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Professional Regulation Newsletter

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Law Society of Ontario Tribunal Considers a Lawyer's Indigenous Background in Determining Penalty for Professional Misconduct

In a recent decision which will be of interest to professional regulators, *Law Society of Ontario v. McCullough*, 2022 ONLSTH 63 (Law Society Tribunal Hearing Division), a panel of the Law Society's Tribunal took into consideration for the first time, a lawyer's Indigenous background in determining the penalty to be imposed for professional misconduct involving misappropriation of trust funds.

Background

The Law Society of Ontario (the "LSO") alleged that Helen McCullough (the "Lawyer") had engaged in professional misconduct by misappropriating over $100,000.00 from her firm's mixed trust account to pay the operating expenses of her firm and also failed to maintain proper books and records. The Lawyer admitted to her misconduct and the panel was required to determine the penalty to be imposed.

LSO Tribunal Decision

The LSO's appeal panel had previously determined that the presumptive penalty for misappropriation by a lawyer is revocation and that a panel can only depart from this in cases of proven dishonesty where there are extraordinary or exceptional circumstances which would warrant a departure from that disposition.

While LSO Tribunal panels had in exceptional circumstances departed from the presumptive penalty of revocation and instead ordered permission to surrender a licence, there had been no reported cases where exceptional circumstances led to a penalty less severe than this.

In this case however, the panel considered the lawyer's life experience as an Indigenous woman in the context of the Supreme Court of Canada's decision in *R. v. Gladue*, 1999 CanLII 679, in which the Supreme Court of Canada, in the criminal law context, set out what must be considered with respect to sentencing in criminal matters for Indigenous offenders. The panel concluded that the principles from *Gladue* should also be considered by the LSO Tribunal in cases involving Indigenous lawyers and must be reviewed in the context of institutional commitments to reconciliation.

The Lawyer was 65 years old, having been called to the Bar of Ontario in 1998 at the age of 41, and was currently practising in a small community primarily in the area of family law, including child protection, for a majority of clients who receive legal aid, as well as a significant percentage of clients who are Indigenous. In considering the *Gladue* principles, the panel noted that the Lawyer's circumstances included the impacts of cultural displacement from her Indigenous identity and community; her efforts to overcome her experiences of hardship, disadvantage and violence as a young woman, which ultimately led her to become a lawyer at the age of 41; commencing her legal career at the same time as she adopted her four nieces and nephews, all of whom had complex special needs, thereby diverting them from the child protection system; the significant stress she was under at the time of her misconduct as a result of financial support she was providing to other family members; and her ongoing services as a licensee to an important community of clients, many of whom are Indigenous parents needing representation in child protection proceedings.

The LSO did not seek the presumptive penalty of revocation given these extraordinary circumstances and agreed that the penalty should not include revocation. While the parties were able to jointly agree on a portion of the penalty consisting of a suspension coupled with practice restrictions they could not agree upon the length of that suspension, with the LSO seeking a twelve-month suspension in light of the serious nature of the misconduct and the need to promote general deterrence while the Lawyer sought only a four-month suspension.

Ultimately, the panel ordered an eight-month suspension of the Lawyer, imposed practice restrictions on her for a one-year period following her return to practice, and required her to meet with an Elder or Traditional Teacher during her suspension. It also awarded costs of $5,000.00 to the LSO.

Takeaways

This is the first time that a panel of the LSO's Tribunal has considered the *Gladue* principles when deciding the issue of penalty for professional misconduct involving a lawyer with an Indigenous background. Going forward, it is likely that the LSO Tribunal will continue to be open to taking into account the *Gladue* principles in such circumstances. Discipline tribunals for other professional regulators should anticipate that similar requests will be made of them when dealing with the issue of penalty involving an Indigenous member of their profession.

Christopher Wirth, Partner

— KC —

Ontario Court of Appeal Upholds Monitoring Order for Doctor Who Issued Improper COVID-19 Vaccine Exemption Letters

In *Thirlwell v. College of Physicians and Surgeons of Ontario,* 2022 ONCA 494, the Ontario Court of Appeal refused to grant a stay of a monitoring order against a doctor who issued improper COVID-19 vaccine exemption letters and spread misinformation about the pandemic.

Background

In the Fall of 2021, the College of Physicians and Surgeons of Ontario (the "College") received reports that Dr. Celeste Thirlwell (the "Member"), was issuing improper medical exemption letters from COVID-19 vaccinations. The letters, which were obtained for payment, were described as vague and failing to identify the medical condition purporting to justify the exemption. The College also received information that the Member had been overheard talking to others about vaccine exemptions, describing someone seeking an exemption as a "Nazi resistor", and stating that "they are gassing people in Australia". It was also alleged that the Member had coached an individual on what language to use to justify an exemption letter.

On October 7, 2021, the College appointed investigators to look into whether the Member had engaged in professional misconduct or was incompetent, however her then counsel advised that the Member would not cooperate with the investigation and that investigators would be "resisted physically, by private security, if necessary." On November 4, 2021, the Member consented to an order from the Ontario Superior Court of Justice requiring her to cooperate with the investigation, however she refused to enter into an undertaking restricting her from providing exemption letters.

The ICRC Decisions

On November 5, 2021, the College's Inquiries, Complaints and Reports Committee (the "ICRC") met to consider this matter, ultimately issuing an interim order imposing terms on the Member's registration pursuant to s. 25.4 of the *Health Professions Procedural Code* (the "*Code*"), being Schedule 2 to the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18 (the "*RHPA*"). The interim order prohibited the Member from issuing vaccine exemptions, while also requiring her to submit to unannounced inspections and provide her irrevocable consent for the College to make appropriate inquiries of the Ontario Health Insurance Plan ("OHIP") to ensure that she was complying with the order (the "OHIP Term").

On November 8, 2021, the Member requested that the ICRC remove the OHIP Term and the requirement to submit to unannounced inspections. The ICRC reconvened on November 15, 2021 but declined to vary its order, finding that these terms were necessary to monitor the Member's compliance with the order. On November 18, 2021, the Member commenced an application for judicial review in the Divisional Court, contesting only the OHIP Term.

The Divisional Court's Decision

On May 10, 2022, the Divisional Court released its decision dismissing the Member's application. The Divisional Court reviewed the ICRC's interim order on a standard of reasonableness, concluding that the principal object of an interim order is the protection of patients, and the mandate to protect patients confirms that "some evidence" is enough on which to base an interim order under s. 25.4 of the *Code*. The Divisional Court found that the ICRC's concerns were not speculative, but based on the Member's past conduct, and the public safety concerns warranted the OHIP Term. The evidence suggested that the Member's motivations to issue exemptions for a fee were not based on any concern for her patients' health but rather an ideological perspective about state actions in response to COVID-19. The Divisional Court held that the OHIP Term was reasonable given the need to monitor and ensure compliance with the ICRC's order and the Member's personal conviction and unwillingness to cooperate with the College.

On May 25, 2022, the Member brought a motion for leave to appeal the Divisional Court order to the Ontario Court of Appeal.

On June 3, 2022, the Member brought a motion to the Ontario Court of Appeal seeking to stay the Divisional Court order pending the resolution of her motion for leave to appeal.

The Court of Appeal's Decision

The Court of Appeal set out the following test for granting a stay of an order pending appeal:

1. a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried;

2. it must be determined whether the applicant would suffer irreparable harm if the application were refused; and

3. an assessment of the balance of convenience must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

However, the Court of Appeal also confirmed that the ultimate test for granting a stay is the interests of justice. The factors above guide this analysis but are not pre-requisites, and the strength of one may compensate for the weakness of another.

Although the threshold for the first factor (a serious question to be tried) is low, the Court of Appeal noted that the Member's appeal raised essentially the same issues that were already rejected by the Divisional Court. The Court of Appeal also found that the Member's appeal did not have much merit and stood little chance of succeeding. The case did not involve the interpretation of a statute's constitutionality, and it was only of significance to the parties. Accordingly, the Court of Appeal held that there was no serious issue to be tried.

The Court of Appeal acknowledged that the second factor (irreparable harm) weighed in favour of granting a stay, because the refusal to grant a stay would immediately empower the College to compel the Member to consent to a review of her OHIP records, rendering the appeal nugatory.

The Court of Appeal commented that the third factor (the balance of convenience) requires consideration of which party would suffer greater harm from granting, or refusing, the stay. The Court of Appeal held that in the circumstances of this case, the public interest (including public safety and public confidence in the administration of justice and the College's disciplinary system) outweighed the Member's personal interests. Accordingly, the balance of convenience weighed against the Member's request for a stay of the order.

The Court of Appeal noted that two panels of the ICRC and a panel of the Divisional Court all unanimously agreed that the OHIP Term was necessary to effectively monitor the Member's activities. These decisions were owed a high degree of deference. The Court of Appeal found that the public's confidence in the College's ability to regulate its members would be eroded were it to grant the stay, and accordingly it dismissed the Member's motion.

Takeaways

This case provides a useful example of how a health professions College can regulate its members, particularly where a member refuses to cooperate with the College's investigation and monitoring. The case also demonstrates the factors that a court will consider when deciding whether to grant a stay of an order pending appeal.

Alex Smith, Associate

— KC —

Law Society Tribunal Rejects Motion to Withdraw Admissions of Professional Misconduct

Introduction

In our Winter/Spring 2022 edition of this newsletter, we reviewed decisions in the ongoing professional discipline proceedings involving Jeremy Dov Diamond ("Mr. Diamond") in which a Panel of the Law Society Tribunal Hearing Division (the "Panel"), denied Mr. Diamond's request that one of its members recuse himself on the basis of a reasonable apprehension of bias and to reject a joint submission on penalty which the Law Society of Ontario ("LSO") and Mr. Diamond had entered into which had provided that the only penalty he would receive would be a reprimand.

Mr. Diamond then brought a motion seeking to withdraw his admissions of professional misconduct, which the Panel also rejected.

Background

After the Panel had rejected the joint submission on penalty which the LSO and Mr. Diamond had entered into, Mr. Diamond brought a motion seeking to withdraw his admissions of professional misconduct.

In support of his motion, Mr. Diamond relied upon affidavits from the lawyers who had acted for him when he admitted to the professional misconduct which admissions he was now seeking to withdraw and also provided his own affidavit which he was examined on.

The evidence before the Panel confirmed that Mr. Diamond's lawyers had advised him that while the hearing Panel could reject the joint submission on penalty it was unlikely to do so. With respect to his subjective understanding, Mr. Diamond testified that while he understood that there was a possibility that the hearing Panel could reject the joint submission he considered that possibility to be very remote.

Notably, on his motion, Mr. Diamond did not raise an allegation of ineffective assistance of counsel.

Panel's Decision

The Panel held that admissions that are voluntary, unequivocal and informed may not be withdrawn and concluded that to permit Mr. Diamond to withdraw a guilty plea on the basis that it was uninformed he must show:

1. that he was misinformed or unaware of information that he needed to have in order to give an informed plea; and

2. that he suffered prejudice amounting to a miscarriage of justice.

In determining whether an admission was uninformed, it must be assessed objectively while by contrast, in determining whether it being uninformed effected the admissions such that it caused prejudice must be assessed subjectively. As a result, a lawyer seeking to withdraw admissions of professional misconduct must be able to establish that had he been informed of the legally relevant consequences, he would have either pled differently or pled differently with different conditions.

Given the evidence before it, the Panel held that Mr. Diamond's plea was voluntary, unequivocal and informed and as a consequence it could not be withdrawn. As such, his motion to withdraw his admissions of professional misconduct was dismissed.

Takeaways

The Panel in this matter accepted the test established by the Supreme Court of Canada with respect to the withdrawal of guilty pleas in the criminal context and held that a similar test should be applied to a request to withdraw admissions of professional misconduct.

As a result, lawyers seeking to withdraw their admissions of professional misconduct will

have to establish that their admissions were not voluntary, unequivocal and informed and will have to demonstrate that on an objective basis. Further, they will have to show that they have suffered prejudice which is assessed subjectively and that their being uninformed would have led them to take a different course of action had they been aware of the consequences such that they would have either pleaded differently or pleaded, but with different conditions.

Given the Panel's rejection of Mr. Diamond's motion, it will now determine the appropriate penalty to impose on him given his admissions of professional misconduct. This decision will be reviewed in a subsequent edition of this newsletter.

Christopher Wirth, Partner

— KC —

Law Society Tribunal Rejects Joint Submission on Penalty, Revokes Lawyer's Licence

In *Law Society of Ontario v. Di Giacomo,* 2021 ONLSTH 159 and 2022 ONLSTH 25, the Law Society of Ontario Tribunal Hearing Division (the "Tribunal") rejected a joint submission on penalty seeking a one-year suspension for a lawyer who was found to have engaged in misconduct which deprived his clients of their investment funds, and instead imposed the penalty of revocation of the lawyer's licence to practice law.

Background

Christopher John Di Giacomo (the "Lawyer") admitted to committing numerous acts of professional misconduct including basic failures to communicate with clients, conflicts of interest, and mishandling of trust funds, all in relation to his handling of the files of 84 investor clients who lost all or part of their investments as a result of dishonest dealings by the mortgagor, a company known as Black Bear Homes ("BBH").

At the suggestion of the Lawyer's father, who had been involved in BBH's predecessor company, representatives of BBH approached the Lawyer to act for the investors, who loaned a total of approximately $7.7 million to BBH for various real estate projects. The Lawyer's misconduct included multiple conflicts of interest such as favouring the interests of BBH and his father over the interests of his investor clients, and abdicating his responsibilities to an unqualified individual with a financial interest in the transactions, leading to the clients losing their investments.

The Lawyer and the Law Society of Ontario (the "LSO") made a joint submission on penalty in which they sought a one-year suspension of the Lawyer's licence, claiming that the Lawyer's misconduct was the result of "extreme incompetence and inexperience", and suggesting that he had been "duped" into believing that he had been working for BBH rather than his investor clients.

After the hearing on the merits, but prior to making a decision, the Tribunal advised the parties by way of endorsement that it was reluctant to accept the jointly-proposed penalty of a one-year suspension. The Tribunal explained its difficulty with the proposed penalty and invited the parties to make further written submissions, which they provided.

The Tribunal's Decision to Reject the Joint Submission on Penalty

In its first decision, dated December 1, 2021 (the "merits decision"), the Tribunal found that the allegations of misconduct set out in the parties' agreed statement of facts were established. However, the Tribunal rejected the parties' explanation that the Lawyer had been duped by BBH or that his misconduct was the result of extreme incompetence and inexperience. Rather, the Tribunal found that the Lawyer was aware of what he was doing, and actively participated in depriving his

clients of their investment funds by knowingly misleading them, misrepresenting the facts, and failing to advise them of the true status of their investments.

Having found that the Lawyer's misconduct was deliberate, wilful, or reckless, the Tribunal moved to considering the case law on rejecting a joint submission on penalty. The Tribunal cited *Law Society of Ontario v. Dolgonos*, 2019 ONLSTH 4, where the Tribunal had previously held that a joint submission on penalty should be respected "unless it is clearly contrary to the interests of justice or so unconscionable as to bring the Law Society's professional discipline system into disrepute." The Tribunal also cited *R. v. Anthony-Cook*, 2016 SCC 43, where the Supreme Court of Canada held that the rejection of a joint submission on penalty "denotes a submission 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." Accordingly, a joint submission on penalty should not be rejected lightly.

The Tribunal emphasized that even without a formal allegation of fraud, the facts supported its conclusion that the Lawyer was deliberately dishonest with his clients and completely failed to protect their interests and investments. The Lawyer's misconduct was unethical, egregious, systematic and repeated, and resulted in the bulk of the clients' approximately $7.7 million in investment funds never being returned to them.

The Tribunal commented that the privilege of self-regulation requires the LSO not to subordinate its public protection obligations to parties' interests in a settlement, particularly where that settlement would impair public confidence in the administration of justice. The Tribunal found that the proposed penalty did not sufficiently recognize the "primary objective" of protecting the public. Accordingly, the Tribunal rejected the joint submission on penalty.

However, rather than immediately imposing an alternative penalty, the Tribunal offered the parties an opportunity to bring a motion and to make further submissions. Following this decision, the Lawyer initially advised that he intended to bring a motion requesting that he be relieved of his agreement on the facts and his admissions of misconduct, but he subsequently advised that he no longer intended to bring the motion. The parties were then invited to make further submissions, but no such submissions were received.

The Tribunal's Decision to Impose the Penalty of Revocation

Given the foregoing, the Tribunal issued its second decision on March 3, 2022 (the "penalty and costs decision") in which it revoked the Lawyer's licence to practice law.

The Tribunal reviewed the analogous case law, finding that the cases previously cited by the Lawyer and LSO counsel in support of their proposed one-year suspension were distinguishable because they involved misconduct that was not deliberately dishonest or misleading. The Tribunal found that the Lawyer's misconduct in this case more resembled cases in which the penalty of revocation had been imposed for knowing participation in mortgage fraud. Cases involving serious failures of honesty and integrity have special weight and significance and therefore carry the presumptive penalty of revocation. The Tribunal found that revocation was appropriate in this case, in accordance with other cases of serious proven dishonesty.

The Tribunal then considered the four primary purposes of penalty awards, namely: specific deterrence; general deterrence; rehabilitation and restitution; and maintaining

public confidence in the legal system and professions. The Tribunal also noted that the well-accepted jurisprudence establishes that maintaining public confidence is more important than the fortunes of any individual lawyer. The Tribunal found that while there was little concern about the Lawyer re-offending in this case, the concern for maintaining public confidence in the legal profession was greatly affected. The Lawyer also failed to raise any explaining or mitigating circumstances to dispute the presumptive penalty of revocation.

Accordingly, the Tribunal made an order immediately revoking the Lawyer's licence to practice law and requiring the Lawyer to refund fees to his clients and pay costs to the LSO. The Lawyer is appealing this decision.

Takeaways

This case demonstrates the exceptional circumstances in which an administrative tribunal can depart from a joint submission on penalty, as well as the circumstances in which revocation of a regulated professional's licence or certificate to practice is appropriate. In particular, cases involving deliberate, wilful, or reckless misconduct and serious failures of honesty and integrity may warrant such action. The Tribunal's reasons also highlight the need for penalty decisions to serve the objective of maintaining public confidence in the profession's ability to self-regulate.

Alex Smith, Associate

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News

Keel Cottrelle LLP, partner, Christopher Wirth has again been recognized by Best Lawyers in Canada for Corporate and Commercial Litigation and for Administrative and Public Law

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