

**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
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- and -)
)
)
Alexandru Tanase (Registration No. 016236)) Seth Weinstein,
) Michelle Biddulph,
) for Alexandru Tanase
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)
) 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:



Vinay Jain, Chair
Chair, Discipline Panel

19 June 2018

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.**