

## **POTENTIAL LOSS OF JURISDICTION IN A PROFESSIONAL DISCIPLINARY PROCEEDING THROUGH THE REFERRING PROCESS**

A professional regulatory body (or governing body) is a creature of statute. As a creature of statute, the powers of a governing body to discipline one of its members are prescribed in its enabling legislation. Before a governing body can subject a member to a professional disciplinary proceeding, it must strictly abide by the legislative requirements of its enabling statute when referring a matter to a discipline committee for hearing. A failure to do so will, in most cases, result in a loss of jurisdiction in the disciplinary proceeding.

Many regulatory schemes provide that before a discipline committee can hold a hearing into a member's conduct, a "matter", or "specified allegations" of professional misconduct, must first be referred to it by an investigative body.<sup>1</sup> The law requires that before a member can be subjected to a disciplinary proceeding that the investigative body the subject-matter of the complaint must be referred to the discipline committee in relatively precise terms.

In disciplinary proceedings, a form of charging document<sup>2</sup> will be issued by the regulator which stipulates the allegations against the member. The courts have made it clear that the allegations contained in the charging document need not have that degree of precision that is required in a criminal prosecution. However, at a minimum, the charge must allege conduct which, if proven, could amount to professional misconduct and it must give the person charged reasonable notice of the allegations that are made against him so that he may fully and adequately defend himself. It is not sufficient for a regulatory body to baldly allege in its charging document that the member is guilty of professional misconduct. That would be akin to alleging that the member did something wrong.

In Ontario, it is clear that:

... the jurisdiction of a discipline committee is restricted to considering acts of professional misconduct or incompetence properly referred to it. A discipline committee lacks the jurisdiction to go beyond matters properly before it.

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<sup>1</sup> For example a Complaints Committee, Executive Committee, ICRC, etc.

<sup>2</sup> Depending on the regulatory body the charging document has been referred to by different names including a "Notice of Application", "Notice of Hearing" and "Statement of Allegations".

Jurisdiction can neither be consented nor attorned to, nor can jurisdiction be expanded by the provision of disclosure.<sup>3</sup>

In *Kupeyan v. Royal College of Dental Surgeons of Ontario*, the Divisional Court considered the appellant's argument challenging the jurisdiction of the discipline committee to deal with the charges involved in the hearing. In reviewing the failure of the complaints committee and the executive committee to articulate with any precision the charges the member was to face (amongst other difficulties), the Court said the following:

In my view, the purpose of the Act to be taken from its plain language is that the conduct of a member of the profession is not to be subjected to proceedings before the discipline committee save for subject-matters of complaint considered and referred, in relatively precise terms, by either the complaints committee or the executive committee ... In other words, before a member is to be put in the unenviable position of having complaints or allegations of misconduct heard by the discipline committee, the conduct which is to be the subject of such hearing must have been defined and considered by the complaints committee or the executive committee.

In the instant case it is impossible to decide that such was the case. The most that can be concluded is that the conduct of the appellant with respect to a number of patients was considered by the two committees and that ultimately specific charges were made with respect to a smaller number of patients. The identity of the patients whose treatment was to be made the subject of the complaint and the specific allegations of misconduct were apparently determined otherwise than by the two committees.

I would not go so far as to hold that the precise charges which a member is to answer must be framed by either committee, though I am not persuaded that such a requirement would involve any insuperable problems. What I do hold is that when the hearing and determination by the discipline committee takes place, it must concern allegations which manifestly relate to misconduct, recognizable as misconduct which, in substance at any rate if not in precise terms, has been the subject of a reference by the complaints committee or a direction or a reference by the executive committee.<sup>4</sup>

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<sup>3</sup> *Yar v. College of Physicians and Surgeons of Ontario* [2009] O.J. No. 1017 (S.C.) at paragraph 22.

<sup>4</sup> *Kupeyan v. Royal College of Dental Surgeons of Ontario* [1982] O.J. No. 3376 (Div.Ct.), at paras. 28 – 30.

Apart from the effect of depriving a discipline committee with the jurisdiction to deal with the matter, the significance of stating, with some degree of precision, the conduct that is alleged to amount to professional misconduct was stated by Justice Galligan in the following way:

In cases of this type, no one would suggest that an allegation of professional misconduct need have that degree of precision that is required in a criminal prosecution. But the charge must allege conduct which if proved could amount to professional misconduct and it must give the person charged reasonable notice of the allegations that are made against him so that he may fully and adequately defend himself. This proposition has been stated by many authorities. I need refer only to the language of Culliton, C.J.S. ....

Not only must the charge be correct in form and sufficient to inform the person charged, in general terms, of the charge against him, but must contain sufficient particulars to enable him to properly prepare his defense.

... It follows from the requirement that the charge must be particularized to that extent that an accused must not be tried on a charge of which he has not been notified. It also follows that evidence ought to be confined to the charge against him. Evidence relating to other suggestions of misconduct should not be presented because it could have a very serious prejudicial effect upon the tribunal and it is evidence relating to conduct which he is not prepared to defend.

I think that it is particularly important to remember these fundamental principles when considering a charge as broad as professional misconduct. Obviously, there can be a great range in the degree of seriousness of conduct which could amount to professional misconduct. And there can be a wide range in what would be the appropriate penalty depending upon the seriousness of the allegations made against a person accused of professional misconduct. It is therefore particularly important for a person accused of professional misconduct to know with reasonable certainty what conduct of his is alleged to amount to professional misconduct.<sup>5</sup>

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<sup>5</sup> *Golomb v. College of Physicians and Surgeons of Ontario*, [1976] O.J. No. 1707 (Div. Ct.) at paras. 32 – 34.

An allegation that a member has committed professional misconduct is not, in and of itself, an allegation – it is simply a bald assertion of wrongdoing. In similar circumstances, Justice Wright said the following:

... I am satisfied the complaint referred to should state with reasonable precision the nature of the unprofessional conduct alleged. It is not sufficient to say only that the accused member is guilty of unprofessional conduct or misconduct. (Counsel for the respondent expressed agreement with this proposition). It is necessary to allege something more. For example, it is not sufficient to simply say the accused member has been convicted of a criminal offence. The offence must be identified. Similarly an allegation of unprofessional conduct should indicate in what way the conduct is in breach of professional standards as they may exist – perhaps by following the wording of one or more of the many rules of conduct listed in the professional engineers’ code of ethics (authorized by bylaw passed pursuant to the Act). ...

The complaint as it stands is therefore invalid, in effect a nullity, and thus not capable of amendment.<sup>6</sup>

Further, the Ontario Divisional Court has held that it was not appropriate for the College of Physicians and Surgeons of Ontario to frame the misconduct after a referral by the complaints committee and executive committee when it stated the following:

It was contended by counsel for the [regulatory body] that, the conduct of the appellant having been considered in some amorphous way by the complaints committee and the executive committee, it was appropriate that the precise charges of misconduct should be framed by “the College”. In my view, that submission finds no express foundation in the Act and flies in the face of its specific terms.<sup>7</sup>

In the same case, the Divisional Court ruled that the provision of specific allegations and particulars to allow the member to know the case he has to meet will not cure the jurisdictional

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<sup>6</sup> *Bateman v. Association of Professional Engineers of Manitoba* [1984] M.J. No. 391 (Q.B.) at paragraph 19 and 22.

<sup>7</sup> *Kupeyan v. Royal College of Dental Surgeons of Ontario* [1982] O.J. No. 3376 (Div.Ct.), at para. 31.

error of a failure to properly refer a matter to the discipline committee for hearing. Specifically the Divisional Court had the following to say:

I have also considered the obvious fact that in the circumstances the appellant had full notice of the specific allegations which were heard by the discipline committee. There can be no argument that he was taken by surprise or was not afforded a reasonable opportunity to make answer. None of that can prevail if the allegations were such that the discipline committee had no jurisdiction to deal with them. Even if the appellant were taken to have consented, and there is no evidence of that save such inference as can be drawn from participation in the proceedings, it would make no difference. ...

... it is a fundamental principle that no consent can confer on a court or tribunal with limited statutory jurisdiction any power to act beyond that jurisdiction, or can estop the consenting party from subsequently maintaining that such court or tribunal has acted without jurisdiction.<sup>8</sup>

Further, a discipline committee only has jurisdiction to hear evidence relevant to the charges. So, for example, if the only allegation that was referred to hearing was an allegation that a member sexually abused a patient, the regulatory body cannot call expert evidence that the physician's treatment of the patient fell below the standard of practice of the profession. As was stated by Justice Galligan in *Golomb v. College of Physicians and Surgeons of Ontario*:

It follows from the requirement that the charge must be particularized to that extent that an accused must not be tried on a charge of which he has not been notified. It also follows that evidence ought to be confined to the charge against him. Evidence relating to other suggestions of misconduct should not be presented because it could have a very serious prejudicial effect upon the tribunal and it is evidence relating to conduct which he is not prepared to defend.<sup>9</sup>

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<sup>8</sup> *Kupeyan v. Royal College of Dental Surgeons of Ontario* [1982] O.J. No. 3376 (Div.Ct.), at para. 36.

<sup>9</sup> *Golomb v. College of Physicians and Surgeons of Ontario* [1976] O.J. No. 1707 (Div. Ct.), at para. 33.

In conclusion, where an enabling statute requires a referral from a committee for a matter to be considered and heard by a discipline committee, a regulatory body should refer allegations in relatively precise terms that, if proven, would constitute professional misconduct. The referral of a member to discipline, or the referral of a bald allegation that the member is alleged to have committed professional misconduct, will likely not be sufficient to provide a discipline committee with jurisdiction to hear and consider the allegations. Further, provision by the regulatory body to the member of specific allegations or particulars will not cure the lack of jurisdiction.

While counsel defending members should scrutinize carefully the charging document (i.e. the Statement of Allegations, Notice of Hearing, Statement of Application, etc.) in learning the case the client must meet, counsel should also carefully review the decision of the committee referring the matter and compare the matter referred against the allegations stipulated in the charging document to determine if the regulatory body has jurisdiction to hear and consider each allegation. If a decision has not been disclosed, counsel should request that the regulatory body produce a copy of the decision or minutes or notes of the referral.

Neil Perrier

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