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Divisional Court Offers First Interpretation of New Interim Suspension Powers Under the RHPA

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Introduction

In Rohringer v Royal College of Dental Surgeons of Ontario (2017), [1] the Divisional Court issued its first decision applying the new interim suspension powers in the *Regulated Health Professions Act* ("***RHPA***"). Health professionals governed by the *RHPA* can have their certificate of registration suspended (or have terms, conditions, or limitations placed on their certificate of registration) prior to a discipline hearing if their conduct "exposes or is likely to expose the member's patients to harm or injury."[2] On May 30, 2017, Bill 87, *Protecting Patients Act, 2017* came into force and amended the interim order provisions of the *RHPA*. Prior to these amendments, interim orders could only be issued by a college's screening committee, known as the Inquiries, Complaints, and Reports Committee (the "**ICRC**"), if an allegation of professional misconduct or incompetence had been referred to the Discipline Committee. Under the new provisions, however, the ICRC can make an interim order any time after a complaint is received or an investigator is appointed. This was intended to be a significant change and this decision is the first time the amendment has been considered by the courts.

Facts

According to the decision, Dr. Rohringer was criminally charged in Florida for exposing himself and masturbating in front of several teenage girls (the "**Florida Charges**"). The Royal College of Dental Surgeons of Ontario (the "**College**") learned of these charges and initiated a Registrar's investigation on March 10, 2017. College investigators interviewed the two dentists with whom Dr. Rohringer practised and over twenty of his current and former staff. The dentists stated that no concerns had ever been raised regarding Dr. Rohringer and that they had no such concerns, but staff stated that Dr. Rohringer had told inappropriate sexual jokes in the presence of patients and made sexual comments to staff. The College also learned from Florida police that Dr. Rohringer had confessed to the Florida Charges.

On September 29, 2017, Dr. Rohringer was given notice that the College intended to issue an interim suspension of his certificate of registration. He was given an opportunity to respond, but failed to deliver his response by the deadline. Without Dr. Rohringer's submissions, the ICRC considered the evidence before it and suspended him, providing reasons for this decision (the "**Interim Order**"). Dr. Rohringer submitted a response after the deadline, which included an expert report from Dr. Gojer who had performed a psychiatric assessment of him. This report indicated that, among other things, Dr. Rohringer admitted to the conduct that was the subject of the Florida Charges, that he had a diagnosed problem with exhibitionism, and that he sought out teenage victims because they were less likely to report him. Notwithstanding this behaviour, Dr. Gojer concluded that Dr. Rohringer did not pose "any risk to patients at his workplace".[3] Dr. Rohringer also offered to consent to a monitoring term on his practice in lieu of a suspension.

The ICRC reconvened to review his response and materials on October 23, 2017. Without providing written reasons for their second decision, the ICRC upheld the suspension and indicated that they would "seek further information, including information from its own experts, as well as further information about the criminal charges in Florida against Mr. Rohringer"[4] (the " **Affirming Decision**"). Dr.

Rohringer proceeded to bring an urgent application for judicial review, which was heard on November 1, 2017. Subsequent to the Affirming Decision but before the application for judicial review was heard, the ICRC conducted further investigation, including obtaining an expert report from Dr. Klassen. In creating his report, however, Dr. Klassen did not have an opportunity to review Dr. Gojer's report or interview Dr. Rohringer.

The Decision

Justice Spies of the Ontario Divisional Court determined three issues in Dr. Rohringer's application: (1) whether the ICRC had some evidence that Dr. Rohringer's conduct exposes or is likely to expose his patients to harm or injury; (2) whether the ICRC improperly relied on a 1994 decision of the Complaints Committee; and (3) whether the interim decision was unreasonable because it was not the least restrictive means of protecting patients. Ultimately, Justice Spies sided with Dr. Rohringer on all three issues and quashed the decision of the ICRC.

On the first issue, the court considered whether there was some evidence before the ICRC to establish that Dr. Rohringer's conduct exposed or was likely to expose his patients to harm or injury. Justice Spies took particular issue with the fact that the conclusions in Dr. Rohringer's expert report were, in her words, "uncontradicted",[5] as the ICRC did not request an expert report before issuing the Affirming Decision. Further, although the College subsequently obtained an expert report from Dr. Klassen, Justice Spies did not think it addressed whether there was a likelihood of harm to Dr. Rohringer's patients. Justice Spies came to the conclusion that the suspension was based on mere speculation arising out of the Florida Charges and Dr. Rohringer's inappropriate jokes. In her view, the decision was not based on evidence of likely exposure to harm. All that being said, Justice Spies appears to have decided the first issue largely on the basis that no reasons were provided in the Affirming Decision. In particular, she stated that reasons should have been provided to explain why the ICRC rejected the expert report and Dr. Rohringer's offer to have his practice monitored. On this point, Justice Spies held that "the failure to give any reasons [in the Affirming Decision] is reason alone to set aside the ICRC decisions."[6]

On the second issue, the court held that the ICRC improperly relied on a 1994 decision from the Complaints Committee (the previous name for the ICRC) where Dr. Rohringer was alleged to have made inappropriate sexual comments to an employee. No action was taken by the Complaints Committee, but Dr. Rohringer was advised to draw stronger distinctions between his professional and personal life. In the reasons for the Interim Order, the ICRC stated that Dr. Rohringer's past history "heighten[ed] the panel's concerns."[7] Justice Spies held that this decision had no relevance as to whether Dr. Rohringer's recent conduct was likely to expose his patient's to harm or injury and that it was unreasonable to rely on such a dated decision.

On the third issue, the court held that a decision of the ICRC will be unreasonable if the panel does not consider whether restrictions less than a suspension would still protect patients from likely harm. In Dr. Rohringer's case, the ICRC provided no reasons in the Affirming Decision as to why a monitoring term would not protect the public. Without reasons for the Affirming Decision, Justice Spies states that she could not know if the ICRC even considered his offer to consent to a monitoring term.

Key Take-Aways

<u>(1) The new interim order provisions do not create a more permissive standard</u>

First and foremost, this decision is important for what the Divisional Court says about the amendments to the interim order provisions in the *RHPA*. Given that an interim order can now be made before referral to discipline, and at any point following a complaint or appointment of investigators, one might have reasonably concluded that the legislature intended to make it faster and easier for the ICRC to issue an interim order. This expectation also arises from the fact that the amendments to the *RHPA* include a new power for the ICRC to vary an interim order at any point.[8] Previously, an interim order continued in force until the matter was disposed of by the Discipline Committee. These amendments suggest that the legislature intended to create a regime where the ICRC could act quickly in issuing interim orders to protect the public, while retaining the ability to vary the order if the member could subsequently

provide evidence that they did not expose their patients to likely exposure to harm.

However, Justice Spies' comments suggest otherwise. First, she states that an interim order must be based on more than mere speculation, and "that this is particularly so where, as in this case, the governing statute allows an interim order to be issued pre-referral for prosecution."[9] These comments suggest that Justice Spies thought the evidentiary burden may be greater if an interim order is issued before an investigation is complete. Second, in discussing the fact that the College waited seven months before making the Interim Order, Justice Spies agreed "that the College needed to undertake a proper investigation before taking action."[10] Thus, although the *RHPA* grants the ICRC the power to make an interim order before any investigation has taken place, it appears that Justice Spies thought that an investigation had to occur before an interim order was issued. Justice Spies arguably misinterpreted the amendments to the *RHPA*, but for now her decision is the only judicial commentary on the new interim suspension powers. The decision as to when to issue the interim order will always depend on the facts of the case and there should certainly be situations where no investigation is needed before issuing an interim order. However, this decision would suggest that a degree of caution should be exercised in issuing an interim order before undergoing an investigation.

(2) Good reasons for an interim order are essential

Another take-way, and one that we have written about recently, is the crucial importance of reasons. Had the ICRC provided reasons for the Affirming Decision that explained why they rejected Dr. Rohringer's expert report and why a monitoring term would be insufficient, it is possible that their decision may have withstood judicial review. However, the lack of reasons, in and of itself, was sufficient in the court's eyes to render the decision unreasonable. When the ICRC issues an interim order, it should deliver reasons that explain, at a minimum, why the member's conduct exposes or is likely to expose his/her patients to harm or injury, what evidence supports this conclusion, why the member's submissions (including any expert report filed) do not adequately explain or address the likelihood of harm to patients, and why a less restrictive alternative is not sufficient.

One potential approach for the ICRC to take when it is asked to reconsider its decision in light of new evidence is to make use of section 25.4(4) of the *RHPA*,[11] which allows the ICRC to vary an interim order. Under this approach, where there is evidence of likely exposure to harm to patients and the member fails to submit any evidence, the ICRC could issue an interim suspension. If the member submits their response or an expert report after a deadline, the ICRC could inform him/her that the suspension will remain in place based on the evidence that was before the ICRC when the decision was made, but that the ICRC will consider whether the order should be varied. At this point, the member could submit his/her evidence and any expert reports and the ICRC would have an opportunity to file its own expert report, if necessary. This process allows the ICRC to uphold the original decision on the basis of the evidence that was before the ICRC at that time, subject to the member's ability to bring a motion to vary the order. However, much like the decision to issue an interim order, the ICRC must provide reasons for their decision to vary or not vary an interim order in a way that adequately responds to any new evidence provided by the member.

(3) Expert reports play a critical role

This case also demonstrates the importance of expert reports when the ICRC seeks an interim order. The failure of the ICRC to file an expert report before issuing the Affirming Decision meant that the conclusions in Dr. Rohringer's expert report were, in the words of the court, "uncontradicted".[12] Further, when the ICRC eventually did file an expert report, Dr. Klassen did not, according to Justice Spies, interview Dr. Rohringer, respond to Dr. Gojer's report, or opine on whether Dr. Rohringer's conduct was likely to expose his patients to harm or injury. This is a similar result to Liberman v College of Physicians & Surgeons (Ontario) (2010)[13], where the ICRC's expert reports did not conclude that there was likely exposure of harm to patients. With no expert report demonstrating likely exposure to harm, the court quashed the decision of the ICRC.[14] Thus, where a member files an expert report that addresses whether their conduct is likely to expose their patients to harm, and the ICRC is not satisfied with this opinion, it should obtain its own export report. The ICRC's expert should also be provided with a copy of the member's expert report beforehand, in order to determine whether he/she agrees with the conclusions in that report with respect to the likelihood of harm to patients.

(4) The test is “likely exposure to harm”, not risk of harm

Justice Spies expressed concern that the ICRC misunderstood the legal test it was required to consider. Notably, the ICRC concluded in its reasons for the Interim Order that Dr. Rohringer’s patients were “at risk of exposure to boundary violations of a sexual nature and/or sexual abuse.”[15] Justice Spies confirms that risk of harm is not the test. The test is whether the member’s conduct is likely to expose patients to harm or injury.[16] Given these comments, it is important that a panel of the ICRC ensures that it does not justify its decision solely on the basis that the member’s conduct creates a risk of harm. The panel must explain why there is likely exposure to harm.

At the same time, some would say that Justice Spies took too strict of an approach in this case. It is well established that the ICRC does not need to wait until actual harm occurs to a patient to issue an interim order[17] and Justice Spies recognizes this in her decision.[18] Yet, she appears to apply a more rigorous standard that is not in keeping with the public protection mandate of *RHPA* colleges. For instance, while acknowledging that Dr. Rohringer’s conduct and his “deviant urges” to expose himself created a risk of future harm, she qualifies this by stating that “there is no dispute that there is no evidence of actual harm to any patients.”[19] Justice Spies repeatedly refers to the fact that Dr. Rohringer has not been accused of misconduct with a patient in his 32 years of practising dentistry as a reason why an interim order is unreasonable. While this may be a relevant consideration, Justice Spies’ comments strongly suggest that she would not have issued an interim order unless there was evidence that harm had actually occurred to a patient. This interpretation is not in line with the public protection purpose of the *RHPA*.

(5) Be wary of considering old and unproven allegations of misconduct

As discussed, Justice Spies determined that it was unreasonable for the ICRC to consider an unproven and, in her view, irrelevant allegation from 1994 to “heighten” its concerns of likely exposure to harm. This is consistent with the Divisional Court’s decision in *Kunynetz v College of Physicians and Surgeons of Ontario* (2015),[20] where Justice Sachs stated that “dated or historical allegations will not generally provide evidence of a current risk of harm.”[21] Generally, where previous decisions of the ICRC are dated, they should not play a significant role in the ICRC’s determination as to whether patients are presently exposed to likely harm. This will not always be the case, but it is worthwhile to be cautious in considering older allegations, as they may be deemed irrelevant. The same considerations apply to previous decisions of the ICRC where a referral is not made (such as a decision to issue a caution or take no action), especially where the conduct does not relate to patients. In this case at least, Justice Spies was not convinced that an allegation regarding a staff member that was not referred to the Discipline Committee was relevant to the likelihood of harm to patients. Although one can quarrel with Justice Spies’ conclusions, the ICRC should nonetheless ensure that they are cautious in how they consider these decisions, and such caution should be reflected in the ICRC’s written reasons.

[1]2017 ONSC 6656 [Rohringer].
[2]Health Professions Procedural Code, Schedule 2 to the Regulated Health Professions Act, 1991, SO 1991, c 18, s 25.4(1) [Health Professions Procedural Code].
[3]Rohringer, supra at para 20.
[4]Ibid at para 22.
[5]Ibid at para 54.
[6]Ibid at para 52.
[7]Ibid at para 16.
[8]Health Professions Procedural Code, s 25.4(4).
[9]Rohringer, supra at para 43.
[10]Ibid at para 47.
[11]Health Professions Procedural Code, s 25.4(4).
[12]Rohringer, supra at para 54.
[13]2010 ONSC 337 (Div Ct).

[14]Ibid at paras 28-30 and 34.
[15]Rohringer, supra at para 15.
[16]Ibid at para 54.
[17]Morzaria v College of Physicians and Surgeons of Ontario, 2017 ONSC 1940 at paras 33 and 38 (Div Ct).
[18]Rohringer, supra at para 56.
[19]Ibid at para 54.
[20]2015 ONSC 6830 (Div Ct).
[21]Ibid at para 3.

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 application of the law to specific situations, the reader should seek professional advice.

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