But everyone does it this way

Discipline of Conduct that is Widespread in a Profession[1]

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Introduction

One of the most common defences put forward by professionals subject to discipline is that their conduct which is the subject of complaint or discipline is normal and consistent with the way many others in the industry practice their profession. We will refer to this argument as an "industry standard" defence.

Industry standard defences pose a particular challenge for professional regulatory bodies charged with upholding standards of conduct across a profession. That challenge arises from the fact that outside of the creation of new rules governing conduct, discipline of individuals is the key regulatory tool available to a professional regulatory body. Disciplining individual professionals that have engaged in conduct that is widely engaged in (or *perceived* to be widely engaged in) may cause a professional subject to discipline to feel unfairly singled out for doing something that "everyone else" does. A professional subject to discipline may also view the discipline of widespread industry conduct as the professional regulatory body acting outside of their mandate, particularly where the conduct is related to business practices.

This paper explores the particular challenges posed by an industry standard defence. Key points to be covered in this paper include:

1. The legal test for assessing when an industry standard defence may be established;
2. Express rules governing professional conduct;
3. Identifying a standard of conduct against which conduct may be assessed; and
4. Establishing a responsible and competent body of professional opinion.

The legal test for assessing when an industry standard defence may be established

That a professional must conduct themselves in accordance with all applicable rules and law is a longstanding principle. In *Moody and College of Dental Surgeons*,[4] a 1909 decision of the British Columbia Court of Appeal, the Court was faced with an appeal from a dentist who was found by the College of Dental Surgeons to have engaged in unprofessional conduct for using a trade name for his dental business rather than his own name in violation of a provision of the *Dentistry Act*.

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[4] *Moody v College of Dental Surgeons*, [1909] BCJ No 18, 14 BCR 206 [*Moody*].

On appeal, the decision of the College was upheld, with the Court finding that the dentist had indeed infringed an express provision of the *Dentistry Act* and that such infringement was unprofessional conduct. In reaching that decision, the Court articulated the following fundamental principle: "where the law of the land requires a professional man to carry on the practice of his profession in a certain way, it is, in my opinion, "unprofessional conduct" to carry it on otherwise (at 7)."

The principle from *Moody* was subsequently refined in *Brett v. Ontario (Board of Directors of Physiotherapy)*,[5] a decision of the Ontario Divisional Court. In that case, a licensed physiotherapist, was found guilty of professional misconduct for numerous charges, including that she treated an excessive number of patients per hour at her clinic, employed an excessive number of auxiliary staff at her clinic, and allowed students and auxiliary staff to administer treatment that should only be given by a physiotherapist. The Board based its finding of professional misconduct on the results of a survey conducted of the profession that was undertaken to develop recommendations on maximum patient caseloads and maximum physiotherapist/auxiliary staff ratios. The Board also relied on the evidence of certain professionals whose evidence supported the survey results. The Board found that the treatment of more than 5.5 patients per hour constituted professional misconduct.

The Court in *Brett* overturned the Board's finding of professional misconduct. As a starting point, the Court found that the conduct at issue breached no applicable rule of professional conduct. Further, the Court held that the survey evidence was inadequate to establish a clear standard of professional conduct against which an individual member's conduct could be assessed.[6]

While not questioning the Board's jurisdiction to make findings of professional misconduct against a physiotherapist, the Court differentiated between conduct which is unrelated to the actual application of the skills of the profession and conduct which relates to the methods or techniques practiced by a member performing the very function of the profession. Regarding the latter conduct, the Court questioned a system of discipline in which acceptable methods of practice were limited to the common methods used by a majority of practitioners:

> If it be misconduct to use methods and techniques that are foreign to or disapproved by the vast majority in the profession, the profession might never progress. In the case of medicine, for example, acupuncture would probably not have become a method of treatment in Ontario.[7]

To preclude the tyranny of majority-view methods of professional practice, the Court in *Brett* articulated the following legal test as to when a professional regulatory body will not be able establish that a member is guilty of professional misconduct:

> Where the alleged misconduct does not infringe a specific law and relates to the conduct or judgment of the member in performing his professional work, then the

[5] *Brett v Ontario (Board of Directors of Physiotherapy)*, 1991 CanLII 8286 [*Brett*], affirmed on appeal, 1993 CanLII 9390 (ON CA).

[6] The Court noted the shortcomings of the survey, including a response rate of only 61% and that 10% of those surveyed reported treating more than 5.5 patients per hour; *ibid* at paras 20-21.

[7] *Ibid* at para 33.

> member cannot be found guilty of professional misconduct if there exists a responsible and competent body of professional opinion that supports that conduct or judgment.[8]

In support of this approach, the Court in *Brett* made reference to the following passage from a judgment of Lord Scarman in *Maynard v. West Midlands Regional Health Authority*,[9] a case concerning damages for negligence but which the Court in *Brett* held applied equally to a professional regulatory body on the issue of professional standards of conduct:

> ... I have to say that a judge's 'preference' for one body of distinguished professional opinion to another also professionally distinguished is not sufficient to establish negligence in a practitioner whose actions have received the seal of approval of those whose opinions, truthfully expressed, honestly held, were not preferred. If this was the real reason for the judge's finding, he erred in law even though elsewhere in his judgment he stated the law correctly. For in the realm of diagnosis and treatment negligence is not established by preferring one respectable body of professional opinion to another.

Applying this framework, the Court in *Brett* found that the Board had erred by ignoring a substantial body of competent responsible opinion evidence that supported the use of auxiliaries for the treatment of patients under the supervision of a physiotherapist. The Court noted that despite the fact that the vast majority of a profession may feel the conduct or judgment of a member is wrong, a member cannot be found guilty if there exists a responsible and competent body of professional opinion that supports his conduct or judgment.

The legal test from *Brett* set out above focuses on the jurisdiction of a professional regulatory body. The test may be reframed to deal with a professional seeking to establish an industry standard defence. Where a professional seeks to defend their conduct on the basis that it conforms to a particular industry standard or standard of practice, for the defence to succeed, the following two conditions must be met:

1. There can be no express practice standard or rule which prohibits the conduct in question; and

2. There must exist a responsible and competent body of professional opinion that supports that conduct.

Below we consider this test and the key elements which must be grappled with when dealing with an industry standard defence.

Express rules governing professional conduct

In the presence of a rule or law which directly applies to particular conduct and sets out a standard of practice that is within the jurisdiction of a professional regulatory body, a divergent standard within the profession, no matter how popular or widespread, will provide no assistance to a professional subject to discipline.

[8] *Ibid* at para 35.

[9] [1985] 1 All ER 635 (HL).

In *Thompson v. Chiropractors' Assn. (Saskatchewan)*,[10] the Saskatchewan Court of Queen's Bench dismissed an appeal of a finding that a chiropractor was guilty of professional misconduct due to his use of a mechanical device used to perform adjustments on a patient. The use of such a device was contrary to a section of the regulations to the *Chiropractic Act* which expressly stated that no chiropractor shall use a machine or mechanical device for adjustment.[11] It was admitted before the discipline committee that the appellant chiropractor had used an activator, which was an adjustment device.

On appeal, the chiropractor challenged the discipline committee's decision on a number of bases, including that the regulation in question violated public policy and that it ought to be void for having an improper purpose. In support of these arguments, the chiropractor adduced evidence to show the effectiveness of the activator device and the wide extent to which adjustment devices were used by members of the profession in the province. On the latter point, the appellant pointed out that Saskatchewan chiropractors were the only or almost the only chiropractors in North America who were prohibited from using a machine or mechanical device, such as an activator, as a substitute method of adjustment by hand.

The Court of Queen's Bench was not persuaded by the appellant's arguments or evidence. Citing the test from *Brett,* the Court noted the operative words "does not infringe a specific law" to mean that only where a professional's conduct does not infringe a specific law will it be possible for the professional to avoid discipline. As the regulation squarely applied to the appellant's conduct, the Court found the evidence adduced by the appellant to demonstrate the benefits of the activator device or its popularity were not relevant. Rather, the Court explained, the only way to avoid the consequences associated with breaching the regulation in question was to change the bylaws:

> … it was not the purpose of the hearing before [the tribunal] to address the efficacy or popularity of the use of the activator device. If the appellant wishes to bring about a change in the bylaws of the Chiropractors' Association of Saskatchewan, he must do so in a democratic manner. So long as the *Act* provides, as it does, that a breach of the *Act* … or its bylaws … is professional misconduct within the meaning of the *Act*, it is professional misconduct to breach the *Act* and the bylaws (*Regulations*) properly passed, and gazetted, pursuant thereto.[12]

In summary, where an identifiable standard of conduct is contained in an express law or rule which a professional is charged with breaching, it is no defence for a professional to defend their conduct by claiming that it accords with an industry practice which does not conform to the express law or rule.

Identifying a standard of conduct against which conduct may be assessed

Where there is no express rule applicable to particular conduct, a professional may still be found to have committed professional misconduct. For that to occur, it is necessary for a professional regulatory body to identify a standard of conduct against which the conduct at issue may be assessed. Where an identifiable standard cannot be made out, that may signal that the conduct at issue is outside the jurisdiction of a professional regulatory body.

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[10] *Thompson v Chiropractors' Assn. (Saskatchewan)* (1996), 145 Sask R 35, 1996 CanLII 7186 (SK QB) [*Thompson*].

[11] The regulations in question also expressly provided that a breach of this section of the regulations "shall be deemed to be misconduct"; *ibid* at para 10.

[12] *Ibid* at para 27.

In *Li v. College of Pharmacists of British Columbia,*[13] "customer service" proved to be outside the jurisdiction of the College of Pharmacists. The case concerned a pharmacist who had allegedly treated a number of customers in a rude and condescending manner. The tribunal found the pharmacist guilty of professional misconduct for his "bad manners".

The Court of Appeal did not agree with the tribunal's finding. The Court held that the authority of the College with respect to a professional conduct issue was conditional on a finding that the impugned conduct was "reasonably a professional conduct issue". Civility, the Court noted, was not amenable to regulation and was not the subject of a generally accepted standard set by the College. The Court also commented upon the absence of any cases in which bad manners had been the subject of a disciplinary proceedings by a professional body.[14] In the result, the Court concluded that the regulation of the "personal idiosyncrasies" of members, including short temper, intemperate language, and rude behavior was not reasonably connected to the objectives of the *Pharmacists Act* to protect the public through drug control and public safety.

Identifying a relevant standard of conduct is critical to an objective assessment of a professional's conduct. However, even where the regulation of particular conduct is clearly within a professional regulatory body's jurisdiction, establishing such an objective standard of conduct may prove to be challenging. In every case, a standard of conduct against which a member's conduct may be assessed must be based in objective legal or evidentiary sources and cannot be based upon a subjective standard derived from the specialized knowledge or personal backgrounds of tribunal members.[15] Tribunal members may use their expertise to assess evidence, including expert evidence. But the standard must derive from objective legal or evidentiary sources.[16]

In *Bennet v. Manitoba (Registered Psychiatric Nurses' Association)*,[17] the Manitoba Court of Appeal held that tribunal members could not rely on their specialized knowledge of an issue in arriving at their decision. In that case, a psychiatric nurse was found guilty of professional misconduct for having had a sexual relationship with a former patient with whom he allegedly continued to have a therapeutic relationship. The Court overturned the tribunal's decision on the grounds that the tribunal did not have before it sufficient evidence to establish the boundaries of therapeutic relationships. Notably, no expert evidence was called, nor was there any evidence that he or any other psychiatric nurse should have known, based on education, training, or experience, that a therapeutic relationship was ongoing.[18]

In *Novick v Ontario College of Teachers*,[19] the Ontario Superior Court overturned a tribunal's decision to discipline two teachers for failing to "immediately notify" the parents of a student who was sexually assaulted by a group of other students on a school trip. The Court allowed the appeal for a number of reasons, including because of the tribunal's failure to refer to any sources in its decision which established an objective standard of conduct against which the teachers conduct could be assessed. The

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[13] *Li v College of Pharmacists of British Columbia*, 1992 CanLII 2023 (BC SC), affirmed on appeal, 95 BCLR (2d) 153 (BC CA) [*Li*].

[14] *Ibid* at paras 43-44.

[15] *Ibid* at para 53.

[16] *Provincial Dental Board of Nova Scotia v Dr. Clive Creager*, 2005 NSCA 9 at para 53 [*Creager*]

[17] *Bennet v Manitoba (Registered Psychiatric Nurses' Association)*, 2003 MBCA 69 at paras 14-16 [*Bennet*].

[18] *Ibid* at paras 20-21.

[19] *Novick v Ontario College of Teachers*, 2016 ONSC 508 [*Novick*].

Court also noted that the tribunal did not present any expert evidence of the standard of care applicable to teachers in similar circumstances.[20] Instead, the tribunal had merely noted that the standard was so "notorious" and "ingrained" that evidence was not required.[21] The Court also held that the tribunal had mistakenly relied on the *Statutory Powers Procedure Act* to take judicial notice of specialized information known to the tribunal based on its expertise in order to establish what it said was the applicable standard of conduct.[22]

Where the relevant standard of conduct which applies in particular circumstances is not readily apparent it may be necessary to look beyond the express rules governing the profession and to consider other legislation, guidelines or practice directives endorsed by the professional regulatory body. Expert evidence is also often a critical source for identifying an applicable professional standard. In some instances, more nebulous concepts such as moral and ethical principles may be relevant when attempting to identify a standard of conduct against which conduct may be assessed.

In the Matter of Edward K.Y. Lim P. Eng.[23] provides an example where a discipline panel examined a wide variety of sources in order to ascertain and define an applicable standard of conduct. In that matter a structural engineer was charged with demonstrating unprofessional conduct after he had submitted sealed structural drawings to an approving authority for the purposes of obtaining a building permit in circumstances where it was alleged that the structural drawings were alleged to be materially incomplete, to contain errors, and, contrary to a section of the British Columbia Building Code, to lack "sufficient detail about structural members to enable the design to be checked".[24]

Under the *Engineers and Geoscientists Act*, RSBC 1996, c 116, a member may be disciplined if he or she demonstrates unprofessional conduct[25] which will be established where the evidence demonstrates a marked departure from the standard to be expected of a competent professional.[26] As a result, a live issue in the *Lim* matter was what standard of conduct applied in the circumstances of a structural engineer submitting structural drawings at the building permit stage.

At the discipline hearing in *Lim*, the engineer called witnesses who testified that, because of the lengthy amount of time required to obtain a building permit from the approving authority due to a backlog of applications, it was common practice to submit incomplete drawings in an application for building permit in order to "get in the queue" and obtain a permit as soon as possible. Evidence was given that it was customary for missing structural details to be worked out over the course of the project as construction proceeded. With respect to the Building Code section in question, it was argued that the "check" mentioned in the section was the check performed by the plan checker employed by the approving authority as opposed to a design check which might be performed by a structural engineer. Further, as a building permit for the project at issue had in fact been issued, the engineer contended

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[20] *Ibid* at paras 24-27.

[21] *Ibid* at para 27.

[22] *Ibid* at paras 64-72.

[23] Discipline decision of Engineers and Geoscientists BC, May 2019 (Weblink) [*Lim*].

[24] Section 2.2.4.3 of the BC Building Code, 2012, provides that "Structural drawings and related documents submitted with an application to build shall indicate … the dimensions, location and size of all structural members in sufficient detail to enable the design to be checked."

[25] Section 33.

[26] The test for unprofessional conduct in the engineering context is based on the decision of *Law Society of British Columbia v Martin*, 2005 LSBC 16.

that the plan checker had determined that the structural drawings at issue contained sufficient information.

In detailed reasons, the discipline panel in *Lim* found the engineer to be guilty of unprofessional conduct as the panel determined that a structural engineer in the circumstances was obliged to ensure that the structural drawings were fully detailed. The panel considered a wide variety of sources to identify the standard of conduct expected of a structural engineer submitting sealed structural drawings for a building permit. In particular, the panel considered the Association's *Code of Ethics*, Bylaws, Guidelines, industry publications, past discipline decisions, and expert evidence as all informing the applicable standard of conduct.[27]

The panel's consideration of the various sources also informed its interpretation of the Building Code provision. The panel in *Lim* held that the "check" required by that provision was the design check required of a structural engineer which, the panel noted, could only be performed if all of the structural members were sufficiently detailed.[28] In this regard, the panel noted the evidence of the plan reviewer who testified that he was not a structural engineer and did not conduct any engineering analysis when he reviewed structural drawings.

The principle of using other sources to inform the meaning of legislation, bylaws, or other rules upon which a discipline charge may be based was discussed in *Kaminski v. Association of Professional Engineers*.[29] In that case, a discipline panel had found an engineer guilty of unprofessional conduct because of an inadequate structural concept review he had performed where he had failed to identify deficiencies in structural drawings which were the subject of the concept review he performed. A bylaw of the Association made the performance of structural concept reviews mandatory, but provided no details on how the review should be carried out.[30] In reaching its decision, the panel had relied on an Association guideline detailing how a concept review should be performed.

On appeal, the engineer argued that the panel had exceeded its jurisdiction by basing its finding of unprofessional conduct on the guideline, arguing that this constituted an impermissible delegation of power.

The Court dismissed the engineer's appeal, finding that it was appropriate for the panel to consider the guideline because the bylaw which made structural concept reviews mandatory gave no guidance on how they should be carried out; the guideline, which was drafted to assist engineers in carrying out the review in question and to aid in maintaining uniform standards, provided a tool to engineers performing concept reviews.[31] As the guideline articulated how an engineer might properly complete a concept review, it gave the panel insight into what was expected of a professional in the circumstances. The engineer, the Court found, had purported to follow the guideline but had failed to identify the deficiencies in the structural drawings.

In summary, where there is no express rule applicable to particular conduct, a professional may still be found to have committed professional misconduct. As a first step, an identifiable standard of conduct

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[27] *Lim*, *supra* note 23 at paras 75-85.

[28] *Ibid* at paras 86-92.

[29] *Kaminski v Association of Professional Engineers*, 2010 BCSC 468 [*Kaminski*].

[30] *Ibid* at para 38.

[31] *Ibid* at para 39.

that is within the jurisdiction of the discipline body must be identified. The sources of standards of conduct can vary from express rules which clearly apply to other legislation, expert evidence, or relevant guidelines. In every case, a standard of conduct against which a member's conduct may be assessed must be based in objective legal or evidentiary sources and cannot be based upon a subjective standard derived from the personal backgrounds of tribunal members.

A responsible and competent body of professional opinion

Where there is no express law or rule prohibiting certain conduct but where an identifiable standard of conduct does exist, an "industry standard" defence may be made out if there is sufficient evidence demonstrating that there exists a responsible and competent body of professional opinion that supports the conduct. As noted by the Court in *Brett*,[32] this concept originates in professional negligence law and is often referred to as the "respectable minority" principle.

The Ontario Court of Appeal in a medical negligence case has described the respectable minority principle as holding that where the practice followed by a doctor is adhered to by at least a respectable minority of competent medical practitioners in the same field; it is not for the court to prefer the practice of the majority over that of the respectable minority.[33] In the negligence context, a defence based on the respectable minority principle will be made out where a defendant professional can establish by evidence the existence of a body of respected professional thought and also establish that their own conduct conforms to that body of thought.

In order for a professional subject to discipline to establish an industry standard defence it is necessary to adduce expert evidence to establish a responsible and competent body of professional opinion which differs from a competing body of thought which a professional regulatory body contends to be the governing standard for assessing conduct.

An industry standard defence based upon the respectable minority principle was unsuccessfully argued in *Provincial Dental Board of Nova Scotia v. Dr. Clive Creager*.[34] In that case, a dentist was found guilty of professional misconduct arising from his treatment of temporomandibular disorders suffered by six of his patients. On appeal before the Nova Scotia Court of Appeal, the dentist argued that there were two competing schools of thought as to the treatment of temporomandibular disorders and that his treatment simply followed one approach whereas, he contended, the witnesses for the prosecution followed the other.[35]

The Court in *Creager* rejected this argument, finding that the Board's decision did not depend on accepting one or the other of the competing schools of thought. Instead, the Court held that the Board's decision was based on finding that the dentist's conduct failed to meet the appropriate standard of care.[36] Notably, the Court found that the Board had identified the applicable standard of care from the regulations which set out that dentists must meet a standard of skill, knowledge or judgment that is reasonable in the practice of dentistry in Nova Scotia and prohibited conduct that is detrimental to the

[32] *Brett*, *supra* note 5.
[33] *Cleveland v Whelan*, 2011 ONCA 244 (CanLII) at para 38.
[34] *Creager*, *supra* note 16 at para 33.
[35] *Ibid* at para 35.
[36] *Ibid* at para 37.

best interests of one or more patients.[37] The dentist's conduct fell short of this standard and did not accord with either school of thought within the profession.

The discipline panel in *Lim* also rejected the engineer's attempt in that case to establish an industry standard defence.[38] The panel in that case held that the evidence adduced by the engineer at the hearing regarding the general practice to submit incomplete structural drawings in order to get "in the queue" to obtain a building permit was inadequate evidence to establish that there was a body of competent and responsible opinion supporting that practice as required by the test set out in *Brett*.[39] On this point, the panel noted that all of the non-engineer witnesses had testified that they relied on the structural engineer having fulfilled his or her professional responsibilities. Given that evidence, if an engineer had not fulfilled his or her professional responsibilities, such reliance was obviously misplaced.

An industry standard defence based upon the "respectable minority" principle was successful in *Brett*.[40] The Court in that case found that the Board had improperly ignored a substantial body of competent responsible opinion evidence before it that supported the use of auxiliaries for the treatment of patients under the supervision of a physiotherapist. Such evidence was provided by properly qualified experts, was admissible, and was relevant to the issue of the applicable standard of conduct.

Summary

Industry standard defences are commonly raised in many different professions, especially in situations where the impugned conduct is not regulated by an express rule and is widespread in a profession. The absence of an express rule prohibiting certain conduct may signal that the conduct is outside the jurisdiction of a professional regulatory body.

Where an express rule exists which applies to certain conduct, it is no defence for a professional to claim that the conduct is widespread or well-accepted in a profession. Where no express rule applies, a standard of conduct against which conduct may be assessed may be derived from other sources, such as other legislation, rules, guidelines, or expert evidence. In every case, a standard of conduct against which a member's conduct may be assessed must be established and must be based in objective legal or evidentiary sources.

An industry standard defence will only be available in the absence of an express practice standard and where a professional subject to discipline can establish that a body of competent professional opinion exists which supports the conduct in issue. Such a defence will generally only prevail where there is more than school of thought or method of practice within a profession and the professional subject to discipline can establish that their conduct is consistent with one of those methods.

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[37] *Ibid* at para 54.

[38] *Lim*, *supra* note 23.

[39] *Ibid* at para 77.

[40] *Brett*, *supra* note 5.