations of misleading advertising, particularly in relation to his firm's name (RealEstateLawyers.ca LLP), the size and experience of the firm, its fees, and its use of the "specialty" description. The LSO also claimed that Mr. Rothman flouted a bencher decision allegedly prohibiting the firm from using its name. With the exception of one "minor mistake" found in the firm's fee description in a particular publication, all of the allegations against Mr. Rothman were dismissed.

Mr. Rothman then sought costs against the LSO on the basis that the initiation of the proceeding against him was unwarranted and that it was unreasonable for the LSO to continue pursuing the unfounded allegations.

The Panel's Decision

The Panel cited Rule 25.01(1)(a) of its *Rules of Practice and Procedure* as its authority for awarding costs against the LSO where a proceeding was unwarranted, or where the LSO caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default. The Panel noted that the standard for awarding costs against the LSO is extremely high, as it should not be deterred from initiating or continuing a proceeding out of fear of an adverse costs award, however it should be deterred from initiating or continuing an unjustified proceeding. Where there was no evidence of bad faith or improper purpose, the analysis of whether the proceeding was unwarranted under Rule 25.01(1)(a) must focus on whether, objectively, there were grounds or a reasonable justification to initiate the proceeding.

The Panel then considered each of the dismissed allegations in turn. It concluded that the LSO had reasonable justification for initiating the firm name and specialization allegations because, even though these allegations were ultimately dismissed, they were not without merit or doomed to fail. However, this did not give the LSO licence to add the other 3 allegations, as these were objectively without grounds or legal basis.

In coming to this conclusion, the Panel noted that the firm size and fees allegations were unwarranted, in part because they were of such a minor and insignificant nature that there was minimal public interest in pursuing the issue. No member of the public complained about the firm's advertising, and the few components that the LSO took issue with were not "demonstrably false", nor did they raise any concerns about fraud, deception, or Mr. Rothman's integrity. Rather, the LSO's concerns were simply that the advertising was not clear enough, and that it was presented in such a way that it might give a misleading impression, despite the information being truthful and transparent.

The Panel noted that even if the advertising was misleading in the way the LSO suggested, which the Panel did not find, the misconduct would be so trivial that there would be little to no benefit to the public in pursuing the allegations. The Panel also found that Mr. Rothman made continuous, proactive and good faith efforts to respond to the LSO's concerns and comply with the applicable rules and guidelines. With respect to the allegation that Mr. Rothman flouted a bencher order prohibiting him from using the firm name, the Panel found that the allegation had no legal basis because the order did not deny him the right to use the name for a limited liability partnership.

Based on these findings, the Panel exercised its discretion to award costs to Mr. Rothman. The Panel determined that 65% of the costs of the proceeding were attributable to unfounded allegations, and accordingly ordered the LSO to pay $46,000.00 in costs to Mr. Rothman.

Takeaways

This decision provides a reminder of the cost consequences that can accompany a decision to pursue unfounded allegations of professional misconduct. The Panel in this case emphasized that its decision to award costs against the LSO was not made lightly. A professional regulatory body such as the LSO should not be deterred from fulfilling its public interest mandate by costs considerations, as such a body is granted considerable deference in exercising prosecutorial discretion. It will not always succeed in its prosecutions and should not be sanctioned by a costs award unless the circumstances require it. That being said, costs may be awarded where there were no grounds to justify initiating or continuing the proceedings. While there is a very high standard that must be met before costs will be awarded, professional regulatory bodies should always remain mindful of their mandate to protect the public interest, and not pursue trivial or unfounded allegations of professional misconduct.

Alex Smith, Associate

— KC —

Tribunal's Decision Set Aside Due to Panel Members' Improper Questioning of Witnesses

In *Yee v. Chartered Professional Accountants of Alberta*, 2020 ABCA 98, the Alberta Court of Appeal overturned a decision of a discipline tribunal of the Chartered Professional Accountants of Alberta which had found a member guilty of professional misconduct, finding that the manner in which the members of the panel had questioned the witness gave rise to a reasonable apprehension of bias.

Background

The member was the president, chief financial officer, and an officer and director of an oil and gas company. The allegations of professional misconduct against him arose from a complaint, which had been made to the Chartered Professional Accountants of Alberta by an investor in some of the assets owned by that company. The discipline tribunal of the Chartered Professional Accountants of Alberta (the "Discipline Tribunal"), found the member guilty of four

counts of professional misconduct. The member appealed to the appeal tribunal, which overturned the conviction on the first count but upheld the remaining counts. The member then appealed to the Court of Appeal arguing among other grounds that the way the Discipline Tribunal conducted itself demonstrated a reasonable apprehension of bias and breached the principles of fairness and natural justice.

Court of Appeal Decision

It was argued before the Court of Appeal that the manner in which members of the Discipline Tribunal questioned the witness and the statements they made in that context gave rise to a reasonable apprehension of bias. The Court of Appeal acknowledged that the Discipline Tribunal is entitled to challenge and question a witness vigorously provided that it remains open minded but that on its review of the transcript of the discipline hearing, the comments made by the members of the Discipline Tribunal, when viewed collectively, gave rise to a reasonable apprehension of bias as their repeated comments suggested a lack of impartiality towards the member and a prejudgment concerning important issues in the hearing. Further, the questions and statements of the Discipline Tribunal which showed prejudgment, were also unfair and not impartial.

In the Court of Appeal's view, this breach of procedural fairness could not be cured and so the decision of the Discipline Tribunal was set aside and the matter was returned to the Discipline Tribunal to be heard by a new discipline panel.

Takeaways

While members of a panel of a discipline tribunal are entitled to question witnesses, they must be careful in so doing so that they do not lead to a suggestion that they are not impartial and maintaining an open mind so that it cannot be argued that their questioning gave rise to a reasonable apprehension of bias which potentially could lead to their decision being set aside.

Christopher Wirth, Partner

— KC —

News

Keel Cottrelle is pleased to announce that Christopher Wirth and Bob Keel have been recognized by Best Lawyers in Canada for 2021. Chris Wirth has been recognized in the areas of Corporate & Commercial Litigation and Labour & Employment Law, and was also recognized in these areas in 2019 and 2020. Bob Keel has been recognized in the area of Education Law.

Keel Cottrelle is also pleased to announce that several of its lawyers will serve on Canadian Bar Association or Ontario Bar Association Executives for the 2020/2021 term.

Nicola Simmons, Chair, OBA Civil Liberties,
Constitutional and Human Rights Law Section
Chris Wirth, Past Chair, CBA Administrative Law Section
Patricia Harper, Member at Large, CBA Administrative Law Section
Kimberley Ishmael, Member at Large, OBA Education Law Section
Alex Smith, Member at Large, OBA Education Law Section

More information about all of the lawyers at Keel Cottrelle can be found on our firm's website - www.keelcottrelle.com. During this unprecedented pandemic period, rest assured that Keel Cottrelle LLP remains open and available to meet your legal needs.

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