

HARPER GREY LLP
3200 – 650 West Georgia Street
Vancouver, British Columbia, V6B
4P7
Canada

Tel: 604 687 0411
Fax: 604 669 9385

CASE SUMMARY: CAREFUL WHAT YOU AGREE TO: WHERE A PARTY ENTERS INTO AN AGREED STATEMENT OF FACTS AND ADMITS UNPROFESSIONAL CONDUCT, AND A DECISION IS MADE BASED LARGELY ON THE AGREED STATEMENT OF FACTS AND ADMISSION, OVERTURNING THAT DECISION WOULD BE TO UNDERMINE THE EFFICACY OF AGREED STATEMENTS OF FACT

Where a party enters into an agreed statement of facts and admits engaging in unprofessional conduct, and a decision is made on the basis of that agreed statement of facts and admission, it will be difficult for the party to then seek to resile from those facts and admission in an appeal.

Administrative law – Decisions reviewed – College of Dental Surgeons – Judicial review – Appeals – Evidence – Standard of review – Reasonableness – Dentists – Disciplinary proceedings – Professional misconduct or conduct unbecoming – Penalties

Byun v. Alberta Dental Assn. and College, [2021] A.J. No. 1019, 2021 ABCA 272, Alberta Court of Appeal, July 28, 2021, F.L. Schutz, M.G. Crighton and J. Streckfuss JJ.A.

The appellant Dr. Byun is a pediatric dentist who provided restorative dental treatment to a two-year-old child. On August 22, 2016, the child attended Dr. Byun to have four crowns put on his upper front teeth. The appellant recommended general anesthesia for the procedure, but the child's mother did not consent. When the child arrived for the procedure, his mother agreed to have sealants applied to the child's molars before the restorative procedure. Two dental assistants performed the sealant procedure. They strapped the child to a papoose board to immobilize him, and applied nitrous oxide gas to him. As one dental assistant began to open the child's mouth, the child thrashed, fought, screamed, and came loose from the papoose board. One dental assistant laid on top of the child to restrain him and held his head while the other dental assistant completed the sealant procedure.

Dr. Byun entered the room after the sealant procedure had been completed and performed the restorative procedure. He injected a local anesthetic which escalated the child's panic. One of the dental assistants continued to lay on top of the child to restrain him. The child screamed, cried, choked on his saliva, and wriggled up on the dental chair such that his head was dangling off. Two of the crowns were crooked once the procedure was complete. The child had bruises and a sore neck for several days afterwards.

The child's mother filed a complaint with the Alberta Dental Association and College. The Complaints Director engaged a specialist in pediatric dentistry, Dr. Graham, to provide an opinion about the appellant's treatment and care of the child. Dr. Graham's opinion was active restraint should not have been used for applying the sealants as there was no indication to proceed with that non-emergent procedure if the child was not compliant, and it would only further his distress. Dr. Graham also opined that Dr. Byun should have discussed proceeding with the crown procedure with the child's mother after seeing the distress the child was under for a comparatively minor procedure, and perhaps receive consent to continue under general anesthetic or defer to another day.

Before a Hearing Tribunal of the Alberta Dental Association and College, the appellant and the Complaints Director entered into an agreed statement of facts which confirmed Dr. Byun had committed unprofessional conduct by failing to obtain the child's mother's informed consent to the use of restraint, by continuing the treatment and restraint in light of the child's severe emotional distress, and by failing to adequately supervise the dental assistants while administering oral sedation and restraining the child with the papoose board. There was no agreement as to an appropriate sanction.

The Hearing Tribunal issued a written decision imposing a six-month suspension, a \$30,000 fine, a requirement to complete courses, and an order to pay the costs of the investigation and hearing.

Dr. Byun appealed both the finding of unprofessional conduct and the sanction to the Appeal Panel. The Appeal Panel dismissed Dr. Byun's appeal. The Appeal Panel commented that where a party has agreed to proceed by an agreement statement of facts and admission of unprofessional conduct, and makes submissions based on that agreement and admission, it is reasonable for the Hearing Tribunal to accept the admission. The Appeal Panel found the six-month suspension to be excessive, however, and reduced it to a three-month suspension to be served within 60 days followed by a three-month suspension to be held in abeyance for three years provided certain conditions were met (the "Appeal Decision").

Dr. Byun appealed the Appeal Decision and sought to resile from the agreement statement of facts. Dr. Byun submitted the Appeal Panel erred by:

- a) treating Dr. Graham as an expert and relying on his report without first qualifying him as an expert;
- b) upholding the Hearing Tribunal's findings of unprofessional conduct regarding informed consent as reasonable, as Dr. Byun had obtained informed consent for the possible need for restraint in an earlier meeting with the child's mother;
- c) determining Dr. Byun breached the Standard of Practice: Use of Sedation in Non-Hospital Dental Practice (the "Standard") as the Standard states an authorized provider may administer sedation and there was no evidence the dental assistants were not authorized providers; and
- d) imposing a six-month suspension, which Dr. Byun argued was overly punitive and out of step with similar decisions issued by other Colleges.

Dr. Byun also asserted that the reliance of the Hearing Tribunal, Appeal Panel, and Dr. Graham on the "Guideline on Protective Stabilization for Pediatric Dental Patients 2016" by the American Academy of Pediatric Dentistry (the "Guideline") when assessing the allegations regarding use of restraint is a breach of natural justice and the Appeal Panel's duty of fairness, as the Guideline had not been formally adopted by the Alberta Dental Association and College as a standard of practice.

Regarding the Appeal Panel's reliance on Dr. Graham's report, the court placed emphasis on the fact that it had been attached to the agreed statement of facts and provided to Dr. Byun in advance of the hearing, and no objection was made to its admission. In the circumstances, the court found it was not necessary for the Hearing Tribunal to hear evidence regarding qualifications before admission of the report.

Regarding the Hearing Tribunal's findings of unprofessional conduct regarding informed consent, the court placed emphasis on the fact that the finding was Dr. Byun failed to obtain informed consent regarding the unplanned sealant procedure, and regarding continuing the treatment and constraint for the crown procedure given the child's emotional state. Dr. Byun had also admitted failure to obtain informed consent in the agreement statement of facts. The court found there was no reviewable error by the Appeal Panel in upholding the Hearing Tribunal's finding.

Regarding the finding that Dr. Byun breached the Standard, Dr. Byun had admitted his conduct was contrary to that Standard, and was unprofessional conduct. He had admitted he was required to be present to supervise the sedation. The court found that to overturn the Hearing Tribunal's decision would be to undermine the efficacy of agreement statements of fact.

Regarding the sanction, the court found both the Hearing Tribunal and the Appeal Panel considered the relevant factors including the seriousness of the conduct, the age of the patient, and the fact that Dr. Byun is a pediatric specialist. The court held that deference is owed to professional disciplinary bodies on the fitness of sanctions and the fact findings underpinning them, being findings of mixed fact and law.

Regarding reference to the Guideline, the court held that ascertaining a standard of practice which must be met by a professional is an evidentiary matter and within the purview of the regulatory body. The Guideline had been attached to the agreed statement of facts and relied on by Dr. Graham, and Dr. Byun did not apply to cross-examine Dr. Graham or object to the admission of the Guideline, and his counsel had also relied on the Guideline to justify his conduct. The court found there was no unfairness in the Hearing Tribunal referring to and relying on the Guideline to inform the applicable standard of practice. The appeal was dismissed.

This case was digested by [Mollie A. Clark](#), and first published in the LexisNexis® Harper Grey Administrative Law Netletter and the Harper Grey Administrative Law Newsletter. If you would like to discuss this case further, please contact Mollie A. Clark at mclark@harpergrey.com.