In the Court of Appeal of Alberta

Citation: Sefcik v College of Podiatric Physicians of Alberta, 2025 ABCA 263

Date: 20250724
Docket: 2301-0299AC
Registry: Calgary

Between:

Dr. Ben Sefcik

Appellant

- and -

The College of Podiatric Physicians of Alberta

Respondent

The Court:

The Honourable Chief Justice Ritu Khullar
The Honourable Justice April Grosse
The Honourable Justice Alice Woolley

Memorandum of Judgment

Appeal from the Decision of
The Council of the College of Podiatric Physicians of Alberta
Dated the 21st day of November, 2023

Memorandum of Judgment

The Court:

I. Introduction

[1] The appellant Dr. Ben Sefcik had a consensual extra-marital affair with his employee "AA" from late May or early June 2019 to May 2020. AA had begun work as the appellant's medical office assistant six months earlier, as an extension of her work at her brother-in-law's wellness clinic, in which the appellant's podiatry practice was located.

[2] When AA's then husband found out about the affair, he and his sister reported the appellant to the respondent College of Podiatric Physicians of Alberta. The respondent's Hearings Director referred two allegations against the appellant to a Hearing Tribunal. First, the Director alleged the appellant committed "sexual abuse" by having a sexual relationship with a patient: *Health Professions Act*, RSA 2000, c H-7, s 1(1)(nn.1). In the alternative, the Director alleged the appellant committed "unprofessional conduct" by having a relationship with a former patient before one year had passed since their last clinical visit and without following the procedures for such relationships set out in the College's Practice Standards for the Protection of Patients from Sexual Abuse and Misconduct (Practice Standards): *Health Professions Act*, s 1(pp).

[3] On two occasions, in February 2016 and in April 2019, the appellant provided healthcare services or treatment to AA. In 2016, the appellant treated AA's in-grown toenail. He saw her once for this purpose. On April 18, 2019, he referred AA for an x-ray after she complained of a sore ankle at work. Although he and AA denied the appellant examined her ankle, the Hearing Tribunal found he must have: "[AA] may have forgotten that Dr. Sefcik examined her, or his examination may have been very quick such that she did not know that he was doing it". Following receipt of the x-ray results, which were clear, the appellant discussed the results with AA and suggested she follow up with her family doctor "if persistent".

[4] Based on the April 2019 services provided by the appellant to AA, the Hearing Tribunal found that when their sexual relationship began in late May or early June 2019, AA was a "patient" of the appellant as defined by the Practice Standards. The *Health Professions Act* defines "patient" for the purposes of a complaint made in respect of sexual abuse to mean "a patient as set out in the standards of practice of a council", and defines "sexual abuse" to include "conduct of a regulated member towards a patient that is of a sexual nature and includes... (i) sexual intercourse between a regulated member and a patient of that regulated member": *Health Professions Act*, ss 1(1)(x.1), 1(1)(nn.1)(i). Therefore, because AA was a "patient" of the appellant within the meaning of the Practice Standards, the appellant's sexual relationship with AA was sexual abuse. The Hearing Tribunal imposed the mandatory sanction the *Health Professions Act* requires for sexual abuse,

that the appellant's practice permit and registration be cancelled with no opportunity for reinstatement: *Health Professions Act*, ss 82(1.1)(a), 45(3)(a). It also ordered the appellant to pay 75% of the costs of the investigation and hearing in the amount of $62,612.

[5] The Hearing Tribunal found in the alternative that, if AA was not a patient, she was instead a former patient and the appellant had not complied with the requirements set out in the Practice Standards to permit a podiatrist to have a sexual relationship with a former patient. It said that it "would have found Dr. Sefcik's failure to comply with these requirements of the Standard to be unprofessional conduct" as defined by section 1(pp)(ii) of the *Health Professions Act*.

[6] The appellant unsuccessfully appealed the finding of sexual abuse and the alternative findings related to unprofessional conduct to the Council of the College of Podiatric Surgeons. The Council found that no reviewable error had been made with respect to the finding of sexual abuse. It declined to consider the appellant's appeal of the findings related to unprofessional conduct on the basis that those findings were merely "supplemental" or "*obiter*". The Council ordered the appellant to pay a further $25,000 in costs of the appeal.

[7] The appellant appeals the finding of sexual abuse as well as the costs orders imposed. For the reasons that follow, the appeal is allowed. The finding of sexual abuse, along with the sanctions and costs orders, are quashed, and the remaining findings of the Hearing Tribunal related to unprofessional conduct are remitted to the Council for consideration of the appellant's appeal of those aspects of the decision.

II. Preliminary Issue: Validity of the Practice Standards

[8] Before the Hearing Tribunal, the appellant raised issues with the legality of the Practice Standards. After legislative changes in 2019 regarding sexual abuse, the *Health Professions Act* required councils to develop and propose standards of practice "setting out who is considered to be a patient" and "respecting when a sexual relationship may occur between a regulated member or former member and a patient": *Health Professions Act*, s 133.1(1). It required the standards of practice to be adopted and come into force by March 31, 2019, and directed colleges to provide "for review and comment" a copy of the proposed standards of practice to their regulated members and to the Minister: *Health Professions Act*, ss 133.1(9), 133.1(3)(a)-(b). The legislation required that, after a college had reviewed and considered comments received, and made any amendments it considered necessary, the college's council submit the proposed standards of practice to the Minister for final approval: *Health Professions Act*, s 133.1(4). Finally, it prohibited a council from adopting any standards of practice that had not been approved by the Minister: *Health Professions Act*, s 133.1(5).

[9] The appellant "raised concerns about whether the College sought registrant feedback on the new Standard as required by section 133.1(3)(a) of the HPA before imposing it on the College's registrants". The Hearing Tribunal noted the College had not provided any evidence showing its members were consulted prior to the Practice Standards being adopted on March 15, 2019.

Nonetheless, it concluded it was "obliged to apply the Standards put in place by the Council despite the lack of evidence that the draft Standard was sent directly to Dr. Sefcik for comment."

[10] For its part, the Council noted that no specific evidence showed section 133.1 was not complied with and that, even if it "was not strictly complied with", that did not affect the College's statutory obligation to create the Practice Standards, or the fact that they "were clearly in force effective April 1, 2019 and governed Dr. Sefcik's conduct as a regulated member of the College": Decision of the Council of the College of Podiatric Physicians of Alberta, November 21, 2023 at paras 124-125 (Council Decision).

[11] The appellant submits the Council erred in treating the Practice Standards as legally effective despite his position that section 133.1 was not complied with. If the requirements of section 133.1 were not satisfied, he argues, the Practice Standards are *ultra vires* and did not apply to him.

[12] We see no error in the refusal of the Hearing Tribunal and Council to give effect to the appellant's suggestion that the Practice Standards were *ultra vires*. It is fair to say that neither the Hearing Tribunal nor Council appeared to entirely appreciate the legal significance of a demonstrated failure by the College to comply with the mandatory conditions precedent of section 133.1: *Wildlands League v Ontario (Natural Resources and Forestry)*, 2016 ONCA 741 at para 49; *Katz Group Canada Inc v Ontario (Health and Long-Term Care)*, 2013 SCC 64 at para 27 [*Katz Group*]; *Thorne's Hardware Ltd v The Queen*, [1983] 1 SCR 106 at 111. Nonetheless, the appellant had the burden of proving the Practice Standards, even though presumptively valid, were *ultra vires*: *Auer v Auer*, 2024 SCC 36 at paras 29, 32, 38, 50; *Katz Group* at para 25. The evidence does not discharge this burden.

[13] One e-mail from the respondent inviting feedback on the Practice Standards bearing a date after the Practice Standards had already been adopted establishes nothing about whether prior communications were sent. Although there is some reference in the Hearing Tribunal's decision to testimony from Dr. Sefcik about not being consulted, the appellant has not put that evidence before us and does not rely on it in this appeal. No other evidence to establish that the requirements of s. 133.1 were not complied with was provided. Given that evidentiary deficiency, we cannot interfere with the Council's conclusion that there "was no specific evidence before the Hearing Tribunal" about non-compliance. The appellant has not demonstrated that the Practice Standards were *ultra vires* and, on the record before us, neither the Hearing Tribunal nor Council erred in relying on them in their assessment of the appellant's conduct.

III. Sexual Abuse

a) Standard of Review

[14] Section 90 of the *Health Professions Act* grants the appellant the right to appeal the Council's decision to uphold the Hearing Tribunal's finding of sexual abuse but does not specify

the standard of review applicable to that appeal. As such, appellate standards of review apply to our review of the Council's decision: *Muradov v College of Naturopathic Doctors of Alberta*, 2024 ABCA 224 at para 12 [*Muradov*]; *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29 at paras 27-29; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 33, 36-52.

[15] The Council was to apply a separate standard to its review of the Hearing Tribunal's decision, focused on whether the decision was "based on errors of law, errors of principle, or [was] not reasonably sustainable". On questions of law, the Council was "entitled to independently examine the issue, to promote uniformity in interpretation, and to ensure that proper professional standards are maintained": *Muradov* at para 11; *Yee v Chartered Professional Accountants of Alberta*, 2020 ABCA 98 at para 35.

[16] The facts related to the appellant's medical treatment of AA and their sexual relationship are not in dispute. The central issue is: did the Council err in upholding the Hearing Tribunal's finding that, at the time of their sexual relationship, AA was the appellant's patient? That question turns on the interpretation of the definition of "patient" in the Practice Standards, and on the broader intersection between the Practice Standards and the *Health Professions Act*. As noted above, the Practice Standards' definition of patient is directly incorporated into the *Health Professions Act* and determines the scope of what constitutes "sexual abuse" under that legislation: *Health Professions Act*, ss 1(1)(x.1), 1(1)(nn.1). The issues in this appeal are thus questions of law, and a correctness standard of review applies.

b) Legal Framework

[17] In 2019, the provincial government amended the *Health Professions Act* to define sexual abuse to include consensual sexual intercourse between a regulated member and a patient, and to impose a mandatory sanction of permanent cancellation of the member's practice permit and registration if they are found to have committed sexual abuse: *Health Professions Act*, ss 1(1)(nn.1)(i), 45(3)(a), 82(1.1)(a). The amendments permit the college governing each profession to determine who is a "patient" for these purposes:

> "patient", for the purposes of a complaint made in respect of unprofessional conduct in relation to sexual abuse or sexual misconduct, means a patient as set out in the standards of practice of a council.
>
> *Health Professions Act*, s (1)(1)(x.1)

[18] The College adopted its Practice Standards in March 2019, and defined a "patient" as a person currently receiving a health service or treatment:

> In these standards, 'patient' refers to the individual to whom the regulated member is currently providing a health services [sic] and/or treatment (HPA Schedule 21.1,

> 2000), as part of the professional and therapeutic relationship which includes ***informed consent*** between the patient and regulated member. [underlining added; other emphasis in original]

[19] The Practice Standards also include a glossary of defined terms, one of which is "minor healthcare service":

> Minor healthcare service – a situation that requires discrete procedural or episodic care for which the regulated member has no determination in the ongoing care of the person receiving the service.

[20] While most defined terms in the glossary are explicitly used elsewhere in the Practice Standards, "minor healthcare service" is not. The appellant suggests the concept of minor healthcare service as "procedural or episodic care" arises from the previously applicable 2013 standards of practice, which created guidelines for a podiatrist providing "episodic care", that is, treatment for "an episode of illness or concern".

c) Hearing Tribunal and Council Decisions

[21] The Hearing Tribunal found AA was a current patient when her sexual relationship with the appellant began because of the treatment provided by the appellant in relation to her ankle in April 2019. It found that not enough time had elapsed for AA to cease to be a current patient:

> A one-month period is not sufficient for current health services or treatment to fade, or for the imbalance of power between a podiatrist and their patient to dissipate. It is not a sufficient period for a current patient to become a former patient.

[22] The Hearing Tribunal found that nothing the appellant had done changed AA's status from that of current patient; "recommending follow-up with a family physician is not sufficient to sever the professional and therapeutic relationship". It accepted AA's evidence that the appellant did not "formally communicate the termination of the professional therapeutic relationship" to her.

[23] The Council upheld the Hearing Tribunal's decision that AA was a patient, such that her sexual relationship with the appellant constituted sexual abuse. It noted that there "was no clear evidence that AA's care was terminated or transferred", and found that it was reasonable for the Hearing Tribunal to conclude that a one-month period was not sufficient to change AA's status from patient to former patient: Council Decision at paras 78, 84. It rejected the appellant's argument that the definition of "minor healthcare service" in the glossary of the Practice Standards could inform the analysis of whether AA was a patient, taking the position that language applied "only if a member is considering a relationship with a former patient": Council Decision at para 81. And, in any event, it found that if a podiatrist does not terminate the professional relationship, "the patient remains a patient despite any treatment being a 'minor healthcare service'": Council Decision at para 82.

d) Analysis

[24] In assessing the nature of the professional relationship between the appellant and AA, and whether she was a current patient, both the Hearing Tribunal and Council declined to assess the significance and extent of the "health services and/or treatment" provided by the appellant to AA. Specifically, the reasons of the Hearing Tribunal and the Council treat all health services and treatment as equivalent in considering whether there is an ongoing podiatrist-patient relationship and if so, whether the passage of one month is sufficient to end the podiatrist-patient relationship. The Hearing Tribunal held that in all cases one month "is not a sufficient period for a current patient to become a former patient". In addition, the Council refused to consider the significance of the Glossary's inclusion of the term "minor healthcare service" in determining whether someone remains a patient after that type of service has been provided: Council Decision at para 81. It asserted the term is applicable only where a member is considering a relationship with a former patient, although the part of the Practice Standards directed at sexual relationships "with a former patient" also does not explicitly reference the term "minor healthcare service".

[25] In both these respects, the Hearing Tribunal and Council erred. The term "minor healthcare service" is not used elsewhere in the Practice Standards, but it is expressly included in them. As with the legislature, the College can be presumed not to have used superfluous or meaningless words, or to have spoken in vain: *McDiarmid Lumber Ltd v God's Lake First Nation*, 2006 SCC 58 at para 36; *British Columbia Human Rights Tribunal v Schrenk*, 2017 SCC 62 at paras 45-46; *Canada v Canada North Group Inc*, 2021 SCC 30 at para 64. The term "minor healthcare service" does not qualify or change the definition of patient but, as this case indicates, it logically informs the analysis of how that definition applies to the facts of a particular case, and in particular, how long the status of "patient" endures.

[26] We note the position taken by the Council that the term "minor healthcare service" applies only when a podiatrist is considering a relationship with a former patient; however, since the term is also not explicitly used in the provisions related to former patients, we do not understand the basis for treating the term as relevant to one concept but not the other. The Council does not explain what that basis might be. It is true that the factors provided in the Practice Standards with respect to the propriety of sexual relationships with former patients reference the nature and duration of the professional relationship, and the number of times the patient was seen by the regulated member, as relevant to that assessment. Yet, that arguably makes the term "minor healthcare services" superfluous to that assessment – the Practice Standards explicitly identify the criteria to be considered by the podiatrist and decision-maker in relation to "the appropriateness of a sexual relationship with a former patient", and do not require any additional criteria from the Glossary. Further, even if it is relevant to consider the nature of services provided, including whether they were "minor healthcare services", when assessing the appropriateness of a relationship with a former patient, this does not preclude consideration of the nature of the services provided when determining the period of time over which a patient should be considered a current patient, as

opposed to a former patient. We note that the Practice Standards do not include a specific definition of "former patient".

[27] In our view, to properly determine the point at which a patient becomes a "former patient", the College must consider the nature of the podiatrist-patient relationship in context. It must assess the "health services and/or treatment" provided by the podiatrist to the patient and then, in light of that analysis and any other relevant factors, consider whether the individual who received the health service or treatment continued to be a patient once it was completed and, if so, for how long thereafter.

[28] As the definition of "minor healthcare service" indicates, not all health services and treatments are the same. Where a podiatrist provides regular care to an individual over several years, even a long gap between appointments, on its own, may not be sufficient to change the recipient of that care's status from current patient to former patient. Conversely, where a podiatrist sees an individual once for a non-recurring issue for which no follow-up is required or reasonably anticipated – i.e., where the podiatrist provides a minor healthcare service – the individual may cease to be a patient as soon as they leave the podiatrist's office. Given that the treatment has been completed, the patient would not reasonably expect ongoing care, and the podiatrist would have no reason to expect that the patient would return.

[29] On the facts as found by the Hearing Tribunal, the appellant twice provided AA with a minor healthcare service. He treated her in-grown toenail on one occasion in 2016. He provided her a minor healthcare service three years later, in 2019, by ordering an x-ray to assist with diagnosis of ankle pain she complained of at work and sharing the results of that x-ray with her. He did not treat her ankle or identify any podiatry treatment that might be helpful to her; the circumstances required no follow-up or ongoing care by him or another podiatrist. The appellant suggested that, if AA needed further care because her pain was persistent, she consult her family physician. Nothing in the nature of the health service provided by the appellant to AA in April 2019 suggested AA would be receiving recurring or ongoing care from the appellant. AA did not indicate any other health issues for which she might require podiatric services.

[30] In the circumstances of this case, including the discrete non-recurring health service provided by the appellant in April 2019, we are satisfied that the only conclusion available on a proper interpretation and application of the Practice Standards is that AA ceased to be a patient by May 2019. AA was not the appellant's "patient" when their sexual relationship began. As such, the appellant did not commit "sexual abuse" as defined by section 1(1)(nn.1) of the *Health Professions Act*.

IV. Unprofessional Conduct

[31] As earlier noted, the Hearing Tribunal found that if AA was not a "patient", she was a former patient and the appellant had not complied with the requirements set out in the Practice

Standards to have a sexual relationship with a former patient. The tribunal stated it "would have found" that failure to be unprofessional conduct.

[32] The *Health Professions Act* defines "unprofessional conduct" as including "contravention of this Act, a code of ethics or standards of practice", whether or not the contravention was "disgraceful or dishonourable": *Health Professions Act*, s 1(1)(pp)(ii).

[33] The Practice Standards explicitly address sexual relationships between a podiatrist and a former patient, with more rigorous requirements applying when the patient relationship ended less than one year prior to the proposed sexual relationship. In those circumstances, the Practice Standards require the podiatrist to take a number of specific steps, including terminating the care of the patient verbally and in a formal letter of discharge, notifying the College of the proposed relationship, and ensuring care of the patient is transferred to another podiatrist. In addition, it requires that the podiatrist "await approval from the college and refrain from commencing the relationship for at least thirty (30) days from the last appointment date". The Practice Standards also require the podiatrist to ensure that no continuing power imbalance exists, and identify various factors as relevant to assessing whether the proposed sexual relationship is appropriate.

[34] The Hearing Tribunal found the appellant had failed to comply with these requirements. It pointed out that he had not, for example, notified the College of his intention to "engage in a personal relationship with a former patient". He did not terminate "his care of [AA] via verbal means or a formal letter of discharge," or transfer her care to another podiatrist. He did not provide the College with necessary documentation to show the date the relationship terminated or that AA consented to the personal relationship.

[35] The Hearing Tribunal said it "would have found Dr. Sefcik's failure to comply with these requirements of the Standard to be unprofessional conduct". It emphasized the purpose of the required disclosure, to "enable the College to inquire and ensure the patient is acting freely and voluntarily" and to protect "former patients who may not yet be free from the podiatrist's power imbalance and influence". The Hearing Tribunal found that the appellant's failure to comply with these requirements "circumvented measures designed to protect the public and committed conduct that harms the integrity of the profession".

[36] Before the Council, the appellant challenged the Hearing Tribunal's finding on the basis that it failed to properly consider, articulate or apply the definition of "former patient" within the context of professional and therapeutic relationships.

[37] The Council declined to consider this ground of appeal. It said the Hearing Tribunal's findings related to unprofessional conduct with a former patient could be "characterized as supplemental or 'obiter' comments", and "the fact remains that there was only a finding of unprofessional conduct regarding allegation 1. The question of whether [AA] was a 'former' patient is only relevant for the purposes of allegation 2".

[38] The Council's characterization of the Hearing Tribunal decision on allegation 2 as *obiter* is no longer a valid basis for avoiding consideration of the appellant's appeal of that decision. The appellant did not commit sexual abuse. The only issue remaining is whether the Hearing Tribunal erred in stating it would have found he committed unprofessional conduct otherwise, given his sexual relationship with a person to whom he had previously provided episodic and minor health care services, an issue the Council has yet to adjudicate.

[39] Before this Court, the appellant did not articulate further the issue he had identified with the Hearing Tribunal's alternative assessment that he committed unprofessional conduct – understandably given that his statutory right of appeal was only with respect to the decision of Council. As a result, this Court is not positioned to assess the merits of the Hearing Tribunal's decision on unprofessional conduct as it relates to the standards applicable to relationships with former patients who received episodic or minor health care services, and must remit that issue to the Council for consideration.

V. Conclusion

[40] The appeal is granted. The decision that the appellant committed sexual abuse is quashed, as are the cancellation of his permit and registration and the costs awards made against him. The issue of whether the Hearing Tribunal erred in stating it "would have found" the appellant committed unprofessional conduct on account of his relationship with a former patient is remitted to the Council for consideration. In the event the Council upholds the finding of unprofessional conduct, it will need to address sanction and whether the appellant ought to be responsible for any costs of the regulatory proceeding, given his success on this appeal.

Appeal heard on April 17, 2025

Memorandum filed at Edmonton, Alberta
this 24th day of July, 2025

Khullar C.J.A.

Grosse J.A.

Woolley J.A.

Appearances:

J. Melnychyn
for the Appellant

J.C. Gagnon
M.R. Hayward
for the Respondent