Alberta Doctors' Digest

Zero tolerance toward sexual abuse or misconduct

Introduction

As legal counsel to the Alberta Medical Association, I watched the progress of Bill 21 (an Act to protect patients) closely, especially in light of the recent dramatic changes to parallel legislation in Ontario. This included monitoring many of the exchanges in the Legislative Assembly of Alberta. My first reaction was not on the legislation itself, but more on the comments in Alberta Hansard when the legislation was introduced.

The comments reflected an attitude that regulatory bodies, and particularly the College of Physicians & Surgeons of Alberta, not really doing their job and needed a legislated "kick in the pants." The suggestion seemed to be that the regulatory body (again, particularly the CPSA) did not have the tools to crack down on sexual impropriety and therefore physicians were getting away with it, and were receiving essentially slaps on the wrist.

The other inference that came from the conversations in the chamber was that this is a doctor issue (even though the Act being amended focused on "health professions" in general). All of the comments and questions voiced in the assembly seemed to circle around physician misconduct. Certainly, it was a physician's return to practice following the cancellation or suspension of his license some months ago which prompted this whole process to commence.

Background and summary of changes

The Bill was introduced the afternoon of October 30, 2018 and passed third reading (with some controversy, as will be seen below) on November 8, 2018. It received royal assent on November 19, 2018 and, with some limited exceptions, came into force that same day. Here is a summary of the key changes to the *Health Professions Act*.

1. Application for registration

The Act now adds five new pieces of information to be gathered from an applicant. These are a criminal record check; evidence of whether the applicant is currently an investigated person either in Alberta or in another jurisdiction; any information required respecting "any conduct of the applicant which has previously constituted unprofessional conduct"; evidence of whether the applicant has ever had conditions imposed on a practice permit; and evidence of whether there has even been a civil judgement against the applicant in respect of his/her practice.

None of this is particularly radical – the criminal record check is already available through other legislation, and no one would seriously question the need for this additional information being requested.

2. Re-application following cancellation/suspension

This was by far the most dramatic and contentious change. When first introduced, the Bill provided that if the cancellation of a practice permit is a result of proven sexual

abuse or sexual misconduct, the registered practitioner could not re-apply for a permit for five years, whether the cancellation occurs in Alberta or in another jurisdiction. And, if an application is made unsuccessfully following the lapse of five years, the applicant has to wait a further six months to try again. Things changed on November 8, 2018, however.

A previously introduced (and rejected) amendment to the Bill re-appeared during third reading, prompting the assembly to send the matter back to the committee of the whole for a further prolonged and very emotional debate. The result? An amendment (unanimously passed) providing that a regulated member whose practice permit was cancelled as a result of sexual abuse, would never be allowed to re-apply for reinstatement. And, a regulated member whose permit was cancelled as a result of a decision of unprofessional conduct based in whole or in part on sexual misconduct, could not apply for re-issuance for a minimum of five years.

This is without question the harshest discipline found in health professional legislation in Canada.

3. Dispute resolution processes

The discretion of the complaints director to resolve complaints between a complainant and the physician, or to refer to alternate dispute resolution, will no longer exist where the complaint involves allegations of either sexual abuse or sexual misconduct.

The reality is that very few, if any, current complaints involving sexual abuse would go to dispute resolution. However, there are certainly instances where sexual misconduct (which includes things like inappropriate comments, objectionable conduct or behavior short of actual sexual contact) have resulted in a mediated resolution. That discretion will no longer exist.

4. Employer’s obligation to report

Previously, the employer’s obligation to report arose only if the employment of the regulated member was terminated as a result of unprofessional conduct. Under the new legislation, if the employer has reasonable grounds to believe that certain conduct is sexual abuse or misconduct, the employer must, as soon as possible, give notice of that conduct to the complaints director (so no action relating to the employment relationship is required).

5. Role of the complainant

There are several sections in the new legislation where the complainant’s role in the process is addressed. The complainant must be updated on the status of investigations every 60 days. There is a positive obligation on the complaints director to use reasonable efforts to interview the complainant (unless it is impossible or the complainant refuses). The complainant may provide names of other persons who might have information. Notice of the hearing must be given to the complainant at least 30 days prior to the hearing (whereas previously, only the investigated person was entitled to that notice).

The clear inference was that these things were currently not happening, so legislation had to be put in place. My understanding is that inevitably the complainant was interviewed and other potential witnesses’ identities were canvassed. It would be surprising if at least 30 days’ notice of a hearing was not, in the past, given to the

complainant. This is likely an example of codifying practices that were already being followed.

6. Tribunal decisions

This is significant. Under this proposed legislation, where the tribunal makes a finding of unprofessional conduct arising from sexual abuse, the tribunal must cancel the license. There is no discretion. And, if the finding arises from sexual misconduct, the tribunal must suspend (at a minimum). Again, there is no discretion except for the length of the suspension. These actions must occur immediately following the finding of unprofessional conduct (previously there may have been a gap between the finding of improper conduct and the penalty hearing). And, prior to the tribunal making any orders arising from the finding (such as completion of courses or other remedial activities), the tribunal must provide the patient with an opportunity to present written or oral testimony about the impact of the misconduct on the patient. Essentially, this is importing the notion of a victim impact statement into the hearing process.

7. Appeal by complaints director

Previously, only the investigated person had the right to appeal the finding, direction or order of council. This new legislation extends the right of appeal to the complaints director as well, which is interesting, as it puts the complaints director in a position of being potentially adversarial to his employer.

8. Finding of unprofessional conduct in other jurisdictions

If the regulatory body becomes aware of a finding of unprofessional conduct arising from sexual abuse or sexual misconduct from another jurisdiction (including the USA), or that there is sufficient evidence that a governing body in a different jurisdiction has made that finding, then the registrar must cancel or suspend the member’s permit (depending on which level of misconduct occurred.)

9. Information sharing

There is an enhanced ability of the minister to disclose health information or personal information to the regulatory body where the minister believes that the disclosure will avert or minimize a risk of harm; that the conduct of a regulated member may constitute unprofessional conduct; that a person is holding himself/herself out as a regulated member incorrectly; or that a person may be performing a restricted activity without authorization.

The troubling aspect here is it creates a situation where the minster is called upon to make a determination that action may constitute unprofessional conduct. That is a determination that trained professionals struggle with at the regulatory level, so it is certainly hoped that the minister would exercise this discretion sparingly.

10. Mandatory reporting

A regulated member who has reasonable grounds to believe the conduct of another regulated member constitutes sexual abuse or sexual misconduct, has a mandatory reporting requirement. Previously that requirement existed in the standards of practice. This requirement does not arise if the information comes into the hands of the regulated member as a result of professional services being provided (i.e., a psychiatrist

in the course of therapy or counselling is not required to breach the doctor/patient relationship).

11. Standards of practice

There is now a requirement to develop standards of practice regarding who a patient is; when a sexual relationship might properly occur; and when a spouse can be a patient. The Act lays out factors that must be taken into account. And, most contentiously, the minister must be consulted and if, ultimately, does not approve these standards, the minister has the discretion to create and impose the standards.

This is quite a dramatic intrusion into the self-regulated nature of the profession and, again, one would hope would be exercised with the greatest of restraint.

12. Patient relations program

There is an obligation on the regulatory body to create a patient relations program which focuses on the prevention and addressing of sexual abuse and sexual misconduct, and the Act identifies five different measures for the prevention including education, training, information and assistance in directing persons to appropriate resources.

13. Counselling

The regulatory body will be required to provide funding for the purpose of providing treatment or counselling for patients who are the victims of sexual assault or misconduct, or who otherwise meet criteria to be set out in regulations. Colleges are allowed to jointly fund these counselling efforts if an individual college is too small to do it on its own.

14. College website

The CPSA will be required to post on its website compliance with many of these new requirements and, specifically any decision made by a tribunal, council or the court based in whole or in part on sexual abuse or misconduct, and whether a regulated member’s practice permit has been cancelled or suspended as a result of findings of sexual abuse or sexual misconduct. There are some exceptions to disclosure (such as where the information may cause harm to one or more persons or is no longer relevant to the regulated member’s suitability to practice).

Conclusion

Many of these changes reflect the codification of practices already followed by the complaints director, or appearing in standards of practice. Embedding these requirements in legislation, in some cases, removes discretion that previously existed, or clarifies practices. There is no doubt, however, that the legislation expresses a zero tolerance attitude toward conduct which amounts to sexual abuse or misconduct. The impact this will have on the day-to-day operations of regulatory bodies remains to be seen.

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