Court of Appeal provides interpretative guidance on Regulated Health Professions Act

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In *Tanase v. College of Dental Hygienists of Ontario*, 2021 ONCA 482, the unanimous decision from the five-judge panel, signals the strict approach regulatory authorities will likely take when considering licence revocation in accordance with the sexual abuse provisions of the *Regulated Health Professions Act, 1991* (RHPA).

Regulated health professionals should read the decision as a caution that they must govern themselves according to the literal letter of the RHPA's sexual abuse provisions, as there is no exception for personal circumstances. As well as providing clarity for health care providers, this decision may inform health care institutions facing decisions regarding staff privileges or employment in the context of a patient's sexual abuse allegations.

Background

In Ontario, members of regulated health professions are guilty of professional misconduct under section 51(1) of the *Health Professions Procedural Code* (the Code), being Schedule 2 to the RHPA, if they commit "sexual abuse" against a patient.

"Sexual abuse" is defined by the Code in subsection 1(3) as "(a) sexual intercourse or other forms of physical sexual relations between the member and the patient, (b) touching, of a sexual nature, of the patient by the member, or (c) behaviour or remarks of a sexual nature by a member towards the patient". The legislation provides an exception for spouses, if the College governing a profession introduces a regulation to that effect.

Case decision

Tanase v. College of Dental Hygienists of Ontario involved a dental hygienist who provided dental treatment to a friend on two occasions in 2013. When their relationship became romantic in mid-2014, he stopped treating her. However, in April 2015, a colleague told the dental hygienist that the rules had changed and that dental hygienists were permitted to treat their spouses. This advice was in error, but he did not attempt to confirm the advice and resumed providing treatment. In 2016, the two were married.

Subsequently, in 2016, a separate dental hygienist filed a complaint with the College of Dental Hygienists of Ontario (the College) about the relationship. The complaint lead to a Discipline Committee hearing where the dental hygienist's registration was revoked by operation of the provisions of the RHPA requiring mandatory revocation on a finding of sexual abuse of a patient.

Before the Court of Appeal, the dental hygienist challenged the constitutionality of the mandatory revocation provisions. Among other things, he also noted that the RHPA definition of "sexual abuse" was amended to create an exception for spouses, and despite it not being enacted at the time, he argued it should open the door to more discretion in the matter. At the time when the dental hygienist provided care, the College had proposed a "Spousal Exception Regulation", however, the spousal exception did not come into force until October 8, 2020 through O. Reg. 565/20 under the *Dental Hygiene Act.* The Court of Appeal soundly rejected this argument:

> [27] This argument must be rejected. In essence, it invites the court to convert the bright-line rule prohibiting sexual relationships into a standard requiring the nature and quality of sexual relationships between practitioners and patients to be evaluated to determine whether discipline is warranted in particular circumstances. It finds no support in the language of the Code and would frustrate its clear purpose. Moreover, it begs the question by assuming that no concerns arise in the context of pre-existing sexual relationships, regardless of the nature or duration of those relationships.

The Court of Appeal held at paragraph 33 that "treatment cannot be given to sexual partners outside of the context of a spousal relationship, as defined by the Code, regardless of whether marriage occurs subsequently" and took a strict approach to interpreting the provisions of the RHPA:

> [28] The Code is clear when it comes to sexual relationships. It is neither ambiguous nor vague. Professional misconduct is established once sex occurs between a member of a regulated health profession and a patient. That the misconduct is termed "sexual abuse" neither mandates nor permits an inquiry as to the nature of a sexual relationship. The Legislature did not prohibit only sexual relationships that are abusive, leaving it to disciplinary proceedings to determine what constitutes abuse; it prohibited sexual relationships between regulated health practitioners and their patients per se. This approach obviates the need for discipline committees – bodies composed of health care professionals and laypeople – to inquire into the nature of sexual relationships and whether, as the appellant would have it, they give rise to "actual sexual abuse" because they arise out of coercion or exploitation…

The Court of Appeal made clear that the provisions create a "bright line rule", that there is no ambiguity as to when and to whom the provisions apply, and that decision-makers are not afforded discretion to consider factors such as the nature or quality of the relationship when considering license revocation. The Court of Appeal's strict and literal interpretation of the provisions, despite the appellant's invitation to adopt a more flexible approach, provides guidance to regulatory colleges, and informs the approach that they will take when assessing whether to revoke a health professional's license in the context of sexual abuse of a patient.

The Court of Appeal commented at paragraph 29 that “the purpose of the rule-based approach established by the Code is to avoid any doubt or uncertainty by establishing a clear prohibition that is easy to understand and easy to follow”. It is mandatory that health professionals know the rules and laws governing the profession. There is no leeway or room to plead ignorance when it comes to sexual abuse of patients.

With respect to the constitutionality of the subject provisions, the Court of Appeal reaffirmed that there is no constitutionally protected right to practice a profession or occupation afforded under section 7 of the *Canadian Charter of Rights and Freedoms*, nor a common law right to practice a profession free of regulation. Despite finding section 7 rights were not engaged, the Court considered whether the mandatory revocation provisions are contrary to the principles of fundamental justice and decided that they were not. Ultimately, the Court of Appeal concluded that neither the definition of sexual abuse, nor the mandatory penalty of licensing revocation touches upon the limits set out in the *Charter*. The appeal was dismissed.

BLG’s Health Care lawyers are available to assist you or your institution on matters involving the *Regulated Health Professions Act* and how this decision could impact your healthcare practice. Get in touch with any of our lawyers listed below.

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