COURT OF APPEAL FOR ONTARIO

CITATION: Covant v. College of Veterinarians of Ontario, 2023 ONCA 564
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Benotto, Trotter and Zarnett JJ.A.

BETWEEN

Dr. Howard Covant

Appellant

and

College of Veterinarians of Ontario

Respondent

Lorne Honickman and Laura Brown, for the appellant

Bernard LeBlanc and Anastasia-Maria Hountalas, for the respondent

Heard: March 21, 2023

On appeal from the order of the Divisional Court (Justices George W. King, L. Favreau and Sandra Nishikawa), dated December 16, 2021 with reasons reported at 2021 ONSC 8193, affirming a decision of the Discipline Committee of the College of Veterinarians of Ontario, dated July 6, 2020.

Trotter J.A.:

A. INTRODUCTION

[1] Dr. Covant is a veterinarian who is licensed to practice in Ontario. He is the owner and operator of Bayview Seven Animal Hospital ("BSAH"). A panel of the Discipline Committee ("the Committee") of the College of Veterinarians of Ontario ("the College") found that Dr. Covant engaged in professional misconduct by re-

selling large quantities of veterinary drugs to human pharmacies, contrary to a newly amended regulation. The Committee imposed a one-month suspension from practice, along with other sanctions and costs. Both dispositions were upheld by the Divisional Court. Dr. Covant obtained leave to appeal to this court on June 28, 2022.

[2] Dr. Covant raises three main grounds of appeal: (1) the Divisional Court erred in failing to find that the impugned section of the regulation is unconstitutionally vague and/or overbroad; (2) the Divisional Court erred in upholding the Committee's finding that Dr. Covant engaged in professional misconduct; and (3) the penalty imposed by the Committee, which was upheld by the Divisional Court, was unreasonable.

[3] I would dismiss each ground of appeal.

B. BACKGROUND

[4] Dispensing drugs is a common aspect of veterinary practice. It is strictly regulated by "Part III – Drugs", of R.R.O. 1990, Reg. 1093 ("the Regulation"), passed under the *Veterinarians Act*, R.S.O., c. V.3. ("the Act").

[5] Typically, veterinarians obtain drugs from manufacturers or wholesalers and then dispense them directly to their patients, through their owners. The Regulation provides detailed requirements for prescribing drugs, with stringent record-keeping

obligations. The general rule is that veterinarians may only administer and dispense drugs for their own patients: see s. 33(1)(a) of the Regulation.

[6] This case engages an exception. A veterinarian in Ontario may re-sell veterinary drugs to another veterinarian or to a human pharmacy. Previously, the Regulation placed no restrictions on these re-sales. At that time, s. 33(2)(d) of the Regulation read:

> No member shall, […]
>
> (d) knowingly dispense a drug for resale except to another member or a pharmacist.

[7] On November 24, 2015, s. 33(2)(d) was amended by O.Reg. 233/15, s. 23(3). Section 33(2)(d) now provides:

> No member shall,
>
> (d) knowingly dispense a drug for resale except where the drug is dispensed to another member or a pharmacist <u>in reasonably limited quantities in order to address a temporary shortage experienced by that other member or pharmacist</u>. [Emphasis added.]

[8] Dr. Covant was found to have infringed this section by purchasing large quantities of veterinary drugs from manufacturers and a distributor, and then re-selling them to human pharmacies, subject to a 5% “handling fee.” The Committee found that the drugs re-sold by Dr. Covant were not in “reasonably limited quantities”, nor were they re-sold to address a “temporary shortage experienced by” those pharmacies. The Divisional Court agreed.

C. PROCEEDINGS AND EVIDENCE BEFORE THE DISCIPLINE COMMITTEE

(1) Introduction

[9] The proceedings before the Committee were protracted. Dr. Covant advanced various pre-hearing claims for relief, all of which were unsuccessful. The only one that is pursued on this appeal stems from a motion to strike down s. 33(2)(d) of the Regulation on the basis that the process leading up to the passing of the amendment was invalid, insufficient notice of the amendment was provided to members of the College, and that the amended provision is *ultra vires*, vague, and overbroad.

[10] A panel of the Committee dismissed this motion ("the Constitutional Ruling"), and it was upheld by the Divisional Court. A differently-constituted panel found that Dr. Covant committed professional misconduct and imposed disciplinary sanctions.

[11] I will set out the evidence led before the Committee and then address the reasoning of both the Committee and the Divisional Court in the discussion of each issue raised on appeal.

(2) Summary of the Evidence

[12] At the Committee hearing on the merits, a number of witnesses called by the College gave evidence concerning Dr. Covant's purchasing and selling of

veterinary products. Dr. Covant did not testify, nor did he adduce evidence at the merits hearing.

[13] The College called the evidence of witnesses from companies who sold veterinary drugs to Dr. Covant, and from witnesses to whom he sold those drugs.

[14] Veterinary Purchase Co. (“VP”) supplies veterinarians with various products. Its CEO Rick Culbert testified that, in 2016, BSAH purchased significant quantities of specific products, including far more Advantage II and Caninsulin than any other clinic in Ontario and Quebec. In an email exchange between Mr. Culbert and the Dr. Covant, between November 21, 2016 and January 2, 2017, Mr. Culbert accused Dr. Covant of sub-distributing various products, contrary to Health Canada regulations and the Act.

[15] Dr. Covant did not deny the allegation. In an email written on December 29, 2016, he wrote to Mr. Culbert that, “The Bayview Seven Animal Hospital will not sub-distribute products purchased from [VP], except for sales directly to other duly licensed Veterinary Clinics or on the isolated/occasional request by a licensed Pharmacist; as permitted by CVO by-laws.” This assurance was unsatisfactory to Mr. Culbert, who sought and then received a more categorical undertaking from Dr. Covant concerning future sales.

[16] Nathan Williams, a sales representative of Bayer Inc., Animal Product Division, testified that Bayer sold veterinary drugs to BSAH. BSAH agreed to install

Bayer's tracking software on its computer system in order to allow Bayer to keep track of its sales, so that Bayer could be in a better position to offer the clinic other products consistent with their sales patterns. Mr. Williams came to believe that, between April 2016 and January 2017, BSAH may have been re-selling Bayer Products. Mr. Williams had discussions with BSAH staff about the propriety of re-selling animal products to pharmacies.

[17] Dr. Tamara Hofstede, a veterinarian employed by Bayer, testified that Bayer does not sell animal products directly to pharmacies because it is unable to keep track of where its products end up. Nonetheless, Bayer ended up making a complaint to the College based on a complaint made by an end-use purchaser, whose product had originally been purchased from Bayer by BSAH. Dr. Hofstede also testified to the comparatively large amount of product purchased by BSAH.

[18] A helpful window into the operations of BSAH came from one of its former employees, Vanessa Bastos. Ms. Bastos is a veterinary technician who also worked as the office manager at BSAH. She described the re-selling operation in the following straightforward terms:

> We would receive an order in the morning, we would place the order – or the receptionist would place the order through Veterinary Purchasing for Canada Chemists or Pet Pharm. The order would come in the next day, it would be sorted and then somebody would come and pick it up.

[19] Ms. Bastos testified that, when placing their orders, the pharmacists did not indicate where the products were going, nor did they mention anything about temporary shortages.

[20] Around April 2016, Ms. Bastos asked Dr. Covant whether this was illegal activity. He responded that it was merely “frowned upon.”

[21] I rely upon the following summary of Mr. Bastos’ evidence that was accepted by the Committee:

> Ms. Bastos stated that BSAH sold animal drugs to pharmacies on a regular basis. She stated these pharmacies included Canada Chemists, PetPharm and Glen Shields Pharmacy. She explained the pharmacies would place drug orders to BSAH; orders would then be placed to the pharmaceutical drug wholesalers (like VP). BSAH shared a list of available drug product to the pharmacists. Orders received by BSAH, would be ordered from the wholesaler the same day. The product would then be received by the clinic the next day. Staff at the clinic would check each order and repackage it for the pharmacy. Pharmacy staff would pick up the drug orders at BSAH.
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> …
>
> Ms. Bastos recalled discussing the resale of animal drugs to pharmacies with Mr. Williams, of Bayer. He explained to her that the practice may be in contravention of the College rules. Ms. Bastos testified that she asked Dr. Covant about whether they were allowed to resale to pharmacies. Dr. Covant told Ms. Bastos that this was a “grey area”.
>
> Ms. Bastos confirmed that the sales made to the pharmacies were not connected to any particular patient or client. The clinic did not keep track of who the

> pharmacist was distributing the products to and therefore had no mechanism for ensuring or even tracking whether the products were being sold or used appropriately.

[22] The Committee also heard the evidence of two pharmacists. Wendy Chui, of Canada Chemists, testified that BSAH supplied veterinary products to her pharmacy. She testified that pharmaceutical companies refuse to sell animal products directly to retail pharmacies. Again, I include an excerpt from the Committee's summary of this evidence:

> Ms. Chui explained that she would be unable to provide her customers with animal drug products if not for Dr. Covant and other veterinarians willing to re-sell the products. She described herself as being in a "permanent" temporary shortage of the necessary products.

[23] Similarly, David Bedggood, a licenced pharmacist and a former owner of Glen Shields Pharmacy, confirmed that pharmaceutical companies and wholesalers do not sell veterinary drugs directly to human pharmacies. He wrote to the College on August 22, 2017 to describe his business relationship with Dr. Covant, which began in 2016. In his letter, David Beggood describes how Glen Shields Pharmacy purchased veterinary drugs from Dr. Covant to provide to patients through the pharmacy.

D. ISSUES

[24] The issues on appeal are:

1. Did the Divisional Court err in failing to find that s. 32(2)(d) is unconstitutionally vague and/or overbroad?
2. Did the Divisional Court err in upholding the Committee's finding that Dr. Covant engaged in professional misconduct?
3. Did the Divisional Court err in upholding the penalty imposed by the Committee?

[25] At the outset, I note the standards of review for each ground of appeal: correctness on the constitutional question, and palpable and overriding error on the question of mixed fact and law raised in the second ground: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1, at para. 37.

[26] The standard of review for the penalty imposed by the Committee is that of being clearly unreasonable, demonstrably unfit, or representing a substantial and marked departure: see *College of Physicians and Surgeons of Ontario v. Peirovy*, 2018 ONCA 420, 143 O.R. (3d) 596, at paras. 56-57; *Mitelman v. College of Veterinarians of Ontario*, 2020 ONSC 6171 (Div. Ct.), at para. 41.

E. ANALYSIS

(1) Section 32(2)(d) of the Regulation is Not Invalid

(a) The Discipline Committee

[27] As noted above, Dr. Covant brought a pre-hearing motion in which he challenged the constitutionality of s. 33(2)(d) of the Regulation. The motion was wide-ranging – it asserted that the amended regulation was not properly enacted, it was *ultra vires* the College, it was "overly broad and vague", it constituted an improper restraint on trade, and it impaired public access to pet medications. The motion was dismissed in its entirety. The only part of this motion that survives on appeal is the submission that s. 33(2)(d) is void for vagueness and overbroad.

[28] The Committee addressed the argument that s. 33(2)(d) is "overly broad or vague" in the context of Dr. Covant's *ultra vires* argument. Applying *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 65, [2013] 3 S.C.R. 810, the Committee found that the amendment was "entirely consistent with the College's authority to enact regulations regarding the sale and use of prescription drugs by its members." Turning to the vagueness and overbreadth submissions, the Committee wrote the following in its Constitutional Ruling:

> The [Committee] is also satisfied that section 33(2) is not overly broad or vague. The fact that no specific quantum is included in the Regulation does not invalidate it. Many laws need to be interpreted in context, including this Regulation. Whether a member engages in re-selling contrary to section 33(2) will depend on the particular

> circumstances. There can be no suggestion that the language in section 33(2) is unclear or unfairly captures a broad range of activities that should not be prohibited.

[29] For these reasons, the Committee dismissed the motion.

(b) The Divisional Court

[30] The Divisional Court held that the Committee did not err in finding that the expressions in issue – "reasonably limited quantities" and "temporary shortage" – are not impermissibly vague. It observed that the amendment did not need to stipulate a specific quantity of drugs to be re-sold because the application of s. 33(2)(d) will depend on individual circumstances. Writing for the court, Nishikawa J. held, at para. 33:

> The terms are capable of coherent interpretation based on their common usage and context. 'Temporary' means for a limited period of time, as opposed to permanently or on an ongoing basis. Based on the context, 'reasonably limited quantities' would mean quantities proportionate to the temporary shortage.

[31] The Divisional Court also observed that, "under no circumstances could the significant quantities sold by Dr. Covant be considered 'reasonably limited'": para. 32.

[32] Finally, the Divisional Court agreed that s. 33(2)(d) is not overbroad. It found that the amendment is sufficiently specific and addressed the risk of veterinarians engaging in the purchase and sale of drugs for purposes other than to ensure that

a substance required by patients is legitimately available through a pharmacy or another veterinarian.

(c) Discussion

[33] Dr. Covant submits that the Divisional Court erred in applying the doctrines of vagueness and overbreadth. During the hearing, the juristic basis of Dr. Covant's claims was explored.

[34] In written materials before the Committee and the Divisional Court, and in oral submissions before this court, the submissions made on Dr. Covant's behalf were grounded in the application of s. 7 of the *Charter*. However, the protection of s. 7 of the *Charter* is not triggered unless there is a deprivation of "life, liberty, or security of the person." Only then may a person claim the protections of the "principles of fundamental justice", as defined in the jurisprudence.

[35] Generally speaking, s. 7 does not protect economic interests. In particular, "section 7 does not protect the right to practise a particular profession": see Hamish Stewart, *Fundamental Justice*, 2nd ed. (Toronto: Irwin Law, 2019), at p. 107. This was the holding of this court in *Mussani v. College of Physicians and Surgeons of Ontario* (2004), 74 O.R. (3d) 1, a case involving the mandatory revocation of a licence to practice medicine as result of the "sexual abuse" of a patient, as defined under s. 51(5) of the *Health Professions Procedural Code*, being Schedule 2 to the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18.

[36] Mussani challenged the validity of this provision under ss. 2(d), 7, and 12 of the *Charter*. Addressing the general scope of *Charter* protection, Blair J.A. said, at paras. 41 and 43:

> The weight of authority is that there is no constitutional right to practise a profession unfettered by the applicable rules and standards which regulate that profession…[Citations omitted.]
>
> . . .
>
> I am satisfied, therefore, that there is no constitutionally protected right to practise a profession, and that the mandatory revocation of a health professional's certificate of registration in substance infringes an economic interest of the sort that is not protected by the *Charter*.

[37] More specifically, Blair J.A. held that professional disciplinary proceedings do not trigger the "security of the person" or "liberty" arms of s. 7: at paras. 49-60. On an alternative basis, Blair J.A. considered the submissions of the parties on vagueness and overbreadth, finding that the impugned provision did not violate either principle of fundamental justice: at paras. 61-85.

[38] The holding in *Mussani*, and in the related case of *Leering v. College of Chiropractors of Ontario*, 2010 ONCA 87, 98 O.R. (3d) 561 (C.A.), were challenged in *Tanase v. College of Dental Hygienists of Ontario*, 2021 ONCA 482, 156 O.R. (3d) 675, leave to appeal refused, [2021] S.C.C.A. No. 350. This court upheld both decisions. Huscroft J.A. wrote for a five-judge panel: "[p]rofessional discipline is stressful, to be sure, but it does not give rise to constitutional protection on that

account": at para. 44. The court held that neither professional disciplinary proceedings, nor the sanctions that may flow from them, engage the right to liberty or security of the person in s. 7: *Tanase*, at para. 42. See also *Shaulov v. Law Society of Ontario*, 2023 ONCA 95, 481 D.L.R. (4th) 283, at para. 12.

[39] The applicability of s. 7 *Charter*, and this court's holding in *Tanase* (and related cases), were not addressed by either party in their written submissions. Nor was *Tanase* considered by the Divisional Court. Consequently, following the hearing, the parties were invited to make written submissions on the applicability of *Tanase* in the context of this case.

[40] Even though the practice of veterinary medicine is not governed by the *Regulated Health Professions Act* (Schedule 1 – Self Governing Health Professions), both parties accept that the principles in *Tanase* apply in the context of veterinary medicine, which is a regulated public interest profession in Ontario.

[41] In his supplementary submissions, Dr. Covant clarified that his overbreadth and void for vagueness claims are no longer predicated on a breach of s. 7 of the *Charter*; instead, he submits that his claims are grounded in the rule of law, a precursor to the doctrines that evolved under s. 7 of the *Charter*: *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, at p. 210. Further, Dr. Covant relies on vagueness and overbreadth as interpretative tools in relation to the enforcement of municipal by-laws, and other subordinate legislation,

including s. 33(d) of the General Regulation. See, for example, *Clublink v. Town of Oakville*, 2018 ONSC 7395, 143 O.R. (3d) 738, at paras. 74-75 and *Wainfleet Wind Energy Inc. v. Wainfleet (Township)*, 2013 ONSC 2194, 115 O.R. (3d) 64, at para. 31, both addressing alleged vagueness and uncertainty of by-laws.

[42] Acknowledging the authority of *Tanase* in this context, the College submits that "administrative legislation should generally be interpreted and applied in a manner consistent with the rule of law and basic constitutional values," and that Dr. Covant is "not precluded from arguing that the regulation in question should not be enforced on the basis of 'overbreadth' and 'vagueness' on the basis that a regulatory regime should comply with the rule of law."

[43] It is not necessary to definitively resolve the juristic footing of Dr. Covant's submissions on this point in order to dispose of this ground of appeal. Whether rooted in the *Charter* or in more general rule of law considerations, I agree with the findings of the Committee and the Divisional Court that s. 33(2)(d) of the Regulation is not impermissibly vague, nor is it overbroad.

[44] In *R. v. Nova Scotia Pharmaceutical Society,* [1992] 2 S.C.R. 606, Gonthier J.A. wrote: "[t]he doctrine of vagueness can therefore be summed up in this proposition: a law will be unconstitutionally vague if it so lacks precision as not to give sufficient guidance for legal debate": at p. 643; see also *Wakeling v. United States of America*, 2014 SCC 72, [2014] 3 S.C.R. 549, at para. 62. Building on this

analysis in *Mussani*, Blair J.A. wrote that, “unconstitutional vagueness stems from language that is so imprecise neither the individual concerned nor the agency enforcing the provision can determine whether the conduct in question is prohibited or not”: at para. 63.

[45] Section 33(2)(d) does not run afoul of this standard. The two phrases under attack – “in reasonable quantities” as a result of a “temporary shortage” – provide permissible room for legal debate. The fact that a regulation requires interpretation in the context of a specific factual matrix does not suffice for a finding of vagueness. Here, the impugned phrases are complementary – they inform the content of each other, and in so doing, achieve an acceptable level of clarity. I agree with the observation that, “[b]ased on the context, ‘reasonably limited quantities’ would mean quantities proportionate to the temporary shortage”: at para. 33 of the Divisional Court reasons.

[46] I would dismiss this ground of appeal.

[47] The question of overbreadth is even more straightforward. Returning to *Mussani*, the question is whether the means chosen by the legislator are “unnecessarily broad, going beyond what is needed to accomplish the governmental objective”: at para. 69, citing *R. v. Heywood*, [1994] 3 S.C.R. 761. The rationale provided for the amendment by the College’s Council was “to mitigate the risk of veterinarians engaging in the purchase and sale of drugs for

purposes other than to ensure a substance required by patients is legitimately available via a pharmacy or another member." In my view, the Divisional Court reached the correct conclusion on this issue.

[48] Dr. Covant submits that there was no evidence before the Committee that his conduct created harm to the public and, for this reason, s. 33(2)(d) overshoots the mark. There are two problems with this submission. First, the College is not required to wait for harm to materialize before taking action. Instead, the College is entitled to regulate its members to mitigate risk. Second, this submission amounts to a challenge to the wisdom of the amendment to s. 33(2)(d). Indeed, this was a recurrent theme in a number of Dr. Covant's submissions. That Dr. Covant does not agree with the Regulation is of no concern to the College, nor to the courts.

[49] Dr. Covant further submits that s. 33(2)(d) is overbroad because, as a result of pharmaceutical companies refusing to supply drugs to human pharmacies, the provision is in effect a categorical prohibition on the re-sale of drugs to pharmacies. I would reject this submission. The College has no control over the sales and marketing strategies of private pharmaceutical entities, something that may or may not shift over time. While pharmaceutical companies may refuse to supply human pharmacies with certain drugs, this does nothing to demonstrate that the impugned section of the Regulation captures conduct beyond what is required to achieve the College's objective. Section 33(2)(d) is sufficiently tailored to its objective of

mitigating the risk of re-sale of drugs for certain purposes, regardless of how this may impact pharmacies' inventories.

[50] Lastly, Dr. Covant's conduct did not amount to anything close to being a borderline case. He was engaged in an ongoing sub-distribution enterprise, whereby staff would place orders one day, receive them the next, repackage the products, then wait for them to be picked up by the purchasing pharmacists, who paid a handling fee.

[51] I would dismiss this ground of appeal.

(2) Dr. Covant's Misconduct Was Properly Established

[52] Dr. Covant submits that the Committee and the Divisional Court erred in a number of ways when considering the merits of the case against him. He submits that they misconstrued the elements of s. 33(2)(d), in addition to misapprehending some of the evidence adduced by the College, while ignoring other evidence that supported his position that his conduct did not infringe s. 33(2)(d).

[53] As discussed in more detail below, I would reject these submissions, which are an attempt to relitigate factual issues that were decided by the Committee in the merits decision. Moreover, Dr. Covant's submissions under this heading amount to another attempt to challenge the wisdom of s. 33(2)(d), something that neither the Divisional Court, nor this court, is entitled to consider.

(a) The Discipline Committee

The Majority

[54] The majority relied upon the "uncontroverted evidence" of the pharmacists that Dr. Covant purchased animal drugs and resold them to human pharmacies "at a significant volume." Based on the evidence of Ms. Bastos, and other documentary evidence, the majority found that this was done on a regular basis.

[55] The majority relied upon the evidence of the pharmacists who testified that they turned to Dr. Covant because they were unable to purchase animal products directly from pharmaceutical companies or other wholesalers. As the majority said: "[t]hey did not testify that their purchases were to fill a temporary shortage." As Ms. Chui explained, she used Dr. Covant to address a "permanent temporary shortage." Moreover, the majority found that the sales were not made in "reasonably limited quantities"; it found that the sales were not limited, were occurring regularly, and were "quite significant."

[56] The majority ultimately made the following findings:

> The term "temporary" expresses that something not be lasting or is intended to last or be used only for a short time and not be permanent. The pharmacists testified that they had an on-going business relationship with the Member and his clinic to be supplied with certain animal drugs and they had no plans to cease this relationship.
>
> The testimony heard does not support that there was a "temporary shortage" experienced by the pharmacists. The pharmacists had an ongoing and permanent inability

> to purchase animal drugs through the regular veterinary supply chain. Dr. Covant provided them with a permanent solution to an ongoing issue.

The Dissent

[57] The dissenting member of the Committee observed that there was no evidence that the drugs were sold in large quantities in single transactions and that, cumulatively, the evidence shows that large quantities of drugs were resold over a period of time. The dissenting member also found that there was no evidence that any animal was ever put at risk as a result of Dr. Covant's conduct. Similarly, there was no evidence that he was attempting to hide his activities. The dissenting member was not satisfied that there was any evidence of what constitutes a "temporary shortage", or what amounts to a "reasonably limited" quantity.

[58] Another theme of the dissenting member's reasons is that it is "the experience of the pharmacist who must be the guide here. The College does not regulate the activities of pharmacists, who are part of another professional college. The regulation clearly relies on the experience of the pharmacists and so does this case."

(b) The Divisional Court

[59] The Divisional Court found that the Committee made no palpable and overriding error in finding that Dr. Covant breached s. 33(2)(d) and engaged in

professional misconduct. The Divisional Court found there was “ample evidence” to conclude that s. 33(2)(d) was infringed, including evidence of purchases made by Dr. Covant from his suppliers, and of his sales to pharmacies: paras. 57-58.

[60] The Divisional Court also pointed to the evidence of Ms. Bastos, who explained the internal operations of BSAH and reported Dr. Covant’s comment about operating in a “grey area”: para. 59. The Divisional Court found that the evidence supported the Committee’s conclusion that pharmacies were unable to obtain animal drugs from other sources and that there was no evidence of a temporary shortage; the drugs were simply not otherwise available: paras. 60-62.

(c) Discussion

[61] Dr. Covant submits that the Committee, endorsed by the Divisional Court, erred in considering Dr. Covant’s conduct in general, instead of deciding whether each re-sale to a pharmacy infringed the s. 33(2)(d). I would not give effect to this submission. The allegations against Dr. Covant concerned a course of conduct, involving many similar transactions. The College was not required to prove that any single re-sale amounted to an infringement of s. 33(2)(d).

[62] The evidence was clear, especially from Ms. Bastos, that BSAH was not responding to temporary shortages of drugs; they filled orders without requiring an explanation. And in any event, Ms. Chui testified that she ordered pharmaceutical products to a keep a supply for future demand. In short, the evidence proved in a

clear and convincing manner that the drugs were resold without regard to the requirement of a temporary shortage.

[63] Dr. Covant submits that the case against him could not be proved in the absence of expert evidence showing what amounted to a “reasonable quantity” and a “temporary shortage.” I do not accept this submission. As the Committee found, these are concepts that are capable of evaluation on a common sense basis. I see no error in how the Committee approached this issue, nor in the manner that the Divisional Court addressed it.

[64] Dr. Covant points to what he loosely characterizes as a disconnect between the stated purposes of s. 33(2)(d) and the concern expressed by the pharmaceutical companies when it came to the re-sale of their products. The evidence before the Committee revealed that the companies were not really concerned with the quantities that were re-sold; instead, they objected to any re-sales at all because this activity hampered their ability to trace their products to end-users, and thereby compromised quality control.

[65] That the manufacturers and distributors of veterinary products had different priorities than the College is of no import for the purposes of this appeal. The value in the evidence from representatives of these entities was in detailing the volume of drugs sold to Dr. Covant. Combined with the evidence of Ms. Bastos and the

pharmacists, it amounted to an overwhelming case against Dr. Covant that he was infringing the Regulation by engaging in a sub-distribution business.

[66] The reality of the situation is that the pharmacies with whom Dr. Covant did business never experienced a “temporary shortage.” This is because manufacturers and distributors of veterinary products never sold to pharmacies in the first place. Thus, there was never a supply chain interruption amounting to a “temporary shortage” that would have justified Dr. Covant’s intervention. The pharmacies’ arrangements with Dr. Covant amounted to an end-run around the decisions taken by pharmaceutical companies not to sell animal medicines to human pharmacies. That this may have been blameless behaviour on the part of the participating pharmacists is of no moment; it was behaviour that s. 33(2)(d) forbade Dr. Covant from engaging in.

[67] Lastly, Dr. Covant submits that the Committee and the Divisional Court ignored the fact that the College was required to prove that he “knowingly” infringed s. 33(2)(d). This was not a serious issue at the merits hearing. The evidence adduced established that Dr. Covant was aware of the regulatory amendment to s. 33(2)(d). It also proved that he had been warned about his conduct but persisted in his sub-distribution enterprise.

[68] I would dismiss this ground of appeal.

(3) The Sanction Imposed Was Not Unfit

(a) The Discipline Committee

[69] At the penalty hearing, the College sought a public reprimand, a 12-month licence suspension, a post-suspension inspection of Dr. Covant's practice, a requirement that Dr. Covant complete an ethics course, and a costs award.

[70] Dr. Covant submitted that there should be no penalty at all, relying on the fact that the provision he was found to have infringed was open to interpretation, and that no harm had been caused to any animal. At the time, Dr. Covant had been practicing for 30 years, with no disciplinary history.

[71] The Committee held that Dr. Covant showed "little regard to abide by the revised Regulation." Moreover, although Dr. Covant brought a motion before the Committee contesting the sufficiency of notice to the profession concerning the amendment, there was no evidence that he was unaware of the regulatory changes; indeed, the evidence suggested that Dr. Covant was well aware of the amendment. He had been warned by others that his drug re-selling activities were improper. He told Ms. Bastos that he considered it to be a "grey area."

[72] The Committee acknowledged that there was no evidence of public harm. However, the Committee put this in perspective:

> The College has a right to make regulations and enforce them, and the [Committee] finds that its penalty will make clear to other members of the College and to the public

> that members must follow the College's rules. Following the College's rules and regulations is a basic requirement of membership. It ensures [accountability] and provides the public with confidence that the profession can and should be self-regulated. As a result, failure by the member to abide by the regulation requires a penalty be imposed in order to ensure that the public interest is protected and the public's confidence in the ability of the profession to self-regulate is maintained.

[73] The Committee stopped far short of imposing the penalty requested by the College, finding it to be "too severe." Instead, it ordered a public reprimand, a one-month suspension, a requirement that Dr. Covant complete an ethics course, and a post-suspension inspection.

[74] The College also sought an order that Dr. Covant pay $188,470.24 in costs, which represented roughly two-thirds of the College's actual legal and hearing costs. However, the Committee ordered Dr. Covant to pay one-third, amounting to $94,235.12. It rejected the submission that the apparent novel nature of the case should preclude an order of costs. The Committee wrote:

> The [Committee] finds that both the College and the Member, extended the hearing longer than necessary. All the motions the Member brought forth were unsuccessful. The College witnesses were unhelpful during the constitutional phase of the hearing. The College proved the majority of all of the allegations against the Member, but not all. For these reasons the [Committee] determined that an order requiring the Member to pay approximately one-third of the College's costs, rather than the two-thirds sought by the College was appropriate. The order is a recognition of the Member's role in the process, while also acknowledging

> that the protracted nature of the proceedings was as a result of both parties.

(b) The Divisional Court

[75] The Divisional Court dismissed the appeal from the penalty imposed. Taking the required deferential approach to the choice of sanctions in the professional disciplinary context (see *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, paras. 30-34), the Divisional Court was satisfied that the Committee considered all relevant factors. It agreed with the Committee that Dr. Covant was not confused about the regulatory amendment; he knew about it, but chose to disregard it. It found that the penalty imposed was proportionate, the Committee having rejected the College's request for a 12-month suspension.

[76] The Divisional Court also found that the Committee made no palpable and overriding error in its award of costs, under s. 30(6.1) of the *Veterinarians Act*.

(c) Discussion

[77] I see nothing clearly unreasonable, demonstrably unfit, or representing a substantial and marked departure in the Committee's penalty decision, as upheld by the Divisional Court: see *Peirovy*, at paras. 56-57; *Mitelman*, at para. 41. Neither the reasons of the Committee nor the Divisional Court reveal an error in principle.

[78] The most serious component of the sanction was the suspension from practice for a one-month period. Given the nature of Dr. Covant's conduct, and his ongoing conduct in the face of numerous red flags, the sanction was appropriate.

In imposing the sanction that it did, the Committee also intended to deter other veterinarians from engaging in similar conduct, and at the same time, maintain the public's confidence in the ability of the College to regulate its members. There is no error in this approach.

[79] I reach the same conclusion on the costs award. Section 30(6.1) of the Act provides as follows:

> (6.1) In an appropriate case, the Discipline Committee may make an order requiring a member or former member who is found guilty of professional misconduct or of serious neglect by the Committee to pay all or part of the following costs and expenses:
>
> 1. The College's legal costs and expenses.
>
> 2. The College's costs and expenses incurred in investigating the matter.
>
> 3. The College's costs and expenses incurred in conducting the hearing. [Emphasis added.]

[80] The Committee commands a wide discretion in determining whether the College's costs should be paid. The Committee reduced what might have otherwise been a greater costs award based on its assessment of the role of both parties in lengthening the proceedings. This was a fair approach. The costs award was reasonable in all of the circumstances.

F. DISPOSITION

[81] I would dismiss the appeal. In accordance with the agreement of the parties, the College is entitled to its costs in the amount of $20,000, inclusive of applicable taxes and disbursements.

Released: August 30, 2023 “M.L.B.”

“Gary Trotter J.A.”
“I agree. M.L. Benotto J.A.”
“I agree. B. Zarnett J.A.”