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

The Importance of Teamwork

by Julie Maciura
March 2020 - No. 244

Most professions emphasize the value of collaboration with colleagues. Cooperation with others on the team serving clients is often necessary to obtain a good outcome. But can this sort of expectation ever be enforced through discipline? A recent case indicates that the answer is yes, at least where the lack of teamwork skills is substantial.

In *Al-Ghamdi v College of Physicians and Surgeons of Alberta*, 2020 ABCA 71, http://canlii.ca/t/j59f9 a surgeon was suspended for three years for persistently disruptive behaviour. The findings were summarized as follows:

> In summary, the Hearing Tribunal found the appellant was unable or unwilling to work by consensus with the other surgeons, and would not follow established protocols. He believed that he had superior qualifications to the other staff at the hospital, that he was more focused on patient care, and that he had an obligation to improve standards. However, rather than engaging with his colleagues and co-workers when he observed what he thought were unacceptable practices, he reported, or threatened to report them to their superiors or their regulatory bodies for even relatively minor concerns. The Hearing Tribunal found that the appellant lacked insight into his behaviour, and his refusal to accept responsibility for the impact of his actions had affected his ability to practice his profession. The appellant did not appreciate that he could not form a positive working relationship with colleagues and co-workers who were in constant apprehension of him advancing criticisms and complaints to those in authority.

Application of *Vavilov* to Discipline Appeals

This is one of the first appellate court decisions applying the new standard of judicial review espoused in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, http://canlii.ca/t/j46kb to a professional discipline hearing. The Court in *Al-Ghamdi* affirmed that the standard of review for issues of statutory interpretation, including of a regulator's home statute, is correctness.

Further, on the critical issue of how it would examine findings of professional misconduct, the Court suggested the review would be on a spectrum. Where the issue was how the hearing panel interpreted the definition of professional misconduct, scrutiny would be close to a correctness test. However, where the issue was whether the evidence met such a test for professional misconduct, the finding would be given deference by the Court.

In this case the Court noted that the definition of professional misconduct was quite broad, including such phrases as "displaying a lack of knowledge of or lack of skill or judgment in the provision of professional services" and "conduct that harms the integrity of the regulated profession". Given this language, the Court found that disruptive behaviour could fall within the scope of those broad definitions:

> Deciding whether a particular act meets the expected standard of professional conduct engages the expertise of the Hearing Tribunal and Review Panel. It is properly characterized as a mixed question of fact and law, a type of decision which is reviewed for palpable and

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: Steinecke Maciura LeBlanc, 401 Bay Street, Suite 2308, P.O. Box 23, Toronto, ON M5H 2Y4, Tel: 416-599-2200 Fax: 416-593-7867,
E-Mail: info@sml-law.com

> overriding error. The finding that the conduct described in the particulars of the Notice of Hearing could constitute unprofessional conduct does not disclose any reviewable error.

What Constitutes Disruptive Behaviour?

The Court discussed in what circumstances disruptive behaviour could amount to professional misconduct:

> Not every workplace misstep or disagreement should be characterized as "professional misconduct". Workplace issues generally call for workplace remedies. However, workplace conduct that has a serious detrimental effect on the provision of patient care, and the efficient and sustainable operation of a healthcare facility (like the Queen Elizabeth II Hospital) can fall within the definition of professional misconduct if it is sufficiently egregious to be what could reasonably be called "misconduct".

The Court also accepted the concept that it was the pattern of behaviour that brought this practitioner within the definition of professional misconduct. The Court also indicated that disruptive behaviour is not a discrete definition of professional misconduct. Rather "disruptive behaviour" is a short hand description of certain types of professional misconduct.

The Court also held that the physician did not have to intend to cause a culture of fear among his colleagues. Being arrogant and lacking self-awareness of the impact of his conduct on others was sufficient.

Specific examples of conduct that constituted disruptive behaviour included:

- persistently disrupting the on-call schedule, refusing to accept his assignments, refusing to pass untreated patients to the next surgeon, and being secretive about why he was absent;
- weaponizing the complaints process against colleagues, excessive criticism of others and failing to follow through on complaints that were initiated; and
- filing a human rights complaint which, while not objectionable on its own, could be seen as a part of the pattern of disruptive behaviour.

Defence of Duty to Report

The practitioner defended his frequent reporting of colleagues on the basis of his general ethical duty to report misconduct pursuant to his professional Code of Ethics. While some statutory mandatory reporting requirements (such as sexual abuse provisions) are quite specific and strict compliance is compulsory, where there is a general and less clearly defined ethical obligation, different circumstances apply. The Court said:

> The obligation of a physician to report misconduct is clear, but it cannot be interpreted in a vacuum. The physician has an equally important obligation to cooperate with other healthcare workers in patient care, and treat coworkers with dignity and respect …. The appellant's constant criticism of his coworkers was merely one of the particulars underlying the general allegation of disruptive conduct. The Hearing Tribunal found that the appellant had an inflated view of his own superior qualifications and abilities, and was oblivious to the effect that his conduct had on others. The Hearing Tribunal observed … that when transgressions are perceived "the

> [reasonable] physician seeks to help the other physician understand the perceived transgression and improve their quality of care". A physician must engage in "a serious attempt to understand the professional's behaviour and to ensure that there were no extenuating circumstances explaining the observed behaviour" prior to making a complaint. Further, most instances of perceived inadequate performance should properly be resolved in the hospital, by discussion, education, and mentoring. The obligation to report misconduct does not permit the weaponization of the complaints procedures, and does not excuse excessive criticism of others.

Using the Conduct of the Defence to Assess Credibility

The practitioner, who was also a lawyer, defended himself at the hearing. The tribunal used some of the practitioner's advocacy efforts in assessing his credibility. The Court held that in some circumstances this was acceptable.

> It is unreasonable for the appellant to expect that his conduct during the hearing would have no affect [sic] on the Hearing Tribunal. Misrepresenting the content of documents, misstating the qualifications of witnesses and making contradictory submissions need not be ignored. The mere fact that the professional has denied the allegations and has mounted a full defence should not be held against him, but that is not what occurred here. There was nothing unfair or unreasonable about the assessment of the appellant's credibility.

Sanction for Disruptive Behaviour

In addition to the three-year suspension, the tribunal imposed a requirement to successfully complete a "comprehensive assessment program" and a recommended course of therapy. Given the possibility of rehabilitation, the Court had difficulty understanding the need for that length of suspension to act as a general deterrent.

The Court was concerned that the "reasons given for the lengthy suspension do not clearly connect it to the public interest." However, the issue was now moot given the passage of time.

Costs Order

The practitioner was ordered to pay over $700,000 in costs, which represented more than 60% of the total costs for the 47 day hearing. The Court accepted that the manner of the practitioner's defence greatly increased the cost of the hearing, including bringing multiple preliminary motions with little merit, unduly long cross-examinations of witnesses and calling 50 witnesses of his own that added little relevant information.

The Court described the criteria for evaluating the costs the practitioner should pay as follows:

> A professional charged with misconduct is entitled to make full answer and defence. That principle, however, does not insulate the professional from a costs award if the defence is conducted in a way that is insensitive to the expenses generated. A costs award requires consideration of many factors, including the outcome of the hearing, the reasons the complaint arose in the first place, and the financial burden on both the College and the

> professional. The way that the defence was conducted is also relevant ….

The Court concluded that the "costs award here is substantial, but on this record it is not unreasonable".

Conclusion

A basic level of collaborative teamwork is a professional expectation for practitioners that can be enforced at discipline. However, the degree of disruptive behaviour required to constitute professional misconduct is substantial and proving this type of misconduct is challenging.