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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IN THIS ISSUE -

Regulation of Off-Duty Social Media Conduct: *Strom v. Saskatchewan Registered Nurses' Association*

In September 2019 the Saskatchewan Court of Appeal heard the appeal of Carolyn Strom, a Saskatchewan nurse, from a decision of the Court of Queen's Bench dismissing her appeal of a 2016 decision of the Discipline Committee of the Saskatchewan Registered Nurses' Association.

The Court of Appeal's decision (the "Decision") granting Ms. Strom's appeal was released on October 6, 2020. The Decision is noteworthy as one of the most high profile post-Vavilov[1] decisions in the professional regulatory context and is instructive with respect to limitations that professional regulators may face in attempting to regulate "off-duty" conduct, particularly when doing so engages the right to freedom of expression under the *Canadian Charter of Rights and Freedoms* ("*Charter*").

Overview of the Case

The case centred around certain Facebook posts made by Ms. Strom with respect to the care received by her grandfather, including nursing care, while he was a resident at a long-term care facility (the "Facility").

The Discipline Committee found that the posts, in which Ms. Strom identified herself as a nurse, established a link between her professional role and her off-duty expressions, and thus were open to findings of professional misconduct. The Discipline Committee found that Ms. Strom had "engaged in a generalized public venting about the facility and its staff and went straight to social media to do that" (paragraph 42) and that, in doing so, she had committed misconduct. In response to Ms. Strom's argument that a finding of

1 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 DLR (4th) 1 [*Vavilov*]

misconduct in these circumstances constituted an unjustifiable breach of her Section 2(b) *Charter* right of freedom of expression, the Discipline Committee found that, although there was an infringement of Ms. Strom's Section 2(b) *Charte*r right, that infringement was justified under Section 1 of the *Charter*.[2]

Ms. Strom exercised a statutory right of appeal and appealed the decision of the Discipline Committee to the Court of Queen's Bench. The Court of Queen's Bench upheld the decision of the Discipline Committee. In doing so, the Court of Queen's Bench applied a reasonableness standard of review to both the finding of misconduct and the finding that there was a justifiable infringement of Ms. Strom's Section 2(b) *Charter* right.

Ms. Strom appealed the decision of the Court of Queen's Bench on three (3) grounds:

(a) The judge erred in upholding the Discipline Committee's conclusion that she was guilty of professional misconduct within the meaning of the Act[3];

(b) The judge erred in not finding that the Discipline Committee had erred in finding that the infringement of Ms. Strom's section 2(b) *Charter* right was justified under Section 1;

(c) The Court erred in finding the Discipline Committee had the authority to award costs against Ms. Strom in the amount of $25,000.00.

As will be described, Ms. Strom was successful on the first two ground of the appeal and so the Court of Appeal determined it did not need to decide the third ground with respect to costs.

1. Impact of Vavilov

After the Court of Queen's Bench released its decision, and indeed, after the Court of Appeal had heard the case, but before it had rendered its Decision, the Supreme Court of Canada released its decision in *Vavilov*. Prior to the decision in *Vavilov*, courts across Canada generally applied the judicial review standard to appeals of administrative decisions.

Vavilov clarified that where there is a statutory right of appeal of an administrative decision, the appellate standard of review, rather than the standard on judicial review, applies. The Court of Appeal invited the parties in this case to provide further submissions based on the outcome of *Vavilov*.

As noted at paragraph 52 of its Decision, the Court of Appeal noted that it was a secondary appellate court in these circumstances. As such, its task was to determine whether the Court of Queen's Bench had chosen and applied the correct standard of review and, if it had not, to assess the Discipline Committee's decision according to the correct standard of review.

The Court of Appeal found that because the Court of Queen's Bench Judge had chosen the judicial review standard of reasonableness and applied that standard, the Court had made an error in law. The Court of Appeal made in clear that the Judge had correctly chosen the standard of review in the law as it was understood at the time the case was heard at the Court of Queen's Bench, but that the *Vavilov* decision had clarified that, in cases where there is a statutory right of appeal to a court from a decision of an administrative body, the appellate standard of review applies, rather

2 Section 1 of the *Charter* sets out a legal test to be applied to determine whether the infringement of a Charter right is justified under the law.

3 *The Registered Nurses Act, 1988*, SS 1988-89, c R-12.2 [*Act*]

than the judicial standard of review of reasonableness.

Because it found that the application of the judicial standard of review was an error in law, the Court of Appeal then turned to an assessment of the Discipline Committee's decision pursuant to the correct, appellate standard of review. In the result, it set aside the Discipline Committee's findings of misconduct.

2. Off-Duty Conduct and the Charter

The Court of Appeal's decision affirms that a member of a profession may be disciplined for off-duty conduct, but in making findings of misconduct in a case where there has been an infringement of a *Charter* right, a thorough Section 1 *Charter* analysis must be conducted to determine whether that infringement is justified.

(a) Off-Duty Conduct

Off-duty conduct may be described as conduct in which a professional engages during their own personal and/or private time. Generally speaking, for off-duty conduct to attract sanction by the discipline committee of a professional regulator, there will have to be a connection between the person's off-duty conduct and their profession, such that it raises questions about the ability of the professional to carry out their work and/or the undermining of the integrity and/or public confidence in the profession.

As set out the decision of the Court of Appeal:

"…….off-duty conduct may be found to be professional misconduct if there is a sufficient nexus or relationship of the appropriate kind between the personal conduct and the profession to engage the regulator's obligation to promote and protect the public interest. More specifically, I would state the issue this way: was the impugned conduct such that it would have a sufficiently negative impact on the ability of the professional to carry out their professional duties or on the profession to constitute misconduct?" (paragraph 89)

In this case, the Court of Appeal found that there was no nexus between Ms. Strom's off duty conduct and the ability of Ms. Strom to carry out her professional duty, nor was there a negative impact on the profession. Rather, the Court of Appeal found that the Discipline Committee had failed to take into account important evidentiary and contextual factors, including the context in which Ms. Strom made the comments, Ms. Strom's purpose in making the comments, and in focusing on specific aspects of her posts, while ignoring others.

In the result, the Court of Appeal concluded that "the Discipline Committee erred in principle by failing to accord sufficient or any weight to important criteria that governed the exercise of their discretion. Its analysis was one dimensional, referring repeatedly to the fact that Ms. Strom made critical comments on social media rather than through proper channels. It did not reflect the complete contextual inquiry necessary to determine whether professional misconduct had been made out on the evidence." (para. 128)

In these circumstances, the finding of misconduct was not made out.

(b) Freedom of Expression Under the Charter

Given that it had determined misconduct was not established, it was not necessary for the Court of Appeal to go on to consider the *Charter* issue raised (i.e. infringement of freedom of expression), however, given the importance of that issue, the Court of Appeal did so.

The Court of Appeal noted that the impact of the infringement of Ms. Strom's Section 2(b) *Charter* right was serious. Further, the Court of Appeal pointed to a lack of evidence that Ms. Strom's posts impacted the broader

public interest, the public standing of the profession, or even the Facility and its staff. The Court of Appeal noted, "It bears repeating that speech cannot be unduly constrained to avoid offending others." (para. 168)

In the result, the Court of Appeal found that the denial of Ms. Strom's right to speak in the circumstances was serious and not justified by Section 1 of the *Charter*.

Takeaways

Discipline committees of professional regulators may make findings of misconduct for the off-duty conduct of members, but they much engage in a robust analysis of the relevant evidence, including contextual factors before doing so.

In the age of social media, when private or personally held views may find a broader and more public forum than they did in the past, the Court of Appeal's Decision in *Strom* provides guidance to both professionals and regulators alike with respect to the tension that can sometimes exist between the freedom of a professional to express personally held views and the requirement of the regulator to protect the integrity of the profession. Where a *Charter* issue is raised and an infringement of a right found, a discipline committee must give careful consideration to whether or not that infringement is justified under Section 1 of the *Charter*.

Patricia Harper, Partner

— KC —

College of Dental Hygienists of Ontario Permits its Members to Treat Their Spouses

The *Regulated Health Professions Act, 1991* (the "*RHPA*"), which governs most regulated health professionals in Ontario, provides that engaging in simultaneous therapeutic and sexual relationships with an individual is an act of professional misconduct constituting sexual abuse of a patient. Further, certain forms of sexual abuse of a patient mandate the mandatory revocation of a health professional's license to practice their profession.

In 2015, the *RHPA* was amended to give the Council of each health regulatory College, the ability to make a regulation exempting its members to provide that the treatment of one's spouse is not prohibited, however, any regulation made by a College's Council would then have to be approved by the Provincial government.

The Council of the College of Dental Hygienists of Ontario subsequently made a regulation exempting the treatment of spouses and submitted it to the Provincial government for approval. The Provincial government's approval has now been granted.

Pursuant to this regulation, the definition of "spouse" as set out in the *RHPA* for these purposes is limited to only:

(a) a person who is the dental hygienist's spouse as defined in section 1 of the *Family Law Act* (i.e. a person to whom the dental hygienist is married); or

(b) a person who has lived with the dental hygienist in a conjugal relationship outside of marriage continuously for at least three (3) years.

As a result, commencing October 8, 2020, dental hygienists in Ontario can now treat their spouses without it being considered sexual abuse of a patient, as long as the dental hygienist is not engaged in the practice of dental hygiene when any sexual conduct occurs and the sexual relationship is kept entirely out of the office setting.

Takeaways

Although this will permit dental hygienists to treat their spouses in limited circumstances,

the College of Dental Hygienists of Ontario has made it clear that treating a sexual partner who does not meet this definition of a spouse will continue to be considered sexual abuse of a patient.

Christopher Wirth, Partner

— KC —

Law Society Suspends Lawyer for inappropriately withholding Settlement Funds from a Client

In *Law Society of Saskatchewan v. Merchant*, 2020 SKLSS 6, a Hearing Committee (the "Committee") of the Law Society of Saskatchewan ("LSK") found a member guilty of conduct unbecoming of a lawyer and ordered an 8-month suspension for inappropriately withholding settlement funds from a client.

Background

Mr. Merchant was a lawyer whose firm ("MLG") represented a residential school survivor ("J.S.") and eventually assisted her in settling her claim through the Independent Assessment Process (the "IAP"). The Government of Canada paid $107,509.62 in settlement proceeds to MLG in trust for J.S., who was 69 years old at the time. The settlement agreement provided that no assignment of the settlement proceeds could be made.

MLG sought to deduct $21,310.83 from the settlement proceeds to cover unpaid invoices from unrelated work MLG had done for her son going back to 2003. MLG sent a letter to J.S. acknowledging that it lacked any legally enforceable assignment by which it could hold back the funds, but arguing that J.S. had a moral obligation to pay the outstanding accounts and warning that if she did not do so, MLG could sue her and seize her assets, car, and bank account to cover the debt. After receiving this letter, J.S. agreed to let MLG deduct the old accounts from her residential school settlement funds.

The Independent Special Advisor to the Court Monitor investigated and ordered MLG to pay the money back to J.S., finding there was no evidence that J.S. had any obligation to pay her son's legal fees and J.S. had not received independent legal advice prior to agreeing to have the fees deducted from her settlement. MLG brought an application to the Supreme Court of British Columbia for a direction that it was entitled to deduct the fees from the settlement proceeds, which was denied. The Court's decision was upheld by the British Columbia Court of Appeal, and Mr. Merchant's application for leave to appeal to the Supreme Court of Canada was denied.

The Committee's Decision

The LSK initiated disciplinary proceedings after receiving a formal complaint about Mr. Merchant's conduct in 2016. In the Committee's decision, it found Mr. Merchant guilty of conduct unbecoming of a lawyer. The Committee acknowledged that a lawyer who advances an incorrect legal position based on a sincerely held belief should not be held to have committed professional misconduct for that reason alone, but in this case it was not believable that Mr. Merchant, an experienced lawyer who had helped establish the IAP settlement regime, had any basis for believing his legal position was correct. Furthermore, the disrespectful and intimidating letter to J.S. was not in keeping with a lawyer's professional obligations.

In its penalty decision, the Committee emphasized that the misconduct took place in the context of a process that was designed to determine and protect the rights of vulnerable people who had lived through or been affected by the trauma wrought by residential schools. Mr. Merchant was essentially using the residential school settlement process to aid in his collecting of a debt, that was arguably not hers, from his client, whom he knew to be particularly vulnerable.

Furthermore, Mr. Merchant had already been disciplined and given a 3-month suspension in the past for similar misconduct. The Committee held that the concept of progressive discipline is not meant to be a rigid formula or scale that should be applied without regard to the seriousness of the latest offence or its place in an apparent pattern of behaviour and that serious misconduct followed by minor misconduct does not mean a higher penalty automatically needs to be imposed for the latter. However, the concept of progressive discipline is a reminder that the underlying objective of a disciplinary sanction is to bring about a change in the member's behaviour. Where a member does not learn from prior misconduct, a disciplinary body may be justified in imposing a more stringent sanction.

Mr. Merchant provided a copy of his upcoming schedule and argued that a suspension would disrupt the large scale and high profile matters in which he was involved, and thus would not be in the interest of the public or his clients. The Committee, however, gave little weight to this argument, finding that any meaningful penalty will necessarily have disruptions on the member's practice in order to remind him of his ethical obligations.

The Committee found a number of aggravating factors, most notably Mr. Merchant's disciplinary history for similar misconduct, but also his resistance to modifying his behaviour in the wake of that discipline, and his tone of disrespect and intimidation towards a vulnerable client. The Committee concluded that this was a case in which the principles of progressive discipline warranted a more stringent penalty. Accordingly, the Committee ordered an 8-month suspension and payment of costs in the amount of $10,643.00. Mr. Merchant is appealing this decision.

Takeaways

This case provides guidance on the principle of progressive discipline. Where a history of prior discipline demonstrates that a member has not learned from prior misconduct, a more stringent sanction may be justified. Disciplinary tribunals should, however, consider the seriousness of the latest offence and its place in the member's pattern of behaviour, as not all cases will warrant a more stringent penalty for subsequent misconduct. The case also demonstrates that misconduct towards vulnerable clients may warrant a greater penalty, particularly where the member is an experienced professional who knows or ought to know that the conduct is not in keeping with their professional obligations.

Alex Smith, Associate

— KC —

Doctor Revoked for Improper Billings

In *Ontario (College of Physicians and Surgeons of Ontario) v. Attallah*, 2020 ONCPSD 38, a Discipline Committee Panel (the "Panel") of the College of Physicians and Surgeons of Ontario (the "College") revoked a Doctor's certificate of practice for deliberately and dishonestly submitting improper billings to the Ontario Health Insurance Plan ("OHIP").

Background

The College's Discipline Committee found Dr. Attallah to have committed an act of professional misconduct by engaging in conduct that would reasonably be regarded by members as disgraceful, dishonourable or unprofessional. In particular, Dr. Attallah was found to have routinely collected health card information from family members accompanying patients to his office, and used that information to improperly bill OHIP. Dr. Attallah was also found to have improperly billed OHIP for interviews with family members and for services which he

did not render. He was also found to have created false or inaccurate records such as medical charts to support his improper billings.

Counsel for the College submitted that the only adequate penalty would be the revocation of Dr. Attallah's certificate of practice and a reprimand. Counsel for Dr. Attallah submitted that a suspension in the range of 3 – 6 months and a reprimand would be an appropriate penalty.

The Panel's Decision

The Panel reviewed relevant prior cases, finding that more recent cases have demonstrated a trend of increasingly severe penalties for similar conduct. In matters of deliberate and dishonest conduct such as this, the Panel confirmed that the primary penalty considerations are protection of the public and maintaining the public's confidence in the profession.

The Panel found that Dr. Attallah's misconduct was very serious, intentional, and ongoing. Dr. Attallah continued his misconduct even after being questioned about his actions, and his creation of false or inaccurate medical records put the future medical care of his patients at risk, and had the potential to create problems for them should they seek health insurance or need to have corrections made. Although the true quantum of Dr. Attallah's improper billings was unknown, the Panel found this to be of limited significance. Regardless of whether Dr. Attallah's misconduct yielded a large or small financial gain, his actions were dishonest, deliberate, and sustained, and had the potential to harm his patients.

Furthermore, the Panel found that Dr. Attallah demonstrated little or no insight into his misconduct and was unwilling to accept responsibility for it. Although he apologized for the circumstances in which he found himself, he avoided apologizing for any specific misconduct and it was apparent to the Panel that he did not believe he had acted improperly in any way. He also failed to offer any meaningful plan for change should he be permitted to return to practice.

Accordingly, the Panel held that revocation was the only penalty that would adequately serve the critical goals of public protection and promoting public confidence in the profession. Revocation would also serve as notice to the profession at large that dishonest and deceitful behaviour such as Dr. Attallah's will not be tolerated.

The Panel recognized that some prior cases involving even more serious misconduct had not ordered revocation, however it noted that revocation is not reserved solely for the most egregious misconduct. Ordering a suspension and the monitoring of Dr. Attallah's billings and practice was found not be sufficient given his lack of insight into his misconduct. Although Dr. Attallah had no prior discipline history, the Panel found that revocation was the appropriate penalty.

In addition to revocation of Dr. Attallah's certificate of practice, the Panel ordered Dr. Attallah to pay the College $124,440.00 in costs and to appear before the Panel for a reprimand.

Takeaways

This case demonstrates that deliberately and dishonestly submitting improper billings is serious misconduct that may be sufficient grounds for revocation for a medical professional's certificate of practice, even in the absence of a history of prior discipline. The important considerations of protecting the public, promoting public confidence in the profession, and general deterrence towards other members of the profession may, in the circumstances, justify revocation particularly where the member shows little or no remorse or appreciation of the consequences of his or her misconduct, and demonstrates an unwillingness to change.

Alex Smith, Associate

— KC —

News

Keel Cottrelle is pleased to announce that Christopher Wirth has obtained the Advanced Certificate in Adjudication for Administrative Agencies, Boards and Tribunals from the Osgoode Hall Law School of York University and the Society of Ontario Adjudicators and Regulators.

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
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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