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# Professional Regulation Newsletter

**Fall 2019**

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### Divisional Court upholds decision to revoke dental hygienist's license for treating spouse

In *Tanase v. The College of Dental Hygienists of Ontario*, 2019 ONSC 5153, the Divisional Court confirmed that dental hygienists are prohibited from treating their spouses and will be subject to the mandatory revocation provisions of the *Regulated Health Professions Act* if they do. The Divisional Court further found the *Canadian Charter of Rights and Freedom* ("*Charter*") does not afford protection to an economic interest or a right to freely practice a profession.

#### *Background*

Alexandru Tanase ("Mr. Tanase") was a dental hygienist who entered into a patient relationship with his spouse after being incorrectly advised by a colleague that dental hygienists were permitted to treat their spouses under spousal exemption rules made by the College of Dental Hygienists of Ontario (the "College"). Mr. Tanase relied on this information and did not conduct further research.

Unfortunately for Mr. Tanase, the law currently provides for mandatory revocation of dental hygienists who engage in sexual relations with their patients, including spouses, even if consensual. In 2013, the College did grant a spousal exemption under its governing regulation, however, it was not subsequently passed by the government and therefore did not come into force. However, other health professions such as dentists, do permit a spousal exemption.

Mr. Tanase's spouse subsequently posted information on social media about her husband having treated her which then led to professional misconduct allegations against him before the Discipline Committee of the College ("Discipline Committee"). Mr. Tanase argued that the mandatory provisions requiring revocation of a license for sexual abuse infringed his *Charter* rights. Specifically, he claimed that the mandatory revocation provisions infringed his section 7 right to liberty and security, and his section 12 right not to be subjected to cruel and unusual punishment. The Discipline Committee rejected these arguments and revoked Mr. Tanase's license. He appealed the Discipline Committee's decision to the Divisional Court.

### *Divisional Court Decision*

The Divisional Court upheld the Discipline Committee's decision to revoke Mr. Tanase's licence for treating his spouse despite his honest, but mistaken belief that members were permitted to treat their spouses. In its decision, the Divisional court sympathized with his decision to treat his spouse who was fearful of dental treatment. The Divisional Court also acknowledged the detrimental effects that revoking Mr. Tanase's license may have on his life and career. The Divisional Court even addressed the unfairness that dentists are permitted to treat their spouses while dental hygienists are not.

Despite these factors, the Divisional Court found that the revocation of Mr. Tanase's license was warranted because the objective of the provision was to address and prevent the serious concerns of sexual abuse and exploitation of patients by health practitioners. The Divisional Court therefore reaffirmed the legislature's intentions and longstanding case law regarding the greater public policy objectives and purpose behind the zero- tolerance policy.

The Divisional Court also rejected Mr. Tanase's argument that the mandatory revocation and public disclosure requirements breached his *Charter* rights guaranteed under section 7 and 12 of the *Charter*. The Divisional Court found that economic interests and a right to practice a profession freely are not grounds protected under the *Charter*.

### *Takeaways*

Until the government of Ontario approves the spousal exemption, dental hygienists and other regulated health professionals ought to be cautious whom they decide to treat. This case suggests that the College and the courts are unwilling to provide leniency or exceptions to the mandatory revocation provisions in order to address greater public policy objectives. This decision also clarifies that economic interests and a right to practice a profession unfettered are not protected by the *Charter*.

Christopher Wirth, Partner
Sakshi Chadha, Articling Student

— KC —

## Court of Appeal finds that Sale of Prescription Glasses and Contact Lenses by British Columbia Company to Ontario residents, not subject to Ontario Legislation

In *College of Optometrists of Ontario v. Essilor Group Inc.*, 2019 ONCA 265, the Ontario Court of Appeal recently decided that the delivery of ordered prescription eyewear to residents of Ontario, which has been processed outside of Ontario, was not subject to Ontario's *Regulated Health Professions Act ("RHPA").*

### *Background*

Essilor Group Canada Inc. ("Essilor"), is a large manufacturer of ophthalmic lenses.

Since 2014, Essilor has carried on a retail business of selling contact lenses and eye glasses online and acquired Clearly Contacts Ltd. ("Clearly") and Coastal Contacts Inc. ("Coastal") which are located in British Columbia. The online business of Essilor is conducted in British Columbia through its websites, clearly.ca and costal.com. Its customers include Ontario residents.

The regulatory scheme in British Columbia permitted Essilor's method of selling prescription eyewear. Its legislation related to optometry and opticianry define the practices of these professions to include "dispensing vision appliances" and define "dispense" to mean "design, prepare, fit, adjust, verify or supply" and the regulations limit the practice of optometry and opticianry to registrants of the respective colleges of these professions. However, there is an important exception, whereby persons who are not registered optometrists and opticians are permitted to dispense corrective eye glass lenses and contact lenses so long as certain conditions are met, including that the person dispensing can rely on a prescription written by an optometrist or qualified medical practitioner outside of British Columbia.

These regulations differ from the Ontario regulatory scheme, which includes not only the *RHPA*, but the Ontario *Optometry Act* and the Ontario *Opticianry Act*. Unlike the British Columbia regulatory scheme, the Ontario regulatory statutes and their regulations do not define the term "dispensing". Section 27(2) of the *RHPA* lists several controlled acts, one of which is "*prescribing or dispensing, for vision or eye problems, subnormal vision devices, contact lenses or eye glasses other than simple magnifiers*". Under section 27(1) of the *RHPA*, controlled acts may not be performed by person in the course of providing health care services unless: a) the person is a member authorized by a health profession Act to perform the controlled act; or, b) the performance of the controlled act has been delegated to the person by a member described in (a).

The College of Optometrists of Ontario and the College of Opticians of Ontario (the "Colleges"), which regulate the practices of optometry and opticianry respectively, wrote a joint letter to Essilor in September 2014 noting that it was engaging in unlawful behaviour by dispensing prescription eyewear through the Internet to people in Ontario without involving an Ontario licensed health care provider. Discussions between the Colleges and Essilor ensued but did not resolve any issues. The Colleges then commenced an application against Essilor in December 2016, alleging it was in breach of section 27 of the *RHPA* by accepting orders for prescription eyewear through its websites as well as by shipping the eyewear to patients in Ontario.

### *Superior Court of Justice Decision*

The Application Judge found that Costal and Clearly were "dispensing eyewear to those who required corrective lenses to assist with less than perfect vision" and also concluded that there was a sufficient connection between Ontario and the conduct of Essilor which operated outside of Ontario, such that Essilor's conduct was captured within s. 27 of the *RHPA*. Essilor appealed the Application Judge's decision to the Court of Appeal.

### *Court of Appeal*

The Court of Appeal noted that there were two main issues on the appeal which were: 1) whether Essilor's sale of prescription eyewear in Ontario amounted to the controlled act of "*dispensing*" within the meaning of the *RHPA*; and, 2) whether there was a sufficient connection between Essilor's online provision of prescription eyewear and Ontario, which brought Essilor's activities within s. 27 of the *RHPA*.

On the first issue, the Court reviewed the acts of ordering, selling and delivering prescription eyewear. The Court determined that the mere fact that a customer placed an order for an Ontario located device could not support a finding that Essilor performed the controlled act of dispensing in Ontario. The Court also noted that the provision of prescription eyewear to an individual involved a transaction which combined elements of professional health care services as well as a commercial sale, such that prescription eyewear was not dispensed free of charge. Lastly, the Court noted that while it was persuaded by the Colleges' arguments that the delivery of prescription eyewear fell within a continuum of activities which made up the act of "dispensing" eyewear, this did not lead to the conclusion that the delivery of this eyewear would violate s. 27 of the *RHPA*. It noted that if all of the acts in the continuum of activities were performed by an individual in Ontario, then a violation of s. 27 of *RHPA* could be made out, however, this was not the case.

The Court then considered the issue of whether there was a sufficient connection with Ontario. The Court relied on the analysis of the Supreme Court of Canada decision *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40 (CanLII), which dealt with the applicability of provincial legislation to an out-of-province defendant. The Court concluded that the placement of an online order by a customer in Ontario is an act performed by the customer, and did not amount to an act that Essilor was performing as part of the controlled act of dispensing. The Court further noted that the steps that Essilor takes for selling prescription eyewear meet the requirements of the regulatory scheme in British Columbia and that the mere commercial act of physically delivering an ordered product outside of British Columbia to a customer in Ontario, did not establish a sufficient connection with Ontario, whereby s. 27 of the *RHPA* would apply. Accordingly, the court overturned the application judge's decision and dismissed the Colleges' application.

The Colleges subsequently sought leave to appeal from the Supreme Court of Canada but that request was dismissed on October 17, 2019.

***Takeaway***s

This case illustrates the challenges that regulatory health colleges may face with respect to the cross-border activities of commercial entities which supply health care products and supplies to patients and members of the public. These challenges become more apparent when there are gaps in the provincial legislation governing regulatory health colleges, including the absence of provisions which define key terms or acts. The Court of Appeal in this decision commented that if the Ontario legislature intended to give a commercial monopoly to Ontario optometrists and opticians over the distribution of orders of prescription eyewear placed with other regulated suppliers in other provinces, it would have to adopt the requisite language to do so. However, this decision also gives rise to public interest issues beyond just the commercial impact on Ontario health professions, including whether there should be legislation that will put controls in place to ensure that any health care related products coming from outside the province adhere to the Ontario regulatory scheme of the health colleges which are established to protect the public.

Christopher Wirth, Partner
Jasmeet Kala, Associate

— KC —

**Divisional Court finds that Protecting Patients Act 2017 not retrospective**

In *Ontario (College of Physicians and Surgeons of Ontario) v. Kunyetz*, 2019 ONSC 4300, the Divisional Court, in overturning a decision of the Discipline Committee of the College of Physicians and Surgeons of Ontario (the "College"), found that the provisions of the *Protecting Patients Act 2017* (the "Act") with respect to penalty, which amended the *Regulated Health Professions Act* (the "RHPA"), could not be applied retrospectively.

***Background***

Four patients made complaints regarding the behaviour of Dr. Kunyetz (the "Doctor") concerning events which all occurred prior to the coming into force of the Act.

***Discipline Committee Decision***

On March 21, 2017, the College Discipline Committee issued a Liability Decision, which found that the Doctor had committed professional misconduct by engaging in conduct which included sexual abuse by a sexual touching of a patient's breasts. It later issued a Penalty Decision in which it revoked the Doctor's licence to practice. The Act had added sexual touching of the breasts to the acts requiring mandatory revocation and the Discipline Committee concluded that the imposition of this penalty was not subject to the general rule against retrospective application. The Doctor appealed to the Divisional Court.

***Divisional Court***

On appeal, the Court concluded that two of the Discipline Committee's most significant findings on the liability issues were not reasonable. It quashed the decisions that the Doctor had engaged in sexual abuse by touching a patient's breasts and that the Doctor had engaged in disgraceful, dishonourable or unprofessional conduct by allowing contact between two of the patients' bodies and a portion of his body.

With respect to penalty, the Court determined that the Discipline Committee erred in its analysis and disagreed with its decision that the Act had a retrospective effect. There is a general presumption that legislation will not apply retrospectively to conduct which predates the change and the court held that there was no indication that this presumption was displaced by any express or implied intention by the Legislature, or that the Legislature had even considered whether the amendments were retrospective or not. The Court also determined that the Discipline Committee's penalty decision could not stand, since the allegations of sexual abuse and professional misconduct by touching had been set aside.

When an appeal of an administrative decision maker is granted, the usual remedy is to remit the matter to the decision maker which will then reconsider the issue of penalty based upon the remaining findings.

However, in this case, the Court held that there were unique circumstances which warranted not doing so as the parties and the public all have a shared interest in finality and a new hearing would take many months. Additionally, the Doctor had already been subject to a period of suspension and of revocation that totalled 45 months. It was unlikely that a penalty greater than this would be imposed with respect to the remaining findings.

As a result, the Court concluded that the appropriate penalty for the remaining findings was a period of suspension from October 1, 2015 to the date of the release of its decision.

***Takeaways***

Amendments to legislation with respect to penalty in the professional misconduct context are unlikely to be given retrospective effect unless the legislation clearly states that they are meant to be retrospective. In such cases, the law in place at the time of the commission of the conduct will usually govern.

Christopher Wirth, Partner
Brennan Caldwell, Summer Student

— KC —

**Law Society Tribunal asks Divisional Court to inquire into whether the Immigration and Refugee Board is in contempt**

In *Law Society of Ontario v. Odeleye*, 2019 ONLSTH 135, the Law Society of Ontario Tribunal (the "Tribunal") decided that that it would exercise its discretion under s. 13(1) of the *Statutory Powers Procedure Act* ("SPPA"), to ask the Divisional Court to inquire into whether the Immigration and Refugee Board ("IRB"), was in contempt of the Tribunal's orders for production of records.

***Background***

A lawyer, Richard Adedayo Odeleye ("the Member"), faces allegations of professional misconduct before the Tribunal that he sexually harassed clients, made unwelcome sexual advances, engaged in verbal and physical conduct of a sexual nature towards clients, billed Legal Aid for services not rendered to a client and requested; asked that clients pay fees in addition to those permitted by the Legal Aid Certificate, and that he also made false statements about a client in submissions to the IRB about sexual orientation.

The Member subsequently brought a motion before the Tribunal seeking an order that the IRB produce records in its possession relating to the application for refugee status made by three of his former clients, concerning his conduct towards the subject of the allegations of professional misconduct. The IRB appeared on the motion and it, along with the Law Society, opposed the Member's motion.

The Tribunal ordered the IRB to review its records with respect to these clients and to produce to the Tribunal for inspection a number of documents.

Following this decision, counsel for the IRB requested directions about compliance with the order and receive direction from the Tribunal in that regard.

The IRB then delivered documents to the Tribunal. Following the Tribunal's review of those records it directed the IRB to produce additional records and to provide redacted copies of some of the records already produced. However, rather than comply with this further direction, the IRB objected to producing the additional records because of ss. 8(2)(c) of the *Privacy Act*, RSC 1985, c. P-21, and because it alleged that the Tribunal had no jurisdiction to order production of the additional records. In response, the Tribunal convened a conference call to receive further submissions on the position taken by the IRB.

After hearing submissions, the Tribunal concluded that it did have the jurisdiction to order the IRB to produce the unredacted records and provided a further deadline for such production of May 29, 2019.

Despite this, the IRB did not respond to the Tribunal's order and did not produce the records by this deadline.

On June 3, 2019, given that it had not received the records from the IRB as it had ordered, the Tribunal made a further endorsement and directed the IRB to provide

forthwith a response. Despite this, the IRB failed again, without explanation, to comply with this order.

As a result of the request of counsel for the Law Society, the Tribunal convened a case conference on July 17, 2019 in order to understand the IRB's position as to whether it intended to produce the records which had been ordered.

At the case conference, counsel to IRB repeated the same submissions with respect to jurisdiction which the Tribunal had previously rejected. In the Tribunal's view, the IRB was left with three options:

1. Comply with the order:
2. Seek to appeal the order: or
3. Seeks judicial review of the order.

Despite this, the IRB neither complied with the Tribunal's Orders, nor did it appeal the Order or seek to judicially review it. As a result, the Tribunal scheduled a motion to consider what action it should take if any given the IRB's failure to comply with its orders.

***Law Society Tribunal Decision***

On the motion, after receiving submissions, the Tribunal considered s. 13 of the SPPA which provides that:

*Contempt proceedings*

*13(1) Where any person without lawful excuse, ...*

*(b) ...refuses... to produce any document or thin in his or her power or control legally required by the tribunal to be produced by him or her for or to answer any question to which the tribunal may legally require an answer; or*

*(c) does any other thing that would, if the tribunal had been a court of law having power to commit for contempt, have been contempt of that court,*

*the tribunal may, of its own motion ... state a case to the Divisional Court setting out the facts and that court may inquire into the matter and, after hearing any witnesses who may be produced against or on behalf of that person and after hearing any statement that may be offered in defence, punish or take steps for the punishment of that person in like manner as if he or she had been guilty of contempt of court.*

In the Tribunal's view, given that the IRB had failed without explanation to produce the records ordered by the Tribunal, it concluded that the continued breach of its order will have a serious deleterious effect on the fairness of the adjudication of the proceedings if the breach was not remedied. Accordingly, the Tribunal decided to state a case on its own motion to the Divisional Court pursuant to s. 13(1) of the SPPA for the Divisional Court to inquire into whether the IRB is in contempt of the Tribunal's orders for production of records.

***Takeaways***

This decision demonstrates that a party served with a Tribunal's Order, must take it seriously and not ignore it. If it is believed that the Tribunal's Order was made in error or without jurisdiction, then consideration must be given to appealing the Order or seeking judicial review of it and asking that it be quashed, as a failure to do so and to instead refuse to comply with the Order, can potentially lead to contempt proceedings being brought against the party before the Divisional Court.

Christopher Wirth, Partner

— KC —

**Lawyer's "good faith" obligation to cooperate with Law Society Investigation to be objectively assessed**

In *The Law Society of Ontario v. Diamond*, 2019 ONSC 3228, the Superior Court dismissed an appeal from a decision by the Law Society Tribunal Appeal Division, which upheld the decision of the Hearing Division that a lawyer, Mr. Diamond, had failed to cooperate with a Law Society investigation into his firm's referral practices.

At the heart of this appeal was the issue of what constitutes "good faith" in the context of Rule 7.1-1 of the Society's *Rules of Professional Conduct*, which requires lawyers to act in good faith and reply promptly and completely to the Law Society.

***Background***

The events that triggered this action began on October 17, 2016 when the Law Society informed Mr. Diamond that it was investigating his firm's structure and referral fee practices. The Law Society investigator requested various documents, a portion of which Mr. Diamond produced right away, but some of which he failed to produce promptly. There were six categories of documents and the Hearing Division found that Mr. Diamond had refused to cooperate in relation to five of them.

Two of the categories were general receipts and disbursements journals, which Mr. Diamond maintained he did not have. After numerous requests for the journals, the Law Society informed him that he was being investigated for not keeping proper records. Mr. Diamond then stated that he was complying with these requirements through records he kept through an accounting software called QuickBooks. Despite his numerous assurances that he did not have these documents, he later provided the investigator with his QuickBooks records. These were generated into the appropriate format for the journals and produced to the Law Society.

Another category was general monthly business statements. Mr. Diamond provided the majority of these statements about two months after they were requested. The Law Society then advised that it was missing some bank statements for his TD account. Approximately 8 months after the initial request Mr. Diamond provided the remaining TD statements.

The Law Society also requested cancelled cheques from 2013 to 2016. It requested these cheques a few months after its initial request as a way of obtaining information in the absence of the general receipts journal. Mr. Diamond advised that he had learned that a significant cost would be incurred to obtain the cheques and requested that the Law Society cover this cost. The Law Society did not provide an answer, but Mr. Diamond later obtained all of the cancelled cheques.

The final category was deposit slips. Mr. Diamond initially said that he did not retain deposit slips. He later discovered that this was not the case and provided them.

***The Hearing and Appeal Divisions Decisions***

The Hearing Division found that Mr. Diamond committed professional misconduct by his failure to cooperate with the Law Society's investigation and ordered that he be reprimanded and pay costs of $25,000.00. It described the communications between him and the Law Society as a "cat and mouse game" and found that the documents requested were routine documents that he should have been able to provide on short notice. Mr. Diamond appealed.

On appeal, the Appeal Division found that the decision of the Hearing Division a reasonable conclusion. It further held that any

confusion or mistaken beliefs did not relieve Mr. Diamond from his obligation to cooperate.

***Divisional Court Decision***

Mr. Diamond further appealed to the Division Court (the "Court") arguing that the Appeal Division used an overly narrow definition of good faith, limiting it to circumstances beyond the lawyer's control, such as mental health or computer problems. He argued that he was always willing to provide the requested information and any delay was due to confusion and misunderstanding.

The Court considered *Groia v. Law Society of Upper Canada*, 2018 SCC 27, in which the Supreme Court of Canada considered whether a lawyer can be found guilty of professional misconduct when he had made a genuine mistake about the law. It found that subjecting a lawyer's sincerely held but mistaken belief about a legal position to a reasonableness analysis could have a damaging effect on the administration of justice for a number of reasons. For example, it could discourage lawyers from raising arguments on behalf of clients.

However, the Court held that none of the policy considerations raised in *Groia* were present in the duty to cooperate and that a lawyer does not meet his duty to cooperate just because he has a genuine or honest belief that he is fulfilling this obligation. His efforts must also be measured against an objective standard of reasonableness.

The Court found that Mr. Diamond's delays in providing the documentation did not establish good faith cooperation with the investigation. Some of the information, such as the general receipts and disbursements, he had all along and were simply in a different form than what was required. Other information, such as the deposit slips, he was unaware he had, demonstrating a lack of awareness of his professional obligations and firm practices.

Further, the Appeal Division had found that due to the length of time it took for Mr. Diamond to provide the documentation, the Law Society's numerous clear requests, and the fact that licensees are required to have such information readily available, it was reasonable to conclude that there was a lack of good faith on Mr. Diamond's part. The Court held that this conclusion was reasonable and dismissed the appeal.

***Takeaways***

Lawyers must always be prepared to respond to inquiries regarding their firm practices and accounting. This involves being well aware of their professional obligations, as honest misunderstandings and mistaken beliefs will not always relieve them of their duties. It is crucial that they be diligent in their record keeping and respond promptly to requests from the Law Society, as failing to do so could result in professional misconduct allegations being made against them.

Christopher Wirth, Partner
Brennan Caldwell, Summer Student

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# Professional Regulation Newsletter

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## Upcoming Events

Keel Cottrelle is pleased to be sponsoring the 2019 Canadian Bar Association Administrative Law, Labour and Employment Law Conference which will be held November 8-9, 2019 at the Westin Hotel in Ottawa.

## News

On September 1, 2019, Keel Cottrelle partner, Christopher Wirth commenced his one year term as Chair of the Canadian Bar Association's Administrative Law Section. The Canadian Bar Association represents over 36,000 members and is the largest professional association for lawyers in Canada.