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To Refer or Not to Refer, That is the Question

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By Alyssa Armstrong

Public reaction to the recent case of *Tanase v. The College of Dental Hygienists of Ontario*[1] was widespread and critical.[2] In this case, the Divisional Court upheld the decision of the Discipline Committee finding that a dental hygienist who treated his spouse had committed professional misconduct and engaged in sexual abuse of a patient within the meaning of the *Regulated Health Professions Act, 1991* (the "**RHPA**").[3] The Discipline Committee found that Mr. Tanase had a sexual relationship with his spouse while also treating her as a patient.[4] As a result, the Discipline Committee was required under the RHPA to order revocation of his certificate of registration for a minimum period of five years.[5] This case raises the question: are there any circumstances under which an Inquiries, Complaints and Reports Committee ("**ICRC**") should exercise its discretion not to refer a complaint of sexual abuse to the Discipline Committee?

In *Tanase*, the Divisional Court commented that it was unfortunate that the ICRC referred this case in the first place, citing Justice Sharpe in *Rosenberg v. College of Physicians and Surgeons of Ontario*:

[I]t is unlikely that a physician-patient relationship will be established between a physician and his or her spouse,[6]

and Justice Blair's statement in *Mussani v. College of Physicians and Surgeons of Ontario*:

While the spousal hypotheticals appear troubling at first blush, I agree with the conclusion of Then J: "It is far-fetched to characterize the intimate relationship between spouses as "sexual abuse" merely because a physician may have treated his or her spouse."[7]

Legislative and Policy Context: Zero Tolerance and the #MeToo Movement

The sexual abuse provisions in the RHPA are, by design, a zero tolerance regime, the purpose of which is to protect patients. The rationale for zero tolerance remains very strong today, as was articulated in *To Zero: The Independent Report of the Minister's Task Force On the Prevention of Sexual Abuse of Patients and the Regulated Health Professions Act, 1991*, chaired by Marilou McPhedran (the "**McPhedran Report**"),[8] released in September 2016.[9] Sexual abuse of patients remains a pervasive problem in the regulated health professions and the McPhedran Report concluded, among other things, that "colleges are using their discretionary authority to find health care professionals guilty of lesser charges, such as "professional misconduct," instead of fully exercising their authority under the RHPA to find them guilty of sexual abuse of a patient."[10] In light of the McPhedran Report, the legislature passed the *Protecting Patients Act, 2017*, which implemented some of the recommendations contained in the McPhedran Report, including recommendations relating to mandatory revocation.

The Protecting Patients Act, 2017 included new provisions relating to sexual abuse and the definition of a patient. This legislation received Royal Assent on May 30, 2017. Some provisions came into force at that time and other provisions relating to the expansion/clarification of the definitions of "patient" and "sexual abuse" came into force as of May 1, 2018. Although these specific amendments to the RHPA had no effect on Mr. Tanase's case in the technical sense because his case fell under the mandatory

revocation regime prior to the change in legislation, what is significant is the policy context in which Mr. Tanase's complaint came before the ICRC. The complaint was filed in August of 2016 by another member of the College of Dental Hygienists ("**CDHO**"). Mr. Tanase's case came on for a hearing before a panel of the Discipline Committee on April 23 to 24, 2018, at which time the McPhedran Report had been in the public domain for about a year and a-half and the legislature had debated and held committee hearings with respect to the *Protecting Patients Act, 2017*.

It is also noteworthy to recall that in or about October 2017, public discourse over social media and other media brought widespread attention to the #metoo movement. It was in this context that the ICRC considered the complaint against Mr. Tanase and ultimately decided to refer the allegations of sexual abuse to the Discipline Committee for a hearing. There is no way to know precisely what factors influenced the decision of the ICRC in this case, but it may be helpful to understand the backdrop against which the referral to discipline was made.

The ICRC and the Discretion to Refer

From a legal perspective, the ICRC is not required to refer allegations of sexual abuse to the Discipline Committee even where the allegation can be proven. This is something recognized by the Divisional Court in *Tanase* when it stated "It is indeed unfortunate that the Inquiries, Complaints and Reports Committee (ICRC) of the College elected to proceed with the complaint, ….". The ICRC had options which included requiring the member to attend to be cautioned, or to take a specified continuing education or remediation program or to refer an allegation that would not have resulted, after a finding of professional misconduct, in a mandatory five-year revocation. One would have to assume that the ICRC carefully considered all of the facts of this case including the importance of the zero tolerance policy before it decided to refer the member to the Discipline Committee on an allegation of sexual abuse as it would have known what the result of the referral would be.

An ICRC has the ability to take into account more than just whether certain allegations can be made out. For example, in *Reyhanian v. Health Professions Appeal and Review Board*, the Divisional Court found that:

the ICRC is entitled to take a critical look at the facts underlying the complaint and the evidence that does and does not support it, along with a myriad of other issues (such as, the record of the respondent, special circumstances surrounding the incident, policy concerns, the capacity of the discipline committee, among others). The factual record revealed from the investigation must necessarily be part of that analysis.[11]

A factually similar situation to that of *Tanase* arose in *F.J.D. v. T.E.*,[12] in which the ICRC received a complaint regarding a female dental hygienist treating her husband; however, the outcome in *F.J.D.* was quite different to that in *Tanase*. In *F.J.D.*, the ICRC exercised its discretion not to refer the allegations of sexual abuse to discipline. As indicated in the decision of the Health Professions Appeal and Review Board ("**HPARB**"), which reviewed the reasonableness of the decision of the ICRC, the ICRC decided not to refer the allegation for two reasons: first, the evidence before the ICRC established that there was a pre-existing spousal relationship and that it did not appear that the practitioner/client relationship led to a personal relationship; and second, it did not believe that referring F.J.D. to discipline, where she would face a mandatory five-year period of revocation, would be in the public interest. HPARB also commented that the CDHO had proposed a regulation for a spousal exception. In its submission for a proposed regulation, it noted that there was a long-standing and accepted practice in the profession of dental hygienists treating their spouses and that the power imbalance and vulnerability that accompanies other health professional relationships is less pronounced for dental hygienists than for other health practitioners.

The divergent outcomes in these two cases illustrate the possibility that an ICRC may, in some circumstances, exercise its discretion and take an action that does not include a referral of provable allegations of sexual abuse to discipline.

Conclusion

Any ICRC determining whether to refer a complaint of sexual abuse faces a serious decision. The finding of sexual abuse in the *Tanase* decision, and the corresponding penalty of mandatory revocation that captured the public and the media's attention was, from a legal perspective, perhaps the least remarkable aspect of the decision. The Divisional Court's decision to uphold the discipline finding of professional misconduct and the penalty was not surprising given the facts of the case. Like the discipline panel before it, the Court was bound by judicial precedent and the mandatory revocation requirements of zero tolerance under the RHPA, which had been challenged unsuccessfully in court on many prior occasions.

However, the *Tanase* decision raises important and difficult questions. Mandatory revocation is a blunt instrument and it does not allow the discipline panel to tailor a penalty proportionate to the circumstances of the case. Consequently, the mandatory penalty regime may, in certain cases, result in what may appear to some to be an unjust or just uncomfortable outcome. The question remains whether or not there are any circumstances under which an ICRC should take into consideration mandatory revocation in making its decision on referral, as suggested by the Divisional Court. It is a conversation that will likely continue.

[1] 2019 ONSC 5153 (Div. Ct.) [*Tanase*]. [Note: It is our understanding that Mr. Tanase has sought leave to appeal to the Ontario Court of Appeal.]

[2] Colin Perkel, "Dental hygienist guilty of sex abuse fights for licence," *Toronto Star*, September 26, 2019, online: <https://www.thestar.com/news/canada/2019/09/26/ministry-dithers-on-exemption-sex-abuser-hygienist-fights-for-licence.html>; Daina Goldfinger, "'Heartbreaking and ridiculous,' says Ontario dental hygienist who lost licence for treating wife," *Global News*, September 26, 2019, online: <https://globalnews.ca/news/5951636/ontario-dental-hygienist-loses-licence/>; Graeme McNaughton, "'I feel like I'm no longer needed by society': Guelph dental hygienist stripped of licence after treating wife," *Guelph Mercury*, September 27, 2019, online: <https://www.guelphmercury.com/news-story/9617020–i-feel-like-i-m-no-longer-needed-by-society-guelph-dental-hygienist-stripped-of-licence-after-treating-wife/>.

[3] *Regulated Health Professions Act, 1991*, S.O. 1991 c. 18 [RHPA].

[4] *College of Dental Hygienists of Ontario v. Tanase*, June 19. 2018, online: < https://selfservice.cdho.org/Pages/en_US/Forms/Public/WebSite/ViewHearing.aspx?Id=6c9a1fd6-18e6-e911-b826-00155d0a3f01 >. The College of Dental Hygienists of Ontario [CDHO] had proposed that a regulation be made providing for a spousal exception for dental hygienists but it had not been passed by the Ontario Government. Mr. Tanase was under the mistaken belief that a spousal exception was in place for dental hygienists and provided treatment at various times to his spouse.

[5] *Health Professions Procedural Code,* Schedule 2 of the *Regulated Health Professions Act, 1991*, [Code], s. 51(5)3 and s. 72(3)

[6] *Rosenberg v. College of Physicians and Surgeons of Ontario*, 2006 CanLII 37118 (ON CA) as cited in *Tanase* at para 95.

[7] *Mussani v. College of Physicians and Surgeons of Ontario* (2004), 74 O.R. (3d) 1 (ON CA) at para 101 as cited in Tanase at para 95.

[8] Letter of Transmittal to the Minister of Health dated December 15, 2015, online: < http://www.health.gov.on.ca/en/common/ministry/publications/reports/sexual_health/taskforce_prevention_of_sexual_abuse_independent_report.pdf> [McPhedran Report].

[9] "Ontario Taking Action to Prevent Sexual Abuse of Patients", Government of Ontario, Newsroom, September 9, 2016, online: <https://news.ontario.ca/mohltc/en/2016/09/ontario-taking-action-to-prevent-sexual-abuse-of-patients.html>.

[10] McPhedran Report, *supra*, at p. ix.

[11] *Reyhanian v. Health Professions Appeal and Review Board*, [2013] O.J. No. 1292 (Div. Ct.) at para 20.

[12] *F.J.D. v. T.E.*, 2015 CanLII 16031 (ON HPARB).

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