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It's Not Easy Being Mean

By: Michael Ilg

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If there is anything worse than being seen as mean - as in saying words that others find harsh, hurtful, or distasteful - it is being mean *and* unpopular. The popular, by definition, collect social benefits from being mean, while the unpopular do not. Although this may read like the social code of a typical high-school, it also reflects the regulation of expression by professional societies in Canada, or at least Ontario, according to a recent decision of that Province's Divisional Court in *Peterson v College of Psychologists of Ontario*, 2023 ONSC 4685 (CanLII).

The object of this brief post is to examine the Court's finding that a remedial order requiring media coaching was not disciplinary in nature, and that the order presented little to no impairment of Dr. Peterson's freedom of expression. This post argues that such orders ought to be considered disciplinary actions, and that these actions are liable to have a chilling effect on dissent, especially when the expression is non-commercial in nature. Identifying the remedial order as a disciplinary action helps make clear that the institution was sanctioning individual expression on content-based grounds. It is also suggested that extra caution should be taken when professional bodies are regulating expression primarily on the basis of public perception.

Background

Dr. Jordan Peterson is a clinical psychologist and a former Professor at the University Toronto. During 2022, Dr. Peterson was a member of the College of Psychologists of Ontario (the College) and identified himself on Twitter (now X) as a clinical psychologist, although he no longer had an active practice and no longer had any clients.

During the first half of 2022, the College received numerous complaints from members of the public over Peterson's controversial comments, including:

- A tweet on January 2, 2022, in which Dr. Peterson responded to an individual who expressed concern about overpopulation by stating: "You're free to leave at any point."

- Various comments Dr. Peterson made on a January 25, 2022 appearance on the podcast, "The Joe Rogan Experience". Dr. Peterson is identified as a clinical psychologist and spoke about a "vindictive" client whose complaint about him was a "pack of lies."

Speaking about air pollution and child deaths, Dr. Peterson said: "it's just poor children, and the world has too many people on it anyways."

- A tweet on February 7, 2022, in which Dr. Peterson referred to Gerald Butts as a "prik".

- A tweet on February 19, 2022, in which Dr. Peterson commented that Catherine McKenney, an Ottawa City Councillor who uses they/them pronouns, was an "appalling self-righteous moralizing thing".

- In response to a tweet about actor Elliot Page being "proud" to introduce a trans character on a TV show, Dr. Peterson tweeted on June 22, 2022: "Remember when pride was a sin? And Ellen Page just had her breasts removed by a criminal physician."

- Another complaint about Dr. Peterson's January 2, 2022 "free to leave" tweet. This second complaint provided a link to a 2018 GQ interview in which Dr. Peterson made a similar comment about suicide.

- Peterson's tweet posted in May 2022, in which he commented on a Sports Illustrated Swimsuit Edition cover with a plus-sized model, tweeting: "Sorry. Not Beautiful. And no amount of authoritarian tolerance is going to change that." (at para 9)

None of the complaints registered by the College were apparently made by any of Dr. Peterson's former clinical clients. As noted above, the comments that triggered members of the public and caused the College's intervention occurred on mediums such as Twitter and the Joe Rogan podcast. A number of the complaints were delivered as tweets.

The Decision of the College

In response to these complaints, on March 8, 2022, the Registrar of the College requested the appointment of an investigator. The report of the investigator was provided to a panel of the College's Inquiries, Complaints, and Reports Committee (ICRC). While two of Dr. Peterson's comments received recommendations of no further response, the bulk of the comments listed above were found to be deserving of action from the College (at para 13).

On August 4, 2022, College staff wrote to Dr. Peterson on behalf of the panel and expressed concern that the "statements may be demeaning, degrading and unprofessional." (at para 14) The College staff recognized Dr. Peterson's "right to freedom of expression" but expressed concern about the "impact risks", and that these "public statements that are demeaning, degrading, and unprofessional may cause harm, both to the people they are directed at, and to the impacted and other communities more broadly." (at para 14) The letter referred to and cited various provisions in the College's *Code of Ethics*. The panel recommended that Dr. Peterson "reflect on these issues with a period of coaching," with a coach to be selected by the panel. Dr. Peterson submitted a reply but refused to undertake coaching. This process was repeated a further time before the ICRC panel

formally made a decision on the matter, in a decision dated November 22, 2022. The decision declared that:

> The Panel is concerned that making public statements that may be inconsistent with the professional standards, policies, and ethics currently adopted by the College poses moderate risks of harm to the public. These potential harms include undermining public trust in the profession of psychology, and trust in the College's ability to regulate the profession in the public interest. Public statements of this nature may also raise questions about Dr. Peterson's ability to appropriately carry out his responsibilities as a registered psychologist. While Dr. Peterson may not currently have an active clinical practice, he continues to be registered and authorized to do so. Furthermore, public statements that are demeaning, degrading, and unprofessional may cause harm, both to the people they are directed at, and to the impacted and other communities more broadly. (at para 24)

In its decision, the Panel ordered (again) that Dr. Peterson undergo coaching, or a specified continuing education or remedial program (a "SCERP"), on the topic of "professionalism in public statements" (at para 2). Dr. Peterson was to pick from one of two proposed coaches; begin the training within three months, and complete it within twelve; and, Dr. Peterson was responsible for the entire cost of the training. Failure to comply with the training to coach's satisfaction, "indicating that the concerns… have been appropriately remediated in the public interest, Dr. Peterson will not be considered to have successfully complied with the SCERP" and this may "constitute professional misconduct." (at para 27)

The Decision of the Ontario Divisional Court

Dr. Peterson sought judicial review of the Panel's decision, and claimed that:

> (1) that the ICRC failed to conduct an appropriate proportionately-focused balancing of freedom of expression and the statutory objectives of the College as required by the decision of the Supreme Court in *Doré*; and
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> (2) the Decision fails to meet the standard of "justification, transparency and intelligibility" required by the Supreme Court's decision in Vavilov. (at para 28)

On August 23rd, 2023 a three-judge panel of the Ontario Divisional Court dismissed Dr. Peterson's application. The Court found that the ICRC had proportionally balanced freedom of expression against the College's statutory objectives, and that its decision met the *Vavilov* standard.

In keeping with *Doré v Barreau du Québec*, 2012 SCC 12 (CanLII), and *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 (CanLII), the Court showed considerable deference to the College Panel and did not require much in the way of balancing. As Justice Schabas, writing for the court, explained:

> The ICRC is made up of a majority of professional members. Deference should also be afforded its assessment of the risk of harm to the public and the profession in this case. (at para 45)
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> […]
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> The fact that the Decision did not provide a detailed discussion of the value of freedom of expression does not mean the ICRC did not appropriately consider it. Furthermore, the ICRC should not be expected to do so. (at para 62)

In my view, the panel recognized Dr. Peterson's right to freedom of expression, but did not engage in any attempt to weigh the infringements to this right against the fulfillment of the College's statutory objectives, which the "proportionality exercise" in *Doré* is said to require.

The *Doré* approach depends upon administrative officials balancing, or at least mentioning, Charter rights alongside statutory objectives. (For a criticism of the superficial administrative balancing exercise that can result, see here). The statutory objectives at issue in this case involved the appropriate use of language in public. As the Court observed: "The ICRC's concerns related to the public interest in members of the College avoiding the use of demeaning or degrading language." (at para 45)

In its interactions with Dr. Peterson, the College relied heavily on its *Code of Ethics* and *Standards of Conduct*, which the Court noted repeatedly, including:

> The Panel considered "Principle I: Respect for the Dignity of Persons and Peoples." This includes the statement that "[r]espect for the dignity of persons is the most fundamental and universally found ethical principle across disciplines, and includes the concepts of equal inherent worth, non- discrimination, moral rights, and distributive, social, and natural justice." The Code continues:
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> > In respecting dignity, psychologists acknowledge that each human being should be treated primarily as a person or an end in him/herself, not as an object or a means to an end, and is worthy of equal moral consideration. In doing so, psychologists acknowledge that all human beings have a moral right to have their innate worth as human beings appreciated … (at para 40)

As the language of the Code makes clear, this statement is not unique to psychology, and these principles are universal "across disciplines" (at para 40). For example, treating individuals as equally deserving of dignity, and as ends in themselves, are essentials of Kantian ethics. The statutory objectives furthered by the College could seemingly be generalized to most publicly regulated professions: promoting the public interest by maintaining the College's reputation and avoiding harm to members of the public.

Extra-mural Expression

Freedom of expression restrictions within a professional workplace are commonplace. The difficulty emerges when employers, or professional bodies, take exception to the expression of

individuals when they are speaking publicly in their private capacity as citizens. As the Court noted, following Jill Copeland J. (as she then was) in *Jha v College of Physicians and Surgeons of Ontario*, 2022 ONSC 769 (CanLII), at para 119:

> It is well-established that actions of members of a profession in their private lives may in some cases be relevant to and have an impact on their professional lives – including where the conduct is not consistent with the core values of a profession and/or where there is a need for a regulated profession to maintain confidence of the public in the profession and not be seen to condone certain types of conduct by its members.

For an example, the Court drew upon *Pitter v College of Nurses of Ontario and Alviano v College of Nurses of Ontario*, 2022 ONSC 5513 (CanLII):

> … in which two nurses spoke out on social media and at a public gathering against masks and vaccines mandates during the COVID pandemic. Both identified themselves as registered nurses. The College of Nurses' ICRC identified concerns with certain statements which were misleading and spread what could be dangerous misinformation. As this Court held, at para. 14: Given its statutory mandate, it was reasonable for the ICRC to be concerned about the Applicants' statements. As the committee noted, in their public statements, both Applicants identified themselves as health professionals. Ms. Pitter publicly identified herself as a nurse practitioner and Ms. Alviano publicly identified herself as a registered nurse. This not only put the public at risk of being guided by false information, but also risked impacting the reputation of the profession. (at para 52)

Another example involved the case of a teacher. "When a teacher makes public statements espousing discriminatory views, and when such views are linked to his or her professional position as a teacher, harm to the integrity of the school system is a necessary result." (*Kempling v British Columbia College of Teachers*, 2005 BCCA 327 (CanLII) at para. 43, citing the Supreme Court in *Ross New Brunswick School District No 15*, 1996 CanLII 237 (SCC), [1996] 1 SCR 825.

The Court found that the panel's decision was in line with this precedent:

> Like the legal profession, the health professions recognize limitations on free expression to maintain "boundaries of civility" and professionalism …
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> Here, the Panel of the College of Psychologists' ICRC – an expert body – reviewed its Code and Standards and expressed concern that Dr. Peterson's public statements, insofar as they contained degrading and demeaning language, may be inconsistent with its professional standards and could undermine public trust in the profession. (at paras 55-56, citations omitted)

The Result

The Court held that the panel: "proportionately balanced the competing interests, protecting the public interest in professionalism in communications by members and prevention of harm, while minimally impairing Dr. Peterson's right to freedom of expression." (at para 67).

In finding the balance reasonable, the Court stressed that the order was remedial in nature, and, therefore, presented a minimal impairment of a Charter right (at para 65). On the nature of the impairment, the Court observed:

> By directing a SCERP, the ICRC pursued a proportionate and reasonable option to further its objective of maintaining professional standards, and which will have a minimal impact on Dr. Peterson's right to freedom of expression. Admittedly, the ICRC Decision is not benign; the direction to submit to a SCERP will be placed on Dr. Peterson's public record with the College, but it is a remedial order, not a disciplinary finding, or even a referral to discipline … The Decision simply requires him to have coaching "to review, reflect on, and ameliorate his professionalism in public statements" in order to avoid making demeaning and degrading statements about people that may be harmful to them and to the profession.
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> The ICRC Decision does not prevent Dr. Peterson from expressing himself on issues of interest to him and his audiences; rather, the Decision is focussed on concerns over his use of degrading or demeaning language, about which he was given advice in 2020. Requiring coaching following apparently unheeded advice seems a reasonable next step, proportionately balancing statutory objectives against Charter rights which are minimally impaired, if they are impaired at all, by the Decision. (at paras 63-64)

Commentary

From the perspective of freedom of expression, it is somewhat disconcerting to read the Court consider remedial retraining to not be disciplinary. (What would Foucault think?) According to the Court, this remediation is not only minimal, but it might not be an impairment "at all." What is more, the Court declares that the "ICRC decision does not prevent Dr. Peterson from expressing himself." How gracious of them. But freedom of expression is not merely the liberty to speak, and it is not merely the absence of prior restraint. Freedom of expression is also, and crucially, about the freedom from post-speech content-based sanctions from the state, or a publicly regulated professional body, which is what occurred in this case.

1. The Economics of Why Bother?

Professionals often need to maintain or update their competencies and training to ensure that they are current with the standards of their field; but the training order in this case is arguably different. The order is not about remedial training on the content of psychology or its clinical practice, it is about language used on social media and on podcasts. I would imagine that many professionals would find it somewhat humiliating to have a public record of being required to undergo remedial

training on basic decorum. Furthermore, the intangible social cost of the order might also include the small indignity of having to agree with, and placate the assigned coach in order to secure the coach's sign-off, or else risk further remediation or sanction. This is not to suggest that professionals being singled out is never permissible, but simply that we should be forthright in recognizing that involuntary remediation is a cost, and can be a form of discipline.

Apart from intangible social costs, there is also the tangible cost in money and time of having to undertake the required coaching. While many professionals might be able to easily afford the cost of training, this may not be the case for all. And surely many professionals might view required coaching sessions on public decorum to be either tedious or an unwelcome imposition on their time. At this point, the intangible and tangible costs of remediation are material but not substantial unless the matter progresses through further stages of dispute resolution or litigation. The key, of course, is to compare these costs against the benefits of non-commercial expression, which are often slight or non-existent.

Expression in economic terms is a form of a public good (see, *e.g.*, Farber), in that it will tend to be subject to market failure because valuable expression will tend to be underproduced in relation to demand. The reason for this market failure is that the benefits of expression are often non-excludable, and the originator of the idea cannot keep others from benefitting for free. Suppose a professional's blog post, unlike this one, contains valuable information - it identifies some corruption or regulatory abuse in government zoning decisions, for instance. On the basis of this information, there is public outrage and subsequent regulatory reform, which improve efficiency and public revenues. Society ends up better off because of the blog post, and all residents, including the author (who may or may not gain some small reputational advantage), share equally in the social benefits of the information, even though it was the author alone who undertook the time and expense of providing it.

The situation is reversed, however, if there is negative feedback in response to the blog. Maybe the post is construed as hurtful or mean. In this circumstance, all the negative consequences from writing the post, such as remedial training for the author, are borne by the author alone. In the first hypothetical everyone participated equally in the benefits, while in the second negative example no one else participated in sharing the costs. For this reason, non-commercial expression is often very susceptible to stifling or chilling, because while the benefits mainly go to others, all the negative consequences go to the author alone. An economic perspective, therefore, helps explain why political and non-commercial expression tends to receive far greater constitutional protection than commercial expression (see Posner).

Dr. Peterson, as a controversial professional with a high profile internationally, was perhaps the inevitable test case for litigating culture wars through professional bodies, but I would suggest he also makes for a terrible test case because he is so unrepresentative of most professionals. Dr. Peterson is a best-selling author with a huge following on social media, and he is surely able to monetize his expression in a manner that most professionals may not. While some public figures are able to blend political and commercial expression, many professionals, when they take to social media, will be engaging in purely non-commercial expression, whether because it is personal in nature or professional but unpaid. As with this blog post, for example, in which the expected remuneration and expected page views are identical: zero.

Given the economics of non-commercial expression, the costs imposed do not have to be substantial to chill expression. One simply needs to impose enough institutional costs to make a disagreeable or dissenting speaker decide that it is not worth the trouble - why bother? A single moment of displeasure or disagreement can launch a tweet. A single tweet can launch an investigation, a 'constructive conversation', or even panel hearings. The costs of these proceedings are not borne by the complainant, who has probably moved on to their next twitter fight, but will be borne by the professional body, and by the speaker, of course.

2. Are You Joking?

It is crucial that professional bodies maintain the trust of the public, but this is arguably more pressing when claims of conduct involve actual patients, clients, and students. This case involved no client complaints and nothing about the practice of clinical psychology that was distinct to the field of psychology: it was about the public perception of language and the public's perception of the profession and the College. The Court granted deference to the ICRC as a "body of experts" (at para 56), which is in keeping with precedent, but the evidence this expert panel was considering were tweets like the one in which "Dr. Peterson referred to Gerald Butts [who is the former Principal Secretary to Prime Minister Trudeau] as a "prik" (at para 9). Does one need to be an expert in psychology to determine that this comment exhibits poor taste and poor spelling? The ICRC committee was apparently composed of not only expert spellers, but also experts in the art of comedy and its boundaries.

On July 27 2022, the Panel issued a decision that "no further action be taken" regarding Dr. Peterson's tweet in which it was alleged he encouraged people to commit suicide ("you're free to leave at any point"), finding that, while "provocative and inflammatory" it "could be interpreted as innuendo, a joke, or parody", and did not "rise to the level of disgraceful, dishonourable, or unprofessional conduct." (at para 13) Though both humor and offense may be said to lie in the eye of the beholder. Contrast the previous joke with Dr. Peterson's comment about air pollution and that "it's just poor children" (para 9) This comment was included in the ICRC's listed comments of concern that led to its decision. So, joking with a specific person on social media about encouraging suicide is okay, but joking about harm to unspecified children around the globe is not okay. Is this because the unnamed people are numerous or because they are children? I'm not sure. No doubt the distinction is explicable to psychologists because of their joke training.

The ICRC's approach to Dr. Peterson's jokes was endorsed by the Court: "[W]hile Dr. Peterson's comment on "poor children" may have been sarcastic, it was open to the ICRC to be concerned about him making "demeaning jokes."" (at para 71) The Court also admonished that: "Sarcasm is commonly used to insult, demean and degrade." Sarcasm can be insulting, but since the time of Diogenes and the Cynics of ancient Greece (see here) there has been a tradition of using humour to mock and unsettle the powerful. The problem with the adjudication of jokes is not only that it is subjective and arbitrary, but that it can often be reactionary and politically motivated. Granting professional bodies jurisdiction, and deference, over extramural speech may seem appealing when we agree with the majority and the professional elite, but sarcasm is not the exclusive preserve of any single political affiliation. Indeed, humour and boundary pushing language have often been the province of the oppressed.

Finally, this decision poses interesting issues for professionals who are also involved in higher education, such as those who teach in the professional schools of universities. Universities are defined by traditions such as academic freedom (and collective agreements) that grant their faculty members a range of expressive liberty, particularly in regards to extra-mural expression, which are exceptional within society. Academic freedom permits faculty to wade into public debates on law and policy without fear of professional reprisals, even when they make social media comments that are inflammatory or intentionally provocative. I would suggest that if you are an academic who is also a member of a regulated profession, the decision in this case provides you with another reason to watch what you say; another reason to avoid the risk of offending anyone; another reason to say why bother? I am not joking. And neither should you.

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