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Dealing with Sexual Assault Complaints: Difficult Issues

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Handout: Case List

This handout provides twenty key Canadian cases to know when dealing with sexual assault complaints. Regulators should be mindful, however, that each regulator has its own distinct requirements set out in its legislation, bylaws, rules or policies.

1. Investigations

a. Allegations of Bias against an Investigator or Complaint-Screening Committee Generally

College of Physicians and Surgeons of the Province of Alberta v. J.H., [2008] A.J. No. 463, 2008 ABQB 205

> Two ophthalmologists being investigated by the College of Physicians and Surgeons of Alberta brought an action to prohibit the College's investigator from further investigating on the basis of alleged bias. The court held that the case law supported the proposition that there is a limited duty of open-mindedness at the investigative stage which is breached if the investigator's mind is so closed that any submissions would be futile; in other words, his or her position would not change no matter what evidence might be disclosed as a result of the investigation. In this case, the evidence did not demonstrate that the investigator was closed-minded.

Histed v. Law Society of Manitoba, [2006] M.J. No. 290, 2006 MBCA 89

> A lawyer challenged two findings of professional misconduct made by a discipline committee on the basis that there was a reasonable apprehension of bias arising from the participation of several individuals at the meeting of the complaints investigation committee, which authorized the charges. The court held that a full and fair hearing before a panel of the Discipline Committee could cure any reasonable apprehension of bias.

MK Engineering Inc. v. Assn. of Professional Engineers and Geoscientists of Alberta, [2014] A.J. No. 119, 2014 ABCA 58

> MK Engineering appealed from a decision by the appeal board of the Association, quashing a discipline committee hearing panel's decision which had found an apprehension of bias by the investigative Committee. The court adjourned the action as premature and noted that the duty of fairness at the investigative stage is qualitatively lower than duties owed at the adjudicative stage and that errors at the investigative stage can be corrected during the adjudicative process.

Newfoundland Telephone Co. v. Newfoundland (Public Utilities Board), [1992] 1 S.C.R. 623, 89 D.L.R. (4th) 289 (S.C.C.)

> The Supreme Court of Canada found that a "closed mind" exists "should a commissioner state that, no matter what evidence might be disclosed as a result of the investigation, his or her position would not change". The Supreme Court further stated that "even at the investigatory stage statements manifesting a mind so closed as to make submissions futile would constitute a basis for raising an issue of apprehended bias".

b. Using Information Obtained by Third Parties or Another Public Body or Agency

R. v. Colarusso, [1994] 1 S.C.R. 20 (S.C.C.)

> This case involved a bodily sample seized by a party other than the police which was ultimately used against the individual in a criminal prosecution. The important take-away for regulators is that, when obtaining information from other public bodies, a regulator cannot use information obtained by another public body or agency through a regulatory search power with less privacy safeguards, if it is subject to more onerous requirements in order to obtain documents or information under its own enabling statute.

Stelmaschuk v. The College of Dental Surgeons of B.C., 2011 BCSC 518

> A complainant provided an inquiry committee with examination for discovery transcripts and expert reports from a separate civil action, in breach of a confidentiality agreement and his implied undertaking of confidentiality as a party to litigation. The court held that the inquiry committee should not have considered the discovery transcripts and expert reports without first obtaining a court order authorizing such use.

2. Concurrent Criminal Proceedings

Blencoe v. British Columbia (Human Rights Commission), 2000 SCC 44

> This case relates to whether a lengthy delay before a regulatory investigation proceeds may amount to a breach of procedural fairness. The case involved a former Cabinet minister who argued that the prejudice that he and his family suffered as a result of a delay on the part of the Human Rights Commission in processing two complaints against him was an abuse of process and a denial of his s. 7 rights under the Charter. The court disagreed. It held that s. 7 did not protect against the stress, anxiety and stigma associated with the complaints process and it also rejected the argument that the delay in question amounted to a denial of natural justice in this case. The court held that unacceptable delay must be shown to result in significant prejudice to the respondent's ability to have a fair hearing and there was no such prejudice in this case.

British Columbia Securities Commission v. Branch, [1995] 2 S.C.R. 3 (S.C.C.)

> The case involved an investigation of a company by the Securities Commission,

for which two of the corporate officers were served with summons issued under the Securities Act compelling their attendance for examination under oath and requiring them to produce company records. The Supreme Court of Canada held that the principle against self-incrimination requires that persons compelled to testify be provided with subsequent "derivative use immunity".

Del Core v. Ontario College of Pharmacists (1985), 51 O.R. (2d) 1 (C.A.)

The discipline committee of the College of Pharmacists of Ontario found a pharmacist guilty of professional misconduct based on a criminal conviction for obtaining pharmaceuticals through fraudulent means. The court held that the prior conviction constituted at least prima facie proof of the fact of a registrant's guilt in the discipline proceedings. However, the court cautioned that its weight and significance will depend on the circumstances of the case. The court observed that the registrant could seek to explain the circumstances surrounding the conviction or attempt to counter its effect in a variety of ways.

Law Society of Upper Canada v. Martyn, 2011 ONLSHP 163 (Q.L.)

The discipline committee accepted that a lawyer conspired to defraud a government ministry based on the fact of his criminal conviction in Bermuda where he had exhausted his right of appeal without allowing the lawyer to re-litigate that issue.

R. v. Wigglesworth, [1987] 2 S.C.R. 541 (S.C.C.)

The court held that a police officer convicted of a major service offence under his regulatory statute, the Royal Canadian Mounted Police Act, was not immune from criminal proceedings for common assault for the same action under the Criminal Code. The take-away for regulators is that individuals may face concurrent criminal and regulatory penalties for the same actions under Canadian law.

Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79, 2003 SCC 63, [2003] S.C.R. 77 (S.C.C.)

A recreation instructor was convicted of sexual assault. The instructor grieved his dismissal from employment by the City of Toronto. During the arbitration hearing, the arbitrator decided that the evidence of the sexual assault was inconclusive, and determined that the City dismissed the instructor without just cause. On appeal, the Supreme Court held that the union could not re-litigate the issue of the instructor's guilt as that issue had already been decided against him in the criminal proceeding. The Court held that the instructor's criminal conviction must stand, with all of its consequent legal effects. The arbitrator was required, as a matter of law, to give full effect to that conviction, and therefore erred in finding that the instructor had not committed the assault. The Court found that allowing the instructor to re-litigate the assault in the arbitration hearing would have constituted an abuse of process.

Voutsis v. College of Physicians and Surgeons of Saskatchewan (1987), 41 D.L.R. (4th) 378 (Sask. Q.B.)

> The court declined to grant a stay of the discipline proceedings initiated by the College during the criminal trial of a doctor because there would be no real prejudice. The court held that there would be no prejudice arising because any testimony that the doctor provided in the disciplinary proceeding could not be used against him in his criminal proceeding by virtue of s. 13 of the Canadian Charter of Rights and Freedoms.

3. Interim Action

Farbeh v. College of Pharmacists of British Columbia, [2009] B.C.J. No. 1640

> A pharmacist sought to quash an interim suspension imposed by the College's inquiry committee. The court expressed that the inquiry committee's power under the College's enabling legislation to suspend a health professional's registration is an extraordinary remedy that should be used sparingly and that the evidentiary foundation required for the order will turn in large part on the degree of urgency. In the circumstances, the court found that the inquiry committee's conclusion that suspension, and no less drastic alternative, was necessary for the protection of the public was a reasonable conclusion.

Hannos v. Registered Nurses Association, [1996] B.C.J. No. 138 (B.C.S.C.)

> A nurse appealed from an order suspending her membership pending an inquiry into her professional conduct. With respect to the applicable standard of proof, the court held that on an interim application, it will fall somewhere between the assertion of one or more unsubstantiated allegations and the high standard which is required with respect to the evidence considered at the full hearing of the merits of the case. The court also noted that the risk of harm to the public must be real and not speculative. In this case, there was a real and serious threat to the safety of patients and a prima facie case that the nurse posed an immediate risk to the public was established.

Larre v. College of Psychologists, 2007 BCSC 416

> A psychologist appealed a suspension of his registration pending further investigation or a hearing of the discipline committee. The court noted that "the tribunal must consider all reasonable alternatives to an interim suspension that may be available and that the restrictions or conditions imposed must be the least severe possible, while safeguarding the public". In the circumstances, the court found that the panel's decision was not unreasonable.

Liberman v. College of Physicians and Surgeons of Ontario,2010 ONSC 337

> An anesthesiologist applied to quash an interim order prohibiting him from practicing except in a hospital under supervision. The court quashed the committee's decision, stating:

> "The committee is clearly entitled to form its own opinion but it must do so on "some evidence", not evidence of below the standard conduct, but evidence of probable harm. Here, I can find none. In coming to that conclusion I am not weighing evidence, I am searching for its existence. Without evidence of probable exposure to harm, the Committee is merely speculating…"

Patton v. College of Dental Surgeons of British Columbia, [1996] B.C.J. No. 2864 (B.C.S.C.)

A dentist appealed from a decision to suspend his registration. The appeal was allowed, and the court expressed that there should always be a consideration as to whether a less severe remedy than a summary suspension is available to protect the public interest until the charges have been disposed of.

Porter v. College of Physicians and Surgoens of Ontario, [2001] O.J. No. 258 (O.N.S.C.)

A psychiatrist applied to quash an interim suspension imposed by the executive committee of the College. Two female patients of the psychiatrist had made complaints that the psychiatrist had committed sexual improprieties against them. The court did not comment on the evidence in the matter, but considered the type of practice, noting that psychiatry takes place behind closed doors between the patient and the doctor. The court also noted the fragile nature of the complainants and the presence of evidence that elevated the evidence of the complainants above the situation of "she says", "he says". The application was dismissed.

R.(J.) v. College of Psychologists of BC (1993), 107 D.L.R. (4th) 335 (B.C.S.C.)

In this case, the College received three complaints of sexually inappropriate conduct, and the board took interim action to impose conditions on the psychologist's practice. The court removed the conditions, finding that there was no foundation to establish that such action was necessary to protect the public, for reasons including that the two treatment-related complaints took place more than a decade previously and the psychologist had no history of sexual abuse.

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