NOTEBOOK ON ETHICS, LEGAL ISSUES AND STANDARDS FOR COUNSELLORS & PSYCHOTHERAPISTS

A SUPREME COURT OF CANADA DECISION, AND THE GOUDGE REPORT ON COMPLAINTS & DISCIPLINE

BY DR. GLENN SHEPPARD
A RECENT COURT DECISION WITH DEFENSE TO PROFESSIONAL REGULATORS

On June 18, 2018, the Supreme Court of Canada released two companion reports that dealt with a challenging and complex societal and legal issue. The challenge before the Court was how to strike a balance between the Canadian values of respect for religious freedom and for sexual orientation when they are at odds in a professional regulatory circumstance. It had to deal with this issue by addressing the decisions of two regulatory agencies to deny professional registration to graduates from a law degree program at Trinity Western University (TWU). TWU is an evangelical Christian university and it requires its students and faculty to adhere to a religious based code of conduct that prohibits sexual activity except in a heterosexual marriage. Both the Law Society of British Columbia (LSBC) and the Law Society of Upper Canada in Ontario (LSUC) decided that they would not accept for registration law graduates of TWU because its program discriminates on the basis of sexual orientation.

Although the Court took issue with how LSBC and LSUC arrived at their respective decisions, it did conclude that both had achieved a reasonable balance between the limitations on Charter rights at issue and their statutory obligations. It stated that its judgement about this complex issue was based on the following considerations:

Equal access to the legal profession, supporting diversity within the bar, and preventing harm to LGBTQ law students were valid means by which the LSBC could pursue its overarching statutory duty: upholding and maintaining the public interest in the administration of justice, which necessarily includes upholding a positive public perception of the legal profession.

RECOMMENDATIONS FROM THE GOUDGE REPORT

The establishment and management of a system for dealing with ethical complaints and discipline is a cornerstone of regulatory governance: it is essential to the primary regulatory mandate of public protection. Of course, this obligation carries with it a duty to follow procedures that are efficient, fair to both complainants and practitioners, and consistent with the principles of due process. In recent years this issue has received increased attention in a number of media and journal articles, court decisions, and reports. The Goughd Report is one of the most recent to address this challenging and important professional responsibility.

“The obligation carries with it a duty to follow procedures that are efficient, fair to both complainants and practitioners, and consistent with the principles of due process.”

The Ministry of Health and Long Term Care of Ontario recently released a report prepared by former Justice Stephen Goughd entitled Strengthening the Physician Complaints Process in Ontario. Justice Goughd was retained to determine how the process of dealing with complaints about physicians made to the College of Physicians and Surgeons of Ontario (CPSO) could be streamlined to make it more efficient, cost effective, less costly, and reduce the number of complaints hearings while still respecting due process. In Canada, the CPSO receives more complaints against physicians than any other health care regulator.

In his report, Justice Goughd made the following recommendations:

⇒ There should be a process for staff person to review complaints early in the process, approve the withdrawal of a complaint where the complainant agrees or dismiss it if there is no reasonable prospect of action being taken on the complaint. There would be a right of appeal to the screening committee.

1The student covenant requirement has since been removed by TWU.
There should be a staff person designated as a patient's advocate for each complaint who will contact the complainant to explain the process and options and ensure that the complainant's perspective is presented to the investigative team. Some complainants might withdraw their complaint or seek other options (e.g., the civil courts) once they better understand the process.

The alternate dispute resolutions process should be modified to make the regulator a full participant to reflect the public interest. Resolutions should be possible even if the complainant does not agree.

Where a Registrar's investigation is commenced, its scope should be specified so that the investigation is not open ended. If additional concerns are identified, a new Registrar's investigation can be initiated.

In appropriate cases, the screening committee can make a conditional referral to discipline subject to a proposed undertaking that the committee would accept. A conditional referral would signal to the member that they are on the cusp of a discipline hearing unless the member agrees to the proposed terms of the undertaking.

The independent review of complaints decisions by an independent tribunal should presumptively be in writing rather than by oral submissions.

Legally trained persons with litigation experience should be appointed as public members on the regulatory college so that they can chair hearings.

Those personnel involved directly with adjudicating complaints and discipline should receive training in mediation and alternative dispute resolution processes and practices.

In the event that an alternative dispute resolution is achieved it remains subject to approval by the Inquiries, Complaints and Reports Committee. Also, the Registrar must disclose his/her conclusion that the resolution is in the public interest, and the basis for that conclusion.

Presumptively, witnesses should be able to testify by video conference in lieu of personal attendance. I have included information from this Report in this Notebook because, in my view, it is relevant to all regulators including those that regulate the profession of counselling and psychotherapy.

**THE GOUDGE REPORT CAN BE FOUND AT:**

**THE SUPREME COURT DECISIONS CAN BE FOUND AT:**
http://Canlii.ca/c/hsipn and http://Canlii.ca/c/hsipt