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

Is Irremediable Becoming the New Ungovernable?

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A practitioner's past history can have a significant impact on subsequent disciplinary sanctions. Previously, a practitioner with a significant past history was labelled "ungovernable". It appears that term is being replaced with the less loaded term of "irremediable".

In *Hanson v. College of Physicians and Surgeons of Ontario*, 2021 ONSC 513 (CanLII), https://canlii.ca/t/jct84 the practitioner admitted engaging in three types of professional misconduct:

1. Being found guilty of an offence for billing for services unsupported by records;
2. Failing to meet the standards of practice with respect to patient assessment and treatment as well as record keeping, and demonstrating a lack of knowledge and judgment; and
3. Permitting a vaccine to be administered by a staff person and then engaging in a lengthy cover up to mislead the regulator, including by preparing a false record and encouraging a staff person to take responsibility for it.

The discipline panel revoked the practitioner's registration. The Court upheld that outcome despite the fact that the practitioner had, since the alleged conduct, successfully completed a course of clinical remediation and mentorship resulting in a report that the practitioner "was a skilled physician, his charting consistently met the standard of care, he did not expose his patients to danger and did not lack judgment or knowledge." If these were the only facts, a sanction of revocation would be difficult to justify.

However, the practitioner had an extensive prior history going back almost twenty years. The Court summarized the prior history as follows:

> … [the] disciplinary history encompassed two prior Discipline Committee hearings and 11 decisions of the ICRC or Complaints Committee which resulted in the Appellant:
>
> 1. Being suspended from practice in 2001 for six months, reduced by three months upon completion of an ethics course;
> 2. Receiving two reprimands;
> 3. Being cautioned five times;
> 4. Being counseled once;
> 5. Being referred to the Quality Assurance Committee to address clinical issues and poor records;
> 6. Being required to take numerous educational courses concerning clinical issues, record keeping and ethics;
> 7. Undergoing clinical supervision and/or re-assessment of his practice on three separate occasions; and
> 8. Entering into three separate undertakings with the College concerning his practice and health.

The concerns involved numerous examples of unethical conduct, including misleading other health care practitioners and the regulator, clinical concerns, and record keeping lapses.

In addressing the standard of review, the Court applied the case of *Mitelman v. College of Veterinarians of Ontario*, 2020 ONSC 3039 (CanLII),

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https://canlii.ca/t/j883c to conclude that the test was whether the sanction was clearly unfit or contained errors in principle.

The Court held that in finding that the practitioner was irremediable, it was appropriate for the discipline panel to consider his entire disciplinary history. The Court said "when considering penalty, the Committee was entitled to consider the whole of the Appellant's disciplinary record, including conduct which occurred after the conduct that led to the misconduct in issue". The Court said:

> The Committee's decision that the Appellant was irremediable was based on its consideration of the Appellant's lengthy disciplinary record, that he already had several opportunities at rehabilitation, without success and that his improvements were not sustained over time. In reaching that conclusion the Committee considered both the 2018-2019 clinical assessment and the subsequent reassessment. The Committee made no error in principle.

The Court also found that the practitioner's history of mental illness and substance abuse did not establish a basis for a sanction less than revocation:

> While there was evidence before the Committee of the Appellant's diagnosis of substance use and bipolar disorders and that he had been subject to health monitoring since 2019, there was no evidence or submissions made to the Committee that the Appellant's mental health or the treatment of his disorders in any way contributed to the misconduct in issue. In the absence of such evidence or submissions, the Committee did not err in not considering those issues as mitigating factors. There must be some connection in the evidence between the health issue and the misconduct in question before the matter can be considered in respect of penalty.

In addition, the Court noted that the practitioner's compliance with three previous undertakings did not detract from the finding that he was irremediable. The Court accepted the panel's observation, borrowed from another case, that while the practitioner had "responded to the direction of the College in the sense that he completed the educational courses required of him, attended cautions, and worked under supervision, the Committee finds that they have had little or no impact and that he had made few of the fundamental changes necessary."

The Court concluded that the revocation was proportional both in the sense that it was appropriate for the finding made and in that it was consistent with prior similar cases:

> Given the evidence before the Committee together with its findings, I do not consider the penalty imposed on the Appellant of revocation was disproportionate. The misconduct in question involved clinical matters, record keeping, as well as integrity and dishonesty issues. In light of the serious, repetitive nature of the Appellant's misconduct, the lengthy history of disciplinary matters and the fact that the Appellant had not benefitted from repeated efforts at rehabilitation, the Committee's conclusion that rehabilitation was not a factor supports a penalty of revocation having regard to the principles in play, protection of the public,

> general deterrence and public confidence in the regulation of the profession.
>
> The penalty proposed by the Appellant of a 12-month suspension followed by supervision and reassessment does not meet those principles.
>
> Finally, while no two cases are alike, the penalty of revocation is consistent with the misconduct in the cases of revocation the Committee considered, [*citations omitted*]. Revocation is not limited to matters of incompetence or breach of an undertaking.

This case shows that a finding that a practitioner is irremediable, similar to the more traditional finding that a practitioner is ungovernable, justifies a sanction of revocation.