

**COLLEGE OF PHYSICIANS & SURGEONS OF MANITOBA  
INQUIRY PANEL DECISION**

**WARNING**

**Publication Restrictions**

1. The Inquiry Panel dismissed the charges against Member A and did not make any findings or orders against Member A under section 59.5, 59.6 or 59.7 of *The Medical Act*. In these circumstances, the following restrictions apply:
  - a. Subsection 56(1) of *The Medical Act* provides that there shall be no reporting in the media of anything that would identify the member whose conduct is the subject of the hearing, including the member's name, the business name of the member's practice or partnership, or the location of practice, unless and until the panel makes a finding under section 59.5.
  - b. Subsection 59.9 of *The Medical Act* permits publication by the College of the circumstances relevant to the findings and any order of the Panel, however, the College cannot publish the member's name unless the Panel makes an order against the member under section 59.6 or 59.7.
2. The Inquiry Panel ordered that Pursuant to Subsection 56(3) of *The Medical Act*, the identities of the Complainant and of other third parties referred to in these proceedings, shall be protected in the record of these proceedings by referring to them in a non-identifying manner.

**INQUIRY: IC1631  
MEMBER A**

**REASONS FOR DECISION OF THE INQUIRY PANEL  
ON THE MOTION RE: DELAY**

**INTRODUCTION**

In December, 2011, a Notice of Inquiry was issued by the College of Physicians & Surgeons of Manitoba (the College) against Member A. The allegations against Member A relate to events which allegedly occurred between November, 1991 and May, 1994. The specific allegations against Member A, and the "Particulars" in support of those allegations, as outlined in the Notice of Inquiry are:

1. During the period commencing in or about November 1991 and continuing until in or about May 1994, on one or more occasions when Ms ● attended at your office for medical care you failed to maintain appropriate boundaries with her and/or exploited her for your personal advantage and thereby violated Article 2 of the Code of Conduct and/or committed an act or acts of professional misconduct.

**PARTICULARS**

- A. You made inappropriate sexual comments to Ms ● about her ability to have multiple orgasms.
- B. You inappropriately touched Ms ●'s breasts and/or genitals, including fondling her breasts and/or stimulation of her clitoris, purportedly for what you represented to Ms ● as being the medical purpose of checking her fluids

and/or making sure she was ovulating when there was no medical justification for your actions.

- C. During Ms ●'s last visit to your office:
- i. you failed to respect Ms ●'s privacy in that you watched her undress;
  - ii. you made inappropriate sexual comments to Ms ● about:
    - a. her panties;
    - b. your desire to have a romantic and/or sexual relationship with her, including your desire to have sexual intercourse with her;
  - iii. you have sexual contact with Ms ● in that:
    - a. you fondled Ms ●'s genitals and/or breasts, unzipped your pants and rubbed your penis against her;
    - b. you pressed your lips against Ms ●'s lips;
    - c. while Ms ● was standing, you stood behind her and pressed your body against her body. ...

On May 30, 2013, an Inquiry Panel, constituted under *The Medical Act, CCSM*, heard a motion brought by Member A. The motion was for an order staying the Notice of Inquiry, dismissing the Complaint and determining that no further proceedings be taken by the College with respect to the allegations raised by the Complaint and referenced in the Notice of Inquiry.

The primary grounds for the motion were that:

1. Pursuant to the principles of nature justice and fairness, Member A is entitled to a fair hearing of the complaints against him, which includes an adequate opportunity to prepare and present evidence, and to make full defence to the allegations made against him;
2. The delay of 19 - 22 years in this matter proceeding to a hearing has impaired Member A's ability to answer the complaint against him such that a fair hearing is no longer possible;
3. In balancing the interests of society in having the complaint heard and the interests of Member A to have a fair hearing, given the prejudice in the present case, the balance favours the fundamental right to have a fair hearing; ...

Present at the hearing of the motion were Member A and his counsel, and counsel for the Investigation Committee of the College.

Counsel for the Investigation Committee of the College argued that Member A's motion for an Order staying the Notice of Inquiry, dismissing the Complaint and determining that no further proceedings be taken with respect to the allegations referenced in the Notice of Inquiry, should be dismissed.

### **THE POSITIONS OF THE PARTIES**

In support of their respective positions, Member A relied on two affidavits, both sworn by him on February 12, 2013, and the Investigation Committee relied

on the Affidavit of C.M., the Manager of the Standards Department of the College, sworn on March 6, 2013. Both parties also filed comprehensive motion briefs with attached authorities. The oral submissions of the parties presented on May 30, 2013, and their written submissions as contained in their motion briefs were very thorough, with extensive references to the authorities referred to in the motion briefs. The summaries of each party's position outlined below are brief and are not intended to fully reflect the detailed arguments of the parties. Instead, the summaries are simply meant to provide the necessary context for the analysis undertaken by the Inquiry Panel.

#### The position of Member A

Member A strenuously denies the allegations being made against him and says that the sexual touchings and other sexual contact and sexual comments alleged in the Notice of Inquiry did not occur.

Member A says that statutory bodies such as the Inquiry Panel are subject to the principles of natural justice, which are intended to import an element of fairness into the proceedings. He asserts that the pre-charge delay in this case (from between 1991 and 1994 until late 2010) has significantly prejudiced him by preventing him from making full answer and defence to the allegations in the Notice of Inquiry. Member A submits that the delays in this case have resulted in important evidence being destroyed or lost, including, but not limited to:

- i) Member A's medical records relating to his care and treatment of the Complainant;
- ii) The medical records of Dr. A, the physician who saw the Complainant immediately after she ceased seeing Member A; and
- iii) A log book which would contain the names of people visiting Member A's clinic on a Saturday in the spring of 1994.

Member A also says that the passage of time has deprived the parties of their ability to be specific about the dates of important events and has thereby severely undermined his ability to introduce alibi evidence.

Member A and his counsel accept that in cases of pre-charge delay (which is the type of delay complained of by Member A in this case), the mere passage of time is not sufficient to result in a stay of proceedings, because if mere delay was sufficient for a stay, that would suggest that a limitation period applies in professional misconduct cases, and no such limitation period exists. Counsel for Member A acknowledges that the evidence put forward on this motion must demonstrate an actual prejudice to Member A's ability to make full answer and defence to the charges to such an extent that he is unable to receive a fair hearing.

In general terms, Member A maintains that the delay in this case has been so long that evidence has been lost which prevents his counsel from effectively cross-examining and challenging the evidence of the Complainant, and prevents his defence team from identifying and introducing evidence corroborating his version of events. It is therefore impossible for Member A to receive a fair hearing. Member A submits that in such circumstances it does not matter who or what caused the delay.

In specific terms, Member A refers to four areas in which he has been significantly prejudiced, and says that prejudice in any one of those areas is sufficient to justify a stay of these proceedings.

Firstly, Member A submits that the passage of time and the lack of specificity as to the dates of the alleged incidents prevent any effective challenge of the Complainant's evidence, by cross-examination or otherwise. For example, a delay of at least 16 years means that it is impossible to identify nurses or other staff members who may have been present in Member A's office and able to recall significant aspects of the Complainant's visits with Member A.

Secondly, Member A contends that he has been severely prejudiced by the destruction of his medical charts relating to the Complainant and the destruction of the charts of Dr. A. Member A alleges that the prejudice from not having his chart available to assist him in responding to the Complainant's

allegation is extreme. Chart entries would provide details as to subjective complaints, whether the Complainant attended upon him with other individuals, his assessment and examination, and his diagnosis and treatment plan. Member A insists that the charts would provide a medical/clinical justification and explanation for every visit by the Complainant upon him, and that the fact that his charts were destroyed many years ago prevents him from making a full answer and defence to the allegations in the Notice of Inquiry.

Thirdly, the lack of specificity about dates, particularly about the date of the Complainant's last visit to Member A, which allegedly took place on a Saturday in the spring of 1994 at Member A's office, prevents Member A from being able to bring forward alibi evidence that he was not present at his office on that particular Saturday. He also alleges that if the date of that last visit was identified, he might be able to prove that he was involved in some other activity, and may not have been in Winnipeg on the date in question.

Fourthly, Member A contends that the destruction of the logbook from the building in which Member A's office is located prevents him from establishing that the Complainant never attended at his office in that building on a Saturday morning in the spring of 1994. All visitors were required to enter their name, place of visit and times of entry and departure in the logbook. This book has been destroyed, and Member A argues that the loss of this evidence is extremely



prejudicial and prevents him from unequivocally proving that the Saturday incident, which is a major element of the allegations against him, did not occur.

In summary, Member A submits that the case law suggests that a stay of proceedings should be granted in situations where pre-charge delay has rendered the proceedings unfair. While the onus is on Member A to show that there has been actual prejudice, that onus has been discharged in this case because prejudice in any one of the four areas outlined above is sufficient to warrant a stay of proceedings. Member A submits that all four areas of prejudice have been established.

#### The position of the Investigation Committee

Counsel for the Investigation Committee referred extensively to two cases, namely the decision of the Supreme Court of Canada in *Blencoe v. British Columbia (Human Rights Committee)* [2000] 2 S.C.R. 307, and the Ontario Court of Appeal decision in *Sazant v. The College of Physicians & Surgeons of Ontario* [2012] O.N.C.A. 727 (CanLII).

According to counsel for the Investigation Committee, those cases and others establish that:

- i) Administrative proceedings should only be stayed because of delay as a last resort where:
  - a) the applicant proves that there has been inordinate delay by the administrative body in bringing the proceedings to hearing and that the delay has so significantly prejudiced the ability of the applicant to defend the charges that the applicant has been deprived of the right to a fair hearing; and
  - b) there has been inordinate delay that has been so excessive and oppressive that it would bring the administrative process into disrepute and amount to an abuse of process if the proceedings were allowed to continue.
- ii) A stay is a drastic remedy which should only be granted in the clearest of cases, taking into account the public interest and the interests of complainants in having cases considered and determined on their merits, especially those involving serious allegations such as allegations of sexual misconduct;
- iii) Where the only delay is pre-charge, particularly in cases involving sexual misconduct, the extraordinary remedy of a stay is very rarely granted. In such cases, the courts have recognized that the delay is not attributable to the investigators or the prosecutors, but rather to

the understandable reluctance on the part of victims to come forward until they are ready.

Therefore, on the basis of her review of the applicable law, counsel for the Investigation Committee disagreed with Member A's counsel that the sole issue for this Inquiry Panel to determine is whether it is possible for them to conduct a fair hearing on the merits, and that the cause of the delay is not relevant. In addition, counsel for the Investigation Committee pointed out that in both *Blencoe* and *Sazant*, the courts considered evidence of prejudice that the applicants said rendered the hearings unfair, and in both cases, notwithstanding substantial delay, the motion for a stay was denied.

Furthermore, counsel for the Investigation Committee emphasizes the importance of considering Member A's arguments with respect to prejudice in specific relation to the charges and the actual allegations outlined in the Notice of Inquiry.

The College stresses that the allegations against Member A are very specific, and can only be proven if the Inquiry Panel accepts the evidence of the Complainant over that of Member A. For Member A to be convicted, the Inquiry Panel must find that:

- the Complainant and Member A were alone together in Member A's examining room on one or more occasions between 1991 and 1994, during which time Member A fondled the Complainant's breasts and/or stimulated her genitals; and/or
- she attended his office for a final time on a Saturday in the spring of 1994, at which time he had sexual contact with her and made sexual comments to her.

The Inquiry Panel can only make these findings if there is sufficient evidence adduced at the hearing to support them, including a finding that the evidence of the Complainant is to be accepted over that of Member A.

With respect to Member A's specific allegations of prejudice, the Investigation Committee asserts that:

- i) There will be many cases in which doctors facing allegations of misconduct will be able to refer to meaningful information in the applicable chart to demonstrate that a procedure or examination was required, and was conducted in an appropriate manner, even though it may have been misunderstood by the patient. However, according to the College, the allegations against Member A are not clinical in nature and there would not have been anything recorded by Member A in his chart that would refer to the type of allegations

being made by the Complainant. The Complainant has stated there was no one else in the examination room when the alleged misconduct took place. Member A was clear in his response to questions posed by the Investigation Chair of the College that if he were to conduct any sort of gynaecological examination of a female patient for any reason, he would have had a nurse or his wife (who did administrative work at his office for part of the period in question) present during the examination.

Member A has not said that he cannot recall whether or not he fondled the Complainant's breasts or stimulated her clitoral area. Neither has he suggested that he needed to perform an examination of her breasts or genitals when she attended his office for issues relating to menstruation, and that he conducted such an examination but she may have misunderstood it. Member A's position is an outright denial of the allegations. The College maintains that whatever Member A may have documented in his chart will neither prove or disprove the Complainant's allegations, nor will they support his position that he never touched the Complainant inappropriately or otherwise misconducted himself.

- ii) With respect to Dr. A's involvement in the Complainant's care, the College suggests the only relevant information is already available through the Manitoba Health billings, namely that Dr. A conducted a

gynaecological examination and PAP test of the Complainant within a few months of her last visit to Member A. Given Member A's denial of the allegations in the Notice of Inquiry, the College says that Dr. A's charts will not contain information relevant to either the allegations of the Complainant, or the defence of Member A. With respect to the destruction of the logbook for the office building as it relates to the allegations of a Saturday visit in the spring of 1994, it should be noted that:

- There is no evidence as to when the book was destroyed, other than Member A says it was many years ago. It may well have been destroyed shortly after 1994 and not available for the hearing regardless of any delay;
- The missing evidence may have assisted the College in proving Member A and the Complainant were present at his office on a Saturday in the spring of 1994, when Member A's wife was not present. In that case, the evidence would be very damaging to Member A's position. Although the Inquiry Panel should not speculate as to what the logbook contained, Member A must establish that the evidence lost would have assisted him in his defence. In fact, the opposite may be true.

- iii) As to a lack of specificity with respect to dates in relation to prejudicing Member A's ability to call other witnesses, this case involves allegations of facts which are known only to the two protagonists, namely the Complainant and Member A. This is usually the case when a doctor is accused of sexually touching a patient. The very nature of the relationship and of the allegations are such that the conduct occurs when no one else is present to witness the encounter.

Moreover, counsel for the Investigation Committee emphasizes that a stay will prevent the College from exercising its legislative authority to discipline its members as part of its mandate to protect the public. Without a hearing on the merits, the strong public interest in favour of having allegations of egregious and potentially criminal conduct by a physician in a position of trust towards a vulnerable patient will not be served.

In summary, the College says that the nature of the allegations against Member A are narrow and specific. During regular office attendances, Member A either touched the Complainant in a sexual way without any legitimate medical purpose and made inappropriate comments to her, or he did not. Similarly, with respect to the alleged Saturday visit, he either made overt sexual advances towards her, or he did not. The Inquiry Panel will only be able to determine what happened in Member A's examining room on those occasions based on findings

of credibility at the hearing and accepting the evidence of one of them over the other. According to the College, this would have been the case if the charges were issued in 1994 and remains the case today. Neither Member A's chart, nor the medical records of Dr. A, nor the suggestion of potential alibi evidence changes the nature of the case.

The College submits that for all of the above-noted reasons, a stay of proceedings should not be granted in this case.

### **ANALYSIS**

There were differences between the analyses and conclusions of counsel for Member A and counsel for the Investigation Committee with respect to the current state of the law relating to delay in an administrative law context.

Both counsel referred to the *Blencoe* and *Sazant* decisions. Those cases are very useful in describing the legal framework in which this case should be decided, but much of the lengthy commentary and analysis in *Blencoe* and *Sazant* relate to Charter issues, which are not relevant in this case because Member A has not alleged that his Charter rights have been violated. It is also clear from reading both *Blencoe* and *Sazant* that decisions as to whether or not to grant a stay of proceedings on the basis of purely administrative law principles, without reference to Charter considerations, will be contextual and fact specific.



Therefore, both the nature and purpose of the administrative proceedings in question, and the background facts of each case will be critical in determining outcomes.

In the Investigation Committee's motion brief, it is asserted that *Blencoe* sets out two circumstances in which administrative proceedings may be stayed, namely:

- i) where there has been an inordinate delay which prejudices a party's right to a fair hearing;
- ii) where there has been an inordinate delay which would bring the administrative process into disrepute and so constitute an abuse of process.

In the Investigation Committee's motion brief, those two circumstances are linked by the conjunctive word "and". The Inquiry Panel believes that the Supreme Court in *Blencoe* was describing two sets of different circumstances, either one of which could give rise to a stay of proceedings, provided the necessary criteria are present. The Inquiry Panel has concluded that the Investigation Committee's summary of the law relating to the circumstances in which administrative proceedings may be stayed for delay would be more accurate if the word "and" was replaced with the word "or".

Reading *Blencoe* and *Sazant* together, it is also clear that the courts in each case recognized that prejudice arising from delay can take two different forms.

The first form of prejudice can be described as prejudice to the fairness of the hearing itself. This type of prejudice arises when the delay seriously compromises the right of a respondent to a fair hearing. For example, when the loss of evidence, or the inadequacy of witnesses' memories substantially deprives a respondent of the ability to defend himself or herself, the fairness of the hearing will be so compromised as to justify a stay.

The second form of prejudice is more personal to the respondent, such as a substantial and detrimental effect on the respondent's ability to earn an income for an extended period of time, or major psychological harm associated with damage to the respondent's reputation.

In order for a stay of proceedings to be granted, in either of the two sets of circumstances contemplated by *Blencoe*, the prejudice which arises must be substantial. The prejudice to the fairness of the hearing must be so significant to deprive the respondent to the right of a fair hearing. Some prejudice to the hearing process will be tolerated. The respondent is entitled to a fair hearing, not to a perfect hearing.

Similarly, the prejudice to the personal interests of the respondent must be so severe as to constitute an abuse of process, namely prejudice of such magnitude to offend standards of decency and impartiality.

Member A is not alleging that the College is responsible for any portion of the delay of which he is complaining. His request for a stay is based on the delay from the time the Complainant was a patient, between 1991 and May, 1994, until her complaint to the College was made in November, 2010. He maintains that if the Inquiry Panel is satisfied that the delay has prejudiced his right to a fair hearing by seriously undermining his ability to defend himself, a stay ought to be granted, regardless of the cause of the delay.

The Inquiry Panel agrees with the submissions of Member A on that issue. If delay has prejudiced an individual's right to a fair hearing, it should not matter who or what has caused the delay. On the other hand, in cases in which it is alleged that the delay amounts to an abuse of process, the cause of the delay may be relevant. If an investigatory and/or prosecutorial body has caused delays, which have prejudiced a respondent's personal interests to a significant degree, the action of that body will certainly be relevant when considering whether or not an abuse of process has occurred.

Member A is not alleging that these proceedings constitute an abuse of process. He is also not claiming prejudice of the second kind, i.e. damage to his personal interests, such as his ability to earn a living or to his reputation.

Accordingly, the Inquiry Panel has confined its deliberations to considering whether or not the very lengthy delay of which Member A complains has significantly prejudiced his ability to defend himself, thereby depriving him of the right to a fair hearing.

In conducting its deliberations, the Inquiry Panel has accepted that pre-charge delay, namely delay which is in no way the fault of the College, may nonetheless deprive the responding party of a fair hearing, and may therefore result in a stay. However, the Inquiry Panel has also been very mindful of the College's submission that where the only delay is pre-charge, particularly in cases of alleged sexual misconduct, the extraordinary remedy of a stay is rarely granted, because the delay is not attributable to the actions of investigators or prosecutors, but rather to the reluctance on the part of victims to come forward until they are ready to do so.

Conducting a hearing into the serious allegations outlined in the Notice of Inquiry, after so much time has elapsed from the occurrence of the alleged events, is clearly not an ideal situation. The passage of time presents serious

challenges for both parties in attempting to prove the facts necessary to support their respective positions.

The Inquiry Panel must determine whether the adverse consequences of the passage of time in this case have deprived Member A of his right to a fair hearing. Member A, as his counsel acknowledged, bears the onus of establishing that in the specific factual context of this case, his ability to defend himself against the specific allegations in the Notice of Inquiry, has been so seriously compromised, that he can no longer receive a fair hearing. To make that determination, the Inquiry Panel carefully considered the four subject areas in which Member A says his ability to defend himself has been significantly prejudiced.

1. The passage of time generally.

Member A submits that the passage of a significant amount of time means that his memory of the time period in question will be incomplete and imperfect. He also submits that the lack of specificity about dates and times with respect to when the alleged misconduct occurred prevents him from focusing on specific dates and times in order to be able to cross-examine the Complainant or from calling other witnesses (e.g. office assistants) who may have been present on specific days and may have interacted with the Complainant.

The Inquiry Panel does not accept that the passage of time and the lack of specificity with respect to dates and times so significantly prejudices Member A's right to a fair hearing, that a stay ought to be granted. It is possible, but by no means certain that if the allegations were more specific as to dates and times, Member A might be provided with additional areas of cross-examination. However, the specific dates of most, if not all of the Complainant's attendances upon Member A have been established through the Manitoba Health records, and a narrower subset of those dates, on which the Complainant says that the alleged misconduct likely occurred, have also been identified. More importantly, there are other ways in which the Complainant may be cross-examined without reference to specific dates and times. Furthermore, the lack of specificity with respect to those issues on the part of the Complainant may weaken her own evidence, and the overall case being presented by the Investigation Committee.

2. A lack of medical records and charts.
  - a) The lack of Member A's own medical records and charts relating to the Complainant; – Member A's office destroyed his charts and records relating to the Complainant many years after he had ceased treating her, pursuant to an appropriate record keeping protocol. Although the exact date the records were destroyed has not been established, the destruction likely occurred years before

the Complainant contacted the College with respect to these matters.

The Inquiry Panel recognizes that the medical records and charts of Member A relating to the Complainant might have assisted Member A in his defence of the allegations in the Notice of Inquiry. Member A argues that his charts and records would have been fundamentally important to his defence because they would have contained information with respect to the Complainant's symptoms, her medical complaints, and his diagnoses and treatment plan. Member A also emphasizes that the existence of the charts and records would have enabled him to prove that all of her visits and attendances upon him were medically justified.

The Inquiry Panel is also cognizant that there may have been other notations in the records which might have been relevant, either directly or indirectly to the issues in this case, such as notes of comments made by the Complainant which may have reflected her state of mind, or other aspects of her life.

The Inquiry Panel therefore accepts the proposition that Member A's charts and records may have contained information relevant to the issues in this case. However, when assessing the likelihood that the charts and records might have contained information relevant to the issues referred to in the Notice of Inquiry, the Inquiry

Panel considered the specific allegations against Member A as outlined in the Notice of Inquiry.

The allegations are that on several occasions when Member A and the Complainant were alone in his examination room, Member A touched her inappropriately, made inappropriate sexual comments to her, and on a Saturday in the spring of 2004 had overt sexual contact with her. It is also alleged that at least some of those actions were undertaken under the guise of Member A conducting medical examinations.

In his defence, Member A adamantly denies the allegations. He does not say he conducted certain medical examinations which may have been misunderstood by the Complainant, he says he did not do any of the things alleged by the Complainant. He has also stated that he would not have conducted any sort of gynaecological examination of a female patient without an attendant being present.

In that specific factual context, the Inquiry Panel is not satisfied that there is a significant likelihood that there would have been entries in the charts and records which would have been directly relevant to the allegations in the Notice of Inquiry.

The Inquiry Panel also recognizes that his medical records and charts would have assisted Member A in his memory of his various



consultations with the Complainant and may have assisted in establishing that all of the Complainant's attendances upon him were medically necessary. However, Member A is still able to assert that all of the visits were medically necessary, and those assertions are arguably supported by the Manitoba Health records.

In summary, while acknowledging that Member A will likely be handicapped to some extent by the non-availability of his charts and records relating to the Complainant, the Inquiry Panel is not satisfied that the absence of those charts and records will deprive Member A of his right to a fair hearing.

- b) The lack of Dr. A's medical records and charts relating to the Complainant; – Similarly, the Inquiry Panel has concluded that the absence of Dr. A's records and charts relating to the Complainant does not deprive Member A of the right to a fair hearing. The Manitoba Health billing records with respect to the Complainant's attendances upon Dr. A are available showing that Dr. A conducted a gynaecological examination and a PAP test of the Complainant within a few months of the Complainant ceasing to see Member A. The Inquiry Panel is not satisfied that it is likely that there would have been entries in Dr. A's charts and records which would contain information relevant to either the allegations in the Notice of Inquiry, or the defence which will be advanced by Member A.

3. Alibi evidence, last visit: spring, 1994.

Member A denies that he saw the Complainant in his office on a Saturday in the spring of 1994. There is no record of Member A billing for such a visit.

Member A says that if the allegations identified a specific Saturday, he might be able to provide alibi evidence which would demonstrate that he was doing something else on that particular Saturday (e.g. attending an activity of one of his children, or being away from Winnipeg).

This argument invites the Inquiry Panel to speculate on some issues, such as the existence of some means of independently establishing Member A's participation in other activities and/or his whereabouts on Saturdays in the spring of 1994 and identifying when, if at all, Member A lost the ability to establish those facts. The Inquiry Panel has concluded that the granting of a stay of these proceedings requires something more than the possibility that the ability to establish an alibi defence with respect to one aspect of the charges may have been compromised.

The essence of Member A's defence is a denial of the allegations in the Notice of Inquiry. During her time as a patient of Member A, the Complainant saw him many times, as established by the Manitoba Health records. Alibi evidence is unlikely to be introduced with respect to those attendances. With respect to the alleged Saturday incident, Member A, his

wife, and potentially other witnesses may be available to provide testimony as to his activities and whereabouts on Saturdays in the spring of 1994.

Accordingly, this category of potential prejudice is not sufficient to convince the Inquiry Panel that Member A has lost the ability to defend the allegations in the Notice of Inquiry, and has thereby been deprived of his right to a fair hearing.

4. Loss of logbook, last visit: spring, 1994.

Member A argues that the destruction of the logbook prevents him from proving that the Complainant never attended at his office on a Saturday in the spring of 1994, and that her version of what occurred on that occasion is therefore a fabrication. This argument has some potency. However, there are two reasons why the argument is not ultimately persuasive.

Firstly, there is no evidence as to when the logbook was destroyed. It may have been destroyed shortly after it was made. Therefore, it may not have been available for the hearing, even if the Complainant had reported her allegations to the College in a more timely way.

Secondly, the evidence in the logbook may have been harmful to Member A's case and supportive of the case to be presented by the Investigation

Committee. If the logbook established that both Member A and the Complainant were present at his office on a Saturday in the spring of 1994, and that Member A's wife was not present, those facts would be supportive of the Investigation Committee's position and damaging to the position of Member A.

In the result, Member A has failed to establish that the destruction of the logbook has prejudiced his ability to defend the allegations in the Notice of Inquiry thereby depriving him of his right to a fair hearing.

In summary, with respect to all four areas of prejudice which Member A has identified, the Inquiry Panel recognizes that as a result of the passage of time, Member A may have suffered some prejudice, but does not accept that Member A has been so significantly prejudiced in his ability to defend the allegations in the Notice of Inquiry that he has been deprived of his right to a fair hearing.

In addition to issues of prejudice, and the right of Member A to a fair hearing, the Inquiry Panel considered the public interest, and specifically whether the public interest would best be served by having the allegations in the Notice of Inquiry proceed to a hearing on the merits.

In the end result, the Inquiry Panel did not place a significant amount of weight on public interest considerations. However, having concluded that the delay in these proceedings, although regrettable, has not deprived Member A of

his right to a fair hearing, the Inquiry Panel did conclude that there is a benefit to having the allegations of serious misconduct against Member A, as outlined in the Notice of Inquiry, proceed to a full hearing on the merits, whatever the outcome of that hearing may be.

For all of the foregoing reasons, the Inquiry Panel hereby dismisses Member A's motion for an order staying the Notice of Inquiry, and for an order dismissing the complaint and determining that no further proceedings be taken by the College with respect to the allegations in the Notice of Inquiry.

DATED this 30<sup>th</sup> day of May, 2013.