

## ***Tanase v College of Dental Hygienists of Ontario: Ontario Court of Appeal Reaffirms the Strict Rule Against Sexual Abuse by Healthcare Professionals***

On July 5, 2021, the Ontario Court of Appeal (“ONCA”) unanimously affirmed the “zero-tolerance” policy for sexual abuse by members of the regulated health professions of Ontario. In [Tanase v College of Dental Hygienists of Ontario, 2021 ONCA 482](#) (“*Tanase*”), the ONCA upheld the mandatory revocation provision in the *Health Professions Procedural Code* (“*Code*”) regarding sexual abuse, finding the provision does not violate section 7 or section 12 of the *Canadian Charter of Rights and Freedoms* (“*Charter*”).

The ONCA held that while revocation is a serious penalty, the Ontario Legislature has the constitutional right to instill a “bright-line” rule prohibiting sexual relationships of any kind between patients and regulated health professionals as a means of protecting the public, as it does not violate the *Charter*.

### ***Tanase v College of Dental Hygienists of Ontario***

In Ontario, members of regulated health professions are guilty of professional misconduct under subsection 51(1) of the *Code* if they are found to have “sexually abused” a patient and are subject to a mandatory revocation of their license to practise. “Sexual abuse” is defined in subsection 1(3) of the *Code* as “*sexual intercourse or other forms of physical sexual relations between the member and the patient.*” Until 2020, there were no exceptions from mandatory revocation for members who treated their spouse or partner with whom they were having a consensual sexual relationship.<sup>1</sup>

*Tanase* involved a dental hygienist, Mr. Tanase, who had treated his partner in 2015 while engaged in a consensual sexual relationship. Although Mr. Tanase had previously stopped treatment of his partner prior to 2015, Mr. Tanase relied on erroneous advice from a colleague that the rules of the *Code* had changed and that dental hygienists were permitted to treat their spouses as of 2015. Mr. Tanase relied on the advice and began treating his partner again in 2015.

In 2016, a separate dental hygienist filed a complaint with the College of Dental Hygienists of Ontario (“College”) regarding Mr. Tanase’s conduct. The matter was eventually referred to a Discipline Committee and, on June 19, 2018, Mr. Tanase’s registration was revoked pursuant to subsection 51(1) of the *Code*. The decision of the Discipline Committee was upheld by the Ontario Divisional Court. Mr. Tanase’s further appeal to the ONCA was dismissed.

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<sup>1</sup> In 2020, the Ontario Legislature introduced new provisions that provide an exception for members who treat their spouses or partners with whom they have been living in a conjugal relationship for over three years. The new provisions provide narrow exceptions from the mandatory revocation provision in the *Code* but were not engaged here as the conduct occurred prior to the amendments.

On appeal, the ONCA upheld the decision of the Divisional Court and Discipline Committee. Justice Huscroft, speaking for a unanimous Court, stated that the imposition of professional consequences as a result of a breach of section 51(1) does not engage the right to liberty or security of the person under section 7 of the *Charter* nor does it constitute treatment within the meaning of section 12, as it is neither excessive nor grossly disproportionate to the necessary consequences of professional misconduct.

### **A bright-line approach**

The ONCA confirmed that when drafting the *Code*, the Legislature sought to prohibit sexual relationships between regulated health practitioners and their patients entirely to ensure the public was protected from sexual abuse by health practitioners. The underlying purpose of the bright-line approach was to avoid any doubt or uncertainty amongst health practitioners by establishing a clear probation that is easy to follow and understand.

The ONCA relied on its previous decision in [Leering v College of Chiropractors of Ontario, 2010 ONCA 87](#), wherein the ONCA determined that the offence of sexual abuse is defined in the *Code* for the strict purpose of providing discipline in situations that involve a sexual relationship and a healthcare professional/patient. The bright-line approach is intended to limit the possibility of ambiguity, ensuring that once the above factual determinations have been made out, discipline becomes universal.

### **No right to practise a profession under sections 7 and 12 of the *Charter***

The ONCA rejected both of Mr. Tanase's arguments regarding the *Charter*, finding that the *Code*'s "zero-tolerance" scheme cannot engage section 7 or 12 of the *Charter* because there is no specific or implied right under the Constitution to practise a given profession.

The ONCA affirmed its previous decision in [Mussani v College of Physicians and Surgeons of Ontario \(2004\), 248 DLR \(4<sup>th</sup>\) 632 \(ONCA\)](#), wherein the ONCA found that security of the person under section 7 of the *Charter* was not engaged by the revocation of registration, regardless of the stress, anxiety, and stigma associated with disciplinary proceeding involving sexual abuse allegations. The ONCA concluded that there must be a serious and profound impact on a person's psychological integrity before the protection of section 7 can be engaged and that no such impact was found here.

### **Key takeaways**

The decision in *Tanase* once again confirms that mandatory revocation of a professional's license or registration for findings of sexual abuse does not engage section 7 or section 12 of the *Charter*, despite the serious nature of a revocation and the broad definition of 'sexual abuse'.

As in Ontario, many New Brunswick statutes governing healthcare professionals contain similar provisions regarding sexual abuse by registered members against their patients; provisions

that do not make exceptions for consensual sexual relationships. *Tanase* is a stark reminder for healthcare professionals practising in New Brunswick to be highly cognizant of maintaining the appropriate boundaries when it comes to relationships with their patients.

*Tanase* once again confirms that regulatory bodies and courts are likely to apply rules regarding sexual abuse by members of a regulatory body in a strict and definitive manner. The protection of the public is paramount and courts are willing to uphold this as a priority. Professionals must ensure they are aware of, and understand, the rules and regulations that govern their profession and frequently review amendments made to governing statutes on an ongoing basis.

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