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Professional Regulation Newsletter

Fall 2021

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Supreme Court of Canada to Hear Appeal From Decision Staying Lawyer's Discipline Hearing

In our Spring 2021 edition of this newsletter, we reviewed the decision of the Saskatchewan Court of Appeal in *Abrametz v. Law Society of Saskatchewan*, 2020 SKCA 81, in which it found that 32½ months of undue delay constituted an abuse of process sufficient to stay a lawyer's discipline hearing.

The Law Society of Saskatchewan sought and obtained leave to appeal from the Supreme Court of Canada and its appeal of this decision will be heard by the court on November 8, 2021. This will be an important decision for regulators as the Supreme Court will be required to consider when does the clock run from for calculating undue delay. In that regard, the Saskatchewan Court of Appeal held that delay in administrative proceedings can begin when a regulator receives a complaint and/or commences its investigation. The Court of Appeal also held that lengthy post-hearing delay can also be considered. The court will also be asked to reconsider its earlier decisions concerning in what circumstances unreasonable delay can lead to an abuse of process sufficient to stay an administrative hearing.

This appeal has attracted the interest of a number of Provincial Attorneys General and Regulators who have intervened in the appeal. From Ontario, the Attorney General of Ontario, the College of Physicians and Surgeons of Ontario, the College of Nurses of Ontario, the Ontario College of Pharmacists and the Royal College of Dental Surgeons of Ontario have all intervened.

The outcome of this appeal will be of significant interest to those who work or practice in the professional regulation area

as it may create new law with respect to what constitutes an abuse of process in the administrative law context, as well as to which periods of time should be considered in the calculation of undue delay.

Christopher Wirth, Partner

— KC —

Divisional Court Finds that French Language Rights are Substantive and Entitle a Doctor to a Bilingual Disciplinary Hearing

In the Spring 2021 edition of this newsletter, we reviewed a decision of the Discipline Committee of the College of Physicians and Surgeons of Ontario (the "College") which had held that a doctor was not entitled to a bilingual discipline hearing. However, in *Bélanger v. College of Physicians and Surgeons of Ontario*, 2021 ONSC 5132, the Divisional Court made a decision which has significant implications for regulators in Ontario when it set aside the decision of the Discipline Committee of the College (the "Discipline Committee"), finding that a French-speaking doctor was entitled to a bilingual disciplinary hearing before a panel whose members could understand and communicate in French without the assistance of an interpreter, subject to reasonable limits.

Background

Dr. Bélanger was facing allegations of professional misconduct and incompetence in relation to his chronic pain management practice. He brought a motion before the Discipline Committee claiming that he was entitled to a bilingual discipline panel pursuant to s. 86 of the *Health Professions Procedural Code* (the "*Code*"), which is Schedule 2 to the *Regulated Health Professions Act, 1991,* S.O. 1991, c. 18 (the "*RHPA*"). Section 86(1) of the *Code* provides that "[a] person has the right to use French in all dealings with the College".

The Discipline Committee decided that the right to use French under s. 86 of the *Code* does not provide a right to a hearing before a bilingual panel, and the right to use French was satisfied through the use of interpreters. Dr. Bélanger brought an application for judicial review of that decision to the Divisional Court.

The Divisional Court's Decision

The Divisional Court began by confirming that the more stringent "correctness" standard of review applies to the interpretation of s. 86(1) of the *Code*, because it deals with the quasi-constitutional issue of language rights, which is of central importance to the legal system and must be addressed in a uniform manner. However, the Court found that the interpretation of s. 86(4) of the *Code*, which provides that the right to use French is subject to reasonable limits, is subject to the more lenient "reasonableness" standard of review, as the Discipline Committee, and not the Court, is in the best place to know what is a reasonable limit in the circumstances.

The Court nevertheless held that the Discipline Committee's interpretation of the right to use French under s. 86(1) of the *Code* could not be upheld even under the more lenient reasonableness standard. Rather, the Court found that while the Discipline Committee appropriately recognized the importance of language rights in Canada, but erred in its application of the relevant principles to s. 86 of the *Code*.

Language rights are to be interpreted and applied liberally in a manner consistent with their importance and purposes. The Court found that the right to "use" French in this context included a right to "take part" in the disciplinary hearing process in French.

The Discipline Committee's decision had emphasized that the Provincial Government appoints its public members, so it had no ability to ensure that there were enough bilingual panel members to conduct a

hearing in French. The Court held that this difficulty did not invalidate the requirement to have a bilingual panel, noting that there are many cases in which the enforcement of legislation depends on government resources. The fact that the Provincial Government has not provided the necessary resources for the Discipline Committee to fulfill its obligations does not mean that there is an inconsistency or conflict in the legislation itself.

The Court also found that s. 86 imposes positive obligations on the College to ensure that "persons may use French in all dealings with the College", meaning it was not sufficient for the Discipline Committee to simply conclude that there is nothing the College can do to ensure the Provincial Government appoints more bilingual members, particularly given that it did not provide any evidence showing that it communicated with the government about the College's need for more bilingual members.

The Court also acknowledged that other statutes contain provisions which more explicitly recognize a right to a French-speaking panel or adjudicator, but found that these differences were not sufficient to derogate from the language rights granted by s. 86(1) of the *Code*, which also includes a right to a French-speaking panel despite the lack of specific wording in that regard.

The Court then considered s. 86(4) of the *Code*, finding that the Discipline Committee erred in concluding that the assistance of interpreters was a reasonable limit on the right to use French in this case. While the use of interpreters may meet the requirements of procedural fairness, that does not mean that it meets the requirements of language rights. The Court also found that the Discipline Committee erred by relying on its mandate to protect the public without considering the particular circumstances of this case. While the Discipline Committee's mandate is no doubt important, it also includes respect for language rights, given the inclusion of s. 86 in the *Code*.

The Court did acknowledge that there may be circumstances where the use of interpreters would be a reasonable limit under s. 86(4), for example where the obligation to constitute a bilingual panel causes undue delay, or where it is truly not possible to constitute a bilingual panel. The Discipline Committee did not, however, consider the circumstances of the case, but rather relied on its interpretation of s. 86(1) and its perceived lack of control over the composition and language abilities of its panel members.

The Court allowed the application for judicial review and set aside the Discipline Committee's decision, finding that s. 86(1) of the *Code* provides a presumptive right to a disciplinary hearing before a panel that can understand and speak French. The Court remitted the matter back to the Discipline Committee to issue a new decision on whether there were reasonable limits to that right in these circumstances.

Takeaways

This decision has significant implications for any College governed by the *Code*, or any other professional regulatory body whose governing legislation provides members with a similar right to use French. For Colleges governed by the *Code*, the Court confirmed that s. 86 includes a presumptive right to a discipline hearing before panel members who can understand and speak French, subject to reasonable limits. These provisions include positive obligations to ensure that a person can use French in all dealings with the College, which may require a College to actively reach out to the Provincial Government to request more bilingual panel members if it has such a need and cannot make these appointments itself, and/or to attempt to recruit bilingual members of the profession to their Discipline Committees. Colleges should therefore review the composition and language

abilities of their panel members in order to ensure that they can conduct hearings in French if requested.

Alex Smith, Associate

— KC —

Divisional Court Upholds Panel's Departure From Joint Submission on Penalty

In *Sammy Vaidyanathan v. College of Physicians and Surgeons of Ontario,* 2021 ONSC 5959, the Ontario Divisional Court upheld a decision of the Discipline Committee of the College of Physicians and Surgeons of Ontario (the "College") which had departed from the parties' joint submissions on penalty.

Background

The Member was a physician who admitted to allegations of professional misconduct and incompetence in proceedings before the College's Discipline Committee. The admissions related to numerous instances of professional misconduct over the course of approximately 10 years, including self-treatment, misrepresentations, unprofessional behaviour, and reckless prescription of opioids. The College and the Member made joint submissions on penalty, in which they sought, among other things, a reprimand, training, and partial restrictions on the Member's prescription of controlled substances. However, the parties disagreed on the length of the suspension period, with the College seeking a 12-month suspension and the Member seeking a 6-month suspension.

Independent legal counsel and the Discipline Committee expressed to the parties some concerns about the joint submissions on penalty, including that the partial restrictions on the Member's prescription of controlled substances did not cover his in-hospital practice. The Discipline Committee reserved its decision on penalty and sought further submissions from the parties. Subsequently, the Discipline Committee reconvened the hearing and the parties provided additional submissions in support of their joint submissions on penalty.

After considering the additional evidence and submissions of the parties, the Discipline Committee made its decision on penalty, in which it accepted the College's submission for a 12-month suspension, but departed from the parties joint submissions by ordering a full prohibition on the Member's prescription of controlled substances, including in hospital.

The Member then appealed to the Divisional Court, arguing that the Discipline Committee erred by departing from the joint submissions on penalty with respect to the Member's prescription of controlled substances, and seeking to have the suspension reduced from 12 to 6 months.

The Divisional Court's Decision

The Court confirmed that the standard of review from a regulatory tribunal's imposition of a penalty is highly deferential. In order to be set aside, the penalty must be found to be "clearly unfit", meaning the Court will not intervene unless the penalty is disproportionate or falls outside the range of penalties imposed in other cases involving similar infractions or circumstances.

The Court recognized that joint submissions on penalty are not to be departed from lightly, however it found that the Discipline Committee upheld this principle and the duty of fairness by seeking out additional written and oral submissions from the parties before doing so. During the supplementary oral submissions, the Discipline Committee was transparent with its concerns about the joint submissions on penalty and gave the parties an opportunity to respond by specifically questioning them about whether a partial restriction on the Member's prescription of controlled substances would be enough to protect the public. The Discipline Committee

appropriately asked the parties for alternative remedies that would be more responsive to the Member's clinical deficiencies.

The Court also found that the Discipline Committee's written reasons demonstrated a full appreciation of the test to be met by expressly recognizing that the joint penalty proposal should be accepted unless it would "bring the administration of justice into disrepute or is otherwise not in the public interest". The Discipline Committee went on to explain in detail its reasons for finding that a full prohibition on the Member's prescription of controlled substances was necessary to protect the public.

The Court found that the outright prohibition was proportionate to the Discipline Committee's findings of fact about the Member's clinical deficiencies. The Court emphasized that a high degree of deference is owed to the Discipline Committee with respect to its findings of fact and its decision regarding the appropriate penalty in the circumstances. The Court also upheld the 12-month suspension, finding that it was neither excessive nor disproportionate considering the nature and extent of the Member's misconduct.

The Court also briefly commented on the Member's motion to adduce fresh evidence on appeal, citing the Supreme Court of Canada's decision in *Bent v. Platnick*, 2020 SCC 23 for the test that must be met in order to do so. The Court held that the fresh evidence that the Member sought to have admitted did not qualify because it could not reasonably be expected to have affected the Discipline Committee's penalty analysis.

Given the above, the Court dismissed the appeal and upheld the Discipline Committee's decision on penalty.

Takeaways

While it might be questionable whether submissions on penalty which differ on a significant element of a penalty, in this case the length of a suspension, are truly joint submissions, this decision provides guidance on the circumstances in which a Discipline Committee may depart from the parties' joint submissions on penalty, the process it should follow when doing so and affirms the principles which will be applied by the Court when reviewing a decision on penalty. If a Discipline Committee has concerns about any aspect of a joint submission, it should express these concerns to the parties and give them an opportunity to respond by making supplementary submissions. The decision also demonstrates the importance of written reasons which set out the test applied and clearly explain the Discipline Committee's reasons for departing from joint submissions on penalty.

Alex Smith, Associate

— KC —

Court of Appeal Upholds Mandatory Revocation for Sexual Abuse

In *Tanase v. College of Dental Hygienists of Ontario,* 2021 ONCA 482, the Ontario Court of Appeal upheld legislation which provides for the mandatory revocation of a registered health professional's certificate of registration in sexual abuse cases, regardless of the nature of the relationship, finding that the provisions did not breach sections 7 or 12 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*").

Background

Section 51 of the *Health Professions Procedural Code* (the "*Code*"), which is Schedule 2 to the *Regulated Health Professions Act, 1991,* S.O. 1991, c. 18 (the "*RHPA*"), provides that members are guilty of professional misconduct if they commit "sexual abuse", which is defined broadly in section 1(3) of the *Code* to include both physical actions and behaviour or remarks of a sexual nature, subject to limited exceptions

for actions, behaviour, or remarks of a clinical nature appropriate to the service provided, or in some cases for members treating their spouses, depending on rules adopted by each regulatory health College. Importantly, the sexual abuse provisions of the *Code* are structured as a "bright-line rule" prohibiting sexual relationships between members and their patients and imposing mandatory revocation of a member's certificate, even if the relationship is consensual.

The Appellant was a member of the College of Dental Hygienists of Ontario (the "College"). He met and became friends with S.M., to whom he provided dental hygiene services. The two then entered into a consensual sexual relationship, during which time the Appellant stopped treating S.M. However, based on an incorrect understanding of new spousal exception rules adopted by the College, the Appellant began treating S.M. again and continued to do so after their marriage in January 2016. In August 2016, a member of the College submitted a complaint after seeing a Facebook post from S.M. in which she thanked her husband for treating her. The matter was referred to the College's Discipline Committee, which found the Appellant guilty of professional misconduct under the sexual abuse provisions of the *Code* and ordered the mandatory penalty of revocation of his certificate.

The Appellant then appealed to the Divisional Court, which upheld the Discipline Committee's decision. The Appellant further appealed to the Ontario Court of Appeal.

The Court of Appeal's Decision

On Appeal, the Appellant argued that the *Code's* zero-tolerance scheme for sexual relationships between patients and members was unconstitutional under sections 7 and 12 of the *Charter*, and that prior case law which had upheld the prohibition should be overturned or distinguished.

The Appellant also argued that the Court should give effect to the Legislature's actual intent, which he claimed was to prevent the sexual abuse of patients, while allowing health professionals to treat their spouses in circumstances where sexual abuse was not present.

On the subject of legislative intent, the Court relied on its decision in *Leering v. College of Chiropractors of Ontario*, 2010 ONCA 87, where it held that it was not the Court's role to convert the *Code*'s bright-line rule prohibiting sexual relationships into a more holistic standard requiring the nature and quality of sexual relationships between health professionals and patients to be evaluated to determine whether discipline is warranted in particular circumstances. While the Court recognized that mandatory revocation of a member's certificate is an "extremely serious penalty", it found that it must respect the Legislature's decision to prohibit sexual relationships *per se* under the sexual abuse provisions of the *Code*.

With respect to the Appellant's arguments under the *Charter*, the Court relied on its decision in *Mussani v. College of Physicians and Surgeons of Ontario*, 2004 CanLII 48653, where it held that there is no constitutional right to practice a profession and that the interest affected by the penalty of mandatory revocation of a health professional's certificate of registration is an economic one that is not protected by section 7 or 12 of the *Charter*.

Accordingly, the Court dismissed the appeal and upheld the penalty of mandatory revocation of the Appellant's certificate of registration.

Takeaways

This decision highlights the strict nature and application of the sexual abuse provisions of the *Code* and serves as a reminder of the importance of maintaining professional boundaries between regulated health professional and their patients, as the

penalty imposed by section 51 of the *Code* is extremely serious and has very limited exceptions, which may vary depending on the spousal exception rules adopted by a given College. The case also confirms the constitutionality of mandatory revocation, as the interests affected by such a penalty are ultimately economic in nature and do not engage a member's *Charter* rights.

Alex Smith, Associate

— KC —

Ontario Court of Appeal Affirms Test for Failing to Cooperate With the Law Society in the Professional Discipline Context

In an April 2021 decision, the Ontario Court Appeal (the "Court") dismissed the appeal of lawyer Jeremy Diamond (the "Licensee" or "Appellant") from an Order of the Divisional Court, upholding a finding of professional misconduct against the Licensee.

Allegations of Misconduct and History of Proceedings

Further to a Law Society of Ontario ("LSO") Tribunal Hearing, the Licensee was found to have committed professional misconduct for failing to cooperate with an investigation of the Law Society as required by Rule 7.1-1 of the Rules of Professional Conduct. This Rule requires that "A lawyer shall reply promptly and completely to any communication from the Law Society in which a response is requested." [Emphasis added]

The allegation of a failure to cooperate stemmed from an investigation commenced by the LSO with respect to the structure and referral fee practices of the Licensee's firm. As part of its investigation, the LSO requested that the Licensee provide various categories of documents. The documents requested were all documents required to be kept by all licensees as part of their professional obligations.

After more than 7 months of back and forth communication with the Licensee's counsel, which included several formal request letters, the Law Society commenced professional discipline proceedings against the Appellant on the basis that he failed to keep records as required and failed to cooperate fully with the LSO.

Ultimately, the Licensee provided all of the requested records and the allegation pertaining to the failure to keep records was withdrawn by the LSO. The Tribunal Hearing proceeded solely on the issue of the alleged failure to cooperate.

The Vice-Chair of the Tribunal hearing the matter found that the Licensee's delay of approximately 8.5 months in providing documents requested as part of a Law Society investigation amounted to misconduct for a failure to cooperate with the LSO contrary to Rule 7.1-1. The Vice-Chair ordered the Licensee be reprimanded and pay costs of $25,000.00.

The Licensee challenged the decision of the Vice-Chair. The LSO Tribunal Appeal Decision found the Vice-Chair's Decision was reasonable and the Divisional Court subsequently upheld the decision of the Appeal Division.

Court of Appeal

The crux of Licensee's argument on appeal to the Court of Appeal was that the LSO Appeal Division, and subsequently the Divisional Court, endorsed and upheld a definition of cooperation in good faith with the Law Society that was too narrow. The position the Licensee specifically asked the Court to accept was that anything less than a clear refusal to cooperate would fall short of misconduct under Rule 7.1-1.

The Court agreed with Appellant that both subjective and objective criteria must be considered in determining whether there has been a failure to cooperate. The Court, however, rejected the Licensee's proposition

that a clear refusal to cooperate was necessary to establish misconduct. Rather, the Court held that "…the test for failing to cooperate is well-established and needs no alteration. It is both a subjective and objective test, one that takes into account all of the circumstances, including a licensee's good faith efforts to respond promptly and completely, whether determining whether a licensee's conduct amounts to professional misconduct."

The Court found that the test for failing to cooperate was correctly identified by the Hearing Division, Appeal Division and Divisional Court. It further confirmed that the test is a question of mixed fact and law, and reviewable on a standard of palpable and overriding error.

As set out in the Court's Decision, the test for failing to cooperate requires consideration of the following factors/principles:

(a) all of the circumstances must be taken into account in determining whether a licensee has acted responsibly and in good faith to respond promptly and completely to the Law Society's inquiries;

(b) good faith requires the licensee to be honest, open, and helpful to the Law Society;

(c) good faith is more than the absence of bad faith; and

(d) a licensee's uniformed ignorance of their record-keeping obligations cannot constitute a 'good faith explanation' on the basis of delay.

In summarizing the Vice-Chair's decision at paragraph 14 of its Decision the Court noted: "The Vice-Chair then indicated that there should have been 'no mystery about the requirements of the By-Law" and that the appellant 'knew or should have known' about his obligations to comply with the By-Law. As noted by the Vice-Chair, 'The sequence of requests and responses represented a cat and mouse game that has no place in the relationship between the licensee and the regulator."

The Court found that the conclusions made by the Vice-Chair were those he was entitled to make on the record before him and that there was no palpable and overriding error. Accordingly, the Licensee's appeal was dismissed.

Takeaways

In addition to affirming that test to be applied to determine if a licensee has failed to cooperate, the Court rejected the "clear refusal to cooperate" test proposed by the Appellant.

Furthermore, the Court emphasized that licensees should not be able to rely on ignorance of their professional obligations (e.g. regarding record keeping) as a good faith explanation for delay in providing requested records. As the Court noted, "With the privilege of being admitted to a self-regulated profession comes the responsibility to know one's obligations."

This case serves as an important reminder to professionals of their obligation to be responsive to regulatory investigations and the risk of being found to have committed professional misconduct for a failure to cooperate.

Patricia Harper, Partner

— KC —

News

Keel Cottrelle is pleased to announce that Christopher Wirth and Bob Keel have been recognized by Best Lawyers in Canada for 2022. Chris has been recognized in the areas of Administrative & Public Law, Corporate & Commercial Litigation and Labour & Employment Law, and was recognized for those areas in 2019, 2020 and 2021. Bob has been recognized in the area of Education Law.

Keel Cottrelle is also pleased to announce that on September 1, 2021, Christopher Wirth completed his term as the Past Chair of the Canadian Bar Association's Administrative Law Section, Patricia Harper has assumed her role as the section's incoming Secretary and has joined the OBA's Administrative Law Section Executive as a Member-at-Large, and Kimberley Ishmael assumed her role as the Public Affairs Liaison of the Ontario Bar Association's Education Law Section Executive.

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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