KEEL COTTRELLE LLP
Barristers and Solicitors

Toronto —
36 Toronto Street,
Suite 920
Toronto ON M5C 2C5

416-367-2900
416-367-2791 (fax)

Mississauga —
100 Matheson Blvd. East,
Suite 104
Mississauga ON L4Z 2G7

905-890-7700
905-890-8006 (fax)

www.KeelCottrelle.com

Professional Regulation Newsletter

Fall 2018

IN THIS ISSUE -

Divisional Court Finds That There Must Be Evidence That a Member's Conduct Exposes or Is Likely to Expose Patients to Harm or Injury Before an Interim Order Can Be Made

In *Fingerote v. The College of Physicians and Surgeons of Ontario*, 2018 ONSC 5131 (Ont.Div.Ct.), the Divisional Court held that before the Inquiry, Complaints, and Reports Committee (the "ICRC") of the College of Physicians and Surgeons of Ontario (the "CPSO") was entitled to make an interim order imposing restrictions on a doctor's certificate of registration, there must be some evidence before the Committee on which it can find that the conduct of the Member exposes, or is likely to expose, the Member's patients to harm or injury.

Background

A patient made a complaint concerning Dr. Fingerote to the CPSO alleging that he had improperly touched her during an examination. Dr. Fingerote denied the allegations.

Following an investigation, the ICRC made an order pursuant to Section 25.4(1) of the *Health Professions Procedural Code*, 1991, c.18, sched. 2, Schedule B, (the "*Code*") and in so doing imposed restrictions on Dr. Fingerote's certificate of registration until the disposition of the matter by the Discipline Committee.

Dr. Fingerote brought an urgent application for judicial review of the ICRC's interim order, which was heard on an expedited basis.

The CPSO argued that the ICRC's decision was reasonable and that the ICRC was entitled to infer a risk of future harm to patients based solely on its finding that the

patient's allegations that formed the substance of the upcoming discipline hearing against Dr. Fingerote, if true, would amount to sexual abuse.

Section 25.4(1) of the *Code*, permits the ICRC to make an interim order "directing the registrar to suspend or to impose terms, conditions, or limitations on, a member's certificate of registration if it is of the opinion that the conduct of the member exposes or is likely to expose the member's patients to harm or injury".

Dr. Fingerote argued that the ICRC's decision was unreasonable as it was only entitled to make such an order if it had received evidence upon which it could make a finding that he was likely to expose his patients to harm or injury and that the allegations against him alone were not a sufficient basis upon which to make such a finding.

The Decision

The Divisional Court found the ICRC's interim order to be unreasonable and set it aside.

In so doing, the Divisional Court held that before an interim order can be made by the ICRC, there must be some evidence, not only of conduct that falls below the standard of practice of the profession, but which establishes the probability of harm to patients.

Dr. Fingerote had been practising medicine for 37 years without any similar prior allegations and he continued to practise for a year after the patient first made her allegation to the CPSO, before the ICRC imposed its interim order.

During that year, there was no evidence of any similar conduct having occurred and the CPSO did not appear to be treating the case as one requiring any urgency.

The Divisional Court further held that the ICRC was not entitled to infer from the nature of the allegations, which if found to be true would amount to sexual abuse, that Dr. Fingerote was likely to expose his patients to a risk of harm or injury.

The Divisional Court also rejected the suggestion that an interim order was available to the ICRC based upon proof of a *prima facie* case on the merits. The Divisional Court held that to do so would render the test in Section 25.4(1) of the *Code* meaningless and redundant as no case should proceed to a discipline hearing if the CPSO did not first have a *prima facie* case, and that if that was all that was required to justify an interim order, then interim orders would be available in every matter.

The ICRC could only draw inferences and form its opinion based on evidence before it and could not speculate. Its order could not stand when there was no evidence before it which would entitle it to find that Dr. Fingerote was likely to expose his patients to a risk of harm or injury, apart from the fact that the allegations against him, if proven, could potentially amount to sexual abuse.

In a case such as this one, where the facts are contested, the conclusions are based on a person's perception of another's intention and where there was a clinically appropriate explanation put forth with no evidence to the contrary on the record, the ICRC must point to some evidence which would support its inference or opinion that the doctor in question exposes or is likely to expose his patients to harm or injury.

Without such evidence, there was no basis for the ICRC's finding that there was no clinical reason for a physician conducting such an examination to rest his hand or arm anywhere on the patient's body and, as such, could not form the basis for the inference drawn by the ICRC that Dr. Fingerote was likely to expose his patients to harm or injury.

Takeaways

1. *Prima facie* proof of the allegations against a member, without more does not meet the test for an interim order.

2. Before an interim order can be made, the ICRC, must have some evidence before it which establishes the probability that the conduct of the member exposes or is likely to expose the member's patients to harm or injury.

Christopher Wirth, Partner

— KC —

Divisional Court Upholds $257,353.76 Cost Award Against Member

In *Robinson v. College of Early Childhood Educators*, 2018 ONSC 6150, the Divisional Court upheld a decision of the Discipline Committee of the College of Early Childhood Educator's (the "Committee") to order a member to pay $257,353.76 in costs and in so doing, confirmed the Committee's jurisdiction to order costs following a finding of professional misconduct and that this jurisdiction is not limited to matters where the member acted "in a manner that was unreasonably frivolous, vexatious or in bad faith in the conduct of the hearing."

Background

After an eighteen day hearing, Bryan Robinson, a member of the College of Early Childhood Educators (the "College"), was found guilty of professional misconduct by the Committee for "abusing physically, sexually, verbally, psychologically or emotionally a child under his professional supervision."

The Committee ordered that Mr. Robinson pay $257,353.76 in costs of the hearing to the College.

This amount represented two-thirds of the College's costs of the hearing but also was five times what Mr. Robinson had made in his final year of employment. In so doing, the Committee determined that it should be the member found to have committed professional misconduct and not the membership that should bear the cost of the discipline proceedings.

Mr. Robinson appealed the Committee's decision to the Divisional Court on the basis that the Committee did not have jurisdiction to award costs of the hearing against him because it had found that his conduct in the hearing was not "unreasonably frivolous, vexatious or in bad faith". Furthermore, Mr. Robinson argued that it was unreasonable for the Committee to order costs against him because it was contrary to its rules.

Section 33(5)4 of the *Early Childhood Educators Act* (the "*ECEA*") provided the Committee with a broad discretion to award costs against a member after finding of professional misconduct. At issue was whether this power to award costs pursuant to section 33(5)4 of the *ECEA* was restricted by section 17.1 of the *Statutory Powers Procedure Act* (the "*SPPA*"), which only permits the awarding of costs where the conduct of a party had been unreasonable, frivolous or vexatious or the party had acted in bad faith, or by the Committee's Rule 16 of its *Rules of Procedure of the Discipline Committee and of the Fitness to Practise*

Committee, 2014 ("Rule 16"), to situations where the member had acted unreasonably.

The Decision

The Divisional Court found that the provisions of the *ECEA* prevailed over the SPPA and accordingly, the restriction in section 17.1 of the *SPPA* which prohibited a tribunal from ordering costs unless the conduct of a party had been "unreasonable, frivolous or vexatious or a party had acted in bad faith" did not apply. Therefore, the *SPPA* did not limit the broad discretion of the Committee to order costs under section 33(5)4 of the *ECEA*.

As well, the Divisional Court read Rule 16 together with section 33(5)4 of the *ECEA* and determined that although Rule 16 allows for costs to be fixed against a member when their conduct in the course of the hearing is problematic, it did not restrict the authority of the Committee under the *ECEA* to order costs after a finding of professional misconduct.

The Divisional Court found that the only reasonable interpretation of both Rule 16 and Section 33(5)4 of the *ECEA* was that while a costs award may be made against a member at any time during a hearing if that member's conduct was "frivolous, vexatious, unreasonable or in bad faith", the Committee may also order costs after the member had been found guilty of professional misconduct, even when a member had behaved reasonably.

The Divisional Court noted that the Committee's decision changed members' reasonable expectations that costs would only be awarded if they acted unreasonably.

The Divisional Court agreed with Mr. Robinson's argument that the result of the Committee's decision may have a "chilling effect" on members' ability to challenge allegations against them because of the potential for a high cost award, however, it found that this concern was a policy matter and that it was for the Committee or the legislature to address this issue.

Takeaways

When assessing whether to defend an allegation of professional misconduct, members must weigh the benefit of successfully challenging the allegations of professional misconduct versus the risk of a potentially high cost award if findings of professional misconduct are made against them.

Christopher Wirth, Partner
Cameron Taylor, Articling Student

— KC —

Divisional Court Upholds Finding That Discipline Committee Did Not Have Jurisdiction Over Pre-Licensure Conduct

The Divisional Court in *Association of Professional Engineers of Ontario v. Leung*, [2018] O.J. No. 4295, 2018 ONSC 4527, upheld a decision of the Discipline Committee of the Association of Professional Engineers (the "PEO"), which had found that pursuant to the *Professional Engineers Act* (the "*Act*"), it did not have jurisdiction over pre-licensure conduct of licensees.

Background

Mr. Leung and his company, JIT were retained by Ms. Aphantis to submit plans to obtain a building permit.

The contract was only one page long on JIT letterhead, with limited reference to the scope of work.

Ms. Aphantis subsequently expanded the scope of the project and asked that Mr. Leung send as built drawings to the City to enable a building code review.

Mr. Leung did not respond to the requests for the as built drawings and Ms. Aphantis hired a second engineer to complete the project. At the time of this alleged misconduct, JIT did not hold a Certificate of Authorization (the "COA").

The PEO alleged that Mr. Leung and JIT were guilty of professional misconduct for:

1. Failing to remedy deficiencies in a building permit application;

2. Failing to complete contracted work and responding to client's inquiries; and

3. Providing engineering services without a COA.

Discipline Committee's Decision

The Discipline Committee dismissed the allegations against JIT. It held that it had no jurisdiction against JIT for conduct that occurred before it held a COA.

The Discipline Committee also dismissed two out of three allegations against Mr. Leung, finding that:

1. There was insufficient evidence to demonstrate that the contract as written included as-built drawings.

2. With respect to the failure to respond to the client, the Discipline Committee expressed its disapproval of Mr. Leung's behaviour but found that it did not rise to the level of professional misconduct; and

3. Mr. Leung had provided engineering services while JIT was not a holder of a COA and had therefore committed professional misconduct.

The PEO appealed this decision to the Divisional Court.

Divisional Court's Decision

Standard of Review

The Divisional Court determined that the standard of review of the Discipline Committee's decision was reasonableness and rejected the submissions by both the *amicus curie* and the appellant who argued that the standard of review should be correctness because the question before the Discipline Committee was one of jurisdiction.

The Divisional Court emphasized that questions of true jurisdiction, which attract a correctness standard, are rare and that this was not one of those cases. It reasoned that the question of whether the Discipline Committee had jurisdiction was based on an interpretation of its home statute and that it had specialized expertise compared to the Court in this regard. The Divisional Court found that a reasonableness standard of review was sufficient to fulfill its supervisory role.

Jurisdictional Issue

The Divisional Court then went on to hold that the Discipline Committee's determination that it did not have jurisdiction over JIT's conduct before the COA was issued was both reasonable and correct.

The PEO argued that nothing in the *Act* limited the temporal scope of the Discipline Committee's jurisdiction, and because JIT

eventually received a COA, it fell within the Discipline Committee's jurisdiction.

The PEO also argued that professional legislation should be interpreted in a broad and purposive manner.

The Divisional Court found that the PEO's argument failed to properly interpret the sections of the *Act* in context.

The sections of the *Act* which cover the duties and powers of the Discipline Committee explicitly use the more restrictive "member of the Association or a holder of a certificate of authorization", suggesting that this language was deliberate and that it was not intended that entities be subject to the Discipline Committee's jurisdiction for events prior to its obtaining a COA.

The Divisional Court also rejected the argument that professional discipline legislation should be broadly interpreted. In keeping with a long-recognized approach, it found that because of the consequences to an individual's livelihood, professional discipline legislation should be narrowly construed.

Finally, the Divisional Court rejected the argument by the PEO that limiting the Committee's jurisdiction would allow non-licensed individuals to hold themselves out as engineers without consequences, finding there are ample consequences for such individuals under, for example, Section 40 of the *Act*, and through other mechanisms of civil liability.

Contractual Issue

The Divisional Court found that the Discipline Committee's decision on this issue should be reviewed on a reasonableness standard and that in this case, its decision was reasonable.

The Discipline Committee found that while Ms. Aphantis may have believed the contract to have had a broader scope, this was not so on the face of the written contract.

As well, the Committee found that while Ms. Aphantis wanted additional drawings, she did not offer to pay more money for them.

While Mr. Leung stopped responding to her over time, it was to these additional requests, which were not the subject of his original contract.

The Divisional Court emphasized that it was not the function of the Court to re-weigh the evidence and that the Discipline Committee's conclusion was a reasonable one based on its findings.

Takeaways:

1. Questions of jurisdiction normally attract a reasonableness standard of review. True questions of jurisdiction that would attract a correctness standard of review will be extremely rare.

2. Under its *Act*, the PEO's Discipline Committee does not have jurisdiction to impose sanctions for conduct that occurred pre-licensing.

Christopher Wirth, Partner
Alana Spira, Articling Student

— KC —

Professional Misconduct Findings are Limited to the Charges

In *MacLeod v Alberta College of Social Workers* (2018 ABCA 13), the Alberta Court of Appeal reversed a finding of professional misconduct by the Alberta

College of Social Workers (the "College") due to its not having provided the member with sufficient particulars of the allegations against her.

In addition, the Court of Appeal found that the College had inappropriately expanded the scope of the allegations beyond the specific events that were the subject of the charge of professional misconduct.

Background

The appellant, Karen MacLeod ("Ms. MacLeod"), had been a member of the College for about 25 years and had a history of communication and workplace difficulties. The College brought allegations of professional misconduct against her which related to events that occurred between 2013 and 2014 and were based upon three complaints by co-workers and supervisors.

The first charge against the complainant was very general, and referred to rude interactions with co-workers without providing dates or locations. The only detail provided was that Ms. MacLeod "put her hand up to halt or discontinue conversations." The second charge was even more general and it merely stated that the appellant was "rude, abrupt and dismissive to staff members."

The third charge related to a specific meeting on November 1, 2013, where Ms. MacLeod was alleged to have been dismissive and rude to client family members who attended the meeting and contained a number of details regarding the specific conduct that was alleged to be dismissive and rude. The final charge was that an email sent to a co-worker by Ms. MacLeod on April 30, 2014, was alleged to be rude and abrupt and attempted to threaten or insinuate a threat to the co-worker.

The Hearing Tribunal of the College found that all the allegations against Ms. MacLeod had been proven and made a finding of professional misconduct against her.

In coming to its decision, the Hearing Tribunal considered evidence regarding events that occurred between 2001 and 2014, even though the charges only related to events that occurred between 2013 and 2014.

The basis for admitting this evidence was not clearly specified, but the Court found it appeared to be entered to demonstrate the likelihood that the alleged events happened, to justify elevating the specific charges to the level of professional misconduct and to demonstrate that Ms. MacLeod was aware of her conduct and thus it could not be excused as unintentional.

Ms. MacLeod appealed the decision, arguing that she was not provided sufficient particulars of the allegations and that the Hearing Tribunal considered events outside the scope of the allegations.

The Court of Appeal's Ruling

The Court of Appeal agreed with Ms. MacLeod that the Hearing Tribunal did not restrict its findings to the exact charges before it and that the Hearing Tribunal failed to distinguish between the evidence and the charges. The formal charges against Ms. MacLeod were the only matters that could form the basis for a finding of professional misconduct.

The evidence that pertained to related events, in this case going back to 2001, could be used to support the finding of professional misconduct, but the related events themselves could not independently form the basis for that finding.

In addition, the Court of Appeal determined that the first two complaints did not provide Ms. MacLeod with sufficient particulars and that the rules of natural justice required more than what was provided. It found that due to the generality of the charges, Ms. MacLeod was required to justify her employment performance all the way back to 2001.

In coming to its decision, the Court of Appeal noted that particulars allow a professional to identify the specific events that form the basis for a finding of professional misconduct and serve to limit the scope of the charges, so that impugned individuals do not have to defend their entire career, or general character, during a hearing.

In the result, the Court of Appeal set aside the finding of professional misconduct on the first three charges, dismissing the first two as being too general to form a basis for a professional misconduct hearing. With respect to the third allegation, it remitted the matter back to the Hearing Tribunal to hold a new hearing before a new panel.

Lastly, with respect to the fourth charge, while the Court of Appeal upheld the panel's finding, it declined to remit it to the Hearing Tribunal on the issue of sanction as Ms. MacLeod had already effectively served the retroactive sanction which had been imposed on her and had retired from her employment.

Takeaways

1. A failure to provide sufficient particulars may be fatal to a finding of professional misconduct.

2. A finding of professional misconduct can only be made with respect to the allegations that form the basis of the charge.

Christopher Wirth, Partner
Cameron Taylor, Articling Student

— KC —

Court Defers to Reasonable Decision Based Upon Unfair Regulation

In *Marshall v College of Psychologists of Ontario*, 2018 ONSC 6282, the Divisional Court confirmed that it could not review a decision of the Registration Committee of the College of Psychologists of Ontario ("the Committee") if the decision was reasonable, even if it was based upon an unfair regulation.

Factual Background

Dr. Liam Marshall ("Dr. Marshall") was denied registration as a "psychologist authorized for supervised practice" by the Committee. Dr. Marshall attended Queen's University and received a PhD in Developmental Psychology.

In 2015, he applied to be registered by the College of Psychologists of Ontario (the "College"). Under Section 12 of *Ontario Regulation* 74/15 under the *Psychology Act, 1991*, SO 1991 c. 38, in order to be registered, an applicant must either have obtained a doctoral degree from an accredited program or from a psychology program considered by a Panel of the Registration Committee to be equivalent. These requirements are non-exemptible.

An earlier version of the regulation allowed an applicant to obtain a doctoral degree "from a program of study with content that is primarily psychological in nature".

Dr. Marshall may have qualified under the previous regulation.

The Committee published the criteria it used to assess whether a program was equivalent. Dr. Marshall's doctoral program was not accredited.

However, Dr. Marshall worked for thousands of hours under registered psychologists in Ontario, as well as publishing numerous articles. These experiences were not part of his PhD program, but Dr. Marshall claimed that his experience was such that he should qualify.

Committee Decision

The Committee determined that the program did not meet the published conditions and thus was not equivalent to an accredited program. The Committee did not consider Dr. Marshall's additional experience outside of his PhD program and directed the Registrar to refuse his registration.

Dr. Marshall appealed to the Health Professions Appeal and Review Board (the "Board").

The Board's Decision

The Board can direct that a certificate of registration be issued if the Committee improperly exercised its powers and the applicant substantially qualifies. However, if the applicant does not meet the non-exemptible requirements, the Board cannot make such an order.

The Board indicated that it could not look at the experience of Dr. Marshall that was outside the scope of his program as Dr. Marshall could not demonstrate that his extensive experience was done within his PhD program, as was required on the Board's interpretation of the regulation. Thus Dr. Marshall did not meet the requirements.

As a result, the Board confirmed the Committee's decision. However, the Board noted that it would serve the public for an individual to be able to augment their educational qualifications and that this ability "would allow for greater diversity of psychological skills within the profession".

The Board also indicated that it had concerns about the fairness of the provisions, but concluded that it could not override the requirements in the current regulation. The Board held that because Dr. Marshall could not link his supervised practice to his doctoral program, it could not be considered an equivalent program. Dr. Marshall then appealed to the Divisional Court.

Divisional Court Decision

The Divisional Court recognized that the Board was entitled to deference and reviewed the Board's decision on a standard of reasonableness.

It also noted that a decision would only be unreasonable if there was no line of reasoning that could support a conclusion based on the evidence that was presented.

Dr. Marshall argued that:

a. The College imposes less stringent requirements on those outside of North American and thus he would have been registered if he completed his degree outside of North America;

b. He would have been registered before the regulations changed; and

c. The ability to augment education serves the public.

The College argued that because Dr. Marshall did not complete the non-

exemptible requirements he was properly refused registration.

The Divisional Court began by recognizing that the purpose behind the registration requirements is the protection of the public, that the College is responsible for establishing and maintaining standards of registration and practices that are transparent, objective, impartial and fair, and that the question for the Board to answer was not whether the regulation was reasonable, but rather whether the program was equivalent within the meaning of the regulation.

The Divisional Court found the Board's interpretation of the regulation, namely that it required a comparison of the programs without considering external education, was reasonable notwithstanding the fairness to Dr. Marshall.

The Divisional Court also echoed the concerns about the fairness of the regulations, but indicated that this was a matter for the legislature to address and recognized that the Court and the Board did not have the authority to overturn the Committee's decision because the regulation was not reasonable or fair.

Takeaways

A decision will be upheld if it is a reasonable interpretation of a tribunal's own regulations, even if the result is based upon an unfair regulation.

Christopher Wirth, Partner
Alana Spira, Articling Student

— KC —

Court of Appeal Restores Discipline Committee Penalty Decision

In *College of Physicians and Surgeons of Ontario v. Peirovy*, 2018 ONCA 420, the Ontario Court of Appeal restored a penalty decision of the Discipline Committee of the College of Physicians and Surgeons of Ontario ("CPSO") related to sexual abuse allegations, which had been overturned by the Divisional Court.

Background

Dr. Javad Peirovy was charged criminally with six counts of sexual assault in relation to the allegations involving six patients.

He eventually pleaded guilty to the lesser offence of simple assault with respect to two patients. The remaining charges were withdrawn by the Crown.

In 2015, the CPSO's Discipline Committee heard allegations that Dr. Peirovy had inappropriately touched the breasts of his patients, including touching their nipples and putting his stethoscope on a patient's nipples in the absence of any clinical reasons to do so. Dr. Peirovy acknowledged that he may have touched the breasts of the complainants while he was examining them, but denied that the touching was of a sexual nature. He acknowledged that he suggested to one patient that they could go out on a date, but again denied that this constituted behaviour or remarks of a sexual nature.

The Discipline Committee found that Dr. Peirovy had committed acts of professional misconduct in that he engaged in the sexual abuse of patients, but found that revocation of Dr. Peirovy's certificate of registration was not warranted based on the totality of the evidence presented.

Instead, the Discipline Committee ordered that Dr. Peirovy's Certificate of Registration

be suspended for six months, that he appear before the Discipline Committee to be reprimanded, and that his Certificate of Registration be subject to a number of conditions including that he have a practice monitor with him in the room when treating female patients and having a sign posted for a minimum of 12 months stating he could not be alone in any examination or consulting room with a female patient.

The CPSO appealed the Discipline Committee's decision to the Divisional Court, arguing that Dr. Peirovy's license should have been revoked and that penalties imposed upon him were not appropriate.

Divisional Court Decision

The Divisional Court found that the penalty imposed by the Discipline Committee was unreasonable (or "unfit"), concluding that the decision of the Discipline Committee was not reasonable considering that an objective observer would have seen Dr. Peirovy's conduct with respect to the patients he sexually abused as a violation of the patients' sexual integrity. The Court further noted that there was no evidence that Dr. Peirovy had significant mental health issues such that he could not appreciate what he had done and found that he was a highly trained medical professional. It found the Discipline Committee's inference of Dr. Peirovy's unawareness of his actions to be inconsistent with the evidence.

The Divisional Court also noted that the Discipline Committee's reliance on the penalties imposed in other decisions was inappropriate as it did little to protect the public and eradicate sexual abuse in the profession.

The Divisional Court referred to the Discipline Committee's comment that revocation was reserved for egregious conduct or offenders with a high risk to re-offend, noting that egregious conduct included sexual contact and that the goal of the relevant legislative provisions was to eradicate sexual abuse in the profession and deter such behaviours amongst members. The Division Court allowed the appeal and remitted the matter back to the Discipline Committee for it to reconsider the penalty.

Dr. Peirovy appealed the decision of the Divisional Court to the Ontario Court of Appeal.

Court of Appeal Decision

The Court of Appeal allowed Dr. Peirovy's appeal and restored the Discipline Committee's original penalty decision, finding that the Divisional Court had erred by concluding that the Discipline Committee had made inconsistent findings of fact, rendering its decision unreasonable as the Discipline Committee's findings were well supported by the testimony of the experts and evidence. The Court of Appeal reaffirmed that the "*standard of reasonableness is satisfied so long as the explanation given for the conclusion is reasonable even if it is not one that the reviewing court finds compelling*".

The Court of Appeal found that the Divisional Court had determined that the penalties being imposed for sexual abuse had not been severe enough and should be increased and had substituted its view of what would have been a more appropriate penalty. By doing so, the Divisional Court had failed to correctly apply the deferential standard which was owed to the Discipline Committee's findings of fact and determination of the penalty as the Discipline Committee was the expert tribunal permitted to make decisions related to allegations of misconduct. Further, its penalty decision contained no inconsistent

findings of fact, nor was it "*manifestly unfit*", nor did its reasons state that revocation was available only in specific egregious circumstances, but rather, that the suspension and practice restrictions imposed were the most appropriate balance in light of all the factors and sentencing principles it had to consider, including protection of the public. The Court of Appeal therefore allowed the appeal and restored the Discipline Committee's decision.

In a strongly worded dissent, however, Justice Benotto stated her disagreement with the majority of the Court of Appeal as, in her view, the penalty was "*clearly unfit*" and highlighted inconsistencies with respect to the Discipline Committee's factual findings and its application when explaining the penalty ordered.

For example, Justice Benotto noted that the Discipline Committee rejected the argument that Dr. Peirovy's behaviours were a result of any misunderstandings, however, in explaining its reasons for issuing the penalties it had decided upon, the Discipline Committee noted that it understood some of the antecedents to Dr. Peirovy's sexual misconduct, including his awkward and unskilled mannerism with female patients. Justice Benotto further noted that this evidence was not supported by the testimony of experts and therefore ought not to have been relied upon by the Discipline Committee.

Takeaways

1. This decision demonstrates that despite the growing scrutiny of penalties awarded in cases where members of regulated professions have been found guilty of sexual misconduct, tribunal decisions are still entitled to a high degree of deference and will be upheld as long as the Discipline Committee correctly states and applies the appropriate principles.

2. It also highlights the challenges faced by disciplinary panels of regulatory health colleges in Ontario who hear matters involving sexual misconduct allegations which occurred prior to the recent amendments to the *Regulated Health Professions Act*.

Jasmeet Kala, Associate

— KC —

KEEL COTTRELLE LLP
Barristers and Solicitors

36 Toronto St. Suite 920
Toronto, Ontario M5C 2C5
Phone: 416-367-2900
Fax: 416-367-2791

100 Matheson Blvd. E., Suite 104
Mississauga, Ontario L4Z 2G7
Phone: 905-890-7700
Fax: 905-890-8006

Keel Cottrelle LLP
Professional Regulation Newsletter

Christopher Wirth - Executive Editor
Tel: 416-367-7708 | E-mail: cwirth@keelcottrelle.ca

Patricia Harper - Managing Editor
Tel: 416-367-7696 | E-mail: pharper@keelcottrelle.ca