

**IN THE MATTER OF SECTION 55 OF *THE MEDICAL PROFESSION ACT, 1981*, S.S.
1980-81, c. M-10.1 AND IN THE MATTER OF DR. EDWARD POON OF REGINA,
SASKATCHEWAN**

Mr. Aaron A. Fox, Q.C. appearing for Dr. Edward Poon

Mr. Bryan Salte, Q.C. for the College of Physicians and Surgeons of Saskatchewan

REASONS FOR DECISION

1. OVERVIEW

[1] In early 2008, some female patients of Dr. Edward Poon, a well-known family physician in Regina, Saskatchewan, complained to the City of Regina Police Service that he had sexually assaulted them in the course of conducting physical examinations on them at his medical clinic. These complaints culminated in police laying six counts of sexual assault against Dr. Poon involving six patients that allegedly occurred during February and March 2008. Dr. Poon elected a jury trial in the Saskatchewan Court of Queen's Bench. At its conclusion on June 30, 2010, the jury convicted him on two counts but acquitted on the remaining four counts.

[2] On July 7, 2010, the trial judge, the Honourable Mr. Justice E.C. Malone, sentenced Dr. Poon to a jail term of two years less a day. As well, Malone J. directed that Dr. Poon be registered under the *Sex Offender Information Registration Act*, S.C. 2004, c.10, and this registration be maintained for a period of 10 years.

[3] On August 2, 2012, the Saskatchewan Court of Appeal dismissed Dr. Poon's appeals from his convictions and sentence. The Court also dismissed the cross-appeal brought by the Crown from the four acquittals. See: *R. v. Poon*, 2012 SKCA 76. Dr. Poon chose not to seek leave to appeal to the Supreme Court of Canada and is currently incarcerated in the Prince Albert Correctional Centre.

[4] Provided the statutory pre-conditions are satisfied, section 55 of *The Medical Profession Act, 1981*, S.S. 1980-81, c. M-10.1 (the "*MPA, 1981*") authorizes the Council ("Council") of the

College of Physicians and Surgeon of Saskatchewan (the “College”) to impose a professional disciplinary sanction on a physician who has been convicted of an indictable offence. Upon learning the result of Dr. Poon’s appeal, the College notified him that it intended to exercise this authority.

[5] This matter came before Council on September 7, 2012 for sentencing. At that time Council heard oral submissions from Mr. Salte on behalf of the College, and from Mr. Fox on behalf of Dr. Poon. Both counsel also filed written materials prior to the hearing.

[6] Mr. Salte submitted that because of the nature of the offences for which Dr. Poon was convicted the only appropriate sanction is revocation of his licence to practice medicine. He advised Council that Dr. Poon had not practiced medicine since April 2008. Dr. Poon provided the College with an undertaking not to do so on May 23, 2008, and since January 1, 2010, he has held an inactive licence. Mr. Salte submitted further that if Council determined that a fine should also be imposed then consistent with *Camgoz v. College of Physicians and Surgeons (Saskatchewan)* (1993), 114 Sask. R. 161 (Q.B.), a fine of approximately \$14,000.00 would be in order. Finally, he indicated that the costs to the College for Dr. Poon’s hearing were minimal totaling \$860.

[7] Mr. Fox did not take exception to Mr. Salte’s submission that revoking Dr. Poon’s medical licence was the appropriate sanction. He furnished Council with medical reports from two psychiatrists, Dr. Charles Messer of Regina and Dr. Robin Menzies late of Saskatoon. These reports which appear to have been before the trial judge as well as the Court of Appeal (see: *Poon, supra*, at paras. 123 and 135) indicate that at the time these offences occurred, Dr. Poon suffered from an undiagnosed bipolar condition. He is now taking psychotropic medicines to manage this condition. Mr. Fox indicated that Dr. Poon may at some future time seek to have his licence reinstated.

[8] Mr. Fox indicated that as Dr. Poon has not been practicing medicine any financial penalty including an order requiring him to reimburse the College for costs of this proceeding would

present a hardship to him, particularly as he is currently incarcerated and unable to generate any income.

[9] Finally, Mr. Fox stated that Dr. Poon wanted him to apology formally to Council for in his words bringing “disgrace and dishonor to not only himself but to the profession and the people he worked with.”

[10] After deliberating Council imposed the following sentence with reasons to follow:

- That Dr. Poon’s licence to practice medicine be revoked and his name be removed from the College’s Register.
- That Dr. Poon re-imburse the College in the amount of \$860 for costs of this proceeding.

[11] These are the promised reasons.

2. FACTUAL BACKGROUND

[12] The events underlying this matter are set out in some detail by Jackson J.A in her reasons for judgment on behalf of the Court of Appeal. See especially: *Poon, supra*, at paras. 18-20. Since the jury convicted Dr. Poon in respect of two complainants whom Jackson J.A. identified as “L.” and “M.”, it is unnecessary to recount in detail what transpired. For present purposes it is sufficient to indicate that each of them had attended at Dr. Poon’s clinic seeking medical attention and in each case he conducted a physical examination. As summarized by Jackson J.A. at paragraph 20:

The complaints of L. and M. were of a difference magnitude than the other four complainants, in that they described simultaneous or successive touching of breast, clitoris and vagina in a continuous sexual manner, which in the case of M. brought her to the point of arousal.

[13] Council proceeded to sentence Dr. Poon on the basis that the factual statements set out in the Court of Appeal’s judgment clearly demonstrated professional misconduct.

3. THE APPROPRIATE PENALTY

3.1 Section 55 of MPA

[14] Section 55 of *MPA, 1981* sets out three pre-conditions to its operation. Once these pre-conditions are satisfied, Council may proceed to sentence the member in question. First, the member must be convicted of an indictable offence in Canada, proof of which is demonstrated by “a duly certified copy of the conviction”. Second, it is necessary to show that the individual convicted of this offence is a registered member of the College. Third, this individual is entitled to a hearing before Council prior to a sanction being imposed.

[15] Mr. Salte on behalf of the College presented evidence to satisfy the first two pre-conditions and Mr. Fox did not contest it. As indicated earlier, Council held an oral sentencing hearing on September 7, 2012.

[16] Accordingly, the statutory pre-requisites to the operation of section 55 of *MPA, 1981* were satisfied.

3.2 General Considerations

[17] As the College complied with these statutory pre-requisites, Council is authorized by section 54 of *MPA, 1981* to impose an appropriate sentence upon Dr. Poon. Section 54 enumerates a wide spectrum of possible penalties ranging at one end from a simple reprimand (s. 54(1)(e)) to suspension or revocation of the member’s license to practice medicine in Saskatchewan (ss. 54(1)(b), (a)) at the other. Council may also impose fines not exceeding \$15,000 (s. 54(1)(f)), require the member to fulfill undertakings relating to retraining or treatment which are tailored to the specific circumstances of a particular case (s. 54(1)(g)), and order the member to pay the costs of the investigation and hearing (s. 54(1)(i)).

[18] Council has considerable latitude to craft a penalty tailored to the particular circumstances of the case before it. When fulfilling this task, however, the over-arching consideration is always the public interest. Council’s principal function is to govern the medical profession in the public interest, and protection of the public must be its paramount objective. Indeed, the Saskatchewan Legislature in section 69.1 of *The Medical Profession Act, 1981*

explicitly directs Council to give protection of the public prominence in all its sentencing decisions. Section 69.1 provides:

In any proceeding before the competency committee or the discipline hearing committee, in any consideration by the council of a report from either of these committees and in any appeal pursuant to this Act, the protection of the public and the safe and proper practice of medicine shall take priority over the rehabilitation, treatment and welfare of a member.

3.2 Relevant Factors When Sentencing a Physician for Unprofessional Conduct

[19] While Council enjoys wide discretion when sentencing a physician found guilty of unprofessional conduct, any sentence must be crafted on a principled basis. In Saskatchewan, the relevant principles to be taken into account when sentencing a physician for professional misconduct were announced in *Camgoz v. College of Physicians and Surgeons (Saskatchewan)* (1993), 114 Sask. R. 161 (Q.B.) There, a discipline hearing committee found the physician guilty of unprofessional conduct for sexually assaulting a female patient by conducting an unnecessary breast examination. As a sentence, Council revoked Dr. Camgoz's medical licence for five years and fined him \$10,000. On appeal, the Court of Queen's Bench sustained both the finding of unprofessional conduct and the sentence.

[20] Respecting the appeal from sentence, Grotzky J. identified 11 factors which are generally relevant when sentencing a physician. As set out in paragraph 49 of his reasons for judgment, these factors include:

- The nature and gravity of the proven allegations
- The age of the offending physician
- The age of the offended patient
- Evidence of the frequency of the commission of the particular acts of misconduct within particularly, and without generally, the Province
- The presence or absence of mitigating circumstances, if any
- Specific deterrence
- General deterrence
- Previous record, if any, for the same, or similar, misconduct; the length of time that has elapsed between the date of any previous misconduct and conviction thereon; and, the members (properly considered) conduct since that time
- Ensuring that the penalty imposed will, as mandated by section 69.1 of [*The Medical Profession Act, 1981*], protect the public and ensure the safe and proper practice of medicine

- The need to maintain the public's confidence in the integrity of [Council's] ability to properly supervise the professional conduct of its members
- Ensuring the penalty imposed is not disparate with penalties previously imposed in this jurisdiction, particularly, and in other jurisdictions in general, for the same, or similar acts of misconduct

(Similar sentencing factors for professional misconduct have been applied in other provinces, see especially: *Jaswal v. Newfoundland (Medical Board)* (1996), 42 Admin. L. R. (2d) 233 (Nfld. S.C.), at para. 36; *Pottie v. Nova Scotia Real Estate Commission*, [2005] N.S.J. No. 276 (S.C.), at para. 64, and *Litchfield v. College of Physicians & Surgeons (Alberta)*, 2008 ABCA 164, at para. 20.)

[21] It should be noted that in *Camgoz*, Grotsky J. considers protection of the public as identified in section 69.1 of *The Medical Profession Act, 1981* as only one factor to be weighed when passing sentence. However, it is more consistent with the statutory injunction contained in section 69.1 to treat protection of the public and the safe and proper practice of medicine as the over-arching objectives in sentencing. It is the consideration which must always be top of mind for Council when making all of its decisions, including an appropriate sentence.

[22] Justice Grotsky underscored that these 11 factors were neither exhaustive nor enumerated in order of significance. He also acknowledged that because a particular sentence should be tailored to the specific factual circumstances before Council, the relevance of these factors will vary in application. See: *Camgoz, supra*, at para. 50.

[23] Council regularly employs the *Camgoz* factors in its sentencing decisions, including recently *Re Chambers* (September 17, 2009); *Re Saha* (June 25, 2010), and *Re Ali (No.2)* (June 22, 2012). Council now explains how applying the *Camgoz* factors to Dr. Poon's misconduct results in the imposition of the sentence set out in paragraph 10 above.

3.3 Application of *Camgoz* Factors to Dr. Poon

[24] When crafting the appropriate penalty to be imposed in this case, Council determined it was not necessary to weigh each and every factor identified in *Camgoz*. In view of the fact that

the Court of Appeal not only confirmed the sexual assault convictions for the offences underlying these charges of professional misconduct but also endorsed the sentence imposed by the trial judge, Council concluded its penalty analysis could be stream-lined to the following five *Camgoz* factors:

- The nature and gravity of the proven allegations
- The presence or absence of mitigating circumstances, if any
- Specific deterrence
- General deterrence
- Ensuring the penalty imposed is not disparate with penalties previously imposed in this jurisdiction, particularly, and in other jurisdictions in general, for the same, or similar acts of misconduct

3.3.1 The Nature and Gravity of the Proven Allegations

[25] The first *Camgoz* factor asks Council to assess the nature and gravity of the conduct found to constitute professional misconduct. It is appropriate that this is the initial consideration since the kind of professional misconduct at issue usefully serves as the prism through which the other factors listed in *Camgoz* are analyzed and applied.

[26] It is difficult to imagine a more serious example of professional misconduct than the sexual assault of a patient by his or her physician. Not only is such an action a serious and unwelcome personal and physical invasion, it also is a stark betrayal of trust that irreparably ruptures the patient/physician relationship. It should not occasion surprise that most provincial Colleges of Physicians and Surgeons treat a sexual assault of a patient as a most grievous breach of professional ethics incompatible with competent medical practice. See for example: *Re Im* (CPSO, 2009), and *Re Nanka-Bruce* (CPSO, 2006). As will be elaborated on in Part 3.3.5 below, Council has typically imposed the severest penalty available to it where allegations of sexual assault against a physician acting in his or her professional capacity have been proven, see especially: *Re Schneeberger* (CPSS, 2000).

[27] Finally, it is apparent that the Court of Appeal also viewed Dr. Poon's actions worthy of severe condemnation. When upholding the criminal sentence imposed on Dr. Poon, Jackson J.A. characterized it as "one of the most significant sentences imposed upon a medical caregiver in

Canada for two incidents of sexual touching giving rise to two counts of sexual assault.” She observed that in view of his criminality it is likely “that [Dr. Poon] will be unable to practice medicine again”. See: *Poon, supra*, at paras. 132 and 135.

3.3.2 Presence or Absence of Mitigating Circumstances

[28] The issue of mitigating circumstances did not figure in Council’s deliberation. However, it is addressed briefly here because at the hearing and in his written submissions¹, Mr. Fox highlighted the fact that Dr. Poon did not obtain any personal sexual pleasure from the sexual assaults he committed on his patients. To be fair he did not suggest this was a mitigating circumstance; however, he did indicate it was an important contextual factor to be considered.

[29] It appears that this argument had also been advanced before the Court of Appeal. Justice Jackson disposed of it as follows at paragraph 129 of her reasons for judgment:

One can make little of the fact that it would appear Dr. Poon did not gain any sexual gratification from the incidents. From the perspective of a victim, it is of little relevance whether a sexual perpetrator derives pleasure from the assault[.]

[30] Council shared Jackson J.A.’s view. In this matter Dr. Poon committed two sexual assaults on two patients for which he was criminally convicted and sentenced. For professional disciplinary purposes the fact that Dr. Poon did not obtain any sexual gratification from these assaults can in no way detract from his egregious breach of professional ethics.

3.3.3 Specific Deterrence and the Physician’s Prior Record

[31] The litany of factors listed in *Camgoz* enumerates “specific deterrence” and “the physician’s prior [discipline] record” as discrete considerations. However, in this case it is useful to consider them together.

¹ Letter dated September 4, 2012 address to Mr. Bryan Salte, Associate Registrar of the College at pp. 1-2.

[32] This matter represents the first time in his long career that Dr. Poon has been charged with, let alone found guilty of, professional misconduct. In the course of his oral submissions, Mr. Fox assured Council that should Dr. Poon ever practice medicine again, it is certain he will not re-offend.

[33] Council acknowledges Dr. Poon's remorse and his public apology for what has occurred. Nor does Council doubt the enormous toll his actions have taken not only on him, but also his family, colleagues and community. However, these factors do not mitigate the stringency of the kind of sentence warranted in cases of this kind. Indeed, Dr. Poon rightfully concedes that revoking his licence to practice medicine is the appropriate penalty.

3.3.4 General Deterrence

[34] Like specific deterrence, general deterrence is a most relevant consideration in the sentencing process. In this case, it is especially so. Every member of the public reasonably expects that they will not be assaulted sexually or otherwise by their physician. As a consequence, any physician in Saskatchewan who like Dr. Poon sexually assaults a patient must know that they will be dealt with harshly by their professional regulatory body. A strong message must be telegraphed to all physicians that such conduct is reprehensible and deserving of the most severe professional disciplinary sanction. The public interest demands no less.

3.3.5 Proportionality of Sentence Compared to Other Relevant Cases

[35] It is important that any court or tribunal called upon to sentence an individual ensure that the sentence imposed is consistent with similar penalties set in similar cases. Proportionality is a central principle in sentencing for it seeks to ensure that individual sentences are principled and not arbitrary. Not surprisingly then that *Camgoz* enumerates this as a factor to be considered in sentencing.

[36] As noted earlier, medical professional regulatory bodies typically revoke the licence of any physician found to have sexually assaulted a patient. Some Colleges impose this sanction

regardless of whether the sexual contact is consensual or not. For example, very recently in *Sazant v. College of Physicians and Surgeons of Ontario*, 2012 ONCA 727, the Ontario Court of Appeal stated at paragraph 177 that in Ontario “a consensual sexual relationship between a physician and a patient is *prima facie* professional misconduct under the [*Health Professions Procedural Code*] and is punishable by mandatory revocation of the physician’s licence.”²

[37] Mr. Salte presented three prior decisions of Council involving doctors found guilty of sexually assaulting their patients: *Re Schneeberger* (CPSS, 2000); *Re Sood* (CPSS, 1996) and *Camgoz, supra*. Common to all three cases is the sanction Council imposed, *i.e.* revocation of licence to practice medicine. In both *Sood* and *Camgoz*, the physician in question had not been charged criminally, and in each case Council imposed a substantial fine in addition to revoking the physician’s medical licence.

[38] Arguably, *Schneeberger* more closely parallels this case. To be sure there the doctor’s actions were far more heinous than Dr. Poon’s, in that Dr. Schneeberger drugged his victims and subsequently provided a false blood sample to police in order to avoid detection. He was eventually convicted of a number of criminal offences including sexual assault, administering a stupefying drug, and obstruction of justice. Following the completion of his custodial sentence, he was deported from Canada.³ In light of these circumstances, Council revoked Dr. Schneeberger’s licence to practice medicine and did not impose a fine.

[39] Council concluded that a penalty similar to that in *Re Schneeberger* should be imposed here.

3.5 Conclusion

[40] In conclusion, when the *Camgoz* factors are applied to Dr. Poon’s case Council concluded that it merited a severe penalty. Council determined that revoking Dr. Poon’s medical licence is a penalty which is both proportionate and principled. It is consistent with the penalties

²See also: *Rosenberg v. College of Physicians and Surgeons of Ontario* (2006), 275 D.L.R. (4th) 275 (Ont. C.A.)

³See further: *Canada (Minister of Citizenship & Immigration) v. Schneeberger*, 2003 FC 970 granting Canada’s request to revoke Schneeberger’s Canadian citizenship and to remove him from Canada.

Council has imposed for such serious transgressions of ethical conduct by other physicians. Furthermore, taking into account the fact that Dr. Poon's professional misconduct also resulted in criminal convictions for which he is currently incarcerated, Council determined that no fine should be imposed.

4. COSTS

[41] Subsection 59(1)(i) of *The Medical Profession Act, 1981* authorizes Council to seek indemnification for all costs related to the proceedings from the physician who is found guilty of unprofessional conduct. Mr. Salte advised that in this case the total amount of these costs is \$860. This small amount is attributable to Dr. Poon's guilty plea to these charges and his co-operation throughout the professional disciplinary process.

[42] It is well-established that an order of costs "is not a penalty": *Brand v. College of Physicians and Surgeons of Saskatchewan* (1990), 86 Sask. R. 18 (C.A.), at para. 22. As a result a physician who is found guilty of unprofessional conduct should be responsible for reimbursing the College for monies expended by it in respect of disciplinary proceedings taken against him or her. It would be unreasonable to expect the membership of the College to underwrite the costs of prosecuting an errant physician. This general principle should be departed from only in circumstances where it is demonstrated to Council that it would cause undue hardship to the physician or would not be appropriate for the physician to shoulder all or any of these costs. These will, of course, be assessed on a case-by-case basis.

[43] Council concluded that in this case no such circumstances exist. Mr. Fox did assert that because Dr. Poon was currently incarcerated it was not possible for him to earn any income and a financial sanction would only present a hardship to him. However, he did not offer any direct evidence of impecuniosity and in view of the small amount of money involved Council determined that Dr. Poon should reimburse the College for all costs expended in this professional discipline matter.

5. **THE DOCUMENT REDACTION ISSUE**

[44] The final issue to be addressed in these reasons is the Document Redaction Issue. As already mentioned Mr. Fox filed letters from two psychiatrists to whom Dr. Poon had been referred in the course of the criminal proceedings against him. The most recent letter was dated May 31, 2010. As a consequence, the issue arose as to whether these documents which formed part of the record before Council should be redacted prior to being released to the public.

[45] Council considered this question in the context of a penalty hearing, most recently in *Re Chambers* dated September 17, 2009 especially at paragraphs 44 to 49. There Council observed that redaction is a delicate issue requiring a careful balancing of two competing interests. On the one hand, this is a public process and as such it must be undertaken in as open and transparent a manner as possible so as to sustain public confidence in Council's ability to regulate the medical profession in the public interest. On the other, Council is sensitive to the fact that revealing intimate personal medical information may embarrass the physician or other parties involved. In *Re Chambers* itself, Council declined to order that documents containing the physician's medical information be redacted.

[46] Council concluded that because the information contained in these various medical reports is dated and played no role in crafting Dr. Poon's penalty, should members of the general public request access to those reports any information relating to Dr. Poon's medical or psychological circumstances contained in them is to be redacted.

[47] In conclusion, Council extends its appreciation to Mr. Salte and Mr. Fox for their thorough and respectful presentations at the hearing as well as their extensive written materials. Their assistance was most helpful.

Dated the 18th day of January, 2013 at Saskatoon, Saskatchewan.