

# Alleged Acts of Sexual Abuse Pre-Bill 87: Will Bill 87 Apply?

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By

Bill 87 (the “Bill”), which contains significant amendments to the *Regulated Health Professions Act, 1991* (“RHPA”),<sup>1</sup> passed first reading in the Ontario legislature in December 2016. Although the Bill is not yet law, if and when it is enacted, there will be some important changes to the way in which RHPA Colleges deal with allegations of sexual abuse.

Under the Bill, a broader scope of conduct will be considered sexual abuse, and more acts of sexual abuse will result in mandatory revocation. This raises the question: how should Colleges deal with allegations of sexual abuse when the events in question pre-dated these new amendments? Is the member subject to the old RHPA provisions, or might the new provisions apply to the allegations?

The answer? It depends. The law on the application of new legislative provisions to prior conduct is complex and often inconsistent. This bulletin outlines two situations in which this question is likely to arise but it is impossible to give an answer that encompasses every situation, and the discussion below will not apply to all scenarios. As always, Colleges would be wise to consult with legal counsel to determine the appropriate way to proceed in any particular case.

**How do the amendments apply to a member who commits an act of sexual abuse before the Bill becomes law, if that conduct would not have resulted in mandatory revocation at the time it occurred but will result in mandatory revocation under the amendments?**

Under the Bill, members who commit certain acts of sexual abuse (such as the touching of the patient’s genitals, anus, breasts or buttocks) will face mandatory revocation even though the current version of the RHPA does not require revocation for this conduct. However, even if the offending conduct pre-dated the Bill, Colleges should consider the fact that the mandatory revocation provisions apply to discipline proceedings that take place after the Bill becomes law.

The rationale for this is the public protection purpose of Colleges, including their discipline proceedings and the public protection purpose of the amendments that broaden the scope of the mandatory revocation provisions. Although the legislature generally cannot attach a new more severe punishment to conduct that occurred before the law was enacted, an exception exists for administrative proceedings that attach a “penalty” to past conduct for the purpose of public protection (and not for the primary purpose of punishing the member).<sup>2</sup>

Under the *Health Professions Procedural Code*,<sup>3</sup> RHPA Colleges have a duty to serve and protect the public interest. Although their discipline proceedings often involve an element of punishment, their primary purpose is to protect the public by allowing the College to assess the degree of risk involved in allowing a member to continue to practise the profession.<sup>4</sup> Consequently, several court decisions have held that it is acceptable for regulatory bodies to apply newly-legislated penalties in respect of prior misconduct, particularly when that conduct is serious and raises ongoing public protection issues.<sup>5</sup>

While this does not mean Colleges should automatically assume that the amendments to the RHPA can be applied to prior conduct,

there is precedent for applying new more stringent “penalty” provisions to misconduct that took place prior to the amendments. Therefore, there is a basis for RHPA Colleges to apply the new mandatory revocation provisions, even if the conduct pre-dated the amendments.

**How do the amendments apply to a member who commits an act that would not be considered sexual abuse under the current RHPA, but will be captured by the definition under the amendments?**

The Bill expands the definition of sexual abuse. For example, it broadens the definition of “patient” for the purposes of the sexual abuse provisions to include former patients, if the conduct occurs within one year of the professional relationship ending.<sup>6</sup> This means that currently, a member who engages in sexual acts with a former patient may not have committed sexual abuse (or professional misconduct),<sup>7</sup> but after the amendments come into force, the same conduct may be considered sexual abuse.

If a College is faced with a matter involving a member’s sexual contact with a former patient, and if that conduct occurred entirely before the amendments come into force, it would be inappropriate to apply the new definition of “sexual abuse” to that conduct.<sup>8</sup> The general rule is that a person cannot be liable for an act that was not “illegal” at the time it occurred. This means that if the member’s actions were not considered to be sexual abuse under the law at the time or would not have been considered professional misconduct at the time the new definitions cannot be applied to retroactively characterize that conduct as sexual abuse.<sup>9</sup>

However, for some Colleges, sexual acts with a former patient could be seen as a boundary violation or disgraceful, dishonourable, or unprofessional conduct under the current version of the RHPA. These Colleges could therefore proceed with allegations of that nature, just as they had prior to the amendments to the RHPA.

Alternatively, some courts have held that if a member’s conduct is so serious that it raises ongoing concerns about his or her suitability to practise, it may be permissible to begin a discipline proceeding in respect of that conduct, even if it pre-dated the legislative amendments.<sup>10</sup> In these cases, if possible, the allegations should be framed in terms of concerns about the member’s current and ongoing suitability to practise, so as to avoid applying a new definition of misconduct to acts that pre-dated the legislation.<sup>11</sup> In practice, this means that allegations will typically be framed in terms of disgraceful, dishonourable, and unprofessional conduct, to reflect the fact that the proceedings are focused on the member’s current and ongoing suitability to practise.

## **Conclusion**

The rules about the retrospective application of legislation are not straightforward, but there are some circumstances in which legislative amendments can be applied to prior conduct. However, courts are not entirely consistent in how they apply these rules. The discussion above therefore should not be taken as legal advice, and Colleges would be wise to obtain a legal opinion if questions of this nature arise.

[1]S.O. 1991, c. 18

[2]*Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301.

[3]Being Schedule 2 to the RHPA, s. 3(2).

[4]*McKee v. College of Psychologists of British Columbia*, [1994] B.C.J. No. 1778 (C.A.), at para. 7.

[5]See e.g. *Brosseau; Re a Solicitor’s Clerk*, [1957] 3 All E.R. 617.

[6]Or such longer period as may be required by regulation.

[7]Currently, not all Colleges consider sexual contact with a former patient to be sexual abuse.

[8]See e.g. *Kalin v. Ontario College of Teachers*, [2005] O.J. No. 2097 (Div. Ct.).

[9]*Tse v. College of Physicians and Surgeons of Ontario*, [1978] O.J. No. 3251 (Div. Ct.); *Kaplan v. Canadian Institute of Actuaries*, [1994] A.J. No. 868 (Q.B.), aff’d [1997] A.J. No. 874 (C.A.)

[10]See e.g. the discussion of this issue in *Ackermann v. Ontario College of Social Workers and Social Service Workers* (June 10,

2003); *Psychologist “Y” v. Nova Scotia Board of Examiners of Psychology*, 2005 NSCA 116; *Stolen v. British Columbia College of Teachers*, [1994] B.C.J. No. 1993 (S.C.), rev'd in part [1995] B.C.J. No. 1980 (C.A.); *Keppel v. Association of Professional Engineers, Geologists, and Geophysicists of the Northwest Territories*, [1996] N.W.T.J. No. 68 (S.C.); *Ho v. Alberta Association of Architects*, 2015 ABCA 68.

[11]For Colleges that do not currently view sexual contact with a former patient as professional misconduct, it will be more difficult to make the argument that conduct of this nature is so serious that it raises ongoing concerns about the member's suitability to practise. As always, it will depend on the facts of the case.

*The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular applications of the law to specific situations, the reader should seek professional advice.*

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