COURT OF APPEAL FOR ONTARIO

CITATION: Hanif v. Ontario College of Pharmacists, 2015 ONCA 640
DATE: 20150921
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Laskin, MacPherson and MacFarland JJ.A.

BETWEEN

Mohamed Imran Hanif

Applicant (Appellant)

and

Ontario College of Pharmacists and Her Majesty the Queen in right of Ontario

Respondents (Respondents)

Neil Abramson and Lindsay Kantor, for the appellant

Josh Hunter, for the respondent Her Majesty the Queen in right of Ontario

Aaron Dantowitz, for the respondent Ontario College of Pharmacists

Heard: September 17, 2015

On appeal from the order of Justice Graeme Mew of the Superior Court of Justice, dated November 21, 2014.

By the Court:

[1] The appellant Mohamed Hanif is a pharmacist. He was involved in a consensual sexual relationship with a patient. Sexual activity between a health professional and a patient constitutes sexual abuse under the *Health Professions Procedural Code* ("*Code*"). A finding of sexual abuse results in a mandatory

revocation of the health professional's certificate of registration: see s. 51(2) and (5) of the *Code*, being Schedule 2 of the *Regulated Health Professions Act*, 1991, S.O. 1991, c. 18.

[2] The appellant challenged the constitutional validity of the mandatory revocation provisions of the *Code*. He did so on distribution of powers (federalism) grounds, not under the *Charter*. He claimed that the Code intruded into federal jurisdiction over the criminal law under s. 91(27) of the *Constitution Act, 1867*.

[3] In a decision dated November 21, 2014, with reasons reported at 2014 ONSC 6613, Mew J. of the Superior Court of Justice dismissed the appellant's application. He said:

> The imposition of mandatory licence revocation in certain cases of sexual abuse may well be seen by some as too blunt an instrument to address the undoubted harm caused by health care professionals who have sexual relations with a patient, but that does not render the impugned provisions of the *Code* criminal law.
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> These provisions are, in pith and substance, concerned with regulating health professions under section 92(13) of the *Constitution Act, 1867*.

[4] The appellant appeals this decision. At the conclusion of the appellant's oral argument, the panel did not call on the respondents Her Majesty the Queen in Right of Ontario ("Ontario") or Ontario College of Pharmacists. The panel

indicated that the appeal would be dismissed with brief reasons to follow. These are those reasons.

[5] We begin with a preliminary point. The respondent Ontario brought a motion relating to the proper route for getting this appeal to this court. The three parties disagreed on the route. However, they all agreed that this court could hear the appeal. In light of that agreement, and because of the clear importance of the issue raised by the appeal, the panel suggested that the merits of the appeal be addressed. The parties agreed. We observe, however, that the jurisdictional issue raised by Ontario may arise in the future.

[6] The application judge accepted the correct analytical approach for addressing a distribution of powers question. He started with a 'pith and substance analysis' of the challenged legislation:

> When the validity of legislation is challenged on federalism grounds, the starting point is to analyse the "pith and substance" or dominant purpose of those provisions: *Canadian Western Bank v. Alberta* … 2007 SCC 22 at para. 25. What are the most important characteristics of these provisions? What do they do? What are they about? What is their leading feature?

[7] The application judge then proceeded, again correctly, to consider both the purpose and effects of the *Code*: see *Reference re Firearms Act*, 2000 SCC 31 at para. 16.

[8] The application judge summarized his description of the purpose of the *Code* in this fashion:

> The mandatory revocation provisions are concerned with the sexual abuse of patients by professionals. They prohibit sexual activity in an effort to prevent sexual abuse. They make sexual acts inconsistent with a professional-patient relationship.
>
> …
>
> [I]t is abundantly clear that the purpose of the mandatory revocation provisions of the *Code* is the protection of the public by the imposition of clear and unequivocal standards of professional behaviour.

[9] The appellant does not challenge the 'purpose' component of the application judge's reasons.

[10] The application judge then turned to an analysis of the effects of the *Code*. He said:

> The legal effects of the mandatory revocation provisions mirror the purpose of the provisions.
>
> …
>
> The provisions identify a type of prohibited conduct for which one's licence to practice will be revoked. Although the personal effect of losing one's licence can be significant for an individual and his or her family, these personal effects are not the focus of the pith and substance analysis. At this stage, we are chiefly concerned with effects in the sense of "how the statute changes the rights and liabilities of those who are subject to it" (Peter Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Thomson Carswell, 2007) at 442.

> The imposition of a condign sanction for what is now recognised as one of the most serious manifestations of professional misconduct is not inconsistent with the regulation of health care professionals. All professions impose the right to terminate the privileges of a licensee in appropriate circumstances.

[11] The appellant contests the application judge's effects analysis. He says that it is too narrow. He submits that the effect of the mandatory revocation of a professional licence not only terminates a person's livelihood (in itself, a very serious consequence); it also carries with it – because of its tie to sexual abuse – a substantial stigma. The professional is in effect branded in the public eye as a sexual abuser. This stigma, says the appellant, makes the *Code* cross over the line from permissible regulation of a profession into impermissible regulation of morality in the context of consensual sexual relations. Once this line is crossed, the *Code* leaves the safe provincial harbour of s. 92(13) and intrudes into one of the core components of federal criminal law under s. 91(27) of the *Constitution Act, 1867* – morality.

[12] We do not accept this submission, essentially for three reasons.

[13] First, the impugned *Code* provisions do not have the effect of regulating morality. The intended, and in fact overwhelming, effect of the provisions is to protect the public. Legislation that declares that any sexual activity, even consensual, between a health professional and a patient is inconsistent with the professional-patient relationship does not make a statement about morality;

rather it speaks to the maintenance of the integrity of the professional-patient relationship.

[14] Second, the *Code* provisions do not have the effect of criminalizing activities that fall outside the delivery of health services. They do not have the effect of importing notions of sexual morality on consenting adults. Rather, they require a health professional to make a simple choice: treat the patient or sever the professional-patient relationship and engage in a sexual relationship. Treating a patient while involved in a sexual relationship undermines the integrity of the professional-patient relationship.

[15] Third, all offences – federal, provincial, criminal, regulatory – involve a degree of stigma. If you break the law, you may lose respect in the public eye. When the appellant says that a contravention of the *Code* in the domain of sexual activity between health professionals and patients can lead to both loss of livelihood and social stigma, he is right. But to say that this combination removes the law from regulation of the health professions and places it in criminal law is a bridge too far. Breach of a provincial law can in some cases bring with it a potential social stigma in the public eye.

[16] In the end, the mandatory revocation provisions of the *Code* are, as the application judge found, in pith and substance the regulation of health care professionals, not criminal law. The fact that Parliament might be able to

criminalize much of the same behaviour is irrelevant. Under the aspect or double aspect doctrine, both levels of government can regulate different aspects of the same activity under their respective heads of power: *Canadian Western*, *supra*, at para. 30. Here, the impugned *Code* provisions rest comfortably inside s. 92(13) of the *Constitution Act, 1867* and there is no duelling federal law to consider.

[17] The appeal is dismissed. No costs.

"John Laskin J.A."
"J.C. MacPherson J.A."
"J. MacFarland J.A."