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Criminal Records Redux: The New Posting Requirements in the *Regulated Health Professions Act*

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Previously, in *What You Need to Know about Police Record Checks*,[1] we examined the new framework under the *Police Record Checks Reform Act, 2015*[2] for conducting and obtaining a police record check and highlighted some of the information that would be (and would not be) disclosed in a report from the police for the various types of checks that are available. So now, with that background, let's talk a little bit more about criminal records.

On May 1, 2018, a new regulation[3] under the *Regulated Health Professions Act, 1991*[4] came into force that expanded the information that regulated health colleges in Ontario are required to post on their registers about members of their colleges. The requirements now include details relating to any outstanding criminal charges against a member and findings of guilt under either the *Criminal Code* or the *Controlled Drugs and Substances Act*. The new requirements, which have now been in place for almost a year, arose from significant amendments to the *RHPA* and the *Health Professions Procedural Code* ("*Code*")[5] under Bill 87 (then referred to as the Protecting Patients Act) that were directed at, among other things, reinforcing a zero tolerance regime for sexual abuse by healthcare practitioners and improving transparency on how health regulatory colleges execute their public interest mandate. During the legislative debates on Bill 87 in 2017, the then Ontario Minister of Health, Eric Hoskins, described the rationale for expanding the disclosure requirements on the register as follows:

We propose to increase the transparency of health regulatory colleges' activities. If our legislation is passed, we would expand the **minimum requirements** for information that colleges must provide on their public registers with respect to their members. Why is this important? Because it means that relevant information about regulated health professionals would be available to the public, because **they have the right to know.**[6] [Emphasis added]

Under the amended provisions of the *Code,* members of a regulated health profession are now required to inform their regulator when they are the subject of outstanding criminal charges.[7] Members are also required to inform the college when they are found guilty of a criminal offence (which was an existing reporting obligation under the *Code*).[8] Within a reasonable amount of time after receiving a member's report (or where information comes to the attention of the college otherwise – for example, through a newspaper article), a college is required to post information about the criminal charge (as well as any conditions of release) and/or the finding of guilt on the register in accordance with the *Code* and the *Regulation*.[9] Specifically, under the *Regulation*, the college is required to post **both** a summary of the finding of guilt and a summary of the sentence.[10]

While, at first blush, the obligation to post such information on the public register seems relatively straightforward, it can raise (and has raised) complicated issues for colleges to consider and address. For example, although the requirement to post under section 23(2) of the *Code* is cast in mandatory language (as noted by the statutory buzzword "shall"), the *Code* is clear that the obligation to post is not a licence to contravene a publication ban ordered by the court.[11] Consequently, in certain circumstances, a college may need to make inquiries with the Crown prosecutor or the court to confirm whether or not a publication ban is in place (which, generally, is the case with alleged sexual offences or offences involving children). Alternatively, inquiries might be necessary to determine the scope of

a publication ban, if unclear (for example, does the publication ban cover the member or another witness?). Once appropriate information is obtained, the college can then make a decision of what information can/cannot be posted on the register in order to comply with the *Code* and the *Regulation*.

Similarly, while the posting obligations are mandatory, the registrar has discretion under the *Code* to refuse to post information in certain circumstances. In order to exercise that discretion, the *Code* sets out a statutory precondition that the registrar must form "reasonable grounds to believe" that either: (i) the disclosure of information may jeopardize the safety of an individual; or (ii) the information is obsolete **and** no longer relevant to the member's suitability to practise.[12] This raises the issue, then, of what "reasonable grounds" means in this context.

The concept of "reasonable grounds to believe" has been considered by the Supreme Court of Canada on numerous occasions, primarily in criminal cases where the court is examining whether or not the exercise of statutory and common law powers has met the constitutionally-minimum standard of reasonable and probable grounds.[13] The most frequently cited formulation of the standard was articulated in *R. v. Debot* where the standard (in relation to reasonable grounds for a search) was described as follows:

The question as to what standard of proof must be met in order to establish reasonable grounds for a search may be disposed of quickly. I agree with Martin J.A. that the appropriate standard is one of "reasonable probability" rather than "proof beyond a reasonable doubt" or "*prima facie* case". The phrase " **reasonable belief**" also approximates the requisite standard.[14] [Emphasis added]

While the content of what may satisfy the legal standard in a particular circumstance has been litigated in numerous criminal cases (and has been accepted as having both a subjective and objective component and requiring a contextual analysis), the legal test has been framed as "reasonable probability" – that is, the point where credibly-based probability replaces suspicion.[15] In other words, reasonable grounds to believe is information that supports a reasonable probability or a reasonable belief.[16]

To be clear, the context here is very different, but the requirement to form reasonable grounds is not foreign in the professional regulatory context. To the contrary, it is everyday business for a health profession college. For example, courts have examined the exercise of other statutory powers under the *RHPA* (such as, investigatory powers, requiring a member to submit to a medical examination, or extraordinary action taken under section 25(7) of the *Code* to protect the public), all of which require a belief based on reasonable grounds.[17] Importantly, in this context, it has been accepted that there is nothing in the *Code* or elsewhere that limits or qualifies the source of information that can inform a reasonable belief.[18]

Importantly, when it comes to interpreting and applying these new posting provisions of the *Code* and the *Regulation*, it is necessary to be mindful of the fact that the powers that regulatory bodies exercise are to be construed in light of their statutory duty to serve and protect the public interest. As the Court of Appeal for Ontario recently noted:

The interpretive principle of strict compliance with and construction of professional discipline legislation to ensure procedural fairness to accused members is not exclusive or overriding. The Discipline Committee is required to interpret its enabling statute with a view to protecting the public interest in the proper regulation of the professions [...]. A balancing of these interests is required.[19]

Consequently, leaving aside for a moment that it is a mandatory obligation to post this information (subject to publication bans and other issues to be discussed) and that a finding of guilt may also be the basis for allegations and/or findings of professional misconduct, the requirement of reasonable grounds must be interpreted in a manner that is consistent with a college's statutory duty to protect the public interest. Said differently, the discretion to refuse to post (or remove) information on the register on the basis that it is obsolete **and** no longer relevant to the member's suitability to practise must be construed in the public interest. As discussed below, it is not solely a consideration of the information itself; for example, how dated is it?

To the extent that there are concerns about a member's interest in the publication of their criminal record, it is noteworthy that there are essentially two ways for a member to have information about their criminal finding removed from the college's public register – either by obtaining a record suspension from the Parole Board or by meeting the test under section 23(7) of the *Code*.

It is significant that the *Regulation* already takes into consideration that findings of guilt are not to be posted (or, conversely, ought to be removed) in circumstances where the Parole Board has undertaken a review and ordered a record suspension in respect of a conviction, a pardon has been obtained, or a conviction has been overturned on appeal.[20] Under the *Criminal Records Act*, section 3 provides that "a person who has been convicted of an offence [...] may apply to the Board for a record suspension in respect of that offence."[21]

To be eligible for a record suspension, a certain amount of time must have elapsed since the individual was convicted of the offence (either five or ten years, depending on the type of offence) and the individual must not have been convicted of certain offences (set out in Schedule 1 of the *CRA* – these are, generally speaking, offences involving children). In accordance with section 2.3 of the *CRA*, a record suspension is, among other things, evidence of the fact that: (i) the Parole Board, after making inquiries, was satisfied that the applicant was of good conduct; and, (ii) the conviction in respect of which the record suspension is ordered should no longer reflect adversely on the applicant's character.[22] Therefore, presuming a member is eligible, a member can take steps to secure a record suspension under the *CRA* whereby, if successful, his or her criminal record will be removed from the register in accordance with the *Regulation*.

Alternatively, this leaves open for a college to consider, on a case-by-case basis, whether or not there are reasonable grounds to refuse to post (or to remove) a finding of guilt under section 23(7) of the *Code*. In practical terms, such circumstances will most commonly arise where a member seeks to have information removed from the register before they are eligible, time-wise, for a record suspension (or are otherwise ineligible) or where a member has received an absolute or conditional discharge – which, perhaps, is one of the mostly likely scenarios to be confronted by registrars. In this regard, it is important to understand the mechanics behind a discharge.

Under Part XXIII of the *Criminal Code* (which is the part that addresses sentencing), a court has jurisdiction under section 730(1) to make an order that an individual who pleads guilty or is found guilty of certain offences be "discharged", either absolutely or on conditions prescribed in a probation order, instead of registering a conviction. The order can only be made in those circumstances where it is in the best interests of the accused and not contrary to the public interest.[23] As a discharge is deemed not to be a conviction under 730(3) of the *Criminal Code*, a record suspension is not available under section 3 of the *CRA*. However, the *CRA* requires that all references to a discharge under section 730 of the *Criminal Code* be removed from CPIC (which is the criminal conviction records retrieval system maintained by the RCMP) on the expiration of the discharge; that is, one year after an absolute discharge and three years after a conditional discharge. The legislation also prohibits discharge records or the fact of a discharge from being disclosed by the RCMP or by any department or agency of the Government of Canada after a discharge has expired (except in narrow circumstances).[24]

To be clear, these provisions of the *CRA* do not negate a member's obligations under section 85.6.1 of the *Code* to disclose a guilty finding to the college, which members are required to report to the college "as soon as reasonably practicable after the member receives notice of the finding of guilt". Moreover, unlike a record suspension, it is clear that the Ontario government did not expressly include in the *Regulation* the purging of a discharge as a basis for prohibiting publication of a finding of guilt or a summary of the sentence on the register. The question is then: does the *CRA* provision bind a college in terms of posting (or, rather, continuing to post) on the register a guilty finding and/or a sentence that involved a discharge?

Until very recently this was an open question and indeed the explicit language of section 6.1(1) suggested that only federal agencies were bound by the provisions. However, on March 12, 2019, the Ontario Court of Appeal held in *R. v. Montesano* that section 6.1(1) precludes the disclosure of a discharge record or the fact of a discharge to any person, noting that, "it is of no moment whether the

record remains in provincial record bases".[25] In that case, the issue on appeal was the disclosure and consideration of a discharge by a judge for sentencing purposes. The Ontario Court of Appeal confirmed a lower court's decision that it was an error to disclose the absolute discharge to the sentencing judge after the one-year period under the *CRA* without the minister's approval.

While the *Montesano* case is not related to (and does not consider) a college's posting requirements under the *Code* or the *Regulation*, the Court of Appeal's interpretation of section 6.1(1) creates a real tension for regulated health colleges. In this regard, bear in mind that the basis to refuse to post information under section 23(7) of the *Code* is **both** that the information is obsolete **and** no longer relevant to the member's suitability to practise. The fact that a court, after weighing the aggravating and mitigating circumstances of the offence and the offender, reached a conclusion that a discharge was appropriate for sentencing purposes is in no way determinative of whether or not the impugned conduct or the finding of guilt is not relevant to a member's suitability to practise. Put differently, even where a member receives a discharge in a criminal proceeding, the *Code* still requires a registrar to consider whether there are reasonable grounds to refuse to post under section 23(7) of the *Code*. The *Code* provision requires both parts of the test to be met.

This raises the question then of what is considered obsolete and/or no longer relevant to a member's suitability to practise. There are no cases in which a court has interpreted the word "obsolete" in this context.[26] However, the purging of a discharge record under section 6.1 of the *CRA* can (and should) be considered by registrars. Registrars will also want to turn their mind to other issues. For example, is the conduct at issue or the finding of guilt (as opposed to the sentence) relevant as prior history in the context of information that could be provided to an Inquiries, Complaints and Reports Committee under section 26(2) of the *Code*? Or, alternatively, might the conduct or the finding of guilt be relevant to a Discipline Committee for deciding an appropriate penalty for misconduct? In this regard, it is of note that although the Court of Appeal held in *Montesano* that the discharge could not be disclosed or relied on for sentencing, the Court still considered the prior incident itself (which was the subject of the discharge) in determining the appropriate sentence in the instant case.[27]

If *Montesano* applies, section 6.1(1) of the *CRA* prohibits a registrar from disclosing a discharge (that is, the summary of the sentence) on the register one year after an absolute discharge or three years after a conditional discharge. However, it would appear that section 23(2) of *Code* and the *Regulation* would still require a registrar to post a summary of the finding of guilt unless a registrar had reasonable grounds to believe it was obsolete **and** no longer relevant to the member's suitability to practise.[28] Query whether a member would want a finding of guilt posted on the register and not disclose the discharge/sentence but, perhaps, that is an issue for a court to address on another day.

As noted at the outset, these new requirements under the *Code* and the *Regulation* are minimum requirements and are intended to improve transparency – both with respect to members of the college and how a college regulates its members. While the provisions may give rise to challenges and difficult questions along the way, the privilege of professional self-regulation demands that the public interest is protected – an obligation that rests with the college and must be advanced in order to maintain the public's trust.

[1] https://www.weirfoulds.com/what-you-need-to-know-about-police-record-checks

[2] *Police Record Checks Reform Act, 2015*, S.O. 2015, c. 30.

[3] *Regulated Health Professions Act*, O. Reg. 261/18 (am.) ("*Regulations*"). Note: While the focus of this article is primarily on legislation applicable to regulatory health colleges in Ontario, other regulators in Ontario and in other Canadian jurisdictions have similar reporting and posting requirements.

[4] *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18 ("*RHPA*").

[5] *Health Professions Procedural Code*, Schedule 2 to the *Regulated Health Professions Act* ("*Code*").

[6] www.ola.org/en/legislative-business/house-documents/parliament-41/session-2/2017-03-27/hansard#para737

[7] *Code*, s. 85.6.4.

[8] *Code*, s. 85.6.1.

[9] *Code*, s. 23(2) and the *Regulation*, s. 1(1).

[10] *Regulation*, s. 1(1). Note: If the finding is under appeal, the college is also required to post a notation that it is under appeal until the appeal is finally disposed of.

[11] *Code*, s. 23(3).

[12] *Code*, ss. 23(6) and 23(7).

[13] While initially there was debate, the Supreme Court has confirmed that the legal standard of "reasonable and probable grounds" and "reasonable grounds to believe" are the same – for example, *Baron v. Canada*, [1993] 1 S.C.R. 416 at pp. 446-47 and *R. v. Loewen,* 2011 SCC 21 (CanLII) at para. 5.

[14] *R. v. Debot*, [1989] 2 SCR 1140, at p. 1166.

[15] *Hunter v. Southam Inc.*, [1984] 2 SCR 145, at p. 167.

[16] *Debot*, *supra* note 14.

[17] *Sazant v. College of Physicians and Surgeons of Ontario*, 2012 ONCA 727 at para. 124 (CanLII).

[18] *Beitel v. The College of Physicians and Surgeons*, 2013 ONSC 4658 at para. 26 (CanLII).

[19] *Abdul v. Ontario College of Pharmacists*, 2018 ONCA 699 at para. 16 (CanLII).

[20] *Regulation*, s. 1(2).

[21] *Criminal Records Act*, RSC 1985, c. C-47 ("*CRA*"), s. 3.

[22] *Ibid.* s. 2.3.

[23] *Criminal Code of Canada*, RSC 1985, c. C-46, s. 730(1).

[24] *CRA,* ss. 6.1, and 6.2.

[25] *R. v. Montesano*, 2019 ONCA 194, at paras. 9 and 11 ("*Montesano*") (https://www.canlii.org/en/on/onca/doc/2019/2019onca194/2019onca194.pdf).

[26] It is noted that, in other contexts, courts have interpreted the word “obsolete” using its plain and ordinary meaning.

[27] *Montesano, supra* note 25, at para. 27.

[28] *Code*, ss. 23(6) and 23(7).

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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