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(Winnipeg Centre)
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The College of Pharmacists of Manitoba et al.
Cited as: 2022 MBQB 29

COURT OF QUEEN’S BENCH OF MANITOBA

B E T W E E N:

KRISTJAN ERIC THORKELSON,)	<u>Appearances:</u>
)	
)	<u>Tyler J. Kochanski and</u>
appellant,)	<u>Jennifer Sokal,</u>
)	for the appellant
- and -)	
)	
)	
THE COLLEGE OF PHARMACISTS OF)	<u>David I. Marr and</u>
MANITOBA, THE COUNCIL TO THE COLLEGE)	<u>Joseph A. Pollock,</u>
OF PHARMACISTS OF MANITOBA, AND)	for the respondents
THE COMPLAINTS COMMITTEE OF THE)	
COLLEGE OF PHARMACISTS OF MANITOBA,)	
)	JUDGMENT DELIVERED:
respondents.)	February 16, 2022

SUCHE J.

[1] In November 2019, Council of the College of Pharmacists of Manitoba¹ cancelled the appellant’s pharmaceutical licences on finding he had been convicted of an offence relevant to his suitability to practice pharmacy. His appeal from this decision is before me.

¹ Herein “Council” and “the College”, respectively.

FACTS

[2] The appellant has been a licensed pharmacist since 1991, and has owned several pharmacies during this time. This includes CanadaDrugs.com LP ("CanadaDrugs") and River East Supplies Ltd. ("River East"). Canada Drugs is no longer in business, but was a licensed retail internet pharmacy that sold to U.S. residents. River East was a U.K.-based licensed wholesale pharmacy that sold to clinics and pharmacies, including many in the U.S. River East, CanadaDrugs and several other corporations licensed as pharmacies in Canada or internationally and owned or controlled by the appellant, called themselves the CanadaDrugs.com Group of Companies ("CD.com Group"). Collectively, these companies were the largest international pharmacy business in the world.

[3] The events leading to cancellation of the appellant's licences began in October 2011 when River East purchased a quantity of Avastin, a cancer-treating drug, from CareMed, a wholesale pharmacy located in Denmark. River East then sold some of the Avastin to a clinic in the U.S.

[4] Within a few weeks of this, the U.S. clinic contacted River East saying the Avastin appeared suspect. River East immediately took steps to secure and quarantine the Avastin, and arranged to have it returned. It notified CareMed of the situation, who in turn contacted the European regulator.

[5] Shortly after this, the Medicine and Healthcare Products Regulatory Authority ("MHRA"), the U.K. regulator, commenced an investigation. It took possession of the Avastin and advised River East that it would notify the U.S. Food

& Drug Administration (the "FDA"), the American regulator. The FDA then launched an investigation.

[6] The appellant and River East learned of the results of the FDA's investigation through an FDA press release issued in February 2012 stating some of the Avastin in issue contained no active ingredient.

[7] The appellant had no direct involvement in these events. They appear to have been relayed to him as they unfolded by the pharmaceutical manager of River East.

[8] MHRA concluded its investigation by finding that neither River East nor CareMed engaged in any improper conduct. Health Canada, the Canadian regulator, also conducted an investigation but did not take any action. The College also conducted an investigation sometime in 2012, but took no action.

[9] In 2015, the U.S. Department of Justice (DOJ) filed an Indictment in the District Court of Montana against the appellant, CanadaDrugs, River East, two other corporations in the CD.com Group, and several employees of these companies. The charges included smuggling, international money laundering, and conspiracy to commit these offences. Extradition proceedings against the appellant and the employees residing in Manitoba were commenced in this court.

[10] The appellant ultimately resolved the charges through a formal plea agreement wherein he pled guilty to one charge of misprision of a felony in 2018. CanadaDrugs, River East and Rockley Ventures ("Rockley"), a Barbados-based member of the CD.com Group providing accounting services to the others, pled

guilty to charges of introduction and delivery of misbranded pharmaceuticals, and selling and dispensing counterfeit pharmaceutical drugs. In exchange for these pleas, DOJ withdrew all other charges.

[11] The crime of misprision is an old common-law offence that is not part of Canadian law. However, misprision of a felony remains an offence in the U.S., the essential elements of which are:

- (a) a felony offence was committed;
- (b) the accused had knowledge of the offence;
- (c) the accused failed to notify authorities of the offence as soon as possible;
- (d) the accused took steps to conceal the offence.

[12] Here, the charge against the appellant was based on an e-mail he sent to employees of CanadaDrugs on March 8, 2012. In it, he reviewed the Avastin incident, including the FDA's announcement that some of the shipment received by the U.S. clinic had no active ingredient.

[13] The relevant portion of the e-mail states:

CanadaDrugs.com has not been contacted by any of the U.S. authorities whatsoever as it has absolutely no connection to selling and offering Avastin given that CanadaDrugs.com has never offered that product for sale and deals only in prescription maintenance medications to individuals.²

² Exhibit "O" to Affidavit of Kristjan Eric Thorkelson sworn December 13, 2019.

[14] The appellant signed the e-mail as "CEO, CanadaDrugs.com Group of Companies".

[15] In the plea agreement, the appellant and DOJ agreed that the appellant committed misprision of a felony because:

- River East had imported defective Avastin into the U.S., which was a felony;
- the appellant knew this happened, but did not notify any U.S. or foreign regulatory authority of the fact;
- in describing himself as "CEO of CanadaDrugs.com Group of Companies", his e-mail was a statement regarding the entire CD.com Group;
- River East was part of the CD.com Group and engaged in selling Avastin including the Avastin in issue. Thus the statement that "it has absolutely no connection to selling and offering Avastin given that CanadaDrugs.com has never offered that product for sale" was not true and amounted to steps to conceal the offence.

[16] The appellant agreed to pay a fine of \$250,000, restitution of approximately \$30,000 and various related costs. He was placed on probation for five years, the first six months of which was on home confinement.

[17] By way of a separate plea agreement, CanadaDrugs, River East and Rockley agreed to plead guilty to introduction and delivery of a misbranded pharmaceutical. River East and Rockley pled guilty to selling and dispensing a counterfeit

medication. The three corporations agreed to jointly pay a fine of \$5 million, restitution of \$30,000, U.S. Marshall's Service \$29 million representing disgorgement of twice the profits made, and various assessment and costs. They were also placed on probation for five years.

[18] Part of the agreement was that all domain names used by the CD.com Group named in the Indictment be surrendered and the corporations cease carrying on business.

STANDARD OF REVIEW

[19] The parties disagree about this. The appellant argues this appeal is a new matter, which means no deference is owed to Council's decision. The College says the standard is that of appellate review, involving the dual approach of correctness on questions of law and palpable and overriding error on questions of fact and mixed fact and law. It relies on *Canada (Minister of Citizenship and Immigration) v. Vavilov*³, where the majority stated:

.... Where a legislature has provided that parties may appeal from an administrative decision to a court, either as of right or with leave, it has subjected the administrative regime to appellate oversight and indicated that it expects the court to scrutinize such administrative decisions on an appellate basis. ...⁴

[20] The difference in the parties' positions arises from their differing interpretation of the appeal provision in section 25 of *The Pharmaceutical Act*⁵ which states:

³ 2019 SCC 65.

⁴ Supra at para 36.

⁵ C.C.S.M. c. P60 (the "*Act*").

Appeal to court

25 A person whose certificate of registration, pharmacist licence or pharmacy licence is cancelled or suspended under section 23 or 24 may appeal the cancellation or suspension to the court, in which case section 22 applies with the necessary changes.

[21] Section 22 concerns an appeal from Council to this court where a person's application for registration as a student, intern, resident or pharmacist, or licence as a pharmacist, was denied. It reads:

Appeal to court

22(1) A person who made an appeal under section 21 may appeal the decision of the council to the court by

- (a) filing a notice of application in the court; and
- (b) serving a copy of the notice of application on the college; within 30 days after receiving notice of the council's decision under subsection 21(7).

No stay of decision

22(2) An appeal of a decision does not stay the decision pending the appeal, unless the court orders a stay.

College is party to appeal

22(3) The college is a party to the appeal.

Appeal heard as a new matter

22(4) The court must consider the appeal as a new matter.

[22] The College argues that only subsection 22(1) applies to an appeal under section 25.

[23] Determining the meaning of section 25 thus requires consideration of these related sections. As the Supreme Court of Canada stated in *Vavilov*, the modern principle of statutory interpretation requires:

...that the words of a statute be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."⁶

Relevant Provisions of the Act

[24] Deciding the issues raised on this appeal requires consideration of various inter-related provisions of the **Act**. Thus an overview is helpful. The starting point is consideration of how a licence can be cancelled.

[25] This can occur in one of two ways. The first is through the disciplinary process outlined in Part 7 of the **Act**. It begins with a complaint (including from the College itself) and moves on to a hearing before a disciplinary panel. Sections 43 to 58 set out the process, which includes substantive and procedural safeguards: the right to counsel, disclosure of documents, restriction on the use of affidavit evidence, and power of the panel to subpoena witnesses. In addition, the hearing is recorded.

[26] Subsection 54(c) addresses the situation where the individual⁷ has been convicted of certain offences:

Findings of panel

54 If, at the conclusion of a hearing, the panel finds that the investigated person

...(c) has been found guilty of an offence that is relevant to the investigated person's suitability to practise pharmacy or operate a pharmacy;

...it must deal with the investigated person in accordance with this Act.

⁶ **Vavilov** at para 117 quoting *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para 21.

⁷ Section 29 of the **Act** states that individuals subject to the disciplinary process include students, interns, and pharmacists.

[27] A disciplinary panel has very broad powers to fashion a remedy, from a reprimand to cancellation of a licence.

[28] An appeal from a decision of a disciplinary panel is an appeal on the record to the Court of Appeal⁸.

[29] The second route is through section 23. This procedure permits cancellation of a licence for several reasons. Some involve straightforward factual determinations such as whether a member failed to pay fees, is bankrupt, deceased, or ceased practising⁹, in which case the decision is that of the registrar.

[30] In addition, a licence can be cancelled in two situations that concern the conduct of the individual, in which case Council makes the decision. The first concerns fraud:

Registration or licence may be cancelled if fraud

23(2) If the registrar is satisfied on reasonable grounds that a person's registration, pharmacist licence or pharmacy licence has been obtained by means of a false or fraudulent representation or declaration, the registrar must report the matter to the council, and the council may direct the registrar to cancel

- (a) the person's certificate of registration;
- (b) any licence or licences held by the person; or
- (c) the person's certificate of registration and one or more of the licences held by the person;

The registrar must then cancel the registration, licence or licences as directed, and give the person and his or her employer, if any, written notice of that fact.

[31] The second situation is at issue here:

⁸ Subsection 59(3) of the **Act**.

⁹ Subsection 23(1) of the **Act**.

Registration or licence may be cancelled if conviction

23(3) If a person has been convicted of an offence that is relevant to his or her suitability to practise pharmacy or operate a pharmacy, the council may direct the registrar to cancel

- (a) the person's certificate of registration;
- (b) any licence or licences held by the person; or
- (c) the person's certificate of registration and one or more of the licences held by the person;

but it must first notify the person that it intends to do so and give the person an opportunity to make representations. The registrar must give the person and his or her employer, if any, written notice of any cancellation.

[32] As noted above, section 25 provides for an appeal of a decision under section 23 to this court, "in which case section 22 applies with the necessary changes".

[33] Section 22, in turn, concerns a decision by Council sitting on appeal from a decision by the registrar or Board of Examiners to deny an application for registration or licence. An appeal from Council's decision is to this court, where it is considered as a new matter.

[34] As with section 23, some of the decisions included in section 22 involve straightforward determinations of fact. Others require the exercise of discretion or professional judgment. This includes the situation of someone applying as a student,¹⁰ intern¹¹ or resident¹², who has been "convicted of an offence that makes the applicant unsuitable for registration...".

¹⁰ Pharmaceutical Regulation, M.R. 185/2013 ("the *Regulation*"), subsection 10(1)(f).

¹¹ *Supra*, subsection 11(1)(b).

¹² *Supra*, subsection 12(2)(d).

Conclusion

[35] I easily conclude the applicable standard of review is that set out in subsection 22(4): I am to consider the appeal as a new matter.

[36] The first reason is that the words of the section clearly state section 22 applies. Had the drafters intended that only subsection 22(1) would apply, they would have said so.

[37] I pause to say that the phrase “with the necessary changes” in section 25 is of no significance to this discussion. As the Supreme Court of Canada explained in *Bessette v. British Columbia (Attorney General)*¹³:

...“with the necessary changes and so far as applicable” is merely a re-wording of “mutatis mutandis.” This Latin expression means “[w]ith the necessary changes in points of detail, meaning that matters or things are generally the same, but to be altered when necessary, as to names, offices, and the like” (*Black’s Law Dictionary* (6th ed. 1990), at p. 1019; ...

[emphasis in original]

[38] It goes without saying that the standard of review to be applied on appeal is not a point of detail.

[39] I am satisfied that this interpretation is also consistent with the context of the legislation and is harmonious with the scheme in the **Act**. The decisions encompassed by section 22 are the result of an administrative procedure with little fact-finding capacity, no procedural safeguards, and limited (if any) opportunity

¹³ 2019 SCC 31, [2019] 2 S.C.R. 535 at para 69. See also *Dorn v. Association of Professional Engineers and Geoscientists of the Province of Manitoba*, 2018 MBCA 18 at paras 61 to 62.

for an individual to be heard. The jurisdiction of Council is limited to a yes/no answer: that is, under section 21 whether to reject the registration or not; under section 23 whether to cancel the licence or not.

[40] This process stands in contrast to the disciplinary process, which is replete with most of the evidentiary and procedural safeguards of a court, and vests broad discretion in the hearing panel to impose a penalty ranging from remedial steps to cancellation of registration or licence.

[41] Cancellation of a professional licence is an extreme penalty, ending an individual's career and livelihood. Accordingly, a licensing authority must take great care in coming to such a decision. This includes providing a very high degree of procedural fairness to the individual¹⁴. The disciplinary process in the **Act** does this, but section 23 falls short. Such disparity between processes addressing the same issue and resulting in the same outcome is in itself concerning. All of this can be remedied, however, when an appeal of a decision under section 23 to this court is heard as a new matter.

[42] As for the Supreme Court of Canada's direction in **Vavilov**, it is important to recall that **Vavilov** was about the scope of judicial review of administrative tribunals. Most of the court's comments concerned the dichotomy of reasonableness review versus appellate review. The core message in **Vavilov**, however, is that courts must give effect to legislative intent regarding the standard of review in every instance:

¹⁴ **Kuny v. College of Registered Nurses of Manitoba**, 2017 MBCA 111 at para 17.

Any framework rooted in legislative intent must, to the extent possible, respect clear statutory language that prescribes the applicable standard of review. This Court has consistently affirmed that legislated standards of review should be given effect: ...

It follows that where a legislature has indicated that courts are to apply the standard of correctness in reviewing certain questions, that standard must be applied. In British Columbia, the legislature has established the applicable standard of review for many tribunals by reference to the *Administrative Tribunals Act*, S.B.C. 2004, c. 45: see ss. 58 and 59. ...We continue to be of the view that where the legislature has indicated the applicable standard of review, courts are bound to respect that designation, within the limits imposed by the rule of law.¹⁵

[emphasis added]

[43] Finally, I reject the College's assertion that the principle that deference is owed to an administrative body's interpretation of its legislation applies to this issue. This principle was explained by the Supreme Court of Canada in *Prasad v. Canada (Minister of Employment & Immigration)*¹⁶:

In order to arrive at the correct interpretation of statutory provisions that are susceptible of different meanings, they must be examined in the setting in which they appear. We are dealing here with the powers of an administrative tribunal in relation to its procedures. As a general rule, these tribunals are considered to be masters in their own house. In the absence of specific rules laid down by statute or regulation, they control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice. ...

[44] The issue before me does not involve the College's internal procedures, but rather, the jurisdiction of this court on appeal therefrom.

[45] In conclusion, I am satisfied that this application comes before me as a new matter. Pursuant to subsection 22(5), I am entitled to set aside, vary or confirm the decision, make a new decision that, in my opinion, should have been made, or

¹⁵ Supra at paras 34 to 35.

¹⁶ 1989 SCC 131, [1989] 1 S.C.R. 560 at para 568.

refer the matter back to Council for further consideration in accordance with a new direction of the court.

IS MISPRISION OF A FELONY AN OFFENCE UNDER SECTION 23(3)?

[46] The appellant maintains his conviction for misprision of a felony is not a conviction for an "offence" under subsection 23(3), nor in any event is it relevant to his suitability to practise pharmacy or operate a pharmacy.

[47] "Offence" is not defined in the **Act**. The appellant argues it should be interpreted to mean offences in Canada. Further, the only types of offences that would be relevant to an individual's suitability to practise pharmacy would involve criminal activity or the sale of drugs. He points to subsection 23(1)(l) of the **Regulation** which outlines the information included in a pharmacist's public profile. This section, he says, informs the type of offences intended in 23(3):

(l) a description of any offence under

- (i) the *Criminal Code* (Canada),
- (ii) the *Controlled Drugs and Substances Act* (Canada), or
- (iii) the *Food and Drugs Act* (Canada),

of which the member has been convicted within the past 10 years, if the council determines that the conviction is reasonably relevant to the member's competence or to the safe practice of pharmacy. The description must include the date of the conviction and the name of the court imposing the conviction.

[48] As an aside, section 23(1) of the **Regulation** simply adopts the wording of subsection 27(3)(a)(v) of the **Act**, which gives Council authority to make regulations respecting pharmacists' profiles.

[49] Finally, the appellant argues that if foreign convictions are included in section 23(3), the “dual criminality” principle in extradition law which only permits extradition for offences where the underlying behaviour is also illegal in Canada, must be implied. Otherwise, convictions in jurisdictions with a government and justice system operating without the rule of law or for political or other illegitimate reasons, would be included.

[50] I disagree with the appellant on both these points.

Analysis

[51] The word “offence” is not defined in section 23(3) nor in the **Act**. I agree it is open to different meanings. Counsel did not direct me to any other provisions in either the **Act** or **Regulation** that use “offence”. However, I note that it appears in several sections of the **Regulation**. Regulations can be of assistance in interpreting their authorizing legislation using the usual rules of statutory interpretation¹⁷. Of course, this is subject to the fundamental rule that since a Regulation is subordinate legislation, it can neither limit nor expand the scope of its enabling statute¹⁸.

[52] Some examples then of the use of “offence” in the **Regulation**:

- In section 4, the requirements for registration as a pharmacist under section 11(1)(e) of the **Act**:

¹⁷ **Canada v. National Fish Co.**, [1931] Ex. C.R. 75.

¹⁸ **Booth v. The King**, 1915 SCC 596, 51 S.C.R. 20; **Canada v. National Fish Co.**, supra at para 11.

(i) provide information satisfactory to the board as to whether the applicant, in Manitoba or in any other jurisdiction,

...

(vi) is the subject of a court proceeding in respect of a *criminal offence, or an offence under an Act regulating the practice of pharmacists or relating to the sale of drugs*

- In section 11(1), the requirements for registration as an intern under section 20(d) of the **Act**:

(b) satisfy the registrar that the applicant has not been convicted of *an offence* that makes the applicant unsuitable for registration.

- In section 12(2), the requirements for registration of a pharmacist licensed in another jurisdiction as a resident under section 9(1) of the **Act**:

(d) satisfies the board that the applicant has not been convicted of *an offence* or been subject to professional discipline that, in the board's opinion, makes the applicant unsuitable for registration.

- In section 14, the licence requirements for a pharmacist under section 15(1) of the **Act**:

(g) satisfy the registrar that the applicant has not been convicted of *an offence* or been subject to professional discipline that, in the registrar's opinion, makes the applicant unsuitable to practice as a pharmacist

[emphasis added]

[53] These sections, when considered along with sections 23(3) and 27(3)(a)(v) of the **Act** reveal that "offence" is used with limiting language or not, depending

on the situation. Those that concern an individual's "suitability" for the profession use the term without any limitation. This suggests a broader meaning is intended.

[54] This is also consistent with what I perceive to be the object of section 23(3), namely to determine whether a pharmacist has engaged in conduct that is both illegal and has implications for their suitability to carry out their professional responsibilities.

[55] The parties did not address what makes a person "suitable" to practise pharmacy. It is not defined or explained in the **Act** or the **Regulation**. However, section 4 of the **Regulation** sheds some light on this.

[56] This section lists requirements for registration as a pharmacist under section 11(1) of the **Act**, including that an applicant:

(g) establish that his or her past and present conduct affords reasonable grounds for the belief that the applicant will engage in professional practice competently and with decency, integrity and honesty and in accordance with the law;

[57] These are all personal or inherent qualities of an individual, about which a conviction for any type of offence committed anywhere might be revealing. This too, suggests an intention to include a much wider range of offences than the three listed in subsection 27(3)(a)(v).

[58] My conclusion then is that the term "offence" in section 23(3) is to be interpreted broadly, and includes a foreign conviction.

Is Dual Criminality Required?

[59] My answer is no. The appellant's concern would not be eliminated by implying this concept into the meaning of offence.

[60] Drug trafficking and murder are crimes in Canada, and would meet the dual criminality test. No doubt, history would show that individuals have been convicted of such offences without any lawful basis in countries that use the justice system as a tool of political suppression. This problem does not arise in extraditions because such proceedings arise from treaties between Canada and countries governed by the rule of law.

[61] This is not to say that the concern is ill founded. However, the legitimacy of a foreign conviction can and should be addressed by Council as part of its obligation to examine the underlying circumstances of the offence.

[62] Finally, the present situation actually offers an example of a conviction for a crime that does not exist in Canada, but could offer important information about an individual's "suitability". I say this because one of the elements of the offence is that the accused took steps to conceal a felony offence of which they were aware. Depending on the circumstances, this may be very revealing of an individual's integrity or honesty.

[63] In conclusion, I am satisfied that the appellant's conviction for misprision of a felony is a conviction for an "offence" within the meaning of section 23(3).

IS A MISPRISION CONVICTION RELEVANT TO THE APPELLANT'S SUITABILITY TO PRACTICE PHARMACY?

[64] The appellant argues that the conviction does not relate to his suitability to practise pharmacy because the events occurred outside Manitoba, did not relate to any obligations in Manitoba, and did not involve dispensing medication or any aspect of the practise of pharmacy. He maintains that the conduct of any of the corporations involved, including their convictions, is irrelevant and it would be improper to take any of this into account in any way.

[65] I disagree. I return to my finding that "suitability to practise pharmacy" relates not just to competence, but also to the personal qualities identified in section 4(g) of the *Regulation* that are required to practise pharmacy, namely decency, integrity, honesty and acting in accordance with the law. Any conduct that is dishonest or unlawful is therefore relevant to this question. His guilty plea is the appellant's acknowledgement that he attempted to conceal the illegal actions of River East, CanadaDrugs and Rockley, which actions he was aware of; he also acknowledged that he had a legal duty to advise an authority of the offences and he failed to do so.

[66] The events underlying the offence occurred when the appellant was acting not just in his role as CEO of CanadaDrugs, but by his admission, also as CEO of the CD.com Group. These companies are all licensed pharmacies, or businesses providing support to them. To suggest that the offence had no connection to his role as a pharmacist totally lacks credibility.

[67] For these reasons, I am satisfied that the conviction for misprision relates to the appellant's suitability to practise pharmacy.

SHOULD THE APPELLANT'S LICENCES BE CANCELLED?

[68] I return to the jurisdiction on this appeal:

Powers of court on appeal

22(5) On hearing an appeal, the court may

- (a) set aside, vary or confirm the decision;
- (b) make any decision that in its opinion should have been made; or
- (c) refer the matter back to the council for further consideration in accordance with any direction of the court.

[69] While not expressly stated, it appears that the parties agree that I should make the decision that in my opinion ought to have been made. Given the length of time that has passed since the events in issue, this is appropriate.

[70] As to what it is I am to decide, I return to section 23(3) which only permits Council to decide whether a pharmacist's licence or registration should be cancelled. That then is the question before me. My answer is no.

[71] I begin with the principles that apply when determining an appropriate penalty in cases of professional misconduct. These are similar, but different from criminal law and start with the fundamental consideration that the primary goal is the protection of the public.

[72] *Jaswal v. Medical Board (Nfld.)*¹⁹ is an oft-quoted decision that identified the relevant sentencing considerations for professional misconduct. The case concerned a physician, but it has been applied in cases involving other professions.

[73] Green J. (as he then was) states:

From the cases cited, the following is a non-exhaustive list of factors that ought to have been considered:

1. the nature and gravity of the proven allegations
2. the age and experience of the offending physician
3. the previous character of the physician and in particular the presence or absence of any prior complaints or convictions
4. the age and mental condition of the offended patient
5. the number of times the offence was proven to have occurred
6. the role of the physician in acknowledging what had occurred
7. whether the offending physician had already suffered other serious financial or other penalties as a result of the allegations having been made
8. the impact of the incident on the offended patient
9. the presence or absence of any mitigating circumstances
10. the need to promote specific and general deterrence and, thereby, to protect the public and ensure the safe and proper practice of medicine
11. the need to maintain the public's confidence in the integrity of the medical profession
12. the degree to which the offensive conduct that was found to have occurred was clearly regarded, by consensus, as being the type of conduct that would fall outside the range of permitted conduct

¹⁹(1996) 138 Nfld & PEIR 181 (NL SC).

13. the range of sentence in other similar cases

[74] It is also important to keep in mind that cancellation of a professional licence is an extreme penalty and should only be imposed in extremely serious cases. As well, if the issue is that the individual has been convicted of an offence, it is not the fact of the offence but the conduct underlying the offence that must be considered. As observed in *Muggoo v. College of Pharmacists (Ontario)*²⁰ where a pharmacist had been convicted of defrauding creditors:

...The degree of moral culpability in such cases can vary greatly from case to case so that the mere statement that a conviction had occurred did not necessarily provide evidence of extremely grave conduct by the appellant in relation to his practice as a pharmacist.

[75] The situation before me is similar to that in *Muggoo*. There, a pharmacist was convicted of defrauding his creditors. The court found this to be an offence relevant to his suitability to practise pharmacy under the *Health Disciplines Act*²¹.

[76] In *Rissi v. Ontario College of Pharmacists*²², the appellant pharmacists carried on their pharmacy practice through a corporation. The corporation was convicted of income tax evasion in connection with undeclared rebates received from drug companies. The Ontario College found the pharmacists had been convicted of an offence relevant to the practise of pharmacy.

[77] In upholding this decision, the Court of Appeal²³ said:

²⁰ Supra at 1982 CarswellOnt 1328, [1982] O.J. No. 1389 (Sup. Ct. HCJ) at para 5.

²¹ R.S.O. 1980, c. 196, section 130(3).

²² [2003] 63 O.R. (3d) 122, 2003 CanLII 19529 (ON SCDC).

²³ Supra at para 17.

There is authority for the proposition that practising pharmacy involves more than merely dispensing pharmaceutical products. We do not find it unreasonable at all for the Committee to have concluded that the appellants' participation in their closely-held corporation's tax evasion scheme was conduct that reflected adversely on the profession as well as on themselves and could therefore be characterized as conduct "relevant to the practice of pharmacy"... see *Stout v. College of Pharmacy (Ontario)* 1977, 12 O.R. (2d) 748, *supra*, at pp. 654-55 O.R....(member distributing trading stamps in respect of sales of prescription drugs contrary to the Criminal Code and warning from the College)...

[78] As is apparent from this passage, the court also accepted that it was appropriate for the College to look beyond the corporate structure. I do as well.

[79] I turn then to consider the circumstances of this situation. On its face, misprision of a felony is a serious offence. It involves dishonest or deceitful conduct: taking steps to cover up a known felony offence. Having said this, the appellant's conduct, not just the fact of the conviction must be considered.

[80] The evidence before me is that no one at River East knew or had reason to believe that the Avastin was defective. River East's management acted quickly and appropriately as soon as it learned there was a problem. While the appellant did not take steps to notify MHRA, he was told River East and CareMed agreed that CareMed would do so. That CareMed followed through is clear from subsequent events. It seems that the appellant was also told that MHRA would notify the FDA of the situation. Clearly it did so. Thus, while he failed in a legal obligation to notify an authority that the Avastin was defective, it seems fair to say that he believed that both the U.K. and American authorities were notified, and in fact they both were notified. This is a mitigating consideration.

[81] It is also of considerable significance that MHRA conducted an investigation and concluded neither anyone at River East nor CareMed had acted improperly. That Health Canada decided to take no action is also relevant.

[82] As for the appellant's steps to conceal the offence, the *mens rea* of the "steps to conceal" component of the misprision was not explained to me, so I don't know if the guilty plea is an acknowledgement that the appellant intended to mislead or if only his statement was made recklessly. It would have been to his benefit for me to know if it were the latter. Regardless, the e-mail was only sent to CanadaDrugs' employees.

[83] The appellant has been a pharmacist for almost 30 years. He has no disciplinary history. He was elected to Council twice. He has been successful and has given back to his community. He has accepted responsibility for his actions, and has been punished for them. The penalty imposed on him by the Court in Montana was substantial- one might say severe- and also brought his internet pharmacy business to an end. He also has suffered a good deal of negative publicity about these events.

[84] The College argued that the appellant was motivated by profit at the expense of his ethical obligations. I see no basis to say this. The suggestion related at least in part to comments by the prosecutor and judge in the transcript of the court proceedings in Montana, which I do not consider proper evidence on this appeal.

[85] The College was not able to point me to any decisions where conduct of a comparable nature, at least in terms of the degree of seriousness, resulted in a pharmacist losing their licence. In fact, looking at the decisions from the College and elsewhere, conduct which arguably is as serious has resulted in nothing more than fines.

[86] In all of the circumstances, I conclude that cancellation of the appellant's licences is not an appropriate penalty.

DECISION

[87] For the reasons above, I am granting the appellant's request for an order setting aside the decision of Council cancelling his licences. In light of my finding on the standard of review, the other issues raised need not be decided.

[88] I leave the question of costs outstanding. If the parties are unable to come to an agreement about this, they may schedule a further appearance before me.

_____ J.