

Not All Breaches of the Law Are Professional Misconduct

by Bernie LeBlanc
April 2018 - No. 225

Most regulators can point to some aspects of their profession that are highly litigious and where they and their members are drawn into disputes. Anyone routinely involved in child custody cases or the entitlement to insurance or government benefits will be familiar with this concern. In *Sanders v College of Physicians and Surgeons of British Columbia*, 2018 BCSC 441, <http://canlii.ca/t/hr3wk>, a regulator was brought into such a clash involving end-of-life care for the complainant's mother.

The issues in the case were nicely summarized as follows:

This matter involves the regulatory review of a complaint from the petitioner, a seemingly well-intentioned Victoria man who had concerns about his extremely ill mother being over-medicated towards the end of her life. One of the petitioner's main complaints, and the focus of this review, concerned the actions of an experienced palliative care physician who overrode the petitioner's wishes in order to provide care and comfort to the mother as she fought immense pain from serious injuries. Both the adequacy of the investigation into the petitioner's complaints, and the ultimate dismissal of those complaints, are in issue.

A major thread throughout the case was whether the Inquiry Committee of the regulator (and the Review

Board) were required to ascertain whether the physician had obtained proper legal consent for his conduct. Neither the Inquiry Committee nor the Review Board squarely addressed the issue of consent and the complainant believed the answer to that question was essential in order for them to deal with his complaint. After all, he had raised that very issue in his complaint.

The petitioner strongly urges that it was necessary for the Inquiry Committee and the HPRB to come to a conclusion on the legal issue as to whether Dr. Love [*i.e.*, the physician complained about] breached the [HCCFA](#) or the [RAA](#) [*i.e.*, the consent legislation]. Yet, while it is possible that circumstances could arise where compliance with an external statute is inextricably linked with professional obligations, the statutory mandate of the Inquiry Committee does not require it to make legal determinations. It had the responses from the physicians and the opinion of the Risk Management Department that Dr. Love had the requisite authority to override the petitioner's wishes as to pain management. It also had the petitioner's position on the issue to the contrary....

To focus on a detailed analysis of the consent issue would have converted proceedings below into an adjudication of the advice provided by the Risk Management Department. Rather than descend into the intricacies of this legal issue, the Inquiry Committee had the discretion to focus the investigation on the adequacy of Ms. Sanders' medical care and the attending physicians' standards of practice....

FOR MORE INFORMATION

This newsletter is published by Steinecke Maciura LeBlanc, a law firm practising in the field of professional regulation. If you are not receiving a copy and would like one, please contact: Richard Steinecke, Steinecke Maciura LeBlanc, 401 Bay Street, Suite 2308, P.O. Box 23, Toronto, ON M5H 2Y4, Tel: 416-626-6897 Fax: 416-593-7867, E-Mail: rsteinecke@sml-law.com

WANT TO REPRINT AN ARTICLE

A number of readers have asked to reprint articles in their own newsletters. Our policy is that readers may reprint an article as long as credit is given to both the newsletter and the firm. Please send us a copy of the issue of the newsletter which contains a reprint from Grey Areas.

It appears that although it could have addressed the consent issue more directly, the HPRB [*i.e.*, the Review Board] viewed the precise answer to the legal question posed by the petitioner as not relevant to the Inquiry Committee's assessment of professional standards.

The Court also noted that the Review Board considered the entire factual context including the totality of care being provided, the challenges in resolving the son's concerns, the pain symptoms experienced by his mother and that the physician had obtained formal advice as to his authority to provide the care in issue. The Court said:

Hence, the context was more nuanced than an isolated legal determination. The Inquiry Committee, to which the HPRB deferred upon further review, considered aspects of this information along with aspects of the record that referred to the consent issue. The HPRB was satisfied that the Inquiry Committee's [*sic*] had a clear factual basis to support its lack of criticism of Dr. Love and the other physicians.

The Court also indicated that the issue to be determined on the complaint was not whether the practitioner had acted in full compliance with the law. Instead, the Court said:

Third, the Inquiry Committee was primarily concerned with professional conduct, not fine interpretations of the law. The process is one of peer review. As noted, the Inquiry Committee was composed of seven senior

physicians of good repute and competency, and five lay members. The Inquiry Committee operates with respect to Part 3 of the *HPA* [*the enabling legislation*] which addresses matters of professional misconduct. That term is defined in s. 26 as including "sexual misconduct, unethical conduct, infamous conduct and conduct unbecoming a member of the health profession." Determinations of law or negligence were not necessarily called for. The relevant part of the *HPA*'s s. 33(6)(a) test for taking no further action is whether the conduct to which the matter relates is "satisfactory," signaling that professionals are not held to a standard of perfection.

The Court also found that it was not at all clear in the circumstances whether the physician had, in fact, breached the law of consent in the circumstances. Interestingly, the Court said that it was also not required to determine the legal issue of whether the physician had proper legal consent in order to dispose of the judicial review application.

The Court concluded on this point as follows:

Assuming for the moment however that the petitioner's interpretation of the law is correct and that Dr. Love breached the [HCCFA](#) (a proposition which I need not decide), it does not necessarily follow that the HPRB erred by not intervening in the Inquiry Committee's decision. In this context, a strict determination of the legality of overriding the petitioner's consent could be seen as far less significant than the professional standards-related question of whether Dr. Love was acting in accordance with satisfactory practice

Grey Areas

A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION

standards. In some cases perhaps, non-consent to treatment may be more obvious and hence more probative of unprofessional conduct. Yet, this was not a clear situation in which a physician plainly acted illegally against the wishes of a representative acting in good faith in the patient's best interests.

Also of interest on this point, the Court said that if the complainant wanted a legal ruling there were more appropriate ways to obtain it rather than making a complaint to the professional regulator:

Last, if the petitioner sought a finding that one of Ms. Sanders' physicians acted without proper consent, he had other legal avenues to pursue. He could have sought relief by way of a civil action; see *Bentley*. In extreme cases, improper conduct could be the subject of a criminal complaint. But here, the petitioner chose to pursue a course of relief involving professional self-regulation. Having elected to complain to a board overseeing a self-governing profession, the petitioner cannot later complain that the HPRB was overly concerned with the Inquiry Committee's determination as to standards of practice rather than a legal determination on the consent issue.

The Court also rejected the notion that the complainant can frame the legal aspects of the issues to be determined in a complaint:

As noted, the petitioner also criticizes the way the issues were framed for consideration. I would reject this argument. Especially here, where the petitioner filed a long narrative of

the history in his complaint, the Inquiry Committee had the discretion to control its own process and was not bound to frame the issue on the narrow basis of whether Dr. Love breached the [*consent legislation*].

An ancillary issue in the case was a criticism of the Inquiry Committee relying on a summary of the medical records rather than reading the records themselves. The Court found that this procedure was acceptable at least where the summary was fair and accurate and the Committee had access to the original records if it chose to look at them.