Grey Areas
A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION
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The Evolution of Screening Complaints

by Natasha Danson
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In the distant past, a complaints screening committee only decided whether a complaint warranted a discipline hearing. However, more than four decades ago, the courts urged regulators to use their screening committees to be more innovative to encourage registrants to enhance their performance: *Re Matheson and College of Nurses of Ontario*, 1980 CanLII 1614 (ON CA). Remedial measures, such as advice or cautions and voluntary undertakings, quickly took root.

The next step in the evolution of screening committee powers was to make remedial measures mandatory. For example, many statutes now enable a screening committee to require a registrant to appear in person for a "caution" or to direct the registrant to complete remedial measures without the registrant's consent. Courts have viewed these provisions as remedial and determined that registrants are owed a lower level of procedural fairness. For example, in *Greenwald v. Health Professions Appeal and Review Board*, 2008 CanLII 63184 (ON SCDC), the Court said:

> … a caution is one of the statutory powers given to the Complaints Committee. It is not punitive in nature; it is advisory or remedial in warning about border line conduct which is short of professional misconduct but which puts the physician and patients at risk. There is no finding of professional misconduct and the caution does not appear in any public record. We find that the caution administered here was not a reprimand.

In *Banner v. College of Physicians and Surgeons of Ontario*, 2012 ONSC 5547 (CanLII), a registrant was required to complete educational measures, mentorship with a colleague, and be re-assessed. The Court held that the direction was authorized by the legislation and was not a form of discipline:

> The applicant has made much of the punitive nature of the Committee's requirements and their significant impact on him in terms of the costs of the preceptor and practice assessment and the detrimental impact on his reputation. However, the Committee is not a fact finding body, and it has not made a finding of professional misconduct. The requirements for a caution and further education are not recorded in the registry of the College (although they will appear temporarily on a Certificate of Professional Conduct until the requirements are satisfied).
>
> The College has an important duty to serve and protect the public interest (Code, s. 3(2)). While the applicant may see the requirements as punitive, the caution and the educational requirements were imposed in the public interest, in an effort to avoid possible problems in the applicant's practice in the future.

A mandatory remedial direction does not require a higher standard of explanatory reasons by the screening committee: *Griffith v. Health Professions Appeal and Review Board*, 2021 ONSC 5246 (CanLII).

More recently, some regulators have the option, or even the statutory obligation, to post remedial directions on the public register. Courts have, again, held that this development does not alter the fundamental nature of the screening committee's role. For example, in *Geris v. Ontario College of Pharmacists*, 2020 ONSC 7437 (CanLII), the Court said:

> It is true, as the applicant argues, that cautions and remedial orders regarding attendance at education programs are now placed on the

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> public register. This was not the case when a number of the leading cases dealing with such orders were decided. However, the fact that the Legislature felt it would be in the public interest to make health disciplines bodies publish remedial orders of the kind issued by the ICRC in this case does not fundamentally alter the preventive, educational and remedial nature of such orders. I cannot agree that an entirely different approach must be taken now that remedial orders appear on the public register.

Courts have also conceded that screening committees have a limited fact-finding role in determining whether a remedial disposition would serve the public interest and would help ensure that registrants avoid problems in the future. For example, in *Hamilton v. Health Professions Appeal and Review Board*, 2022 ONSC 3221 (CanLII), the Court found that it was within the role and expertise of the screening committee to impose remediation even when the registrant filed an expert report indicating that they had done nothing inappropriate.

That is not to say that there is no impact to the expanding role of screening committees. Recently, in *Young v. College of Nurses of Ontario*, 2022 ONSC 6996 (CanLII), remedial directions were sent back for reconsideration because the reasons for decision of the screening committee failed to address concerns about delay and abuse of process raised by the registrants.

More recently, in *Law Society of Newfoundland and Labrador v Buckingham*, 2023 NLCA 17 (CanLII), the highest court in Newfoundland and Labrador questioned some of the assumptions now taken for granted in Ontario. In that case, a lawyer was cautioned for making a public statement about the death of his client in jail "at the hands of" correctional officers. The regulator was concerned that the lawyer did not, at the time the statement was made, have a sufficient basis for making such a serious assertion.

The lower court set aside the caution on the basis that the screening committee did not assess, or give reasons in response to, the lawyer's defences that he had a basis for making the statement, that the statement was in response to public assertions that the death was the client's fault, and that the statement was in the context of calling for an inquiry as to the circumstances of the death.

The significance of the case was evident from the intervention on the appeal by eight health profession regulators.

The Court noted the significance of adequate reasons by screening committees issuing remedial directions:

> First, by their nature, counsels and cautions require explanation so that lawyers may understand what they have done wrong and not repeat the behavior. Second, the CAC [Complaints Authorization Committee] investigates allegations and forms opinions as to whether there are reasonable grounds to conclude that misconduct has occurred. It would be impossible to judge the sufficiency of an investigation or the reasonableness of the opinion without some explanation. Third, counsels and cautions can have significant consequences for lawyers, including impacts on career advancement and with respect to how the Law Society deals with future allegations or complaints against them. Finally, given that lawyers are required to respond to allegations against them, they would legitimately expect the CAC to not reject their response without explanation.

The Court also observed that, while the decision was published in an anonymized fashion, it would be clear that many people would be able to deduce the

lawyer's identity. Also, there was no restriction on the complainant publishing the decision with the lawyer's name.

The Court did not accept that the screening committee was purely investigative in nature. It noted:

> … I would not characterize the CAC's role as always investigative. Although its work is primarily investigative, sometimes the CAC makes a final decision to resolve a complaint, subject only to judicial review. Making a decision to resolve a disputed matter is more of an adjudicative function than an investigative one.

Nor did the Court view the disposition as entirely remedial in nature:

> Although both counsel and caution are generally remedial in nature, they are not exclusively so. Counsel and caution can have adverse consequences for a lawyer, which do not advance remediation.

Ultimately the Court was concerned, like the lower court, that the screening committee had not addressed the lawyer's response to the complaint or the freedom of expression issues the case raised.

Also, the screening committee did not explain the standard to which the lawyer was being held and why the lawyer had not met that standard. On this point, the Court was concerned that the lawyer had not been advised as to which specific provision the lawyer was said to have breached. In fact, the lawyer had been referred to two other provisions rather than the one ultimately relied upon by the screening committee.

The *Buckingham* decision may have little impact in other provinces with well-established jurisprudence on the role of screening committees. In addition, there were specific provisions in the enabling legislation for this regulator requiring reasonable grounds to believe that lawyers had engaged in conduct deserving of sanction before issuing the caution. Most regulators do not have such limiting wording. Finally, the profession in issue is also relevant. Because of the duty of lawyers to be fearless advocates on behalf of their clients, an honest belief, even if unfounded, in their position is a defence. For many other professions, there must be a reasonable basis to support a statement before the professional status of the registrant can be used to make it.

Despite this, regulators should not assume that they can take any less care in issuing remedial directions based on the enhanced scope of screening committees.