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PUBLICATION

Court of Appeal - Mandatory Revocation of Health Professional Certificate in Sexual Abuse Case

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BACKGROUND

On July 5, 2021, a five-justice panel of the Ontario Court of Appeal ("**ONCA**") released its decision in *Tanase v. College of Dental Hygienists of Ontario*, 2021 ONCA 482 ("***Tanase***"), where the court considered whether the Ontario Legislature's decision to impose mandatory revocation of a registered health professional's certificate of registration in sexual abuse cases, regardless of the nature of the relationship, was constitutional under s. 7 or s. 12 of the *Canadian Charter of Rights and Freedoms* (the "***Charter***").

Members of Ontario's regulated health professions are deemed guilty of professional misconduct under s. 51(1) of the *Health Professions Procedural Code* (the "***Code***"), being Schedule 2 to the *Regulated Health Professions Act*, 1991, S.O. 1991, c. 18, if they commit "sexual abuse" against a patient. Sexual abuse is defined broadly under section 1(3) of the *Code* as including sexual intercourse or other forms of physical sexual relations between the member and the patient, as well as touching of a sexual nature, or even behaviour or remarks of a sexual nature. In terms of available defences, the definition of "sexual nature" does not include touching, behaviour or remarks of a clinical nature which may be appropriate to the service provided. Notably, sexual abuse as defined under the *Code*, includes the sexual acts noted above, between a patient and a regulated health professional, even if they are consensual.

In *Tanase,* the ONCA held that while revocation is an extremely serious penalty, the Ontario Legislature's decision to impose a bright-line rule prohibiting sexual relationships with patients in the regulated health professions, regardless of the nature of the relationship, is constitutional as it does not violate section 7 or 12 of the *Charter*.

FACTS

In *Tanase*, the facts proceeded by way of an agreed statement of facts ("**ASF**") noting that the Member (the "**Appellant**") was a duly registered member of the College of Dental Hygienists of

Ontario (**"CDHO"**). In 2012, the Appellant met S.M. and they became friends. S.M. confided in the Appellant that she was afraid of dental treatment and had not sought dental care for several years. The Appellant subsequently provided dental hygiene services to S.M. on two occasions in 2013 while their relationship was still platonic.

In late 2013, the Appellant became roommates with S.M. and in mid-2014 they began a sexual relationship. Once the relationship began, the Appellant stopped treating S.M. because he understood he was not permitted to do so under the *Code*. However, in April 2015, a colleague told the Appellant that the "rules" had changed and that dental hygienists were now permitted to treat their spouses. The colleague's advice turned out to be erroneous and the Appellant did not attempt to confirm that he was permitted to treat S.M. while continuing his consensual sexual relationship with her. The basis for the erroneous advice was that in 2015, the CDHO submitted a spousal exception Regulation to the Ontario government with the intent of permitting dental hygienists to treat their spouses, without it constituting sexual abuse, provided that the dental hygienist was not engaged in the practice of the profession at the time during which the sexual conduct occurred. However, this exception/Regulation did not come into force until October 8, 2020.

Perhaps the reason for the colleague's confusion was that other Regulatory Colleges, such as the Royal College of Dental Surgeons of Ontario ("**RCDSO**"), passed a similar spousal exception Regulation back in 2014, which came into force in July 2014. Therefore, in July 2014, dentists could treat their spouse (and engage in consensual sexual intercourse) without offending the Code, whereas dental hygienists could not.

After receiving the erroneous advice, the Appellant treated S.M. on six occasions between April 30, 2015, and August 26, 2016, with the later three treatments occurring after the Appellant's marriage to S.M. in January 2016.

In August 2016, a member of the CDHO submitted a complaint after seeing a post S.M. had made on Facebook expressing gratitude to her husband, the Appellant, for treating her. On September 19, 2016, the Appellant was notified that the CDHO was investigating him for professional misconduct. The matter was eventually referred to the Discipline Committee and on June 19, 2018, the Discipline Committee held that the Appellant had engaged in professional misconduct and ordered a reprimand and revocation of his certificate of registration. Subsequently, the Appellant appealed the Discipline Committee's decision to the Divisional Court who ultimately dismissed his appeal on September 9, 2019. After the Divisional Court dismissed his appeal, the Appellant appealed to the ONCA.

THE SUBMISSIONS

At the ONCA, the Appellant argued that the *Code's* zero-tolerance scheme involving sexual relationships between patients and health professionals infringed section 7 and/or 12 of the *Charter* and that prior case law holding otherwise should be distinguished or overturned.

The Appellant also argued that the ONCA should give effect to the Legislature's actual intent, which he framed as to prohibit sexual abuse of patients, while permitting regulated health professionals to treat their spouses in circumstances where sexual abuse is not present.

THE DECISION

In its decision, the ONCA relied on the case of *Leering v. College of Chiropractors of Ontario*, 2010 ONCA 87 in dismissing the Appellant's argument regarding legislative intent. The ONCA held that it was not the court's role to convert the bright-line rule prohibiting sexual relationships into a standard requiring determination of the nature and quality of sexual relationships between practitioners and patients. The ONCA was very clear in their decision regarding legislative intent stating (emphasis added):

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.

Regarding the Appellant's submission that the *Code*'s zero-tolerance framework infringed section 7 or 12 of the charter, the ONCA dismissed this aspect of the Appeal relying on the case of *Mussani v. College of Physicians and Surgeons of Ontario* (2004), 248 D.L.R. (4th) 632 (Ont. C.A) ("***Mussani***"). In *Mussani*, the ONCA held that there is no constitutional right to practice a profession and that the penalty of mandatory revocation of a health professional's certificate of registration is not protected by ss. 7 or 12 of the *Charter.*

In *Tanase,* the ONCA affirmed *Mussani* by stating that s. 7 of the *Charter* does not protect "pure economic interests" and that revocation for violating the *Code* engages neither the right to liberty nor the right to security of the person. Furthermore, the ONCA went on to conclude that revocation of registration is consistent with the principles of fundamental justice, notwithstanding the Appellant's submission that the impugned provisions were "overbroad".

After determining that section 7 of the charter was not engaged by revocation, the Court went on to conclude that mandatory revocation also does not infringe section 12 of the *Charter.* At the lower court level, the Divisional Court held:

Mandatory revocation of registration does not constitute treatment within the meaning of s. 12 and would not be considered cruel or unusual in any event, as it was neither so excessive as to outrage the standards of decency nor grossly disproportionate to what was appropriate in the circumstances.

The ONCA agreed with the first part of the Divisional Court analysis, concluding that revocation does not constitute treatment within the meaning of s. 12 of the *Charter* and therefore, this section of the *Charter* does not apply. Given that finding, the ONCA did not comment on

whether mandatory revocation was “so excessive as to outrage the standards of decency nor grossly disproportionate to what was appropriate in the circumstances”.

In light of these findings, the appeal was dismissed.

COMMENTARY

Revocation of a certificate of registration is an extremely serious penalty that can impact health professionals’ economic interests and effectively bar their ability to practice in the health care industry. For many of our regulated health care professional clients, this penalty would effectively end their ability to pursue their passion of treating patients and helping them get better.

Tanase is an exceptional reminder for health professionals practicing in Ontario to be highly cognizant of maintaining appropriate boundaries in their relationships with patients and also serves as a great lesson for health professionals not to rely on “advice” from colleagues regarding whether their sexual relationship with a patient is permissible. Lastly, this case provides yet another reminder that professionals, or their spouses, should be cognizant of what they post online.

This case reflects that both regulators and courts will strictly enforce the rules/laws pertaining to sexual abuse, as per the “letter of the law”, with no exceptions, and based on the laws/rules in place at the time of occurrence. In this case, when the Appellant treated S.M and had a sexual relationship during the same period of time, there was no spousal exception in place at the CDHO. Accordingly, even though the CDHO “intended” to eventually implement a spousal exception in the near future, it was not the “law” back in 2015 and thereafter when the Appellant and S.M. engaged in their sexual relationship. As a result, no spousal exception applied and therefore, the provisions prohibiting sexual relationships with patients, even if they were your spouse, were in effect.

A very important lesson to be learned from this case is that a Member of a Regulatory College needs to know the specific rules and laws which are in effect at any period of time, as these are potentially the rules and laws which will be enforced in the event of a complaint or investigation.

It is prudent for health care professionals to avoid having sexual relationships with their patients. However, if a relationship has already begun, it would be advisable to contact a lawyer immediately to advise you on how the legislation and rules apply to your case and to discuss your options. While some consensual sexual relationship exceptions now exist in **very limited circumstances**, such as certain spousal exceptions, or having a relationship after a prescribed “cooling off” period, this determination requires carefully reviewing the applicable legislation and College guidelines.

Unfortunately for Mr. Tanase, no exceptions applied to the facts of this case and he may never practice his profession in Ontario again unless he can persuade the College to reinstate him after the mandatory revocation period of 5 years. Following this decision, the only remaining option for Mr. Tanase to continue practicing in Ontario would be to appeal the ONCA decision to

the Supreme Court of Canada ("**SCC**"). Notwithstanding that this case touches upon constitutional matters and legal issues of public importance, it is questionable whether leave would be granted. From a practical standpoint, a five-court panel of the ONCA ruled unanimously and there would be significant costs associated with appealing further.

We will continue to monitor developments regarding Health Law jurisprudence and legislation and will provide further bulletins as significant changes arise. Please contact any member of our Health Law Group if you have questions regarding this update.

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