COURT OF APPEAL FOR ONTARIO

CITATION: Tanase v. College of Dental Hygienists of Ontario, 2021 ONCA 482
DATE: 20210705
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Feldman, MacPherson, Juriansz, Huscroft and Jamal JJ.A.

BETWEEN

Alexandru Tanase

Appellant (Appellant)

and

The College of Dental Hygienists of Ontario

Respondent (Respondent)

Seth P. Weinstein and Michelle M. Biddulph, for the appellant

Julie Maciura and Erica Richler, for the respondent

S. Zachary Green, for the intervener Attorney General of Ontario

Heard: May 11, 2021 by video conference

On appeal from the order of the Divisional Court (Justices Julie Thorburn, David L. Edwards and Lise G. Favreau) dated September 9, 2019, with reasons reported at 2019 ONSC 5153.

Huscroft J.A.:

OVERVIEW

[1] Ontario has a "zero-tolerance" policy for sexual abuse by members of the regulated health professions in Ontario. Members are guilty of professional misconduct under s. 51(1) of the *Health Professions Procedural Code* (the "*Code*"),

being Schedule 2 to the *Regulated Health Professions Act,* 1991, S.O. 1991, c. 18, if they commit “sexual abuse” against a patient, which is defined in s. 1(3) as including “sexual intercourse or other forms of physical sexual relations between the member and the patient”.

[2] A finding of sexual abuse does not depend on establishing that a sexual relationship is inherently exploitive or otherwise wrongful; the prohibition of sexual relations between members and patients is categorical in nature. Sexual relationships with patients are prohibited, period, subject only to a spousal exception that may apply. With the approval of the government, the Council of the College of a regulated health profession may make a regulation permitting members to provide treatment to their spouses, but the exception is narrow in scope: “spouse” is defined as including only someone to whom the member is married or with whom the member has been cohabiting in a conjugal relationship for a minimum of three years. The Council of the College of Dental Hygienists of Ontario (“the College”) has a regulation adopting the spousal exception, but that regulation did not come into force until October 2020, well after the occurrence of the events that are the focus of this appeal.

[3] The facts in this case are not contested. The appellant is a dental hygienist who entered into a sexual relationship with S.M., a woman he was treating. Eventually they married and the appellant continued to treat S.M. following their marriage.

[4] In 2016, a complaint was made to the College and a Discipline Committee was convened. The Committee found the appellant guilty of professional misconduct, revoked his registration as required by s. 51(5) of the *Code*, and issued a reprimand. The Divisional Court dismissed the appellant's appeal.

[5] The appellant describes revocation of his registration as an "absurdity" and invites this court to revisit its caselaw in order to "remedy this unfairness". A five-member panel was convened in order to allow the appellant to challenge this court's decisions in *Leering v. College of Chiropractors of Ontario*, 2010 ONCA 87, 98 O.R. (3d) 561, in which the court held that sexual abuse is established by the concurrence of a health care professional-patient relationship and a sexual relationship, and *Mussani v. College of Physicians and Surgeons of Ontario* (2004), 248 D.L.R. (4th) 632 (Ont. C.A.), in which the court held that the penalty of mandatory revocation of a health professional's certificate of registration for sexual abuse does not infringe either s. 7 or s. 12 of the *Charter*.

[6] In my view, *Leering* and *Mussani* remain good law and the Divisional Court made no error in applying them. It follows that this appeal must be dismissed and the appellant is subject to the mandatory penalty of revocation of his certificate of registration.

[7] Revocation of the appellant's certificate of registration is an extremely serious penalty, but it is not absurd. It follows from the Ontario Legislature's

decision that sexual abuse in the regulated health professions is better prevented by establishing a bright-line rule prohibiting sexual relationships – an approach that provides clear guidance to those governed by the rule – than by a standard pursuant to which the nature and quality of sexual relationships between practitioners and patients would have to be evaluated to determine whether discipline was warranted in particular circumstances. This decision to adopt this rule was open to the Legislature and must be respected by this court. It does not violate the *Charter* and there is no basis for this court to frustrate or interfere with its operation.

[8] I would dismiss the appeal for the reasons that follow.

BACKGROUND

[9] The facts in this matter are taken from an agreed statement of facts.

[10] The appellant was a duly registered member of the College of Dental Hygienists of Ontario. He and S.M. met in 2012 and became friends. S.M. confided in the appellant that she was afraid of dental treatment and had not sought dental care for several years.

[11] The appellant gained S.M.'s trust and he provided dental hygiene treatment to her at his workplace on two occasions, January 22, 2013 and September 13, 2013, at no charge. At the time of these treatments the relationship between the appellant and S.M. was platonic.

[12] The appellant rented a room in S.M.'s house in late 2013 and he and S.M. commenced a sexual relationship in mid-2014. Once their sexual relationship began, the appellant stopped treating S.M. because he understood he was not permitted to do so. However, in April 2015, a colleague told the appellant that the rules had changed and dental hygienists were permitted to treat their spouses. This advice was in error, but the appellant did not attempt to confirm that he was permitted to treat S.M. The College had proposed a "Spousal Exception Regulation", but the enabling regulation had not yet been submitted to the Ontario government for approval. Moreover, the appellant admitted that if he had read the proposed regulation he would have understood that he was not permitted to treat S.M.

[13] The proposed regulation was not submitted to the Ontario government for approval until October 2015 and was not in force when the appellant provided treatment to S.M. on April 30, 2015, June 20, 2015, September 25, 2015, December 2, 2015, March 24, 2016, June 2, 2016, and August 26, 2016, while they were engaged in a sexual relationship. The latter three treatments occurred following the appellant's marriage to S.M. in January 2016.

[14] The College's spousal exception did not come into force until October 8, 2020, with the passage of O. Reg. 565/20, made under the *Dental Hygiene Act, 1991*, S.O. 1991, c. 22.

[15] In August 2016, a member of the College submitted a complaint to the College after seeing a post S.M. had made on Facebook on June 2, 2016 expressing her gratitude to the appellant for treating her. On September 19, 2016, the appellant was notified that the College was investigating him for professional misconduct. On June 19, 2018, the Discipline Committee found that the appellant had engaged in professional misconduct and ordered a reprimand and revocation of his certificate of registration. The Divisional Court stayed the Discipline Committee's decision to revoke the appellant's certificate of registration pending appeal, but on September 9, 2019, dismissed the appellant's appeal of the Discipline Committee's decision. On October 10, 2019, this court stayed the revocation pending the determination of this appeal.

THE LEGISLATION

[16] The relevant legislative provisions of the *Code* are set out below.

> *Sexual abuse of a patient*
>
> 1(3) In this Code,
>
> "sexual abuse" of a patient by a member means,
>
> > (a) sexual intercourse or other forms of physical sexual relations between the member and the patient,
> >
> > (b) touching, of a sexual nature, of the patient by the member, or
> >
> > (c) behaviour or remarks of a sexual nature by the member towards the patient.
>
> *Exception*, spouses

1(5) If the Council has made a regulation under clause 95(1)(0.a), conduct, behaviour or remarks that would otherwise constitute sexual abuse of a patient by a member under the definition of “sexual abuse” in subsection (3) do not constitute sexual abuse if,

(a) the patient is the member’s spouse; and

(b) the member is not engaged in the practice of the profession at the time the conduct, behaviour or remark occurs.

(6) For the purposes of subsections (3) and (5),

…

“spouse”, in relation to a member, means,

(a) a person who is the member’s spouse as defined in section 1 of the Family Law Act, or

(b) a person who has lived with the member in a conjugal relationship outside of marriage continuously for a period of not less than three years.

Professional misconduct

51(1) A panel shall find that a member has committed an act of professional misconduct if,

…

(b.1) the member has sexually abused a patient; or

(c) the member has committed an act of professional misconduct as defined in the regulations.

…

(5) If a panel finds a member has committed an act of professional misconduct by sexually abusing a patient, the panel shall do the following in addition to anything else the panel may do under subsection (2):

1. Reprimand the member.

> 2. Suspend the member's certificate of registration if the sexual abuse does not consist of or include conduct listed in paragraph 3 and the panel has not otherwise made an order revoking the member's certificate of registration under subsection (2).
>
> 3. Revoke the member's certificate of registration if the sexual abuse consisted of, or included, any of the following:
>
> i. Sexual intercourse.

THE DECISIONS BELOW

The Discipline Committee's decision

[17] The Discipline Committee concluded that there was no significant change in the law that would warrant deviating from the decision of this court in *Mussani*, which upheld the constitutionality of the mandatory registration revocation provisions. That being so, the agreed statement of facts required a finding of professional misconduct.

[18] The Committee ordered the appellant's certificate of registration revoked and issued the following reprimand:

> One of the rules that the Ontario legislature has enacted for health professionals is that they cannot have a concurrent sexual relationship with a patient they are treating. This policy of zero tolerance is backed up by mandatory revocation of the certificate of registration of the health professional. It is not discretionary. In your circumstances, where you were involved in a consensual spousal relationship, it appears a harsh penalty. In the societal interest of preventing sexual abuse, this penalty can be avoided by dental hygienists, like other health professionals, by ensuring that they comply with the rule of not engaging in a sexual relationship with a client/patient. While we are sympathetic to your personal

> situation, our hands are tied by a strong legal rule designed to protect patients. You have paid a heavy price for breaking the rule. We sincerely hope to see you again as an active member of the dental hygiene profession.

The Divisional Court's decision

[19] The Divisional Court dismissed the appellant's appeal from the Committee's decision. The court held, based on *Mussani*, that the appellant has neither a constitutionally protected right to engage in sexual relations with a patient nor a right to practice as a dental hygienist. The court held, further, that the imposition of professional consequences as a result of the appellant's breach of the *Code* did not engage the right to liberty or security of the person under s. 7 of the *Charter*, which does not protect economic interests, citing *R. v. Schmidt*, 2014 ONCA 188, 119 O.R. (3d) 145, at paras. 37-38, leave to appeal refused, [2014] S.C.C.A. No. 208. Nor did the mandatory revocation provisions engage security of the person by preventing access to health care, as the law did not involve state intrusion into bodily integrity or create significant delays in obtaining health care. The court concluded that the prohibition would not be considered overbroad under s. 7 in any event, again applying *Mussani*.

[20] The Divisional Court also rejected the argument that mandatory revocation constituted cruel and unusual treatment within the meaning of s. 12 of the *Charter*. The court applied this court's decision in *Mussani* in holding that mandatory revocation of registration did not constitute treatment within the meaning of s. 12

and would not be considered cruel or unusual in any event, as it was neither so excessive as to outrage the standards of decency nor grossly disproportionate to what was appropriate in the circumstances. The court concluded, further, that the combined effect of mandatory revocation and publication of the appellant's discipline history did not constitute cruel and unusual treatment.

[21] The Divisional Court rejected the argument that there had been a significant change in circumstances since the decision in *Mussani* had been released, such that the decision should be revisited.

DISCUSSION

[22] The appellant argues that the *Code's* zero-tolerance scheme infringes s. 7 and/or s. 12 of the *Charter* and that *Mussani* must be distinguished or overruled. In the alternative, the appellant says that the court should revisit its decision in *Leering* to give effect to what he submits was the Legislature's intent: to prohibit sexual abuse of patients while permitting regulated health professionals to treat their spouses in circumstances where sexual abuse is not present.

[23] The first question that must be addressed is whether the court's decision in *Leering* is correct. If it is not, it is unnecessary to address the *Charter* arguments.

Leering remains good law

[24] *Leering* involved a chiropractor who was living with the complainant in a conjugal relationship when he began treating her as a patient. He treated her 28 times during the course of their relationship, which lasted for under 12 months, and billed her for the treatments. A dispute over fees owing at the end of the relationship led to a complaint to the College, which determined that the chiropractor should be charged with sexual abuse. The Discipline Committee of the College of Chiropractors found the chiropractor guilty of sexual abuse and imposed the mandatory penalty of revocation of registration. The Divisional Court reversed the decision on appeal, holding that the Discipline Committee was required to inquire into whether the sexual relationship arose out of a spousal or professional relationship in order to determine whether there was sexual abuse.

[25] The Court of Appeal held that the Divisional Court erred by imposing an obligation on the Discipline Committee to inquire into the nature of the parties' sexual relationship. As Feldman J.A. explained, at para. 37:

> The disciplinary offence of sexual abuse is defined in the *Code* for the purpose of these proceedings as the concurrence of a sexual relationship and a healthcare professional-patient relationship. There is no further inquiry once those two factual determinations have been made.[1]

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[1] The Court acknowledged that there was some room for interpretation when it comes to whether or not a complainant was a patient of the health care practitioner, involving cases of incidental treatment, an issue not relevant in this case.

[26] The appellant argues that the Legislature "overruled" *Leering* by amending the *Code* in 2013 to authorize individual colleges to enact regulations permitting practitioners to treat their spouses. Although the spousal exception regulation for dental hygienists was not in place when treatment in this case took place, the appellant says that the Legislature's "clear rebuke" of *Leering* means that the decision ought to be revisited in order to give the Discipline Committee the discretionary authority to determine whether treatment of a spouse involves actual sexual abuse. "On any reasonable view", the appellant asserts, "the concerns about exploitation of a power dynamic or the inducement of consent simply do not arise where the professional and patient are in a pre-existing spousal relationship". Moreover, the appellant argues, the mandatory revocation provisions "were never intended to apply to a member who, on a limited basis, treats his or her spouse or romantic partner where the romantic relationship preceded any treatment rendered."

[27] This argument must be rejected. In essence, it invites the court to convert the bright-line rule prohibiting sexual relationships into a standard requiring the nature and quality of sexual relationships between practitioners and patients to be evaluated to determine whether discipline is warranted in particular circumstances. It finds no support in the language of the *Code* and would frustrate its clear purpose. Moreover, it begs the question by assuming that no concerns arise in the

context of pre-existing sexual relationships, regardless of the nature or duration of those relationships.

[28] The *Code* is clear when it comes to sexual relationships. It is neither ambiguous nor vague. Professional misconduct is established once sex occurs between a member of a regulated health profession and a patient. That the misconduct is termed “sexual abuse” neither mandates nor permits an inquiry as to the nature of a sexual relationship. The Legislature did not prohibit only sexual relationships that are abusive, leaving it to disciplinary proceedings to determine what constitutes abuse; it prohibited sexual relationships between regulated health practitioners and their patients *per se*. This approach obviates the need for discipline committees – bodies composed of health care professionals and laypeople – to inquire into the nature of sexual relationships and whether, as the appellant would have it, they give rise to “actual sexual abuse” because they arise out of coercion or exploitation. Justice Feldman’s observation in *Leering*, at para. 41, remains apt:

> The discipline committee of the College has expertise in professional conduct matters as they relate to chiropractic practice. Their expertise is not in spousal relations or dynamics, nor would it be fruitful, productive or relevant to the standards of the profession for the committee to investigate the intricacies of the sexual and emotional relationship between the professional and the complainant. That is why the *Code* has defined the offence in such a way that the fact of a sexual relationship and the fact of a doctor-patient relationship are what must be established.

[29] The purpose of the rule-based approach established by the *Code* is to avoid any doubt or uncertainty by establishing a clear prohibition that is easy to understand and easy to follow. Sexual relationships with patients are forbidden and members of the regulated health professions must govern themselves accordingly, regardless of whether the rule seems harsh or unfair in their personal circumstances.

[30] Rules may be subject to exceptions, of course, but the Legislature's decision to amend the *Code* to permit colleges to establish a spousal treatment exception cannot be taken to have overruled *Leering*. On the contrary, it acknowledged the decision while permitting individual colleges to mitigate the strictures of the rule by adopting a narrow and specific exception if they consider it appropriate to do so. And while that exception has since been adopted by the College of Dental Hygienists, it came into effect only *after* the appellant provided the treatment that gave rise to the finding of misconduct in this case. The appellant was required to comply with the rule prohibiting sexual relationships with patients at all relevant times – even after he and S.M. married.

[31] That said, it is important to clear up a misconception that underlies the decisions of both the Committee and the Divisional Court, as well as the appellant's submissions, all of which use the term "spouse" without regard to its definition in s. 1(6) of the *Code*.

[32] As I have said, that definition is narrow and specific. It requires either (i) marriage or (ii) cohabitation in a conjugal relationship *for a minimum period of three years*. In other words, the exception applies only to sexual relationships of some permanence. Even if the exception had been in effect when he treated S.M. during their cohabitation in a conjugal relationship prior to their marriage, the appellant would have been in violation of the rule because that relationship had not run for the required three-year period.

[33] The appellant's marriage to S.M. does not have retrospective effect, nor does it operate to render the definition of spouse irrelevant in the application of the exception. Treatment cannot be given to sexual partners outside the context of a spousal relationship, as defined by the *Code*, regardless of whether marriage occurs subsequently.

[34] In summary, the decision of this court in *Leering* remains good law. The Committee's decision that the appellant's actions violated the *Code* is correct. Even if it had been in force at the relevant time, the spousal exception would not have operated to excuse the appellant's pre-marital treatment of S.M. after they began their sexual relationship. And because it was not in force, the spousal exception did not excuse the appellant's post-marital conduct either.

Mussani remains good law

[35] In *Mussani* this court held that there is no constitutional right to practice a profession and that the penalty of mandatory revocation of a health professional's certificate of registration affects an economic interest that is not protected by ss. 7 or 12 of the *Charter*. Security of the person was not engaged by the revocation of registration regardless of the stress, anxiety, and stigma to which disciplinary proceedings inevitably give rise in the context of sexual abuse allegations, nor was a liberty right engaged. The court concluded that the provisions of the *Code* were in accordance with the principles of fundamental justice in any event. Further, the court held that revocation of registration does not constitute punishment or treatment and that, even if it did, it would not be considered cruel and unusual as it is neither so excessive as to outrage standards of decency nor grossly disproportionate to what is appropriate in the circumstances.

[36] Although the Supreme Court has made clear that s. 7 of the *Charter* is not limited to the criminal law context and, in particular, to legal rights in that context, the application of the right outside the criminal law and the administration of justice has been limited. The generality of the rights that engage the protection of the principles of fundamental justice – life, liberty, and security of the person – does not mean that all laws necessarily trigger the application of s. 7. Thus, the right to liberty is not to be understood as a *prima facie* freedom from any restraints on action – as though it protects a right to do whatever one wants. As Newman and

Régimbald point out in *The Law of the Canadian Constitution*, 2nd ed. (Toronto: LexisNexis, 2017) at §23.28, “it protects only those fundamental choices concerning which individuals have a genuine and legitimate claim grounded in the values of human autonomy and dignity. It is a protection of the fundamental and not the petty and of that which is rightfully claimed rather than what someone merely asserts to be important.” And while security of the person has been found to embrace psychological as well as physical security of the person, such that it includes bodily integrity and the choices relevant to bodily integrity, including serious psychological stress, as I will explain these concepts remain limited and it is clear that they do not extend to the economic interests advanced by the appellant, as this court held in *Mussani*.

[37] The appellant submits that *Mussani* is based on outdated case law that has been supplanted by an expansive interpretation of the liberty interest in s. 7. However, the appellant’s argument focuses on security of the person. He submits that the court must consider whether the permanent notation of the details of a finding of sexual abuse on the appellant’s record, and the requirement to publicize those findings – a requirement added in 2007 – engages the right to security of the person in a manner that was not considered in *Mussani*.

[38] The appellant says that the issue is properly characterized not as whether s. 7 protects a positive right to practice a profession unfettered by standards and regulations, but instead, as whether it encompasses the negative right not to be

deprived of a state-granted privilege to practice a profession except in accordance with the principles of fundamental justice. The appellant argues that psychological stress flows directly and automatically from the revocation of registration, and that this stress should be considered analogous to the possibility of the removal of a child, which was held to have engaged security of the person in *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46.

[39] These arguments must be rejected.

[40] The basic holding in *Mussani* is supported by what the Attorney General aptly describes as an unbroken line of authority from the Supreme Court of Canada confirming that s. 7 of the *Charter* does not protect the right to practice a profession or occupation, an example of what that court has described as “pure economic interests”. The cases include *Walker v. Prince Edward Island,* [1995] 2 S.C.R. 407, in which the Court summarily affirmed the decision of the Prince Edward Island Court of Appeal that s. 7 does not protect the right to practice a profession (in that case, public accounting) and *Siemens v. Manitoba (Attorney General),* 2003 SCC 3, [2003] 1 S.C.R. 6, at para. 45, in which the Court held that s. 7 “encompasses fundamental life choices, not pure economic interests” (in that case, the ability to generate business revenue by one’s chosen means).

[41] Nor is there a common law right to practice a profession free of regulation. As the Court held in *Green v. Law Society of Manitoba*, 2017 SCC 20, [2017] 1

S.C.R. 360, at para. 49, the right to practice a profession (in that case, law) is a statutory right – an important right, to be sure, but a right that is subject to adherence to the governing legislation and rules made under it. There is no common law, proprietary or constitutional right to practice medicine, as this court reiterated in *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario,* 2019 ONCA 393, 147 O.R. (3d) 444, at para. 187.

[42] In my view, the holdings in these cases extend to all the regulated health professions. Revocation of the appellant's certificate of registration for violating the *Code* engages neither the right to liberty nor the right to security of the person.

[43] The appellant's attempt to repackage the *Charter* argument by expressing the claim negatively rather than positively – arguing that this case is concerned with the negative right not to be deprived of his state-granted privilege to practice his profession, rather than the positive right to practice his profession – neither distinguishes nor undermines *Mussani*. *Mussani* was concerned with the loss of professional registration, and security of the person is not engaged whether the claim is packaged negatively or positively. Rather, security of the person is engaged when there is either interference with bodily integrity and autonomy or serious state-imposed psychological stress: *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at paras. 66-67. Neither has occurred in this case.

[44] Publication of the decision to revoke the appellant's certificate of registration for sexual abuse does not alter the analysis. Professional discipline is stressful, to be sure, but it does not give rise to constitutional protection on that account. In *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, and in *G.(J.),* the Supreme Court articulated the need for a "serious and profound effect" on a person's psychological integrity before security of the person is engaged: *Blencoe*, at para. 81; *G.(J.)*, at para. 60. The threshold was crossed in *G.(J.)* because a mother was facing the possibility that the state would sever her relationship with her child. This is a profound interference with family autonomy and decisions taken in the context of regulating health care practitioners pale alongside it.

[45] In saying this, I do not mean to minimize the significance of professional discipline. But s. 7 does not apply simply because legislation gives rise to serious consequences. Psychological integrity is a narrow and limited concept, and the right to security of the person is engaged only if there is a serious and profound effect on psychological integrity. The matter is to be judged on an objective basis, having regard to persons of ordinary sensibilities. It is irrelevant whether state action causes upset, stress, or worse. There must be a serious and profound impact on psychological integrity before the protection of s. 7 is engaged. Nothing in this case suggests that this threshold has been crossed, nor has the appellant proffered any basis for this court to revisit that threshold.

Revocation of registration is not inconsistent with the principles of fundamental justice

[46] Given that the rights protected by s. 7 are not engaged by the discipline process, it is unnecessary to determine whether mandatory revocation is contrary to the principles of fundamental justice. But for completeness, I am satisfied that it is not.

[47] The appellant argues that the impugned provisions are overbroad. The test for overbreadth is whether "the law goes too far and interferes with some conduct that bears no connection to its objective": *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 101; reiterated in *Carter*, at para. 85. As the Court explained in *Carter*, the test is not whether the legislature has chosen the least restrictive means; it is "whether the chosen means infringe life, liberty or security of the person in a way that has *no connection with the mischief contemplated by the legislature*": at para. 85 (emphasis added).

[48] This is a difficult test to meet and it is not met in this case. Indeed, as the Attorney General notes, the *Code* is more narrowly tailored than it was when *Mussani* was decided; it now includes a spousal exception, which colleges can choose to adopt, and in addition the regulations have been amended to remove the provision of minor or emergency treatment from the prohibition: see *Code*, s. 95(1)(0.a); *Regulated Health Professions Amendment Act (Spousal Exception),*

2013, S.O. 2013, c. 9, s. 2; and *Patient Criteria Under Subsection 1 (6) of the Health Professions Procedural Code*, O. Reg. 260/18, s. 1.2. Subject to these exceptions, the law establishes a zero-tolerance policy concerning treating relationships that are sexual.

[49] The *Code's* rule-based approach is connected to the Legislature's purpose in prohibiting sexual abuse of patients. It assures patients that their relationships with health care providers will not become sexualized – that they will not have to negotiate a sexualized atmosphere in seeking health care. Plainly, it is within the mischief contemplated by the Ontario Legislature and would not constitute overbreadth within the meaning of s. 7.

The rights of the spouse are not engaged

[50] For completeness, I would also reject the appellant's argument that the impugned provisions of the *Code* engage the liberty or security of the person rights of spouses of health care practitioners, an argument not addressed in *Mussani*. The appellant argues that the *Code* engages the rights of spouses by forcing them to choose between their spousal relationship and their place of residence, and by requiring them to travel to seek treatment rather than be treated by their health practitioner spouses.

[51] It is not clear that it is appropriate to address this argument in the context of this case, which concerns the rights of practitioners rather than spouses. But in

any event, I see no merit in the argument. Even assuming (without deciding) that the rights of spouses under s. 7 of the *Charter* are engaged in the present context, on the facts here travelling for health care treatment would constitute an inconvenience rather than an infringement of liberty or security of the person. The appellant draws a long bow in likening this case to *R. v. Morgentaler*, [1988] 1 S.C.R. 30, in which access to abortion was criminalized but permitted subject to compliance with a regulatory scheme that operated differently across the country. The inconvenience posited by the appellant in this case is minor, if not trivial. And to the extent that a health care professional provides care that is minor in nature or is required on an emergency basis, it is permitted on the basis that it does not establish a practitioner-patient relationship. In short, nothing in this case rises to the level of an infringement of s. 7 from the perspective of the spouse of a practitioner.

The fresh evidence application

[52] The respondent brings a fresh evidence application designed to demonstrate that there was no factual basis for the argument that S.M. would have suffered stress and anxiety if not treated by the appellant. In light of the rejection of the appellant's s. 7 argument, the fresh evidence could not be expected to have affected the result in this case and I would not admit it.

Revocation of registration does not infringe section 12 of the *Charter*

[53] The appellant argues that the rejection of a s. 12 breach in *Mussani* was premised on the erroneous rejection of the very facts of this case as a reasonable hypothetical, because the court did not think these circumstances were possible. Further, the appellant says, the combined effect of mandatory revocation of registration and the permanent notation on the public register constitutes cruel and unusual treatment.

[54] The appellant's submissions founder at the first stage of the inquiry. Although "treatment" may extend the protection of s. 12 beyond instances of punishment and other state action associated with the criminal law that affects individuals, there is no authority supporting the premise that professional regulation constitutes "treatment" within the meaning of s. 12. I see no basis for concluding that regulation of the health care professions is subject to s. 12, and no basis for concluding that it would meet the very high bar established by the Supreme Court in any event.

[55] Contrary to the appellant's argument, this court did not reject the very facts of this case as a reasonable hypothetical in *Mussani.* The hypothetical in *Mussani* at para. 101 was premised on the provision of *incidental* care to a spouse, which the court considered unlikely to establish a physician/patient relationship. Moreover, Blair J.A. rejected the argument that the law wrongly included

relationships that began during the course of treatment, as occurred in this case. As he explained at para. 79:

> The fact that an intimate sexual relationship which began during treatment may blossom into a truly loving one but still lead to revocation of a health professional's certificate of registration, does not necessarily make the Mandatory Revocation Provisions unconstitutionally broad, in the sense that they overshoot the legislative objectives. The health professional need only terminate the treatment relationship to avoid the problem. The issue is whether the means chosen by the Legislature – mandatory revocation of the certificate of registration – are overly broad *in relation to the purpose of the legislation.* If they are not, the legislature has the right to make difficult policy decisions that may, in rare cases, override what might otherwise be considered permissible conduct. [Emphasis in original; citations omitted.]

[56] The appellant's argument that s. 12 is infringed must be rejected. *Mussani* remains good law.

The relevance of the Charter and fairness concerns

[57] Rejection of the appellant's *Charter* arguments does not mean that health care practitioners do not enjoy the protection of the *Charter*. It means only that revocation of the appellant's certificate of registration does not limit his rights in either ss. 7 or 12 of the *Charter*. The severity of the impact of this regulatory penalty on the appellant does not alter this analysis.

[58] In answer to a question from the panel during the hearing of the appeal, the appellant invited the court to stay the decision of the Discipline Committee

pursuant to s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, even if it upheld the decisions in *Leering* and *Mussani*, on the basis that it was harsh or unfair. In effect, the court was invited to nullify the legislation.

[59] The short answer to this invitation is no. The court cannot refuse to give effect to the lawful decision of an administrative tribunal on the basis that it disapproves of the outcome in a particular case.

[60] The court's power to stay a matter in s. 106 is far more limited in nature: it is concerned with staying "any proceeding in the court", rather than the decisions of administrative tribunals, and is typically invoked to stay judicial proceedings based on jurisdiction, convenience of forum, choice of law or venue clauses, or pending criminal or civil proceedings or arbitration. It is not available in this case. Nor is there any other basis to refuse to give effect to the Discipline Committee's decision. If the penalty of mandatory revocation of a certificate of registration is considered unfair or unwise, it is a matter for the Legislature to address.

CONCLUSION

[61] In summary, as this court held in *Leering*, the *Code* defines sexual abuse as the concurrence of a sexual relationship and a health care professional-patient relationship. And as this court held in *Mussani*, neither this definition nor the penalty of revocation of registration establishes limits on either s. 7 or s. 12 of the

Charter. It follows from the dismissal of the appeal that the decision of the Discipline Committee must be given effect.

[62] I would dismiss the appeal and award the respondent costs in the agreed amount of $5,000, all inclusive.

Released: July 5, 2021 K.F.

J.A.

I agree K. Feldman J.A.

I agree. J.C. MacPherson J.A.

I agree J.A.

I agree. M. Jamal J.A.

Court File No. 495-18

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

THE HONOURABLE JUSTICE THORBURN	)	**MONDAY, THE 9TH**
THE HONOURABLE JUSTICE EDWARDS	)	
THE HONOURABLE JUSTICE FAVREAU	)	**DAY OF SEPTEMBER, 2019.**

BETWEEN:

ALEXANDRU TANASE

Appellant

- and -

THE COLLEGE OF DENTAL HYGIENISTS OF ONTARIO

Respondent

ORDER

THIS APPEAL, brought by Alexandru Tanase (the "Appellant"), seeking to set aside the Orders and Decisions of the Discipline Committee of the College of Dental Hygienists of Ontario dated June 19, 2018 and August 1, 2018 was heard on May 21, 2019 by the Divisional Court at Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5, with reasons for decision released September 9, 2019.

ON READING the Appeal Book and Compendium, the Exhibit Book, the Respondent's Compendium, the Factums of the parties, and Briefs of Authorities of the parties, and on hearing the submissions of counsel,

1. THIS COURT ORDERS that the appeal is hereby dismissed.

2. THIS COURT ORDERS that no costs shall be awarded.

Registrar/Clerk

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO: 24
LE / DANS LE REGISTRE NO.:
257
OCT 28 2019
PER / PAR: AL

COLLEGE OF DENTAL HYGIENISTS OF ONTARIO **-and-** **ALEXANDRU TANASE**

Respondent | Appellant | **Court File No. 495-18**

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

ORDER

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CITATION: Tanase v. The College of Dental Hygienists of Ontario, 2019 ONSC 5153
DIVISIONAL COURT FILE NO.: DC-495-18
DATE: 20190909

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

THORBURN, EDWARDS and FAVREAU JJ.

BETWEEN:	)	
	)	
ALEXANDRU TANASE	)	*Seth Weinstein* and *Michelle Biddulph*, for the
Appellant	)	Appellant, Alexandru Tanase
	)	
– and –	)	
	)	
THE COLLEGE OF DENTAL HYGIENISTS OF ONTARIO	)	*Robin McKechney*, for the Respondent Collegee Dental Hygienists of Ontario
	)	
	)	
Respondent	)	**HEARD:** May 21, 2019
	)	

BY THE COURT

REASONS FOR DECISION

OVERVIEW

[1] This is an appeal from a decision of the Discipline Committee of the College of Dental Hygienists of Ontario ("the Committee").

[2] The Appellant's dental hygiene licence was revoked for providing dental hygiene treatment to his spouse, later wife. The Committee found that in so doing, the Appellant committed professional misconduct pursuant to section s. 51(b.1) of the *Health Professions Procedural Code* (the "*Code*"), being Schedule 2 to the *Regulated Health Professions Act, 1991*, S.O. 1991 c.18 ("*RHPA*").

[3] Section 51(1)(b.1) of the *Code* provides that a member of the College commits an act of professional misconduct if the "member has sexually abused a patient". Section 1(3) of the *Code* defines "sexual abuse" to include any sexual intercourse or other sexual relations between a hygienist and a patient. The courts have held that a finding that there was a

hygienist-patient relationship at the time of the sexual encounter is sufficient; the patient's consent is irrelevant.

[4] If a panel of the Committee concludes that a member hygienist had sexual intercourse with a patient, revocation of the member's registration is mandatory.

[5] In this case, the Appellant hygienist's spouse had a fear of dental treatment and had not had dental treatment for several years when he met her.

[6] The Appellant provided dental hygiene treatment to his spouse after being advised by one of his fellow dental hygienists that the College of Dental Hygienists of Ontario had approved a spousal exemption for dental hygienists.

[7] While a regulation had been made by the College, the government of Ontario did not pass the regulation. There was therefore no spousal exemption in force. (A regulation was passed to allow dentists to treat their spouses.) The Appellant did not verify the information from his colleague.

[8] The Committee upheld the constitutionality of the provision and invoked the mandatory revocation of his licence to practice as a dental hygienist. In addition, his discipline history will be included on the College's public registry.

[9] The Appellant seeks a declaration pursuant to s. 52 of the *Constitution Act, 1982* that s. 51(1)(b.1) and s. 51(5) of the *Code* are unconstitutional and of no force and effect as they breach the Appellant and/or his spouse's ss. 7 and 12 *Charter* rights. The Appellant also seeks to set aside the Order of the Disciplinary Committee and the Committee's decision to dismiss his claim for constitutional relief, revoking his license, putting a reprimand on the registry including his name, address and a synopsis of the reprimand on the public registry, and ordering him to pay costs of his appeal in the amount of $35,000.

[10] The Respondent asserts that the constitutionality of the sexual abuse provisions pertaining to health professionals has been upheld by the Court of Appeal and those provisions have been held not to contravene a spouse's s. 7 *Charter* rights. The Respondent acknowledges that the Committee did not deal with the s. 12 *Charter* challenge but submits that there is no breach of s. 12 of the *Charter* as the Court of Appeal in *Mussani v. College of Physicians and Surgeons of Ontario*, (2004), 74 O.R. (3d) 1 (C.A.) held that the mandatory revocation for breach of the sexual abuse provisions does not constitute an infringement of the s. 12 right to be free from cruel and unusual punishment or treatment.

THE EVIDENCE

[11] The Committee was provided with an Agreed Statement of Facts which contains the following information:

The Relationship Between the Parties

[12] The Appellant was a registered member of the College of Dental Hygienists of Ontario practicing in Toronto.

[13] S.M. met the Appellant in late 2012 and they became friends. She told him that she had a fear of dental treatment and therefore had not sought dental care for several years. Over time, S.M. developed a trusting relationship with the Appellant and on January 22 and September 13, 2013 he performed dental hygiene treatment on her at no charge.

[14] Their relationship was platonic.

[15] In mid-2014, the Appellant and S.M. became involved in a sexual relationship and the Appellant stopped treating S.M. as he understood that he was not permitted to treat a person with whom he was in a sexual relationship.

The Appellant's Knowledge of the Regulation

[16] The Appellant began employment at Dawson Dental Centre in Guelph in June 2014. In April 2015, he was informed by a colleague at Dawson Dental Centre that dental hygienists were permitted to treat their spouses. The Appellant and S.M. were engaged to be married in April 2015.

[17] The Appellant did not independently verify the information provided to him by his colleague.

[18] The College website contained a "Proposed Spousal Exception Regulation" which was passed by College in September 2015 but has yet to be passed by the Ontario government. (The government has passed a regulation allowing dentists to treat their spouses.)

[19] The Appellant told S.M. the "good news": he was now permitted to provide her with dental hygiene treatment as she had not sought dental hygiene treatment since her last appointment with him in September 2013.

[20] The Appellant admits that if he had read the proposed regulation, he would have understood that he was not permitted to treat S.M.

The Appellant's Hygiene Treatment of S.M.

[21] The Appellant provided dental hygiene treatment to S.M. at Dawson Dental Centre on April 30, June 20, September 25 and December 2, 2015 and March 24, June 2 and August 26, 2016.

[22] All the while, they were in a consensual sexual relationship. The Appellant and S.M. got married in January of 2016.

The Discipline Committee Hearing

[23] In August of 2016, another member of the College of Dental Hygienists saw a Facebook post of S.M.'s dated June 2, 2016 expressing her gratitude to her husband for treating her. The member submitted a complaint that the Appellant had provided dental hygiene treatment to his wife.

[24] In the Hearing before the College, the Appellant challenged the constitutionality of s. 51 of the *Code*, arguing that it infringed the s. 7 rights of health professionals and their spouses and their s. 12 right to be free of cruel and unusual punishment. On June 19, 2018, the Committee dismissed the Appellant's claim for constitutional relief and ordered revocation of his licence to practice as a dental hygienist. The Committee also ordered the specific terms of the reprimand to be made against the Appellant and that it be placed on the College's public record.

[25] On September 21, 2018, Horkins J. stayed the decision pending determination of this appeal.

THE LEGISLATION

[26] The *Health Professions Procedural Code*, Schedule 2 of the *Regulated Health Professions Act*, 1991, S.O. 1991, c. 18 provides as follows:

(1) Section 51 (1)(b.1) of the *Code* provides that, "A panel shall find that a member has committed an act of professional misconduct if the ... member has sexually abused a patient".

(2) Section 1(3) of the *Code* defines "sexual abuse" as "sexual intercourse or other forms of physical sexual relations between the member and the patient".

(3) Section 51(5) provides that if a panel finds a member has committed an act of professional misconduct by sexually abusing a patient, "the panel shall...revoke the member's certificate of registration if the sexual abuse consisted of...sexual intercourse."

[27] In addition, s. 23(1) of the *Code* provides that the Registrar shall maintain a register that contains "each member's name, business address and business telephone number ... and a synopsis of the decision, of every disciplinary and incapacity proceeding ... and a notation of every finding of professional ... malpractice."

[28] In 2013, a spousal exception provision was added. Section 95(1) provides that "Subject to the approval of the Lieutenant Governor in Council and with prior review of the Minister, the Council may make regulations ... providing that the spousal exception in s. 1(5) applies in respect of the College." Section 1(5) provides that "If Council has made a regulation under clause 95 (1) (0.a), conduct, behaviour or remarks that would otherwise constitute sexual abuse of a patient by

a member under the definition of "sexual abuse" in subsection (3) do not constitute sexual abuse if the patient is the member's spouse ...."

THE ISSUES

[29] The issues to be determined are:

a. Is there an infringement of the Appellant or his spouse's right to liberty and or security of the person pursuant to section 7 of the *Charter*?

b. Does the provision infringe his section 12 *Charter* right to be free of cruel and unusual punishment? and

c. Has there been a significant change in circumstances to warrant revisiting the case law?

JURISDICTION

[30] The Court has jurisdiction to hear this proceeding pursuant to s. 70(1) of the *RHPA* which provides that:

> **Appeals from decisions**
> **70** (1) A party to proceedings before the Board concerning a registration hearing or review or to proceedings before a panel of the Discipline or Fitness to Practise Committee, other than a hearing of an application under subsection 72 (1), may appeal from the decision of the Board or panel to the Divisional Court.
>
> **Basis of appeal**
> (2) An appeal under subsection (1) may be made on questions of law or fact or both.

STANDARD OF REVIEW

[31] Section 70(3) of the *RHPA* provides that,

> (3) In an appeal under subsection (1), the Court has all the powers of the panel that dealt with the matter and, in an appeal from the Board, the Court also has all the powers of the Board.

[32] As this question is whether the mandatory revocation provisions infringe s. 7 or 12 of the *Charter*, it is agreed that the standard of review is correctness.

ANALYSIS

The Reason for Enacting the Legislation

[33] In 1993 the Ontario legislature enacted a zero-tolerance scheme for regulated health professionals who were found to be having sexual relations with their patients. Sharpe J.A. in *Rosenberg v. College of Physicians and Surgeons of Ontario*, 2006 CanLII 37118 ONCA at para. 25, summarized the provision as follows:

> The legislation, like the Task Force recommendations, is clear and unambiguous: when it comes to sexual relations between a doctor and a patient, there is a black letter, bright line prohibition with a drastic sanction and no exceptions or exemptions. The zero-tolerance policy precludes inquiry into any explanation or excuse for the sexual activity. A patient's consent is irrelevant.

[34] This was done in order to address the problem of health professionals exploiting their positions to sexually abuse patients. The legislation included a provision which requires the revocation of the health professional's licence if the sexual abuse of a patient includes intercourse and other specified acts (s. 51(5)).

[35] In 2013, s. 1(5) of the *Code* was amended to provide for a spousal exception if agreed to by the College and passed by the government. Section 95 (1)(0.a) provides that, in order for the spousal exception to come into force, the council of a college must pass a regulation, which is then reviewed by the Minister of Health and must be approved by the Lieutenant Governor in Council.

[36] In September 2015, the College voted in favour of a spousal exception, however it has yet to be approved by the Lieutenant Governor. As such, there is as yet, no spousal exception.

THE FIRST ISSUE: Does the mandatory revocation provision in the *Code* breach the section 7 *Charter* right to security of the person and/or liberty of the Appellant or his spouse?

[37] Section 7 of the *Charter* provides that, "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

[38] It is agreed that:

a. The Appellant was in a health-care patient relationship with his spouse while he was treating her;

b. He performed dental hygiene treatment while in a consensual sexual relationship with his spouse;

c. The College voted in favour of a spousal exception but it has not been passed by the government and there is therefore no spousal exception in force for dental hygienists;

d. The Appellant was advised by a colleague that he could treat his spouse but conducted no due diligence to confirm that information with the College and that information was incorrect; and

e. The Appellant treated S.M. because she had a fear of dental hygiene treatment and had not been treated for years before agreeing to allow the Appellant to treat her.

[39] The purpose of the law is to separate personal sexual relations and professional relationships in order to protect patients from health professionals who seek to abuse their positions of power.

Does the Charter Apply to this Appellant?

[40] The Court of Appeal held in *Mussani* at paras 41-43 that, "the weight of authority is that there is no constitutional right to practice a profession unfettered by the applicable rules and standards which regulate that profession. ... I am satisfied therefore, that the mandatory revocation of a health professional's certificate of registration in substance infringes an economic interest of the sort that is not protected by the *Charter*."

[41] The Appellant has no constitutionally protected right to engage in sexual relations with any patient nor does he have a right to practice as a dental hygienist. The fact that there are professional consequences resulting from his decision to combine a sexual and health care relationship does not engage a liberty or security interest on the part of the Appellant. Moreover, s. 7 of the *Charter* does not protect economic interests: See *R. v. Schmidt* 2014 ONCA 188 at paras 37-38.

[42] As such, there is no s. 7 *Charter* right at issue in the case of the Appellant.

Is the Legislation Overbroad?

[43] Assuming there is a s. 7 *Charter* right, the Appellant argues that the provision meant to protect patients from health practitioners' abusing their power is overly broad, forcing some healthcare workers and their spouses to choose between two aspects of their liberty interest.

[44] The Appellant also argues that the s. 7 *Charter* right to security of the person is engaged because the law prevents access to health care that would otherwise be available. The Discipline Committee's decision may force spouses to choose between who can treat them and who they want to marry. A person in a rural area for example, where health care services are sparse, would be forced to move to a more populous area to receive treatment from a health care provider other than

his/her spouse, or be barred from romantically engaging with the health care provider. The Appellant argues that these choices go to the core of one's autonomy and therefore the impugned provisions' interference with these choices, infringes s. 7 *Charter* rights.

[45] The Appellant argues that in a case like this, S.M. is more vulnerable than others as there are fewer health care providers to choose from, given her grave fear of dental hygiene treatment. The Appellant claims that the impugned provision is therefore overbroad, infringing his right and that of his spouse to liberty and security of the person. The Appellant cites the case of *R. v. Morgentaler*, [1988] 1 S.C.R. 30.

[46] The *Morgentaler* case is, however, distinguishable from this case as the *Morgentaler* case involved direct state intrusion into the bodily integrity of a woman seeking an abortion. The provision in the *Criminal Code* in *Morgentaler* created significant delays in obtaining an abortion or made it impossible to obtain an abortion at all. There is no such evidence in this case.

[47] In *Mussani*, the court held that a consensual sexual relationship concurrent with a doctor-patient relationship (between two individuals who were not spouses) is subject to mandatory revocation of the health care provider's licence and that mandatory revocation is not overly broad even where the sexual relationship is consensual. The court recognized that there are admitted problems with a zero-tolerance penalty regime:

> They are rigid. They can lead to results in individual cases that are harsh, extreme, and even arguably unjust...However, the Mandatory Revocation Provisions were enacted in response to a recognized and growing problem of sexual abuse in the medical profession. Indeed, they were enacted specifically to rectify a situation where discretionary sanctioning on the part of professional disciplinary committees and the courts had been found to be wanting. They must be considered in the context of a general power imbalance between a doctor and patient that can lead to easy exploitation of the relationship by the doctor at the risk of considerable harm to a vulnerable patient.

[48] However, the court concluded that:

> [79] The fact that an intimate sexual relationship which began during treatment may blossom into a truly loving one but still lead to revocation of a health professional's certificate of registration, does not necessarily make the Mandatory Revocation Provisions unconstitutionally broad, in the sense that they overshoot the legislative objectives. The health professional need only terminate the treatment relationship to avoid the problem. The issue is whether the means chosen by the legislature -- mandatory revocation of the certificate of registration -- are overly broad in relation to the purpose of the legislation [See Note 15 at the end of the document]. If they are not, the legislature has the right to make difficult policy decisions that may, in rare cases, override what might otherwise be considered permissible conduct. I do not read *R. v.Heywood* as mandating a contrary decision. The Supreme Court merely decided that the impugned legislation in that case went too far.

> [80] Here, the means chosen to meet the legislative objectives -- i.e., the revocation of the health professional's certificate of registration in the case of the frank sexual acts listed in s. 51(5) para. 2 of the *Code* -- do not go too far, in my opinion. They are not overly broad. Mandatory revocation in such circumstances (a) signals the seriousness with which the sexual abuse of patients is to be taken, (b) underscores the gravity of the breach of trust involved, (c) emphasizes the considerable impact of the practitioner's failure to meet his or her responsibility towards maintaining the integrity of the profession, and (d) responds to the need to protect the public from the risk of recidivism by removing the practitioner from the practice for a minimum period of time. The importance of responding to these objectives is not contested. [Emphasis added.]

[49] In so doing, the court in *Mussani* held that even in cases where there is no exploitation and where the sexual encounters are consensual, mandatory revocation is warranted to meet the broader policy objectives of the legislation. There is therefore no violation of a *Charter* s. 7 liberty or security interest: See *Mussani* at paras. 58-60. The Court of Appeal has determined that, "[T]he importance of upholding the zero-tolerance policy outweighs its pitfalls because the legislation is there to address a growing problem of sexual abuse of patients by some health care professionals." See *Leering v. College of Chiropractors of Ontario* (2010), 98 O.R. (3d) 561 ONCA.

Conclusion

[50] It is up to the legislature to make policy choices: See *R. v. Heywood*, [1994] 3 SCR 761 at 793 (para. 51).

[51] There is no constitutionally protected right to practice a profession: See *Mussani*.

[52] Even if there were, the s. 7 liberty interest does not extend to protecting a practitioner's right to have a sexual relationship with a person he chooses to see as a patient or a patient's right to be treated by one health practitioner specifically. The courts have held that marrying a health care professional and seeking to be treated only by that health care professional is a choice; prejudice is confined to personal hardship, and the choice is not one of the "basic choices going to the core of what it means to enjoy individual dignity and independence protected by s. 7." See *Blencoe v. B.C. (Human Rights Commission)*, 2000 SCC 44 at para 49.

[53] While we recognize that this situation has created hardship for the Appellant and his spouse and may seem unfair, there is an important societal objective for the enactment of the mandatory revocation provision in the *Code*. State action often imposes restrictions and a degree of hardship on individuals outside the strict purview of the purpose of the legislation. The courts have held that this provision is not overly broad.

[54] For these reasons, while we recognize that this decision is harsh for a person in the Appellant's circumstances, we conclude that the mandatory revocation of licence provision of the *Code* does not breach s. 7 of the *Charter*.

THE SECOND ISSUE: Does the mandatory revocation provision in the *Code* and/or the public notation of a healthcare's discipline history on the registry constitute cruel and unusual treatment within the meaning of s. 12 of the *Charter*?

[55] Section 12 of the *Charter* provides that, "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment."

[56] The Discipline Committee failed to address whether the impugned provision constitutes cruel and unusual treatment contrary to the Appellant's s. 12 *Charter* rights. It is conceded that the provision does not constitute cruel and unusual *punishment* as it did not create penal consequences. As such, the only issue is whether mandatory revocation of the licence and or the registry constitute cruel and unusual treatment.

What is the Treatment at Issue?

[57] The "treatment" in this case includes the mandatory revocation of the Appellant's licence, "imposed by the State in the context of enforcing a State administrative structure", and the public registry that contains "each member's name, business address and business telephone number ...and a synopsis of the decision, of every disciplinary and incapacity proceeding ... and a notation of every finding of professional ... malpractice."

[58] The Appellant submits that the mandatory revocation of his licence and the requirement to have his name and address, his revocation, and a synopsis of the reasons for the reprimand listed on a public website is grossly disproportionate because a dental hygienist who provides treatment to his spouse should not be subject to any discipline, the legislation was never intended to capture spouses, the College itself has voted to create a spousal exception, dentists who treat their spouses are not subject to any discipline, and there is no ability for the College to exercise discretion in imposing this treatment. He therefore submits that it constitutes cruel and unusual treatment.

Have the Courts Dealt with this Issue?

[59] The court in *Mussani* at para 94 held that, "the Mandatory Revocation Provisions do not constitute 'punishment' or 'treatment' as those words have been interpreted and applied in the context of section 12." The Court went on to say that,

> Further, if they do, the punishment or treatment is not cruel and unusual; it is neither so excessive as to outrage the standards of decency, nor grossly disproportionate to what is appropriate in the circumstances.

[60] The Court in *Sliwin v. College of Physicians and Surgeons of Ontario,* 2017 ONSC 1947, para. 135, further held that "once it is accepted that there is no obligation to inquire into whether the sex and relationship pre-existed the doctor patient relationship, there is no reasonable basis to contend that the penalty of mandatory revocation is unfit much less grossly disproportionate."

[61] As such, the mandatory revocation *per se* does not constitute cruel or unusual punishment or treatment. The courts in *Mussani* and *Sliwin* did not however, address the requirement that a health college's registry must set out the names and addresses and a synopsis of the reprimand, which would include any findings that the practitioner "sexually abused" a patient.

How to Determine whether Treatment is Cruel and Unusual within the meaning of the Charter

[62] The issue of whether the combined effect of the mandatory revocation of a licence to practice and the content of the public registry contravenes s. 12 of the *Charter* must therefore be addressed.

[63] The *Code* provides that the information on the registry "shall be posted on the College's website in a manner that is accessible to the public or in any other manner and form specified by the Minister." It is not restricted to members of the College but is available to any member of the public who chooses to look at the site.

[64] Treatment is defined in the Oxford English Dictionary as "the manner in which someone behaves towards or deals with someone or something." The Court of Appeal in *Ogamien v. Ontario (Community Safety and Correctional Services)*, 2017 ONCA 667 at para. 10, articulated a two-step process in determining whether treatment is cruel and unusual: first, what treatment would have been appropriate i.e. what is the benchmark, and second, how this treatment measures up against the benchmark.

[65] The Appellant submits that his treatment exceeds the benchmark for similarly situated professionals for the following reasons:

a. The registry is public and can be seen by any member of the public whether or not they are familiar with the definition of "sexual abuser" used by the College;

b. The definition of a "sexual abuser" as set out in the *Code* and as interpreted in the above case law differs significantly from the general understanding in common parlance and the legal definition in the criminal law of what constitutes sexual abuse. The difference is that sexual abuse is generally considered to be sexual behaviour that is engaged in without the consent of the other party;

c. The College's registry will contain a public record that he lost his licence to practice due to his contravention of the "sexual abuse" provision within the meaning of the legislation, when it is agreed there was no sexual abuse of his

spouse. On the contrary, she expressed her gratitude to her husband for helping her to overcome her fear of dental hygiene treatment;

d. There is no other case of any dental hygienist anywhere in Canada who has been found guilty of sexual abuse for treating his wife;

e. Dentists in Ontario are expressly permitted to treat their spouses and would therefore not have any discipline history on their College's registry for the very same behaviour;

f. In *F.J.D. v. T.E.*, 2015 CanLII 16031 at paras 34-44, the only other case before the Ontario College of Dental Hygienists, a female dental hygienist provided treatment to her husband. A complaint was submitted to the ICRC. In that case, unlike the case before us, the ICRC decided not even to refer the matter to discipline because there was a pre-existing spousal relationship and that,

> [T]reating spouses was an established and accepted practice in the dental hygiene profession and the power imbalance and vulnerability that accompanies other health relationships is less pronounced than in the dental hygiene and client relationship, at least where there is a well-established spousal relationship that pre-exists the professional relationship.

g. The HPARB has recognized that the power imbalance and vulnerability that accompanies other health relationships like the dentist-patient, doctor-patient relationships, is less pronounced in the dental hygiene group; and

h. The Appellant's motivation for treating his wife was her fear of dental hygiene treatment. She had not been treated for several years before allowing the Appellant to treat her. Far from exploiting her vulnerability his wife's Facebook post expressed her gratitude to her husband. This matter was only discovered after a fellow hygienist saw his wife's grateful Facebook post and decided to report him to the College.

[66] The *Code* defines "sexual abuse" as "sexual intercourse ... touching ... or ... behaviour or remarks towards the patient". While the courts in *Mussani*, *Rosenberg* and *Leering* have concluded that a patient's consent to such sexual behaviour is irrelevant, consent is not specifically discussed in the legislation. The stated purpose of the provisions is to "encourage the reporting of such abuse, to provide funding for therapy and counselling for patients who have been sexually abused by member and ultimately, to eradicate the sexual abuse of patients by members".

[67] The Respondent cites the Ontario the Court of Appeal in *Hanif v. Ontario College of Pharmacists*, 2015 ONCA 640, in support of its position that the mandatory revocation and or mandatory public notation on the registry does not constitute cruel and unusual treatment. In *Hanif* the Court of Appeal held that:

> [13] First, the impugned *Code* provisions do not have the effect of regulating morality. The intended, and in fact overwhelming, effect of the provisions is to protect the public. Legislation that declares that any sexual activity, even consensual, between a health professional and a patient is inconsistent with the professional-patient relationship does not make a statement about morality; rather it speaks to the maintenance of the integrity of the professional-patient relationship.
>
> [14] Second, the *Code* provisions do not have the effect of criminalizing activities that fall outside the delivery of health services. They do not have the effect of importing notions of sexual morality on consenting adults. Rather, they require a health professional to make a simple choice: treat the patient or sever the professional-patient relationship and engage in a sexual relationship. Treating a patient while involved in a sexual relationship undermines the integrity of the professional-patient relationship.
>
> [15] Third, all offences – federal, provincial, criminal, regulatory – involve a degree of stigma. If you break the law, you may lose respect in the public eye. When the appellant says that a contravention of the *Code* in the domain of sexual activity between health professionals and patients can lead to both loss of livelihood and social stigma, he is right. But to say that this combination removes the law from regulation of the health professions and places it in criminal law is a bridge too far. Breach of a provincial law can in some cases bring with it a potential social stigma in the public eye.

[68] There is no specific reference in that case to the disciplinary history being made public through the registry.

[69] The court in *Nova Scotia (Minister of Community Services) v. D.J.M.*, 2002 NSSC 75, has addressed the effect of sex abuse registration. The court held that the child abuse registry in that case that was less readily accessible to the public than the Discipline Committee's decision constituted a stigma which infringed upon the security of the person:

> [25] It is clear to me that the right to security of the person is affected by having one's name placed on the Child Abuse Register. That being the case, the deprivation of a person's right to security of the person can only occur when it is done in accordance with the principles of fundamental justice.

[70] However, in the case before us, unlike the *Nova Scotia* case, while there is a requirement that the Appellant's name and address be placed on the College registry which records the names and addresses of those whose licence has been revoked and the reasons therefore, the Discipline

Committee in this case set out the terms of the permanent reprimand that are to appear on the registry at paragraph 34 of its decision as follows:

> One of the rules that the Ontario legislature has enacted for health professionals is that they cannot have a concurrent sexual relationship with a patient they are treating. This policy of zero tolerance is backed up by mandatory revocation of the certificate of registration of the health professional. It is not discretionary. In your circumstances, where you were involved in a consensual relationship, it appears a harsh penalty. In the societal interest of preventing sexual abuse, this penalty can be avoided by dental hygienists, like other health professionals, by ensuring that they comply with the rule of not engaging in a sexual relationship with a client/patient. While we are sympathetic to your personal situation, our hands are tied by a strong legal rule designed to protect patients. You have paid a heavy price for breaking the rule. We sincerely hope to see you again as an active member of the dental hygiene profession.

[71] The Committee was alive to the stigma attached to the words "sexual abuse" and the fact that this case is an anomaly as it involves a preexisting loving relationship between spouses, and not a case of a healthcare worker abusing his spouse. On the contrary, the Appellant was seeking to help her overcome a vulnerability.

[72] As such, the words "sexual abuse" will not appear on the description of the appellant's discipline history and the above provision will be included as part of the information available to the public. Readers will only know that the Appellant's status is revoked, and they will have access to the full decision and the terms of the reprimand, which make clear that the sexual relations were with his spouse and were consensual.

[73] In sum, *Mussani* establishes that in order to constitute cruel and unusual punishment within the meaning of section 12 of the *Charter*, the facts of the case must warrant a finding of gross disproportionality. Given the manner in which the Appellant's disciplinary history will be presented on the Registry, we do not find a gross disproportionality in this case.

[74] It is clear that the Appellant poses no danger to the public. On the contrary: it was the Appellant's wife's very vulnerability and fear of dental hygiene treatment and his desire to help her, that lead him to treat her.

[75] We appreciate that the requirement that the Appellant's name and address be included on the public registry and that he contravened the "sexual abuser" provision creates stigma.

[76] However, there is no *Charter* right to practice a profession, and the mandatory revocation provision alone does not constitute cruel and unusual punishment or treatment within the meaning of s. 12 of the *Charter*. Requiring the Appellant's name address and the above particulars to appear on the public registry does not create an infringement of s. 12 of the *Charter* given the information provided on the registry and the terms of the reprimand to be provided as set out above.

THE THIRD ISSUE: Are there circumstances in this case that warrant revisiting the decisions in *Mussani* and *Sliwin*?

[77] The Appellant argues that the Discipline Committee failed to recognize that there has been a significant change in circumstances since the decisions in *Mussani* and *Sliwin* were rendered.

[78] The change is the enactment in 2013 of a legislative provision to enable Colleges to provide for a spousal exception from the sexual abuse provisions. If the option is exercised by a particular healthcare College, it must then be approved by the government. When that is done, as it was in the case of dentists in Ontario, the health practitioner is permitted to treat his or her spouse.

[79] The decisions in *Mussani* and *Sliwin* were decided before the 2013 legislative provision in respect of a spousal exception was enacted. Moreover, neither case involved a situation where the healthcare professional had a pre-existing spousal relationship. The court in *Mussani* specifically noted at para. 101 that,

> 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. ... The fact that during the course of a marriage a physician may provide incidental medical care to his or her spouse is unlikely, in my view, to establish a physician/patient relationship which would attract the discipline procedures of the *Code*.

[80] Similarly, in *Rosenberg* (*supra*) at paragraph 48, Sharpe J.A. for the Court held that,

> This court recognized that it is "unlikely" that a physician could be guilty of sexual abuse of a spouse. ...

[81] Moreover, the Appellant correctly notes that the enactment of the legislative option is evidence of the awareness of legislators of the issue and the potential problems that it raises for healthcare providers and their spouses.

[82] However, although the courts recognized that for obvious reasons it was unlikely that a healthcare provider would be found to have contravened the provisions, the legislature left open the possibility of an exception for spouses, and the College recommended such an exception for spouses, there is as yet no spousal exception for dental hygienists. The government, for reasons unknown to us, chose to pass a regulation enabling dentists to treat their spouses but not dental hygienists. As such, while the legislators have left open the possibility to create an exemption for spouses and the College has endorsed such a change, there is as yet no change in circumstances as the government has not yet passed the regulation.

[83] In this case, the Appellant concedes that he and his spouse had a concurrent professional-patient relationship and a sexual relationship. The disciplinary offense of sexual abuse is therefore

made out as defined in the *Code*. There has been no passage of a regulation by the government allowing a spousal exemption nor was there only "incidental medical care". As such, the mandatory revocation provision must be upheld.

[84] In Canada (Attorney General) v. *Bedford*, [2013] 3 SCR 1101 at para. 44, the Supreme Court held that while there may be circumstances in which trial judges may review the law, the threshold for so doing is "not an easy one to reach". In our view, given the summary to be included on the registry and the fact that the law was not changed, this is not such a case.

CONCLUSION

[85] There is no constitutional right to practice a profession unfettered by the rules applicable to that profession. The rules in question are set out in the *Code*.

[86] In 1993, the Ontario legislature enacted a zero-tolerance provision to prevent any concurrent sexual and patient-healthcare relationships. Legislators were seeking to recognize and address serious concerns about sexual abuse of patients.

[87] In 2013, the legislature passed a provision allowing each College to pass a regulation to create a spousal exemption, but such exemption only becomes effective upon approval by the Lieutenant Governor in Council. The College of Dental Hygienists passed such a regulation, but to date it has not been approved by the Lieutenant Governor in Council and passed

[88] After the College voted to pass a regulation to create a spousal exemption but in the absence of the regulation being passed by the government, the Appellant provided professional dental hygienist services on his wife at his office. There was a patient-hygienist relationship concurrent with the Appellant's spousal relationship.

[89] The Appellant acted in the honest but mistaken belief that he was allowed to treat his wife who had a phobia of dental hygiene treatment. She was vulnerable. He acted out of a desire to help her and she expressed her gratitude to him.

[90] We note that although there is also a requirement that the Appellant's name and address be placed on the College registry, at paragraph 34 of its decision, the Committee has set out the terms of the notation that is to appear on the registry:

> One of the rules that the Ontario legislature has enacted for health professionals is that they cannot have a concurrent sexual relationship with a patient they are treating. This policy of zero tolerance is backed up by mandatory revocation of the certificate of registration of the health professional. It is not discretionary. In your circumstances, where you were involved in a consensual relationship, it appears a harsh penalty. In the societal interest of preventing sexual abuse, this penalty can be avoided by dental hygienists, like other health professionals, by ensuring that they comply with the rule of not engaging in a sexual relationship with a

> client/patient. While we are sympathetic to your personal situation, our hands are tied by a strong legal rule designed to protect patients. You have paid a heavy price for breaking the rule. We sincerely hope to see you again as an active member of the dental hygiene profession.

[91] The words "sexual abuse/abuser" do not appear on the registry page and the synopsis of the terms of the reprimand only include the above text. As such, readers will only know that the Appellant's status is revoked, the detail set out in the above synopsis, and the decisions.

[92] We recognize that this case has created serious hardship for the Appellant and his wife. He has:

a. lost his livelihood and income for five years; and

b. The College's registry will contain a public record that he lost his licence to practice due to his contravention of the "sexual abuse" provision within the meaning of the legislation, when it is agreed there was no sexual abuse of his spouse. On the contrary, she expressed her gratitude to her husband for helping her to overcome her fear of dental hygiene treatment.

[93] We also recognize that it seems unfair that dentists may treat their spouses while dental hygienists lose their licence and are branded sexual abusers for so doing.

[94] Finally, we recognize that it may seem an artificial difference to claim that treatment was "incidental" if it was done at home rather than the office. This Appellant, had he not honestly believed that he was allowed to treat his spouse, could easily have treated her at home without pay so as not to incur these repercussions.

[95] It is indeed unfortunate that the Inquiries, Complaints and Reports Committee (ICRC) of the College elected to proceed with the complaint, notwithstanding the statement by Sharpe J.A. in *Rosenberg* that,

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

and Blair J.A.'s statement in *Mussani* at para. 101 that,

> 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.

[96] In fact, in its own decision, as reflected in *F.J.D. v. T.E.*, 2015 CanLII 16031 at paras 34-44, where a female dental hygienist provided treatment to her husband, the ICRC decided not even to refer the matter to discipline because there was a pre-existing spousal relationship and that,

> [T]reating spouses was an established and accepted practice in the dental hygiene profession and the power imbalance and vulnerability that accompanies other health relationships is less pronounced than in the dental hygiene and client relationship, at least where there is a well-established spousal relationship that pre-exists the professional relationship.

[97] However, unless and until the Ontario government approves the regulation put forward by the College of Dental Hygienists to enact a spousal exemption, the mandatory revocation and ancillary relief imposed by the Discipline Committee as they pertain to spouses must be upheld.

[98] For these reasons, the mandatory revocation provision *per se* does not breach either ss. 7 or 12 of the *Charter*.

[99] For these reasons, the Appeal is dismissed.

[100] Under the circumstances, there is no order as to costs.

THORBURN J.

D. EDWARDS J.

FAVREAU J.

RELEASED: September 9, 2019

CITATION: Alexander Tanase v. College of Dental Hygienists, 2019 ONSC 5153
COURT FILE NO.: DC-18-495
DATE: 20190909

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Thorburn, D. Edwards and Favreau JJ.

B E T W E E N:

ALEXANDRER TANASE

Appellant

– and –

THE COLLEGE OF DENTAL HYGIENISTS OF ONTARIO

Respondent

REASONS FOR DECISION

BY THE COURT

RELEASED: September 9, 2019

Court File No. 495-18

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

THE HONOURABLE) FRI DAY, THE 21 DAY

JUSTICE C. HOPKINS) **OF SEPTEMBER, 2018**

BETWEEN:

THE COLLEGE OF DENTAL HYGIENISTS OF ONTARIO

Respondent

and

ALEXANDRU TANASE

Moving Party

IN THE MATTER OF THE *REGULATED HEALTH PROFESSIONS ACT, 1991*;

AND IN THE MATTER OF ALEXANDRU TANASE,
Of the City of Guelph, a Member of the College of Dental Hygienists of Ontario

AND IN THE MATTER OF an appeal to the Divisional Court
Pursuant to Section 70(1) of the *Regulated Health Professions Act, 1991*

ORDER

THIS MOTION, made by Alexandru Tanase ("the Appellant"), dated September 7, 2018, for an order staying the decisions under appeal, pending the determination of the appeal, was heard on September 21, 2018;

ON READING THE NOTICE OF MOTION, and upon reading the Affidavit of Alexandru Tanase dated September 6, 2018, the Decision and Order of the Discipline Committee dated June 19, 2018, the Decision and Order of the Discipline Committee dated August 1, 2018, the Notice of Appeal filed August 10, 2018, the Factums of the parties, and upon hearing the submissions of counsel; and being advised that the relief requested is unopposed;

THIS COURT ORDERS:

1. The Decisions and Orders of the Discipline Committee of the College of Dental Hygienists of Ontario, dated June 19, 2018 and August 1, 2018, shall be stayed pending the determination of the appeal to this Court.

DATED this 4 day of September, 2018.

C Horkins
JUSTICE

Justice C. Horkins

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO: 23
LE / DANS LE REGISTRE NO.: 268
SEP 21 2018
PER / PAR:

THE COLLEGE OF DENTAL HYGIENISTS OF ONTARIO
Respondent

and

ALEXANDRU TANASE
Moving Party/Appellant

Divisional Court File No. M95-18

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Proceeding commenced at TORONTO

ORDER

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DISCIPLINE COMMITTEE OF THE
COLLEGE OF DENTAL HYGIENISTS OF ONTARIO

PANEL: **Vinay Jain, Chair, Public Member of Council**
Fernand Hamelin, a public member of Council,
Catherine Ranson, a professional member of Council,
Jillian Eles, a professional member of Council; and
Maria Lee, a public member of Council.

BETWEEN:

College of Dental Hygienists of Ontario	**) Robin McKechney, for the) College of Dental) Hygienists of Ontario**
- and -	**)**
Alexandru Tanase (Registration No. 016236)	**) Seth Weinstein,) Michelle Biddulph,) for Alexandru Tanase**
	) Josh Koziebrocki,) Independent) Legal Counsel
	) Heard: April 23-24, 2018

DECISION AND REASONS

This matter came up for hearing before a panel of the Discipline Committee on April 23-24, 2018 at the College of Dental Hygienists of Ontario ("The College") in Toronto.

Agreed Statement of Facts ("ASF)"

Counsel for the College advised the panel that agreement had been reached on the facts, and introduced an Agreed Statement of Facts which provided as follows:

The Registrant

1. At the material times Alexandru Tanase ("the Registrant") was a duly registered member of the College of Dental Hygienists of Ontario, practising at Parkway Place Dental in Toronto, Ontario and Dawson Dental Centre in Guelph, Ontario.

The Patient

2. SM was a patient of the Registrant's and attended for dental hygiene treatment with the Registrant at Parkway Place Dental on or about January 22, 2013 and September 13, 2013 and at Dawson Dental Centre on or about April 30, 2015, June 20, 2015, September 25, 2015 and December 2, 2015 and March 24, 2016, June 2, 2016 and August 26, 2016.

The Relationship between the Registrant and SM

3. The Registrant and SM met in late 2012 and became friends. SM confided in the Registrant that she had a fear of dental treatment and had not sought dental care for several years.

4. The Registrant gained SM's trust and provided dental hygiene treatment to SM at Parkway Place Dental on or about January 22, 2013 and September 13, 2013 at no charge. At this time their relationship was platonic.

5. The Registrant rented a room from SM in late 2013 at a house SM owned in Toronto.

6. In or about mid-2014, the Registrant and SM became involved in a sexual relationship. At this time the Registrant stopped treating SM as he understood that he was not permitted to treat a patient with whom he was in a sexual relationship.

7. The Registrant began employment at Dawson Dental Centre in Guelph on or about June 2014.

8. In or about April 2015, the Registrant was informed by a colleague at Dawson Dental that dental hygienists were permitted to treat their spouses. At this time the Registrant and SM were living together as common law spouses and were involved in a sexual relationship. (The Registrant and SM were later engaged and got married in January 2016.)

9. The Registrant told SM the "good news" that he was now permitted to provide dental hygiene treatment to her. According to SM, she had not sought dental hygiene care since her last appointment with the Registrant in or about September 2013.

10. The Registrant, however, did not attempt to confirm that he was permitted to treat SM. On the College website at that time under the heading "Proposed Regulations" was a "Proposed Spousal Exception Regulation". This "proposed regulation" was not and is not in force and has yet to be enacted. The Registrant admits that if he had read the proposed regulation, he would have understood that he was not permitted to treat SM.

11. The "proposed regulation" was submitted to the Ontario Government for approval in October 2015, however it has never been approved by the Lieutenant Governor in Council (*i.e.* the Cabinet or Executive Council of the provincial government).

12. Notwithstanding that the Registrant was not permitted to do so under the *Regulated Health Professions Act,* the Registrant provided dental hygiene treatment to SM at Dawson Dental Centre on or about April 30, 2015, June 20, 2015, September 25, 2015 and December 2, 2015 and March 24, 2016, June 2, 2016 and August 26, 2016, while they were engaged in a sexual relationship.

The Allegations

It was alleged in the Notice of Hearing that Mr. Tanase ("the Registrant") committed the following acts of misconduct:

It is alleged that the conduct constitutes professional misconduct pursuant to:

1. Clause 51(1)(b.1) of the *Health Professions Procedural Code* ("HPPC"), s. 51(1) (b.1): sexual abuse of a partner

2. Ontario Regulation 218/94 under the *Dental Hygiene Act*, 1991, s.15, para 2: contravening a standard of the profession; and/or

3. Ontario Regulation 218/94 under the *Dental Hygiene Act*, 1991, s. 15 para. 47; contravening, by act or omission, the Act, the Regulated Health Professions Act ("RHPA") or the regulations under either of those Acts, and/or

4. Ontario Regulation 218/94 under the *Dental Hygiene Act*, 1991, s. 15, para 52; engaging in conduct or performing an act, relevant to the practise of the profession, that having regard to all the circumstances would reasonably be regarded by members as disgraceful, dishonourable or unprofessional, and/or

5. Ontario Regulation 218/94 under the *Dental Hygiene Act*, 1991, s.15, para 53: conduct unbecoming a dental hygienist.

Constitutional Question

At the outset of the Hearing, the Registrant served a Notice of Constitutional Question in which he challenged the constitutionality of s.51 of the *Health Professions Procedural Code ("HPPC")*, which requires revocation of a health professional's licence where the health professional is found to have sexually abused a patient. Specifically, the Registrant argues that s.51 of the HPPC is contrary to s.7, 12 of *the Charter* and is not saved by s.1.

Both parties agreed that should the impugned provision be found constitutional, that the behaviour outlined in the ASF would constitute sexual abuse as defined in the HPPC.

Legislation

The relevant legislation is as follows:

Health Professions Procedural Code

1(3) In this Code,

"sexual abuse" of a patient by a member means,

(a) sexual intercourse or other forms of physical sexual relations between the member and the patient,
(b) touching, of a sexual nature, of the patient by the member, or
(c) behaviour or remarks of a sexual nature by the member towards the patient.

1.1 the purpose of the provisions of this Code with respect to sexual abuse of patients by members is to encourage the reporting of such abuse, to provide funding for therapy and counselling for patients who have been sexually abused by members and ultimately, to eradicate the sexual abuse of patients by members.

51(1) A panel shall find that a member has committed an act of professional misconduct if …
(b.1) the member has sexually abused a patient.

(5) If a panel, finds a member has committed an act of professional misconduct by sexually abusing a patient, the panel shall do the following in addition to anything else the panel may do under subsection (2):

1. Reprimand the member.
2. Suspend the member's certificate of registration if the sexual abuse does not consist of or include conduct listed in paragraph 3 and the panel has not otherwise made an order revoking the member's certificate of registration under subsection (2).
3. Revoke the member's certificate of registration if the sexual abuse consisted of, or included, any of the following,
   i. sexual intercourse,

72(1) A person whose certificate of registration has been revoked or suspended as a result of disciplinary or incapacity proceedings may apply in writing to the Registrar to have a new certificate issued or the suspension removed.

(3) An application under subsection (1), in relation to a revocation for sexual abuse of a patient, shall not be made earlier than,

(a) five years after the revocation; or
(b) six months after a previous application under subsection (1)

The Canadian Charter of Rights and Freedoms

7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment

Issues

1. As a Committee we are bound by the legal principle of *stare* decisis to decisions of higher courts. There are however exceptions to the doctrine of *stare decisis*. For the test for any departure from *stare decisis*, I rely on *Canada (Attorney General) v. Bedford.* The Supreme Court of Canada sets out the relevant test at paragraph 42:

> In my view, a trial judge can consider and decide arguments based on Charter provisions that were not raised in the earlier case; this constitutes a new legal issue. Similarly, the matter may be revisited if new legal issues are raised as a consequence of significant developments in the

law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate.

2. The two most significant cases dealing with the constitutionality of the specific provisions we are dealing with in this case are the Court of Appeal decision of *Mussani v. College of Physicians and Surgeons of Ontario, 2004 ("Mussani")* and the Divisional Court decision of *Sliwin v. College of Physicians and Surgeons, 2017 ONSC 1947 ("Sliwin").* Both cases upheld the constitutionality of the impugned provisions. Therefore, the Committee cannot depart from them unless the test in *Bedford* is met.

3. The issues then are as follows:

   A. Are there any new legal issues that were not dealt with in either *Sliwin* or *Mussani*?

   B. Has there been a significant change in circumstances to warrant departure from the decisions in *Sliwin* or *Mussani*?

4. The Registrant asserts that there exists both a new legal issue and a significant change in circumstances. I will deal first, with the former.

Analysis

Issue (A) Is there a New Legal Issue that was not dealt with by *Sliwin* and *Mussani*?

i. The Security of the Person as it relates to the Spouses of Registrants

5. The Registrant argues that the impact on the security of the person of the spouse has not been dealt with previously and is in fact a new issue. Therefore, the Registrant argues that this new issue must be considered with respect to the constitutionality of the impugned provision.

6. I would agree that this is a new issue that has not been considered previously either in *Mussani* or *Sliwin*.

7. The Registrant's argument puts forth that the legislation is overbroad in that it captures the spouses of health providers. Furthermore, the Registrant cites *Bedford* as a change to the law on overbreadth from *Heywood*. Put more simply, if the law is overbroad in its application, then s.7 of the *Charter* is engaged. Conversely, the College argues that the law has not changed with respect to overbreadth and therefore that, *Mussani* must be followed.

8. The test for overbreadth as stated by McLachlan, C.J., in *Bedford* at paragraph 117 is the following:

> Overbreadth simply allows the court to recognize that the lack of connection arises in a law that goes too far by sweeping conduct into its ambit that bears no relation to its objective.

9. The test for overbreadth in *Heywood* was stated by Cory J. and arises when:

> The means are too sweeping in relation to the objective.

10. It is my view that the law for overbreadth was not changed by *Bedford*. Further, it is my view that the impugned provision is not overbroad in its application.

11. Blair J., in *Mussani* wrote that:

> A health professional need only say 'no' to either the sexual or the professional relationship.

I find that this is analogous to the situation at hand with the spouses of dental hygienists.

12. The Registrant argues that as a result of the impugned provision, in a rural community with only one dental hygienist, the spouse must choose between receiving dental hygiene care, and a spouse. I would disagree. In this hypothetical situation, both the dental hygienist and the spouse make a conscious decision to move to a place knowing that there will only be one dental hygienist. The dental hygienist should know that he or she will not be able to receive dental hygiene care in that community before moving there. The spouse of a dental hygienist should also know this.

13. The Registrant cites the Health Professions Regulatory Advisory Council Report ("HPRAC Report") in support. It is argued that the recommendation in this report, for a blanket spousal exemption, is explicit recognition that the impugned provision was not intended to capture a health professional who treats his or her wife.

14. I disagree. The Legislature rejected the blanket exemption, and instead instituted a two step process which required that first, a Regulatory College pass a spousal exemption and second, that the provincial legislature approve the proposed exemption. To date, only the Royal College of Dental Surgeons of Ontario has implemented the spousal exemption with legislative approval. In submissions, the Registrant noted that approximately 4 to 5 other regulatory health colleges out of a total of 26 had passed a spousal exemption but were awaiting legislative approval. This suggests to me that the status quo has mostly been maintained.

15. Notably, the College of Dental Hygienists itself has passed a spousal exemption but is awaiting legislative approval. It is my view that until such time as the legislature approves the spousal exemption for dental hygienists, that it is the intention of the legislature to include spouses of dental hygienists in the impugned provision.

16. For the reasons above, I do not find that with respect to the spouses of dental hygienists, that s. 7 of the *Charter* is engaged. As s.7 is not engaged, it is unnecessary to review whether it has been affected in a manner that is "in accordance with the principles of fundamental justice".

ii. Jail as a Possible Sanction under the HPPC

17. The Registrant asserts that both *Mussani* and *Sliwin* failed to consider that imprisonment was a possible result when a Registrant's certificate of registration has been revoked thereby engaging the Registrant's liberty interest in s. 7 of the *Charter*.

18. I would agree with the College that in the unlikely event of imprisonment of a Registrant, it would only be as a result of a judicial finding of a contempt of court order. Any such finding would not result from the mandatory revocation of this College. Therefore, I do not find this to be a new legal issue that needs to be considered.

iii. The Registrant will be labelled as a "sexual offender"

19. The Registrant argues that both *Mussani* and *Sliwin* failed to consider the fact that the impugned provisions have the effect of permanently stigmatizing the Registrant as a "sexual offender", and as such engages the registrant's security of the person interest in s. 7 of the *Charter*.

20. In oral submissions, the Registrant conceded that the term "sexual offender" does not appear in the HPPC. The Registrant submitted that despite the term "sexual offender" not being part of the HPPC, the effect of the impugned provisions would still have a stigmatizing effect through the label of "sexual abuser".

21. While I would agree that the phrase “sexual abuse” connotes a certain stigma beyond other infractions of the HPPC, I do not agree that the present case is sufficiently comparable as having one’s name included on a child abuse registry as in the case of *Nova Scotia (Minister of Community Services) v. DJM, 2002 NSSC 75.* A finding of “sexual abuse” under the HPPC is not entered on a special registry by the College. A member of the public would have to search by Registrant name in order to even get to the decision. The member of the public would then have to read the decision to find out the exact reason for revocation. This would provide context to the phrase “sexual abuse” which in my view, makes it markedly different than inclusion on a child abuse registry. Accordingly, I do not find this sufficient to engage s.7 of the *Charter*. I note that even had s.7 of the *Charter* been engaged, the Nova Scotia Superior Court found that a name entered in the Child Abuse Register would still be “in accordance with principles of fundamental justice.”

22. The Registrant further asserts that the stigma of the disciplinary process in combination with the stigma noted above engages the Registrant’s security of the person interest.

23. Respectfully, I do not agree. The disciplinary process is a necessary exercise to ensure the protection of the public by the College and outweighs any possible stigma created.

24. For these reasons, I do not find that the stigma attached to a finding of sexual abuse by itself or in combination with the stigma associated with the disciplinary process is sufficient to engage s.7 of the *Charter*.

Issue (b) Has there been a Significant Change in Circumstances or evidence that fundamentally shifts the parameters of the debate?

25. Pursuant to *Bedford,* the second situation in which a lower court may deviate from a higher court decision occurs when there has been a significant change in circumstances or evidence that fundamentally shifts the parameters of the debate.

26. The Registrant cites a number of authorities as support for his argument that there has been a significant change in circumstances in addition to what has been stated above:

- the HPRAC Report (June 2012)
- CDHO Minutes which include the passing of the spousal exemption (Sep 2015)
- Hansard Excerpts (various - 2013)
- Submission to Standing committee on the Legislative Assembly regarding Bill 70 by the Ontario Chiropractic Association (2013)
- Letter from the ADM Health to Dentists (1995)

- CDHA Submission to House of Commons (2012)
- Review of Oral health Services in Ontario: final Summary Report (2014)
- Task Force on Sexual Abuse of Patients, Final Report (1991)
- "Dentists flout 'stupid' law that treats them as sexual abusers" Toronto Star Article (2011)

27. All of the above noted documents contain excerpts which refer to a potential spousal exemption. I do not find it necessary to review each individually, as the end result was a two part approval process instituted by the government: passing of the spousal exemption by the individual College and then approval by the legislature. I am of the view that having a blanket spousal exemption is quite distinct from having a two step process. Had the sitting government at the time so wished, it could have instituted a blanket spousal exemption for all regulated health Colleges. That they did not institute a blanket exemption, suggests to me that the blanket spousal exemption was clearly considered and then clearly rejected.

28. I also find it notable that all of the above documents predate *Sliwin* which was heard in 2016 and dealt with, *inter alia*, this same issue.

29. The Registrant argues that his circumstances are different from *Sliwin* because he would have qualified for the spousal exemption had it been passed. I would agree with the College on this point that whether or not the Registrant would have qualified for a spousal exemption is irrelevant as the legislature has not, to date, passed such an exemption.

30. For these reasons, I am of the view that there has not been a significant change in circumstances to warrant deviating from the decisions in *Mussani* and *Sliwin*.

Conclusion

31. In light of the above, I do not find any new legal issues, a significant change in circumstances or evidence that fundamentally shifts the parameters of the debate to warrant deviating from the Court of Appeal's findings in *Mussani*. Therefore, I find that the impugned provisions to be constitutional.

Decision

32. Upon accepting the Agreed Statement of Facts, and as a result of the finding of the constitutionality of the impugned provisions, I find that the facts constitute professional misconduct pursuant to subsection 51(b.0.1) of the *Health Professions Procedural Code*, being Schedule 2 to the *Regulated Health Professions Act*, 1991; and pursuant to Ontario Regulation 218/94 under the *Dental Hygiene Act*, 1991, section 15, paragraphs 43, 45, and 52.

Penalty and Costs

33. Pursuant to s. 51(5)2 of the HPPC, the Registrant's licence is revoked.

34. Further, pursuant to s.51(5)1 of the HPPC, the registrant is to receive the following reprimand, which will become part of his record, and a summary of it will be posted on the public record:

> One of the rules that the Ontario legislature has enacted for health professionals is that they cannot have a concurrent sexual relationship with a patient they are treating. This policy of zero tolerance is backed up by mandatory revocation of the certificate of registration of the health professional. It is not discretionary. In your circumstances, where you were involved in a consensual spousal relationship, it appears a harsh penalty. In the societal interest of preventing sexual abuse, this penalty can be avoided by dental hygienists, like other health professionals, by ensuring that they comply with the rule of not engaging in a sexual relationship with a client/patient. While we are sympathetic to your personal situation, our hands are tied by a strong legal rule designed to protect patients. You have paid a heavy price for breaking the rule. We sincerely hope to see you again as an active member of the dental hygiene profession.

35. The College and the Registrant may make written submissions with respect to costs within 30 days of this decision.

"I, **Vinay Jain**, sign this decision and reasons for the decision as Chair of this Discipline panel and on behalf of the members of the Discipline panel as listed below:

_____ 19 June 2018

Vinay Jain, Chair
Chair, Discipline Panel Date

Fernand Hamelin, a public member of Council,
Catherine Ranson, a professional member of Council,
Jillian Eles, a professional member of Council; and
Maria Lee, a public member of Council.