October 13, 2020

A Cautionary Tale: Admissions Against Interest in Regulatory and Subsequent Criminal Proceedings

A recent decision from the Ontario Court of Appeal serves as a cautionary tale for regulated professionals and their counsel considering the terms of a potential resolution of discipline proceedings where related criminal proceedings may still be on the horizon. In *R v Lo*, the Court of Appeal upheld a trial judge's decision during a criminal jury trial to admit into evidence the Agreed Statement of Fact ("ASF") from a prior disciplinary hearing on related allegations before the College of Psychologists ("CPO").

The Court of Appeal held that the ASF was a formal admission in the CPO hearing, which the CPO had relied upon as proof of the underlying facts alleged. Justice Watt, writing for a unanimous panel, reasoned that the ASF was properly admissible against the accused in a subsequent criminal trial as an admission against interest. He also provides a helpful summary of the law of evidence with respect to admissions.

Discipline proceedings are routinely resolved based on an ASF – this case is an important reminder that this following practice may have serious consequences if related criminal proceedings may yet follow. In such circumstances, consideration should be given to issues of timing of the related regulatory and criminal proceedings, or if necessary, alternative means of placing sufficient evidence before a discipline panel to support a resolution so as not to operate as formal admissions of fact down the road.

Background

The CPO discipline hearing in 2012 concerned allegations that the member had engaged in sexual abuse and dishonourable and disgraceful conduct, based on the complaints of three prior patients. Pursuant to a negotiated resolution, the CPO and the member jointly filed an ASF where the member plead guilty to dishonourable and disgraceful conduct, but 'no contest' (or *nolo contendre*) to the count of sexual abuse. As expected, the CPO found him guilty on both counts of professional misconduct and revoked his registration as a Psychologist.

The criminal trial concluded in 2017, well after the close of the CPO proceedings. During a contested *voir dire*, the Trial Judge admitted the ASF as an “admission against interest" of the accused. The Judge ruled that any reasoning prejudice was minimal and could be alleviated by instructions to the jury about the permitted and prohibited use of the evidence. The accused was ultimately convicted of three counts of sexual assault.

Although the Defendant had pleaded no contest to the ‘sexual abuse’ allegation before his regulator, according to the Court of Appeal this did not alter the fundamental nature of the ASF as a formal admission of fact capable of being admitted against him in his subsequent criminal trial. When the ASF was tendered by the Crown at trial, it engaged the evidentiary principles governing admissions, described variously as an exception to the hearsay rule, or a category of evidence unto themselves. The Court of Appeal held that the admissions were relevant and material in that they tended to show conduct by the appellant of the *actus reus* of sexual assault. The evidence was tendered by the Crown, therefore meeting the evidentiary requirement for admissions “as a rule that is either the product of the adversary system outside the framework of hearsay exceptions, or its own exception not requiring additional proof of necessity and reliability.”

The Court of Appeal held that the admissions tendered by the Crown were receivable at trial subject to the general requirement that their probative value not be outweighed by the prejudicial effect. Ultimately, the trial judge’s balancing analysis in support of the admission of the ASF, was not tainted by error and was entitled to deference by the appellate court.

Implications

In the context of a disciplinary hearing where criminal proceedings remain a possibility, *R v Lo* provides further support for a deferral of related disciplinary proceedings until after any criminal proceedings have concluded even where the regulatory issues can be disposed of by negotiated resolution. If that is not possible, as may have been the case here, this decision confirms the need for utmost caution when filing an ASF or formal admission in any circumstance, including through counsel, and despite a plea of *nolo contendre*.