KEEL
COTTRELLE LLP
Barristers and Solicitors

36 Toronto Street | Suite 920 | Toronto ON | M5C 2C5
416-367-2900 | Fax: 416-367-2791

Professional Regulation Newsletter

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Doctor Not Entitled to a Bilingual Hearing

In *College of Physicians and Surgeons of Ontario v. Bélanger*, 2021 ONCPSD 5, the Discipline Committee of the College of Physicians and Surgeons of Ontario (the "College") held that a French-speaking doctor was not entitled to a hearing before a bilingual discipline panel, but rather that it was sufficient for the panel to use a French interpreter.

Background

Dr. Bélanger was facing allegations of professional misconduct in relation to his chronic pain management practice and brought a motion arguing 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 of the *Code* provides that "[a] person has the right to use French in all dealings with the College".

Dr. Bélanger did not bring a constitutional challenge to the legislation, but rather argued that s. 86 of the *Code* includes a right to a bilingual panel. The College did not dispute that Dr. Bélanger had the right to file his written materials in French and that he would be provided with a French translation of the Discipline Committee's reasons for its decision, if written in English, but argued that s. 86 does not provide a free-standing right to a bilingual panel, and that it was sufficient for the panel to use a French language interpreter.

The Discipline Committee's Decision

The Discipline Committee held that s. 86 of the *Code* does not provide a right to a hearing before a bilingual panel. The parties agreed that there was no prior case law on the interpretation of s. 86 of the *Code* on the issue of bilingual panels. Accordingly, the Discipline Committee reviewed the case law interpreting s. 86 in other contexts, as well as case law on French language rights in Canada more broadly. The Discipline Committee found that French language rights are substantive and not about procedural fairness, that for many people these rights are exercised through the use of interpretation services, and that the overwhelming view of the courts has been to promote French language rights, in accordance with the statutes that are being interpreted.

The Discipline Committee also applied the principles of statutory interpretation, finding that interpreting "the right to use French" as requiring a bilingual panel would render the legislative scheme incoherent, as it would make it impossible for the College to fulfill its statutory duty in cases where members exercise their right to use French, given that the public members of the College's Council are appointed by the provincial government, and there is no mechanism by which the College can ensure that the individuals appointed are bilingual.

The Discipline Committee found that the "right to use French" must instead be interpreted on its face as meaning that the individual member can use French, with a corresponding obligation on the part of the College to provide interpretation and translation so that the member can understand and be understood by the panel members who preside over the hearing.

The Discipline Committee also considered the language of other statutes, such as the *Courts of Justice Act*, the *Law Society Act*, and O. Reg. 345/96 under the *Ontario College of Teachers Act, 1996*, all of which explicitly grant a right for an individual's case to be heard by French-speaking adjudicators. Accordingly, the Discipline Committee held that if the Legislature intended to provide for a bilingual panel under the *Code,* it would have expressly provided for this.

The Discipline Committee then considered the *French Language Services Act* ("*FLSA*"), which provides individuals in Ontario with a right to receive service in French from "government agencies", but held that the *FLSA* did not apply because the College was not a government agency.

The Discipline Committee also noted that given a lack of bilingual Committee members, an order for a bilingual hearing would result in a stay of proceedings and would not be a reasonable outcome given the availability of translation and interpreters, and the public interest in the timely adjudication of allegations of professional misconduct.

While cautioning that language rights are substantive and not about guaranteeing procedural fairness, the Discipline Committee also addressed Dr. Bélanger's concerns about procedural fairness. Dr. Bélanger expressed concerns about the accuracy of simultaneous interpretation and the risk that the nuances of testimony and evidence would be lost or misunderstood. He further argued that interpreters may have an excellent command of both English and French, but they do not have a legal education and may not fully understand the subtleties and ramifications of the arguments they are asked to express.

The Discipline Committee acknowledged that conducting a hearing through an interpreter is not the same as conducting a hearing before a bilingual panel. However, the Discipline Committee was not persuaded that Dr. Bélanger would suffer any prejudice or disadvantage from using an interpreter. The Discipline Committee also found that to accept Dr. Bélanger's arguments would be to

concede that anyone who has participated in a hearing with the use of an interpreter has suffered prejudice, which would bring the administration of justice to a halt. Prejudice must be real and based on evidence, and in this case the Discipline Committee found that there was not a sufficient evidentiary basis to conclude that there would be a reasonable prospect of Dr. Bélanger suffering prejudice from having to use an interpreter.

As a result, the Discipline Committee concluded that Dr. Bélanger did not have a right to a hearing before a bilingual panel, but confirmed his right to use French and the appropriateness of a panel using the assistance of an interpreter.

Takeaways

This case provides guidance on the limitations of language rights in disciplinary hearings for health professions governed by the *Code* and is the first to interpret s. 86 of the *Code* for the purpose of determining whether a member is entitled to a hearing before a bilingual panel. Regulators which govern health professions which are subject to the *Code* will find this case useful in similar disputes regarding the language of disciplinary proceedings and the use of interpreters.

Alex Smith, Associate

— KC —

Divisional Court Overturns Ontario College of Teachers Discipline Committee's Rejection of Joint Submission on Penalty

In *Timothy Edward Bradley v. Ontario College of Teachers*, 2021 ONSC 2303, the Divisional Court overturned a decision of the Discipline Committee of the Ontario College of Teachers (the "College") which had rejected a joint submission on penalty.

Background

Timothy Edward Bradley ("Mr. Bradley") was a teacher at the London District School Board and was subject to disciplinary proceedings before the Discipline Committee of the College with respect to allegations that he had made harassing comments and engaged in harassing behaviour towards a female teaching candidate who had been assigned to work with him.

At the hearing before the Discipline Committee, the parties presented it with an Agreed Statement of Facts and a Joint Submission on Penalty in which Mr. Bradley admitted to having committed professional misconduct and the parties agreed that he should be subject to a penalty which included a 2 month suspension of his Certificate of Qualification of Registration which was to commence immediately after the hearing. Given that the hearing was taking place on June 24, this meant that the suspension would take place over the summer months.

The Discipline Committee was concerned over the fact that the suspension would take place over the summer and asked counsel for the parties to make additional submissions as to whether that was appropriate. The panel received further submissions on this issue, however, it decided to reject the joint submission on penalty and instead ordered that Mr. Bradley's suspension was to start on September 3. In so doing, the panel stated that it believed that acceptance of the joint submission on penalty would bring the administration of the discipline process into disrepute or be otherwise contrary to the public interest and gave two reasons for this:

1. Accepting the joint submission would cause the public to lose confidence in the College's disciplinary process; and

2. The penalty objectives of specific deterrence, general deterrence, rehabilitation and protection of the public interest would not be sufficiently

met if the Member were allowed to serve a suspension during the summer.

Mr. Bradley appealed the decision to the Divisional Court.

Divisional Court Decision

Before the Divisional Court, the College agreed with Mr. Bradley that the Discipline Committee had made an error in its application of the principles to be applied when deciding to reject a joint submission on penalty.

The Divisional Court held that the public interest test for rejecting a joint submission as set out by the Supreme Court of Canada in *R v. Anthony-Cook*, 2016, SCC 43, also applies to disciplinary bodies.

In *Anthony-Cook*, the Supreme Court of Canada adopted that the public interest test for rejecting joint submissions and, as such, joint submissions on penalty are to be accepted unless the proposed sentence would bring the administration of justice into disrepute or otherwise be contrary to the public interest. This is a stringent test and in order to meet it the penalty must be so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons aware of all the relevant circumstances to believe that the proper functioning of the justice system had broken down. This is a high threshold to meet.

As a result, any disciplinary body that intends to reject a joint submission on penalty must apply this public interest test and demonstrate why the proposed penalty was so "unhinged" from the circumstance of the case that it must be rejected. On the facts of this case, the Divisional Court held that the Discipline Committee had failed to set out any basis for a finding that serving the 2 month penalty in the summer was so "unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down" and this was evident from its:

(a) failure to consider other prior decisions of the Discipline Committee in which members had served 2 months suspension over the summer and had failed to distinguish them;

(b) impermissibly focussing on the fitness of the sentence rather than whether it met the demonstratively unfit test and by impermissibly tinkering with the penalty after finding that a 2 month suspension was appropriate, by moving it from the summer to the early fall;

(c) ignoring the parties submissions that the penalty would remain on Mr. Bradley's record and would be publicly available and that as a result a suspension in the summer was not largely symbolic;

(d) erroneously suggesting that the parties should share more information of the circumstances that led to the joint submission and failing to recognise that the parties are not required to share the totality of this information with the committee in order to justify the joint submission; and

(e) failing to have any regard to the benefits and importance of joint submissions on penalty and the impact of its decision on those benefits.

As a result, the Divisional Court agreed with the parties that the Discipline Committee had erred, set aside its decision and in its place substituted that the term of Mr. Bradley's 2 month suspension would run from the date of the Court's decision which was July 9.

Takeaways

In considering whether to reject a joint submission, Discipline Committees must apply the public interest test set out in *Anthony-Cook* and only reject a joint submission where it is so unhinged from the circumstances of the offence and the offender that to accept it would lead reasonable and informed persons aware of all the relevant circumstances to believe that the proper functioning of the justice system had broken down. Such a circumstance is rare and must meet a high standard.

If a joint submission is rejected, they must provide fulsome reasons which clearly articulate the basis for doing so and address the submissions of the parties as to why the joint submission should be accepted.

Don't tinker!

Christopher Wirth, Partner

— KC —

New Section of *Statutory Powers Procedure Act* Makes it an Offence to Record a Tribunal Hearing

A new prohibition on the recording or publication of tribunal proceedings has been added to the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 (the "*SPPA*"). The new provisions, found at section 29 of the *SPPA*, received Royal Assent and came into force on June 3, 2021. The amendment was included in the *Supporting Recovery and Competitiveness Act, 2021* ("Bill 276").

The new section 29 makes it an offence to take or attempt to take a recording of a tribunal hearing, whether by means of photograph, audio or video recording, or other type of recording capable of producing or transmitting visual or aural representations. The prohibition also covers the recording of attendees entering or leaving the hearing room, or in the building in which the hearing is being held if there are reasonable grounds for believing that the person is there for the purpose of attending or leaving the hearing. The new section also makes it an offence to publish or otherwise disseminate such a recording. These offences are punishable by a fine of up to $25,000.

However, the new section also includes a number of exceptions, which for example permit the unobtrusive making of notes or sketches by a person at a hearing. Party representatives, self-represented parties, and journalists may also be permitted to make audio recordings of hearings for the purpose of supplementing or replacing notes, subject to the authorization of the tribunal.

These provisions are similar to existing restrictions on the recording of court proceedings under the *Courts of Justice Act,* R.S.O. 1990, c. C.43. The need for such restrictions has become more evident as tribunal proceedings have moved online in response to the COVID-19 pandemic, as members of the public or other individuals attending a hearing remotely have in some cases recorded their screens and posted those recordings online.

Takeaways

The new prohibition and its exceptions serve to strike a balance between the need to ensure the integrity and fairness of tribunal proceedings, while also respecting the open court principle by allowing members of the public and the media to attend and take notes at hearings.

Alex Smith, Associate

— KC —

Amendments to *Ontario College of Teachers Act* Retroactively Revoke Teachers

Significant amendments to the professional misconduct provisions of the *Ontario College*

of Teachers Act, 1996, S.O. 1996, c. 12 ("the Act") received Royal Assent and came into force on December 8, 2020. The amendments were passed through the *Protect, Support and Recover from COVID-19 Act (Budget Measures), 2020* ("Bill 229").

These amendments add a new section, 30.3, which retroactively revokes a member's certificate of qualification and registration if the member was previously found guilty of an act of professional misconduct consisting of or including sexual abuse of a student or a prohibited act involving child pornography.

Additional amendments to section 33 of the Act prohibit a person from applying for reinstatement if he/she has had their certificate revoked for certain acts of sexual abuse of a student, child pornography, or a prescribed sexual act involving a student. However, a person may apply for reinstatement if the conviction is overturned on appeal or if a pardon has been granted.

The amendments also mandate the implementation of a sexual abuse prevention program by the College, and require members to report to the Registrar offences, charges and bail conditions.

Alex Smith, Associate

— KC —

Saskatchewan Court of Appeal Finds 32½ Months Undue Delay Constituted an Abuse of Process Sufficient to Stay a Lawyer's Discipline Hearing

In *Abrametz v. Law Society of Saskatchewan*, 2020 SKCA 81, the Saskatchewan Court of Appeal held that a 32½ month undue delay from the commencement of the Law Society of Saskatchewan ("Law Society") investigation into a lawyer's conduct until the commencement of his discipline hearing, constituted an abuse of process sufficient to warrant the staying of the lawyer's discipline hearing.

Background

A lawyer, Peter V. Abrametz ("Mr. Abrametz"), was subject to an investigation commenced in 2012 by the Law Society into his trust account. This investigation culminated with a 2015 investigator's report which led to the Law Society, later in 2015, making a formal discipline complaint against Mr. Abrametz and initiating professional misconduct charges against him. Mr. Abrametz's discipline hearing commenced in May 2017 and was completed by September 2017 with the Discipline Committee's decision being released in January 2018 in which it found him guilty of professional misconduct.

Mr. Abrametz's penalty hearing was scheduled for August 2018 but he sought a stay of the proceeding based upon delay constituting an abuse of process. Arguments on this were heard in September 2018 and the Discipline Committee's decision rejecting the request for a stay was released in November 2018. In January 2019, the Discipline Committee's decision on penalty was released in which it ordered that Mr. Abrametz be disbarred.

Mr. Abrametz then appealed this decision to the Saskatchewan Court of Appeal.

Saskatchewan Court of Appeal Decision

In reasons which took almost 13 months to be released, the Court of Appeal overturned the Discipline Committee's decision, finding that there had been 32½ months of undue delay which constituted an abuse of process such that a stay of the proceedings was warranted.

In reaching this conclusion, the Court of Appeal held that the issue as to whether there was delay constituting an abuse of process was a question of law reviewable on a correctness standard.

In calculating the length of the delay in administrative proceedings, the Court of

Appeal concluded that it is permissible to consider the date when a complaint was received by a regulator and it is not restricted to when it commences an investigation or lays charges. In the administrative context, depending on the facts, delay in the investigation and the hearing process can be both relevant to whether there has been undue delay.

Further, delay can continue after the commencement of a discipline hearing and there is no hard or fast rule as to when that delay concludes. In that regard, lengthy post-hearing delay in the issuance of a decision can be taken into account as can a delay in the scheduling and hearing of the penalty portion of a proceeding and the release of the decision with respect to penalty. The question in the circumstances will be has there been post-hearing delay caused by the regulator which exceeded the reasonable inherent time requirements and if so, has that caused prejudice.

In order to be an abuse of process, any delay deemed to be inordinate must have caused the member significant prejudice and that prejudice must flow from the delay itself rather from the fact that the member was facing administrative proceedings. Further, that personal prejudice must be of such a magnitude that the public's sense of decency and fairness would be offended.

Even when there has been inordinate delay causing prejudice to the member, there still must be a balancing of that with the public interest in seeing complaints of professional misconduct resolved on their merits. As a result, the nature of the alleged misconduct will be a significant factor in that balancing.

Ultimately, members of regulated professions have a right to have allegations of misconduct investigated and their hearing held within a reasonable period of time.

In determining the length of the delay in this case, the Court of Appeal concluded that the delay can commenced at the time that the investigation commenced and was not restricted to commencing at the time that the matter was referred to discipline. In addition, the time between the referral to discipline and the hearing of the matter can count towards delay as can the length of time post-hearing in which it takes the Discipline Committee to release its decision.

On the facts of this case, after considering which portion of the delay was attributable to Mr. Abrametz and which to the Law Society, the Court of Appeal concluded that the Discipline Committee erred in its calculation of the length of that delay, holding that the time period ran from the commencement of the Law Society's investigation in December 2012 and continued until the commencement of Mr. Abrametz's discipline hearing in 2017. The Court of Appeal was not satisfied that the time which it took for the hearing to be completed and for the decision to be released was undue. As a result, the Court of Appeal calculated that the total undue delay in the proceedings had been 32½ months.

Having concluded that there was significant undue delay, the Court of Appeal then considered whether Mr. Abrametz had established that he was prejudiced by that delay to such a degree that it constituted an abuse of process. In that regard, the Court of Appeal concluded that the Discipline Committee had erred as Mr. Abrametz had provided significant evidence of the personal prejudice that he had suffered as a result of the undue delay and that in the Court of Appeal's opinion, that personal prejudice would affect the public's sense of decency and fairness.

Given this conclusion, the Court of Appeal also held that it was in err for the Discipline Committee to have not stayed the proceedings given that there had been undue delay causing prejudice to Mr. Abrametz.

In the Court of Appeal's view, the delay in this matter was sufficient to have brought the Law Society's discipline process into disrepute

and was one of the clearest of cases resulting in the finding that it was an abuse of process warranting a stay of the proceedings.

However, although the Court of Appeal stayed the discipline proceedings and as a result the penalty and cost award imposed by the Discipline Committee were set aside, it left standing the findings of professional misconduct against Mr. Abrametz.

Takeaways

The calculation of delay in administrative proceedings does not begin when the matter is referred to the Discipline Committee but can commence when a regulator receives a complaint or when it commences its investigation. Further, lengthy post-hearing delay can also be considered.

Accordingly, regulators should ensure that once a complaint is made to them, it is investigated promptly and that a decision to refer a matter to Discipline be taken in a reasonable timeframe.

Further, once a matter is referred to Discipline, it must be heard and a decision rendered within a reasonable period of time or there will be a risk that a member could successfully seek a stay based upon undue delay if significant prejudice can be shown.

Christopher Wirth, Partner

— KC —

Divisional Court Upholds Decision of College of Physicians and Surgeons of Ontario's Discipline Committee to Revoke Doctor's Certificate of Registration

In *Hanson v. College of Physicians*, 2021 ONSC 513, the Divisional Court upheld a decision of the Discipline Committee of the College of Physicians and Surgeons of Ontario (the "College"), which had imposed a penalty directing the Registrar to revoke a doctor's certificate of registration.

Background

Dr. Paul Russell Hanson ("Dr. Hanson") faced allegations of professional misconduct before the Discipline Committee of the College in which it was alleged that he had been found guilty of an offence relevant to his suitability to practice, having pled guilty to an offence under Section 37.1(1) of the *Health Insurance Act* for failing to maintain records as necessary; failing to maintain the standards of practice of the profession with respect to patient assessments and treatment as well as record keeping; and that he had engaged in disgraceful, dishonourable or unprofessional conduct when he permitted one of his staff to administer a vaccine to a child and then subsequently provided inconsistent, inaccurate and misleading information to the College when it investigated this allegation.

At the hearing before the Discipline Committee, Dr. Hanson admitted to having committed professional misconduct and based upon this admission and an Agreed Statement of Facts, the Discipline Committee found that Dr. Hanson had committed three acts of professional misconduct.

Dr. Hanson had an extensive disciplinary history with the College which included two prior Discipline Committee hearings and 11 decisions of the Inquiries, Complaints and Reports Committee which had resulted in Dr. Hanson:

1. Being suspended from practice in 2001 for six months, reduced by three months upon completion of an ethics course;

2. Receiving two reprimands;

3. Being cautioned five times;

4. Being counseled once;

5. Being referred to the Quality Assurance Committee to address clinical issues and poor records;

6. Being required to take numerous educational courses concerning clinical issues, record keeping and ethics;

7. Undergoing clinical supervision and/or re-assessment of his practice on three separate occasions; and

8. Entering into three separate undertakings with the College concerning his practice and health.

Further, Dr. Hanson's issues with the College over the previous 18 years involved ethical issues, a variety of clinical matters, repeated record keeping issues and health issues and his practice had been subject to three clinical supervisions and/or re-assessments.

As a result, with respect to penalty, the College submitted that the appropriate penalty was revocation of Dr. Hanson's certificate of registration along with a reprimand and costs of the hearing.

Dr. Hanson submitted that while a reprimand was appropriate, he should only be subject to a 12 month suspension of his certificate of registration, followed by 12 months clinical supervision and an assessment of his practice six months after the clinical supervision as his latest re-assessment demonstrated that he was capable of remediation.

Discipline Committee Decision

The Discipline Committee identified a number of aggravating factors including that his conduct was not isolated but repeated; he put patients at risk of harm; he failed to properly support his OHIP claim; and he lacked integrity and was dishonest with respect to the vaccine incident and had asked his receptionist to share the blame.

Based upon this and his prior disciplinary conduct including conduct which occurred after the conduct at issue, the Discipline Committee determined that Dr. Hanson was irremediable and ordered that his certificate of registration be revoked, that he be reprimanded and that he pay costs of the hearing.

Dr. Hanson appealed this decision to the Divisional Court.

Divisional Court Decision

The Divisional Court held that where there is a statutory right of appeal from an administrative decision, the appellate standard of review normally applies, but in the context of an appeal on penalty alone, it must be demonstrated that there was an error in principle or that the penalty is clearly unfit. This high threshold used in criminal cases also applies to administrative penalty decisions and, to be clearly unfit, a penalty must be disproportionate or fall outside the range of penalties made in other cases.

Among his arguments on appeal, Dr. Hanson argued that the Discipline Committee erred in considering his conduct which occurred after the conduct at issue, however, the Divisional Court held that the Discipline Committee did not err as it was entitled to consider the whole of Dr. Hanson's disciplinary history, including conduct he engaged in which occurred after the conduct which led to the findings of professional misconduct in this case.

Accordingly, the Divisional Court held that the Discipline Committee had not erred in principle nor were the results imposed clearly unfit and dismissed Dr. Hanson's appeal.

Takeaways

In determining the appropriate results, a Discipline Committee is entitled to consider a member's entire disciplinary history, including conduct which occurred after the events in question.

Further, provided that it has not made an err in principle, courts will give Discipline Committee's decisions on penalty a fair bit of deference and will only intervene where the penalty imposed is clearly unfit.

Christopher Wirth, Partner

— KC —

News

Christopher Wirth is a Member of the Canadian Bar Association's Task Force on Justice Issues arising from COVID-19, and spoke about the Task Force's report to the Council of Canadian Administrative Tribunals Symposium on Reimagining Tribunal Excellence in a post-COVID world, held virtually on April 8, 2021.

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.

KEEL COTTRELLE LLP
Barristers and Solicitors

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

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For advice on any specific matter, you should contact legal counsel, or contact Christopher Wirth or Patricia Harper at Keel Cottrelle LLP:

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

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

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