Grey Areas
A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION
SML Steinecke Maciura LeBlanc Barristers & Solicitors

"Clear and Convincing" or Clear as Mud?

by Julie Maciura
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It matters what language is used to describe the standard of proof on the prosecution in discipline hearings. While the onus of proof is always on the regulator, the issue of "by how much" the regulator has to prove the allegations (i.e., the standard of proof) is often the subject of debate.

Language that appears to place the onus on the practitioner of disproving the allegations (e.g., "the practitioner failed to explain…") can result in successful appeals. Conversely, language that over-emphasizes the degree of caution that a hearing panel should exercise can cause a hearing panel to not make a finding where one could reasonably be made. In a hotly disputed credibility case, counsel may take an extraordinarily long time explaining the standard of proof.

For decades until 2008 the case law in Ontario described the standard of proof in professional discipline cases as floating between the civil standard (a balance of probabilities) and the criminal standard (beyond a reasonable doubt). The more serious the allegations and the more significant the potential consequences for the practitioner, the higher the standard (and heavier the burden) became. The leading case, Re *Bernstein and College of Physicians and Surgeons of Ontario*, (1977) 15 OR (2d) 447 (Div.Ct.) said that in serious cases (such as sexual abuse allegations) the burden of proof should be "clear and convincing" evidence.

In 2008 the Supreme Court of Canada released the milestone case of *F.H. v. McDougall*, 2008 SCC 53. The Court rejected the *Bernstein* approach and said that there were only two standards of proof in Canada: the civil "balance of probabilities" and the criminal "beyond a reasonable doubt". There was no middle or floating standard of proof (absent specific statutory provisions). However, in a paragraph near the end of *McDougall*, the Court said: "evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test". The Supreme Court of Canada thus appeared to be saying that the "clear and convincing" test was part of the usual civil standard of proof.

Before the *McDougall* decision a number of statutes, often dealing with police discipline, required disciplinary tribunals to make their findings of misconduct on a "clear and convincing" evidence test. The issue then became whether those statutory provisions were simply repeating the civil standard of proof (such that "clear and convincing" merely described the quality of evidence required to meet the balance of probabilities), or whether they codified a third, intermediate, standard of proof for those hearings.

Earlier this month the Ontario Court of Appeal clearly stated that these statutes (such as the *Police Services Act*) did indeed create a third, intermediate, standard of proof. The Court held that the "clear and convincing" evidence test was a separate, and higher, standard of proof than a balance of probabilities. In *Jacobs v. Ottawa (Police Service)*, 2016 ONCA 345 Court said:

> In my view, we are bound by the Supreme Court's statement in *Penner* that the standard

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> of proof in PSA [*Police Services Act*] hearings is a higher standard of clear and convincing evidence and not a balance of probabilities.

In that passage the Court of Appeal was referring to the Supreme Court of Canada's decision in *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 which addressed the "clear and convincing" comment made in the *McDougall* case. The Court of Appeal in *Jacobs* summarized the *Penner* analysis as follows:

> That concession [by legal counsel], that *McDougall* determined that clear and convincing evidence is a standard within the balance of probabilities, was clearly rejected by the Supreme Court [i.e., in *Penner*].

As a result, discipline hearing panels in non-police cases will now be less likely to hear that they must be satisfied upon "clear and convincing" evidence that the allegations have been proved. The courts have now made it clear that "clear and convincing evidence" represents a higher standard of proof than the balance of probabilities. However, that higher standard will not apply in professional discipline hearings unless the authorizing statute expressly uses that language (as it does under the *Police Services Act*).

The *Jacobs* case can be found at: www.canlii.org.