

**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**

INTRODUCTION

On December 14, 2011, a Notice of Inquiry was issued by the Investigation Committee of the College of Physicians & Surgeons of Manitoba (the "College") to Member A alleging that he was guilty of professional

misconduct, and/or had breached Article 2 of the Code of Conduct of the College, and/or had demonstrated an unfitness to practice medicine. More particularly, the Notice of Inquiry alleged, among other things, that Member A, during the period commencing in or about November, 1991 and continuing until in or about May, 1994, had failed to maintain appropriate boundaries with a particular patient (the "Complainant") in several different ways.

An Amended Notice of Inquiry was subsequently issued, the details of which will be referred to later in these Reasons.

Member A denied and continues to deny all of the allegations in the Notice of Inquiry and Amended Notice of Inquiry.

These proceedings have had a relatively complex and protracted procedural history.

On March 24, 2012, counsel for Member A filed a Notice of Motion for production and disclosure of further documentation from the Complainant, the College, and various other parties referred to in the Notice of Motion.

Member A's motion for production and disclosure was heard by the Inquiry Panel on May 23, 2012. The Inquiry Panel reserved its decision, and provided written Reasons for its decision which were dated and issued on July 6, 2012. A formal Order based on the Inquiry Panel's written Reasons was issued on July 18, 2012.

The Inquiry Panel's written Reasons dated July 6, 2012 and the formal Order of July 18, 2012 represented the completion by the Inquiry Panel of the first stage of a two-stage process, based on Section 278 of *The Criminal Code of*

Canada (the "Code") as interpreted and outlined by the Supreme Court of Canada in *R. v Mills [1999] 3 SCR 688* (hereinafter referred to as "Mills").

After receiving certain documentary materials from various third parties in response to the Order dated July 18, 2012, the Inquiry Panel met to undertake the second stage of the Mills process by reviewing the responses received from the above-noted third parties and by reviewing and considering the specific documents which had been provided by the third parties.

On November 21, 2012, the Inquiry Panel issued written Reasons for Decision relating to the second stage production issues. A formal Order referred to as the "Second Stage Production Order" was issued on January 9, 2013, whereby the Inquiry Panel ordered, among other things, that excerpts from certain records be provided to legal counsel for the parties and the Complainant, subject to certain stipulated conditions.

On February 13, 2013, counsel for Member A filed another motion seeking a stay of the Notice of Inquiry, a dismissal of the Complaint and a determination that no further proceedings be taken by the College with respect to the allegations raised by the Complainant and referred to in the Notice of Inquiry.

The essential ground for the motion was that the significant delay between the events referred to in the Notice of Inquiry and the filing of the Complaint had substantially impaired Member A's ability to answer the Complaint and to make a full defence to the allegations made against him.

This second motion brought by Member A (the delay motion) was heard by the Inquiry Panel on May 30, 2013. The Inquiry Panel reserved its decision and issued written Reasons for its Decision dated August 19, 2013, dismissing

Member A's delay motion, concluding that as a result of the passage of time, Member A may have suffered some prejudice, but that he had not been so significantly prejudiced in his ability to defend the allegations in the Notice of Inquiry, that he had been deprived of his right to a fair hearing.

Accordingly, this matter proceeded by way of a full hearing of the allegations contained in the Amended Notice of Inquiry on June 2, 3 and 5, 2014.

The Amended Notice of Inquiry alleged that Member A was guilty of professional misconduct, and/or had contravened Article 2 of the Code of Conduct of the College and/or had demonstrated unfitness to practice medicine. Specifically, the Amended Notice of Inquiry set forth allegations that:

" ...

1. During the period commencing in or about November 1991 and continuing until in or about May 1994, on one or more occasions when (the Complainant) 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 (the Complainant) about her ability to have multiple orgasms.
- B. You inappropriately touched (the Complainant's) breasts and/or genitals, including fondling her breasts and/or stimulation of her clitoris, purportedly for what you represented to (the Complainant) 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 (the Complainant's) last visit to your office:

- i. you failed to respect (the Complainant's) privacy in that you watched her undress;
 - ii. you made inappropriate sexual comments to (the Complainant) 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 had sexual contact with (the Complainant) in that:
 - a. you fondled (the Complainant's) genitals and/or breasts, unzipped your pants and rubbed your penis against her;
 - b. you pressed your lips against (the Complainant's) lips;
 - c. while (the Complainant) was standing, you stood behind her and pressed your body against her body.
2. By reason of one or more of the foregoing, you have demonstrated unfitness to practice medicine.”

Member A, through his counsel, entered a plea of not guilty to all of the allegations against him as outlined in the Amended Notice of Inquiry.

At the outset of the proceedings on June 2, 2014, counsel for the Investigation Committee and counsel for Member A filed a stipulation which stated as follows:

“Counsel for the Investigation Committee and counsel for the Member agree and stipulate that if the Panel of the Inquiry Committee finds that the matters set out in Paragraph 1, Particulars A, B and C or any part thereof have been proven to the satisfaction of the Panel, the Member is guilty of professional misconduct and has contravened Article A2 of the Code of Conduct of the College without the need to hear expert testimony in that regard.”

THE EVIDENCE

The evidence in these proceedings consisted of several exhibits, one of which was an Agreed Book of Documents (consisting of nine documents) and the testimony of five witnesses. Three witnesses were called by counsel for the Investigation Committee of the College. Those witnesses, listed in the order in which they were called, were:

- i. the Complainant;
- ii. a friend of the Complainant, X.;
- iii. the mother of the Complainant, Y.

Two witnesses were called by counsel for Member A, namely:

- i. Member A;
- ii. Z, the wife of Member A.

A brief summary of the evidence of each witness will be useful in providing a context for the analysis which follows.

The Complainant

At the time of the hearing, the Complainant was 41 years old. She provided a brief summary of her background, including her arrival in Canada in 1991 when she was 18 years old, with her mother and father and two older brothers, as political refugees.

The Complainant explained that all of the members of her immediate family became patients of Member A, having been referred to him by an Immigration Services Agency because he was fluent in their native language and was also from the same country of origin. The Complainant was a patient of Member A from November, 1991 to approximately May, 1994.

In 2000, the Complainant moved to the United States where she met and married her husband. The Complainant (along with her husband and their children) moved back to Winnipeg in 2010 to be close to her family.

In the Complainant's direct examination, she testified that she became a patient of Member A in November, 1991. At that time, she was experiencing irregular periods, which she described as follows: "I would get my period one month and then it would be four months and then maybe six months, and maybe a little bit the next month, and just all over the place".

The Complainant recalled that on the first visit, or on one of her first visits with Member A, she was accompanied by her mother. In her direct examination, she testified that according to her best recollection, she discussed her irregular periods with Member A on her first visit with him. At some point, he prescribed birth control pills as a means of regulating her period. The Complainant also testified that the birth control pills were effective in regulating her periods, and that once she was on the pill, she did not encounter any problems with menstruation.

The Complainant stated that throughout the period of time she saw Member A, she was a virgin and was not sexually active.

In the Complainant's direct examination, she also testified that once she became a patient of Member A, she saw him "almost monthly". With the assistance of records from Manitoba Health, relating to Member A's billings for his attendances upon the Complainant, (which were part of the Agreed Book of Documents), the number and regularity of her visits between November, 1991 and May, 1994 were established. There were several months during that period

when no visits occurred, but there were also periods when the Complainant was seeing Member A at least once a month and sometimes more frequently.

The Complainant testified that Member A explained to her that he wanted her to attend on a monthly basis in order “to make sure that I was ovulating. That everything was working well”. The Complainant acknowledged that she was also seeing Member A for other things, such as sore throats, skin rashes, and sinus infections.

According to the Complainant, during many of her monthly visits to Member A, he acted in a way which she subsequently realized was highly inappropriate. The Complainant testified in detail describing actions by Member A which she says occurred on a repeated basis which actions are as described in the Particulars outlined in paragraph 1B of the Amended Notice of Inquiry. The Complainant also testified that on one or more occasions, he made comments to her as outlined in paragraph 1A of the Amended Notice of Inquiry.

At the time those events were occurring, the Complainant testified that she was a naïve young woman with respect to sexual matters and did not understand that the alleged actions of Member A were wrongful and that his explanation (to make sure she was ovulating) was illogical, if not nonsensical, given the fact that she was on the birth control pill.

The Complainant testified that she stopped seeing Member A in the spring of 1994. The last visit noted in the Manitoba Health Records occurred on Tuesday, May 10, 1994. The Complainant explained that she stopped seeing Member A after a visit to his office in Winnipeg on a Saturday (i.e. a date that was most likely after Tuesday, May 10, 1994). According to the Complainant, as

a result of what occurred on that Saturday visit, she was profoundly upset and never returned to see Member A again.

The Complainant provided details of what allegedly occurred on the Saturday visit in her direct examination. Her testimony was consistent with the Particulars outlined in paragraph 1C (i), (ii) and (iii) of the Amended Notice of Inquiry.

On the Saturday in question, the Complainant testified that she was alone with Member A in his office and that Member A had locked the door behind her after she entered his office.

The Complainant described her emotional state immediately after the Saturday visit. She indicated she was crying and confused. She drove around for a while and then went to a local park. She parked by the dock trying to make sense of what had happened. At the time, she was unaware that there was an organization, like the College, to which she could complain about Member A's conduct.

The Complainant also testified that sometime after the Saturday visit, she spoke to a friend, namely X, about what had happened with Member A. Thereafter she also spoke to her mother about what had happened with Member A.

In terms of the impact of these events on the Complainant, she described having had a lot of dreams and nightmares, and having her relationships with other people adversely affected by her interactions with Member A. She also explained that after her experiences with Member A, she had a very hard time

trusting doctors and was very sensitive to the way doctors interacted with her own children.

She was first advised about the possibility of making a complaint to Member A's regulatory body from a therapist she was seeing in the United States. When the Complainant returned to Winnipeg, she was experiencing anxiety, and when she saw a counsellor in Winnipeg, she was advised of the existence of the College and that a complaint could be made to the College relating to Member A's conduct. The Complainant's initial letter of complaint was sent to the College on or about November 6, 2010, more than 16 years after she had stopped seeing Member A.

Counsel for Member A, in his cross-examination of the Complainant challenged her evidence in some respects and attempted to establish inconsistencies between her evidence at the hearing and statements she had made previously, and between her evidence and other objectively established facts. By way of example:

- (i) Counsel for Member A was able to establish that during the period the Complainant was a patient of Member A, she received treatment from him, and saw him for a variety of conditions other than irregular periods. Counsel for Member A then sought an acknowledgement from the Complainant that nothing inappropriate occurred on any of the numerous visits she had with Member A relating to those other conditions. The Complainant did not acknowledge that nothing inappropriate occurred on any of those visits, but did state that she did not recall anything inappropriate occurring on any of these visits.

- (ii) By referring to the Manitoba Health records and the brief entries in those records relating to the service provided on each visit, counsel for Member A sought to establish that the Complainant did not consult with Member A about irregular periods or anything else under the general description of “disorder of menstruation” during any of the first eight visits she had with him. The Complainant, when being cross-examined acknowledged “it was possible” that the first time she discussed irregular periods with Member A may have been on January 30, 1992, not November 4, 1991. (Member A’s own evidence on that point will be commented upon elsewhere in these Reasons).

- (iii) Again, with reference to the Manitoba Health records, counsel for Member A suggested to the Complainant that there were periods of time of up to two months when she was seeing Member A relatively frequently, but not about any issues relating to menstruation, and that there was one period in which there was a four month interval between attendances relating to menstruation. The Complainant’s answer to the first series of questions was that she couldn’t agree because “I don’t recall”, and her answer to the second series of questions (at page 68, question 412) “Sir, I don’t recall. I don’t know. I didn’t write the printouts. I don’t know what they are claiming for.” On two other occasions in her cross-examination, it was suggested to the Complainant, based on the Manitoba Health records, that there had been other intervals of six and eight months between visits relating to menstruation. The Complainant responded to those questions by stating that she could not recall.

- (iv) The Complainant was confronted with an apparent inconsistency between her testimony in Chief (that Member A had worn latex gloves on only one occasion when he allegedly conducted pelvic examinations of her), and a statement she had made previously to the Chair of the College's Investigation Committee in which the Complainant apparently agreed with the suggestion that Member A had worn gloves on all but one occasion. Any inconsistency was not conclusively established in this area because the record of what the Complainant had told the Investigation Chair was not clear. The Complainant did acknowledge that it was possible Member A had worn gloves on more than one occasion.

- (v) The Complainant readily acknowledged that she had initially seen a counsellor in the United States for post-partum depression, and that she had also discussed two other prior traumas in her life relating to abuse, with that counsellor;

- (vi) The Complainant was challenged over the fact that she had changed the information she gave to the College with respect to when she ceased seeing Member A (from 1993 to 1994) and whether she had discovered that "error" on her own, or whether she had become aware of that error after being told by counsel for the Investigation Committee that the Manitoba Health records showed that she had continued seeing Member A until May, 1994. Although it was established that the Complainant had had a discussion with counsel for the Investigation Committee in April, 2011 in which the date of her last visit with Member A was discussed, the Complainant maintained her position that she realized she had continued to see Member A as a patient until the

spring of 1994 (rather than 1993) independently of any discussions with counsel for the Investigation Committee.

- (vii) With respect to the “Saturday visit”, the date of the Complainant’s last attendance upon Member A, she was challenged for not mentioning or apparently not remembering that on a Saturday visit to the office, she would have had to provide her name to the security guards in the main lobby of the building to be cross-referenced against a list of authorized entrants provided by Member A’s office, and would have gone through a “sign in” procedure at the security desk in the main lobby of the building, in order to gain access to Member A’s office on one of the upper floors. The Complainant acknowledged that it was possible she had gone through such a protocol;

- (viii) The Complainant was challenged more vigorously with respect to her recollection of the weather conditions on the Saturday in question. In the Complainant’s letter of complaint to the College, she had referred to snow melting on the day in question. Weather records from Environment Canada (entered as an exhibit in the proceedings) established that Winnipeg had experienced a warm and early spring in 1994 and that there was no snow on the ground after April 4, 1994. In the Complainant’s cross-examination at the hearing, she initially referred to snow melting on the river and later she referred to snow floating down the river. Counsel for Member A suggested that the change between the contents of her letter of complaint and her testimony at the hearing represented a significant inconsistency, raising doubts as to the credibility of her account of what allegedly happened on that Saturday. The

Complainant, during her cross-examination, expressed frustration over the time spent discussing the weather and temperature, when she asserted that her memory was very clear as to what had occurred that day in Member A's office.

X

The evidence of the witness X, a friend of the Complainant, was very brief and very focused. She explained that sometime in the spring of 1994 or 1995, the Complainant had told her about the concerns she had with Member A. X under the careful direction of counsel for the Investigation Committee did not testify as to what the Complainant had told her about Member A. X's testimony was limited to describing the Complainant's emotional state (page 118, question 598 - "She was very upset. She was scared...She was crying...She was saying she couldn't talk about it again"). X also stated that she advised the Complainant she should report the matter to the police (which the Complainant was not prepared to do) and that the Complainant should tell her mother.

X was not cross-examined by Member A's counsel.

Y

Y, the mother of the Complainant, provided background information relating to herself, her family, and her family's move from their country of origin to Winnipeg. She stated that shortly after moving to Winnipeg, all of her immediate family members became patients of Member A, including the Complainant. She explained that the Complainant had had problems with her periods before moving to Canada, had received some treatment for that condition in their country of origin and had consulted with Member A with respect to that condition.

Y also testified that when the Complainant talked to her about not seeing Member A anymore, and going to see another doctor, the Complainant was crying and was upset.

In cross-examination, Y confirmed that both she and her husband had continued as patients of Member A until 2010. It was also suggested to Y that she had asked Member A and/or Z (Member A's office manager at the time) to see Y's niece as a patient and that in 2001 she had asked Member A and/or Z to see Y's sister, her husband and their two daughters as patients.

Y responded by acknowledging that her niece and her sister and her sister's family had become patients of Member A but indicated that she could not remember asking Member A to take them on as patients.

In re-examination, and in response to questions from the Inquiry Panel, Y indicated she could not remember the month or the year in which she had had the conversation with the Complainant about the Complainant no longer seeing Member A. Y also clarified that she had had two conversations with her daughter on that topic. The first conversation was with respect to her daughter not wanting to see Member A anymore. In that first conversation, her daughter had been crying. The second conversation occurred sometime later and related to the fact that her daughter was seeing another doctor, a female doctor.

In re-examination, Y was also asked to explain why she and her husband had stopped seeing Member A as patients in 2010. Y replied: (at question 682, at page 156) "Just talk to the whole thing about what happened to her. The thing. We just go closer to her when she back, and just like, I say no, we had to stop to see him. How it affect her".

Member A

In his direct examination, Member A provided details as to his personal background, having been born in his country of origin in the early 1950s and growing up and going to medical school there. Member A explained that he took extended medical training in his home country in order to become a specialist. He became an assistant professor in that specialty and practised in that specialty in his home country.

Member A married in late 1970s and moved to Canada in the mid-1980s with his wife and children. When he moved to Canada, he was not able to immediately practice medicine and therefore worked first as a janitor and then as an orderly, while taking English as a second language. He then took the necessary qualifying examinations in order to become entitled to be registered and licensed as a physician in Manitoba. Member A also did a two year rotating internship at a Winnipeg hospital and some additional rotations at another Winnipeg hospital.

Thereafter, Member A commenced private practice in family medicine, working firstly at one Winnipeg location commencing in August, 1991, moving to an office in another Winnipeg location briefly in 1992, and then moving his private practice to another Winnipeg location in October, 1992. He continues to practice from that location to the present.

Member A's wife, Z, has worked with him at his current office from the time of the opening of that office, performing a variety of functions as "office manager".

Following receipt of the Complainant's letter of complaint to the College in November, 2010, Member A and his wife undertook a search of their files and

records, for the medical records relating to the Complainant. However, they were not able to locate any charts, notes or records relating to the Complainant. Member A explained (and his evidence was corroborated by his wife) that their protocol, which was consistent with the applicable standards at the time, was to destroy records after more than ten years had elapsed from the date of the patient's last visit. Member A said it was therefore likely that the charts, notes and records relating to the Complainant had all been destroyed pursuant to that protocol, many years prior to receipt of the Complaint.

As a result, the only records relating to the Complainant's attendances upon Member A from November, 1991 to May, 1994, which were introduced in evidence in these proceedings, were the Manitoba Health summaries (at Tabs 5 and 6 of the Agreed Book of Documents) and the billing cards from Member A's practice at the current location from November 16, 1992 to May 10, 1994 (which were included at Tab 7 of the Agreed Book of Documents).

Member A stated that from the outset of his private practice at the initial location, he dealt with a significant number of patients who speak the same language as he and the Complainant, many of whom had been referred to him by the International Center. He indicated that although he was aware that the Complainant had been a patient of his, based on the Manitoba Health summaries and the billing cards, he had no recollection of the Complainant's personality. He remarked that when seeing her at the commencement of the hearing (after approximately 20 years), he had not recognized her.

In Member A's direct examination, he also outlined:

- (i) in very general terms, the office procedures at the first two clinics in which he worked with respect to staffing, "walk-in" and appointment procedures and the basic physical layout of each office;

- (ii) in somewhat greater detail, those same types of procedures at his current office. He also outlined the manner in which patients could gain access to his office on a Saturday (by having their name on a list provided to security personnel at a security desk in the front lobby of the building) and by going through a “sign-in” and “sign-out” procedure at the security desk;
- (iii) his practice at all of the above-noted offices of having a “chaperone”, or other attendant present when he was conducting a pelvic examination on a female patient.

The balance of Member A’s direct examination was spent reviewing various entries on the Manitoba Health summaries and on the billing cards in order to explain what type of service he might have been providing to the Complainant or what type of tests he may have ordered in relation to treating her. Member A acknowledged that he had no specific independent recollection of his various interactions with the Complainant or the treatments he may have provided to her. For example, he could not remember whether he had ever prescribed birth control pills for her. His comments with respect to what might have been discussed with the Complainant, or what treatment might have been afforded to her, were based on the limited information available from the Manitoba Health summaries, the billing cards, and to a lesser extent, the oral testimony of the Complainant, which Member A had heard prior to his own testimony.

Member A denied all of the allegations against him as particularized in the Amended Notice of Inquiry.

In cross-examination, Member A’s evidence and his denials of wrongdoing were challenged in several respects.

Counsel for the Investigation Committee attempted to establish that on the Complainant's very first visit to Member A on November 4, 1991, issues relating to menstruation were discussed. The Manitoba Health summaries show that on that day lab tests were ordered, and there are two entries relating to the lab as follows:

“TRF - CULTURE OF THROAT SWAB”

“DIAG - DISORDER OF MENSTRUATION”

The previous entry, from the same day relating to the Complainant's attendance on Member A refers to:

“DIAG - AC URI MULT SITES/NOS”

Member A, notwithstanding a vigorous cross-examination on that point, maintained that it was likely that he simply ordered a throat swab because he was exploring the possibility of an upper respiratory tract infection, particularly because the Manitoba Health records indicate that the Complainant had visited another physician two days previously with respect to an upper respiratory infection. Member A did concede that the lab entry referring to “Disorder of Menstruation” would have been based on information coming from him.

Counsel for the Investigation Committee also reviewed with Member A, the practices he would have followed in the early 1990s in relation to treating a young lady who was a virgin, and who was experiencing irregular periods. Member A indicated that one of the acceptable treatments at that time would have been the prescription of birth control pills for the purpose of imposing regularity on the menstrual cycle. He further testified that a responsible physician would be cautious about prescribing birth control pills for that purpose because birth control pills may produce various side-effects. Member A also indicated that if birth controls had been prescribed to such a patient, regularity of

the menstrual cycle would have been achieved within two or three months. When it was suggested by counsel for the Investigation Committee that there would be no need for a follow-up thereafter, Member A indicated some follow-up would be required, because of the side-effects which birth control pills may produce, but he stated that any side-effects would normally manifest themselves within the first several months of commencing taking the pill. Member A acknowledged that if matters then proceeded satisfactorily, there would be no need to do pelvic examinations thereafter.

A significant portion of the balance of the cross-examination of Member A was devoted to a review of the Manitoba Health summaries and the numerous and repeated references in those summaries to "Disorder of Menstruation". Counsel for the Investigation Committee also referred Member A to the testimony of the Complainant that Member A had provided birth control pills as a way of dealing with her irregular periods and that once she was on the pill, she did not experience difficulties thereafter with irregular periods nor with any other aspect of her menstruation.

Member A, while acknowledging he could not remember whether or not he had prescribed the pill for the Complainant, pointed out that the Complainant did not specify when he had prescribed the pill for her. He also described some scenarios in which follow-up attendances and tests of the type which had been ordered would have been appropriate for a young woman on the pill.

Counsel for the Investigation Committee also pointed out to Member A that the Manitoba Health summaries for the period during which the Complainant was his patient contained multiple references to "Disorder of Menstruation", whereas there were no such references during the period from July to December, 1994 when a female physician was the Complainant's physician. Member A responded by pointing out that many of the lab tests ordered by the female physician (eg: hemoglobin and cell counts) related to blood issues generally and

that the female physician did diagnose anemia, which could be related to the Complainant's menstruation. Member A also referred to references to "contraceptive management" in the Manitoba Health summaries related to the female physician's treatment of the Complainant.

In cross-examination, all of the allegations of misconduct being made against Member A were specifically put to him. He steadfastly denied all of those allegations.

Z

Z provided some background information indicating that in their country of origin she had been a physiotherapist. She also testified that when she came to Canada with her husband and their children in mid 1980s. Within a year, she was working as a nurse's aide.

When Member A opened his own office in the fall of 1992, Z started working there immediately. When asked to describe her duties there, she stated (Question 1112, page 254): "... I am the office manager. I book appointments. I phone patients for follow-up. I buy the supplies. I do the billing. I do his scheduling. I do almost everything."

Z reviewed the appointment process which was utilized in Member A's practice during the fall of 1992 and thereafter. She then reviewed each appointment with the Complainant which was noted in the appointment book and related those appointments to the Manitoba Health summaries. Z stated that she was the person responsible for making appointments and noting the appointments in the appointment book. In most cases, on the basis of the notations she had made at the time in the appointment book, Z was able to identify whether the appointments were appointments scheduled in advance, or

whether they were “emergency” appointments scheduled on very short notice. The majority of the Complainant’s appointments were scheduled in advance.

Z also pointed out that in some instances the Complainant came in with other family members who had appointments either immediately before or immediately after her appointment.

Z also confirmed that while Y was a patient of her husband, Y had asked that Member A take on her niece as a patient. Member A agreed. Later, Y also asked that Member A take on her sister, her husband and their children as patients. Initially, Member A refused because he was not taking new patients at the time. However, as a result of Y’s repeated requests, he ultimately accepted them as patients.

In her direct examination, Z also reviewed the procedures utilized for seeing patients on a Saturday. Z was generally responsible for making the list of patients and providing it to the security guards on the main floor of the building. She stated that if patients were being seen on a Saturday, she would also be present at the office along with Member A.

In cross-examination, Z acknowledged that her husband had the authority to provide a list of patients to the security guards, and there were Saturdays when he would go to the office alone to do paper work and she would not be present.

THE ONUS OF PROOF

Given the contentious nature of the evidence in these proceedings, the proper application of the standard of proof is of particular significance to the outcome of this case.

It is therefore understandable that in their final submissions, both sets of counsel seriously and thoughtfully outlined their respective positions on the standard proof, and the way it ought to be applied to the facts this case.

The starting point for all counsel was the 2008 Decision of the Supreme Court of Canada in *C(R) v McDougall* [2008] 3 SCR 41. That case was an appeal from a decision of the British Columbia Court of Appeal, which had overturned the trial decision finding a defendant liable for sexually assaulting the plaintiff, who had been a resident at an Indian Residential School between 1966 and 1974. The case was a civil claim for damages.

The Supreme Court noted in paragraph 26 of its Decision that:

“Much has been written as judges have attempted to reconcile the tension between the civil standard of proof on a balance of probabilities and cases in which allegations made against a defendant are particularly grave. Such cases include allegations of fraud, professional misconduct, and criminal conduct, particularly sexual assault against minors.”

At paragraph 39 of its Decision, the Supreme Court summarized various approaches in civil cases where criminal or morally blameworthy conduct is alleged, as follows:

“I summarize the various approaches in civil cases where criminal or morally blameworthy conduct is alleged as I understand them:

- (1) The criminal standard of proof applies in civil cases depending upon the seriousness of the allegation;
- (2) An intermediate standard of proof between the civil standard and the criminal standard commensurate with the occasion applies to civil cases;

- (3) No heightened standard of proof applies in civil cases, but the evidence must be scrutinized with greater care where the allegation is serious;
- (4) No heightened standard of proof applies in civil cases, but evidence must be clear, convincing and cogent; and
- (5) No heightened standard of proof applies in civil cases, but the more improbable the event, the stronger the evidence is needed to meet the balance of probabilities test.”

At paragraph 40, of its Decision, the Supreme Court stated:

“Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof. I am of the respectful opinion that the alternatives I have listed above should be rejected for that follow.”

Notwithstanding that clear articulation by the Supreme Court of the principle that there is only one civil standard of proof at common-law (namely, proof on a balance of probabilities) and notwithstanding the Supreme Court’s specific rejection of all five of the stated alternatives, some controversy in the law has persisted.

Counsel for Member A cited decisions from various tribunals and Courts, decided after the Supreme Court’s decision in *McDougall*, which refer to the “Bernstein” standard (the name being derived from a 1977 decision of the Ontario High Court involving the College of Physicians & Surgeons of Ontario and a physician named “Bernstein”). For many years, the “Bernstein” standard

was said to be the standard applicable to the determination of allegations of professional misconduct. The Bernstein standard stipulated that the cogency of evidence required in such a hearing must be commensurate with the serious consequences of such a finding.

Counsel for Member A argued that the “Bernstein” standard should apply in this case, because it is a civil standard and its requirement for clear and convincing evidence, given the serious consequences of a finding of guilt, is consistent with the Supreme Court’s articulation of the law in paragraph 40 of the *McDougall* decision.

The Inquiry Panel does not agree that the “Bernstein” standard ought to be applied in this case, given the Supreme Court’s specific rejection of the five alternate approaches which it cited, particularly its rejection of approaches 3, 4 and 5. The Inquiry Panel also agrees with and adopts the reasoning of the Alberta Court of Appeal in *Fitzpatrick v Alberta College of Physical Therapists 2012 Carswell Alta 1130 (Alta CA)*). In the *Fitzpatrick* decision, the Alberta Court of Appeal accepted that there is only one civil standard of proof, namely the balance of probabilities, and that it applies in professional disciplinary proceedings, and that there is no separate “clear, convincing and cogent standard”.

Therefore, the standard of proof which the Inquiry Panel will apply in deciding this case will be proof on a balance of probabilities. Specifically, on the basis of the evidence presented to it, the Inquiry Panel will consider, whether it is more probable than not, that Member A made the comments and committed the acts which are alleged in the Amended Notice of Inquiry.

ANALYSIS

The Positions of the Parties

In his final submissions, counsel for the Investigation Committee outlined many reasons why the Complainant ought to be regarded as truthful and why her evidence ought to be accepted as accurate. According to counsel for the Investigation Committee:

- (i) the Complainant's demeanor was impressive. She gave her evidence in a convincing way and she was composed throughout her testimony. She did not appear to be vindictive or motivated by vengeance. Her accounts of the material facts were consistent throughout the investigation process and the hearing;
- (ii) the Complainant's motivations are clear. She wants Member A to know that what he did was wrong and unacceptable and she wants to make certain that Member A cannot do something similar to any other patient;
- (iii) it is not logical that the Complainant would put herself through this painful process, if her allegations were not true;
- (iv) the Complainant was not challenged on any of the substantive details of her Complaint. She testified in detail as to what occurred on many of her "monthly" visits and in relation to the events occurring during the "Saturday visit" at the office. Although the Complainant was cross-examined on extraneous matters, her evidence on the specific allegations in the Amended Notice of Inquiry, and the details of that evidence were not challenged, or in any way undermined.
- (v) the Complainant's evidence was consistent with most of the other evidence introduced in the proceedings. Her evidence about the frequency of her visits, and her many consultations with Member A

about her menstruation was supported by the Manitoba Health summaries;

- (vi) the Complainant has provided a credible and logical explanation for the delay in submitting her Complaint to the College. She was young, a recent arrival from a foreign country, confused about what had occurred, and unaware of her options. With the passage of time, she came to better understand the seriousness of Member A's conduct and that there was a complaint process which she could initiate. While her conversations with X and her mother cannot be used to establish the truth of the Complainant's allegations against Member A, those conversations can be used to establish her emotional state shortly after the occurrence of the events alleged in the Amended Notice of Inquiry.

Counsel for the Investigation Committee also outlined several reasons why the evidence of Member A ought not to be believed. Some of those reasons were:

- (i) Member A provided no satisfactory explanation for the frequency of the Complainant's visits generally;
- (ii) more specifically, there was no reason for Member A to be seeing the Complainant frequently for issues relating to "Disorder of Menstruation", after he had prescribed birth control pills and her periods had become regular;
- (iii) at one point, Member A had suggested that the Complainant may not have been taking the pill regularly, but counsel for the Investigation Committee argued that assertion was inconsistent with his other statements that he had no specific recollections of his

interactions with the Complainant or his medical treatment of the Complainant;

- (iv) Member A's refusal to acknowledge that he had dealt with menstruation issues with the Complainant on her very first visit (November 4, 1991) indicate a lack of candor and honesty with respect to that specific visit and his testimony generally, particularly given the entries on the Manitoba Health summaries relating to the lab tests ordered on November 4, 1991;
- (v) the failure of Member A to refer the Complainant to a gynaecologist casts considerable doubt on any suggestion that there were legitimate reasons for him to see the Complainant as frequently as he did relating to menstrual issues.

Counsel for the Investigation Committee also emphasized that this is a case in which the Inquiry Panel must decide as between the evidence of the Complainant on the one hand, and the evidence of Member A on the other. It is not possible that both of them testified truthfully, when their respective versions of the facts as alleged in the Amended Notice of Inquiry are so diametrically opposed. Counsel for the Investigation Committee submitted that a comparative credibility assessment must be made between the Complainant and Member A and that in any such assessment, the evidence of the Complainant should be accepted, rather than the evidence of Member A, for all of the reasons outlined above.

Counsel for Member A fundamentally disagreed with the submissions of counsel for the Investigation Committee. Counsel for Member A advanced two broad and important arguments in support of their position that the Complaint and all of the allegations in the Amended Notice of Inquiry ought to be dismissed.

Firstly, counsel for Member A strongly disagreed with the submissions of counsel for the Investigation Committee relating to the evidence of both the Complainant and Member A.

With respect to the credibility of Member A, his lawyers asserted that:

- (i) Member A's evidence was entirely credible. He testified in a straightforward non-evasive manner. His comments about the Manitoba Health summaries relating to the lab tests of November 4, 1991 were sensible and logical based on his understanding of how the Manitoba Health summaries are created and his review of the surrounding entries on the summary. His explanation for some of the other entries on the Manitoba Health summaries were not inconsistent with his testimony that he had no independent recollection of his treatment of the Complainant. Rather, he was being pressed for explanations in cross-examination and he provided potential explanations which were plausible and logical from a medical perspective;
- (ii) Member A's basic position is that all of the Complainant's attendances upon him and all of his actions toward her had a sound medical explanation. However, as a result of the delay in the Complaint being made, and the consequent destruction of his notes, files and records relating to the Complainant, he was greatly prejudiced in his attempts to demonstrate that his actions had a sound medical basis. Notwithstanding the destruction of his records, he provided reasonable explanations for his actions based on the Manitoba Health summaries and his billing cards from his office practice;
- (iii) Member A was unshaken in his denial of any wrongdoing.

With respect to the credibility of the Complainant, Member A's counsel asserted that there were important inconsistencies in her evidence. For example:

- (i) her assertion that she saw Member A initially and thereafter on an almost monthly basis relating to menstruation issues is not consistent with the entries in the Manitoba Health summaries. There were several extended intervals when she did not see Member A for menstruation issues. Although she saw Member A relatively frequently, many of her attendances upon him related to other issues. Moreover, she also saw the female physician she saw after Member A relatively frequently between July and December, 1994;
- (ii) there was a significant inconsistency between the Complainant's initial evidence that she consulted with Member A about menstruation issues on her first visit or on one of her first visits, and her concession in cross-examination that she may not have consulted with him on that issue until late January, 1992;
- (iii) the Complainant's lack of recollection with respect to the security procedures in place for Saturday visits at the office is inconsistent with her having a vivid and reliable memory of the events relating to the alleged Saturday incident;
- (iv) the Complainant's inconsistent and potentially contradictory testimony with respect to "snow melting" or "snow floating down the river" on the day of the alleged Saturday incident is inconsistent with her having a vivid and reliable memory of the events which allegedly occurred on that day.

Secondly, counsel for Member A also strongly disagreed with the submissions of the Investigation Committee relating to the manner in which credibility issues ought to be assessed by the Inquiry Panel, and more particularly, whether or not the Inquiry Panel must choose between two stark alternatives, namely to accept the evidence of the Complainant (thereby rejecting the evidence of Member A), or to accept the evidence of Member A (thereby rejecting the evidence of the Complainant).

Counsel for Member A referred the Inquiry Panel to the 2013 Decision of the Superior Court of Justice of Ontario in *The College of Physicians & Surgeons of Ontario v Beitel*, [2013] OSC 1599. In that case, the evidence of the complainant and the evidence of the physician involved, were directly contradictory. In paragraph 30 of that Decision, the Court quoted with approval the following statement of O'Neill J. in *Olegario v Cabaraban* [2007] O.J. No. 631 (ONT. S.C.) at paragraph 33:

“I am not restricted to simply choosing whether I accept the evidence of the plaintiff or the evidence of the defendant. Rejection of one does not equate to acceptance of the other. The stark alternative of believing the plaintiff’s evidence or the defence’s evidence excludes the legitimate possibility of being unable to resolve conflicting evidence. The issue in this civil trial is not which of the two versions with respect to Terra Cotta and Grand Valley are true but rather, on the totality of the evidence, viewed as a whole, has the plaintiff proved her case on balance of probabilities.”

The Attitude and the Demeanor of the Witnesses

One of the challenges faced by the Inquiry Panel in this case is that all of the witnesses who testified presented their evidence well. Based solely on their own testimony, there was nothing in the manner in which any of them gave their

evidence, or in their attitude or mannerisms which would suggest that they were not being truthful.

The collateral witnesses, namely, X, Y and Z were sincere and credible. The Inquiry Panel is satisfied that all three of those witnesses made genuine efforts to testify truthfully and accurately about events which had occurred more than 20 years ago.

With respect to the Complainant, she testified calmly and competently during both her direct examination and cross-examination. She did not appear vengeful. She generally maintained her composure, even when testifying as to matters which were distressing to her, and even when being challenged by counsel for Member A.

With respect to Member A, he testified calmly and provided straightforward, non-evasive answers to the majority of questions put to him, including questions put to him in cross-examination. His answers to questions of a medical nature were logical and sensible.

Findings and Conclusion

It is tempting in a case such as this for an Inquiry Panel to accept the evidence of a complainant on the basis that his or her allegations must be true, because no complainant would put themselves through the tribulations of an investigation and an adversarial hearing involving painful and embarrassing issues, unless his or her allegations were true. Although such reasoning has a certain appeal, it is problematic for two reasons:

- (i) it comes close to effectively putting the onus on the person who is accused of wrongdoing, to prove his or her innocence, whereas the

onus is on the prosecuting authority to prove the alleged wrongdoing;

- (ii) it detracts from the importance of the evidence of the person who is accused, and who is denying the allegations of wrongdoing.

An Inquiry Panel is required to consider all of the evidence, and then to decide whether or not the case has been proven on a balance of probabilities.

This Inquiry Panel recognizes that the Complainant's specific evidence as to Member A's alleged misconduct was not directly challenged on cross-examination. Specifically, her allegations about Member A's statements to her relating to her ability to have multiple orgasms, his fondling of her breasts and his stimulation of her clitoris, and his many comments and inappropriate contacts with her during the alleged "Saturday visit", were not challenged on cross-examination. Member A's counsel apparently made a decision not to deal with those issues on cross-examination in order to avoid the risk of the Complainant repeating what she had said on those issues in her direct examination. Instead, Member A's counsel chose to simply advise the Complainant that her allegations of wrongdoing would be denied by Member A and to subsequently have Member A deny those allegations during his direct examination.

The Complainant was challenged in cross-examination on other aspects of her testimony in an attempt to establish inconsistencies and to otherwise weaken or discredit certain aspects of her testimony, thereby raising uncertainties about the substantial accuracy of her evidence on an overall basis.

Many of Member A's counsel's attempts to establish inconsistencies did not detract from the overall impact of the Complainant's testimony. For example, the Complainant's initial error with respect to when she ceased seeing Member A (i.e. saying it was 1993 rather than 1994) and her insistence in her cross-

examination that she became aware of that error independently of any discussion with counsel for the Investigation Committee, did not cast much doubt, if any, over the rest of her testimony.

However, some other aspects of the Complainant's testimony were curious and somewhat troubling to the Inquiry Panel. Examples included:

- (i) her evidence in direct examination that Member A acted inappropriately toward her on almost a monthly basis, relative to her evidence in cross-examination that Member A treated her for several things other than menstrual issues and she could not recall him acting inappropriately on any of the visits relating to other issues. Furthermore, the Manitoba Health summaries demonstrate that Member A was in fact treating her for other conditions and that there were several intervals of two or more months when she was not seen for issues relating to menstruation;
- (ii) the number of times she responded to questions in cross-examination indicating that she could "not recall" or with respect to which she would reply that a suggestion put to her on cross-examination, (which was somewhat different from her evidence during her direct examination), was "possible". The Inquiry Panel recognizes that given the passage of time, it is entirely understandable that the Complainant cannot remember many of the details she was asked to recall by counsel for Member A. Nonetheless, the passage of time and the imperfections of the human memory are factors which the Inquiry Panel must consider in determining whether the Complainant's allegations have been proven on the balance of probabilities;

- (iii) her recollection of the weather conditions on the day of the “Saturday” visit. The Complainant testified that the Saturday visit was the last time she attended upon Member A. There is no reference to such a visit in the Manitoba Health summaries. The last entry in the Manitoba Health summaries with respect to an attendance by her on Member A was May 10, 1994. The Saturday visit therefore must have occurred after May 10, 1994. On the basis of the evidence as to the weather that spring, it is highly unlikely there was snow melting on the ground or even snow floating down the river after May 10, 1994. Although the Inquiry Panel would not expect the Complainant to recall the weather conditions in Winnipeg in the spring of 1994, the Complainant herself referred to the presence of snow on the day in question during the complaint process, as part of her recollection of the events of that day. It is concerning that the weather records establish that her recollection of that aspect of the day in question is likely not correct.

None of the above-noted aspects of the Complainant’s evidence are determinative of any of the important issues in this case. They do not establish that the Complainant was being untruthful in her testimony. Nonetheless, they are factors which the Inquiry Panel has considered in its overall assessment of all of the evidence.

Another portion of the evidence which the Inquiry Panel noted with interest was the Complainant’s evidence that she had experienced two other traumas earlier in her life (when she was growing up in her home country) relating to abuse and that she had discussed those traumas with her counsellor in the United States.

Similarly, the Inquiry Panel was mindful of the evidence that Y had referred female patients to Member A, including her niece and sister, after her daughter had told her about her concerns relating to Member A.

Conversely, the evidence of X and Y, relating to their separate conversations with the Complainant with respect to her interactions with Member A and her emotional state at the time, also received thoughtful consideration by the Inquiry Panel.

As noted above, X was a credible witness. As directed by counsel, she did not testify as to what the Complainant told her, only that it was about Member A, and that in the conversation, the Complainant was very upset. X testified that her conversation with the Complainant occurred either in the spring of 1994 or 1995. X's testimony cannot be used to corroborate the truth of the Complainant's allegations against Member A. Nonetheless, the Inquiry Panel must have regard for X's evidence that she was told by the Complainant in either 1994 or 1995 about problematic interactions with Member A, and that the Complainant was frightened and very upset when describing those interactions.

Furthermore, Y's evidence on that issue was substantially similar.

The evidence of X and Y with respect to the Complainant's emotional state when describing her problematic interactions with Member A cannot be determinative of the truth of the Complainant's allegations against him. However, the Inquiry Panel recognizes that it is important evidence which has been given considerable weight by the Inquiry Panel in its deliberations.

The following aspects of Member A's testimony were of significance to the Inquiry Panel:

- (i) his answers to questions were simple, direct and non-evasive. His denials of any wrongdoing appeared reasonable and genuine, even when challenged in a skillful cross-examination;
- (ii) when challenged with respect to issues relating to the Complainant's treatment (eg: not referring her to a gynaecologist notwithstanding the persistence of issues relating to her menstruation), he provided possible explanations which were logical from a medical perspective, notwithstanding that he had no independent recollection of his treatment of the Complainant;
- (iii) Member A's files, charts and records relating to his treatment of the Complainant were unavailable to him as a result of the substantial delay in the Complaint being made to the College. The lack of those records potentially prejudiced Member A's ability to establish that all of the steps he took in relation to the Complainant were medically necessary. Notwithstanding the absence of his records, and his lack of any independent recollection of his treatment of the Complainant, Member A responded reasonably to questions put to him in cross-examination relating to the frequency and the nature of the Complainant's attendances upon him as a patient;
- (iv) the organization of Member A's practice, particularly at the current location from the fall of 1992 onwards and the presence of his wife at the office as Office Manager, and her significant role in making the Complainant's appointments, are inconsistent with Member A being predatory in his behaviour toward the Complainant and of him taking advantage of the Complainant on a regular basis over an extended period of time;

- (v) the Complainant's lack of recollection of the security protocol in place for Saturday visits to Member A's office, as that protocol was described by both Member A and Z, was surprising, particularly given the Complainant's evidence that she had attended at the office on a previous occasion on a Saturday;

None of the above-noted elements of Member A's evidence, either alone, or in combination with each other, are determinative of the truth of Member A's denials. Nonetheless, they are factors which the Inquiry Panel has considered and afforded some weight in its deliberations.

In undertaking its review of all of the evidence in these proceedings, the Inquiry Panel has been very cognizant of:

- (i) the Supreme Court's comments at paragraph 40 of the *McDougall* decision that "context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences";
- (ii) the Supreme Court's comments at paragraph 46 of the *McDougall* decision that evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test;
- (iii) the comments of O'Neil J. in *Olegario v Cabaraban* quoted with approval in *The College of Physicians & Surgeons of Ontario v Beitel*, referred to earlier in these Reasons, to the effect that the issue in a civil proceeding is not which of two competing versions of a series of events is true, but whether "on the totality of the evidence, viewed as a whole, has the plaintiff proved her case on the balance of probabilities".

Having regard to:

- (a) the significant contradictions in the evidence between the Complainant and Member A and the conflicting and competing considerations noted elsewhere in these Reasons;
- (b) the significant passage of time between the occurrences alleged in the Amended Notice of Inquiry and the hearing before this Panel and the negative effect of the passage of time on the overall quality of the evidence;
- (c) the seriousness of the allegations which have been made against Member A;

the Inquiry Panel is simply unable to conclude that it is more probable than not that Member A made the comments and committed the acts which are alleged in the Amended Notice of Inquiry.

The College has therefore not proven the case against Member A on the balance of probabilities. As a result, the decision of this Inquiry Panel is that the charges and the allegations set forth in the Amended Notice of Inquiry must be dismissed.

DECISION

The charges against Member A of professional misconduct, of contravening Article 2 of the Code of Conduct of the College and of having demonstrated an unfitness to practice medicine as set forth in the Amended Notice of Inquiry and all of the allegations contained in the Amended Notice of Inquiry are dismissed.

**RESOLUTION AND ORDER OF AN INQUIRY PANEL OF THE
COLLEGE OF PHYSICIANS AND SURGEONS OF MANITOBA**

WHEREAS Member A, a member of the College of Physicians and Surgeons of Manitoba (the College) was charged with professional misconduct, and with contravening Article 2 of the Code of Conduct of the College, and with demonstrating an unfitness to practice medicine, as more particularly outlined in an Amended Notice of Inquiry dated December 14, 2011.

AND WHEREAS Member A was summoned and appeared represented by counsel before an Inquiry Panel (the Panel) of the College at a hearing conducted on June 2, 3 and 5, 2014, which hearing was also attended by counsel for the Investigation Committee of the College;

AND WHEREAS Member A entered a plea of not guilty to all of the charges outlined in the Amended Notice of Inquiry;

ON HEARING THE EVIDENCE that was introduced at the hearing and on reviewing all of the exhibits filed at the hearing and on hearing submissions from counsel for the Investigation Committee of the College and counsel for Member A,

THE INQUIRY PANEL HEREBY ORDERS THAT:

1. Pursuant to Subsection 56(3) of *The Medical Act RSM*, 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.

2. The charges against Member A of professional misconduct, of contravening Article 2 of the Code of Conduct of the College and of having demonstrated an unfitness to practice medicine as set forth in the Amended Notice of Inquiry and all of the allegations against Member A contained in the Amended Notice of Inquiry are dismissed.

DATED this 22nd day of September, 2014.