**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 AND ORDER OF THE INQUIRY PANEL**
**WITH RESPECT TO A MOTION FOR PRODUCTION AND DISCLOSURE**

**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, had breached Article 2 of the Code of Conduct of the College, and 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 our about May, 1994, had failed to maintain appropriate boundaries with a particular patient ("the Complainant") in several ways, including inappropriately touching her breasts and/or genitals, making inappropriate sexual comments to her, including that he desired to have sexual intercourse with her, having various types of sexual contacts with her, and attempting to solicit a personal and/or sexual relationship with her.

Member A denies all of the allegations in the Notice of Inquiry.

On March 24, 2012, counsel for Member A filed a Notice of Motion to be heard by an Inquiry Panel of the College for production and disclosure of further documentation from the Complainant, the College, and various other parties referred to in the Notice of Motion. The documentation being sought by Member A includes, but is not limited to the following:

i) All versions of the Complainant's letters of complaint which are not included in the College's Disclosure Documents, including any versions stored electronically;

ii) Any and all counselling records relating to discussion or disclosure of the allegations, including records of the Complainant's counsellors in the United States and Winnipeg;

iii) Any and all medical records of the Complainant relevant to the allegations, including any records dating back to the Complainant's attendance upon physicians since arriving in Winnipeg prior to her

first attendance upon Member A in 1991 and records subsequent to May, 1994 relating to any attendances by the Complainant upon physicians for gynaecological issues, including prescription of birth control pills, irregular periods, or other such issues including the records of nine different physicians;

iv) Manitoba Health printout of patient services for services dated January 1, 1995 and the present;

v) Any employment records relating to the Complainant's employment with three different employers.

Member A's motion for production and disclosure was originally scheduled to be heard on April 24, 2012, but was adjourned to May 23, 2012 to enable counsel for Member A to serve the Complainant with the Notice of Motion and all supporting materials, and to consider whether notice was to be given (and if so, the form of notice to be given) to the various other parties referred to in the notice of motion.

Prior to the motion for production and disclosure being heard by the Panel on May 23rd, the Complainant had been served with the Notice of Motion and supporting materials. As a result, she retained independent legal counsel who attended on her behalf on May 23rd. Counsel for Member A had also decided to provide notice to the various other parties referred to in the Notice of Motion and took steps on their own initiative to provide notice to those parties. Counsel for the College has raised objections to the manner in which those other parties were provided with notice of Member A's motion for production and disclosure, and has submitted that the manner in which notice was given to those other parties will have important implications for future cases. Accordingly, counsel for the College has submitted that it is important for this Inquiry Panel to rule on the College's objections. However, counsel for the College has also stated that this Panel may nonetheless proceed to determine Member A's motion for production

and disclosure on its merits. Accordingly, the Inquiry Panel will set out its decision on the merits of Member A's motion for production and disclosure, and in a separate section of these Reasons, will provide its decision with respect to the College's procedural objections.

At the outset of the hearing on May 23, 2012:

i) Member A, through his counsel, admitted his membership in the College;

ii) The Notice of Inquiry was filed as Exhibit 1 in the proceedings;

iii) On consent, the Inquiry Panel granted an order for non-disclosure of the name of the Complainant and any witnesses to be called at the Inquiry hearing pursuant to Section 56(3) of *The Medical Act*, R.S.M.

The following materials had been submitted to the Inquiry Panel in advance of the May 23, 2012 hearing, and were reviewed, considered and relied upon by the Inquiry Panel in making its decision, and in making the Orders referred to herein:

i) The Notice of Motion for production and disclosure dated March 20, 2012;

ii) The Affidavit of Member A sworn March 20, 2012 in support of the motion;

iii) The Affidavit the C.M., the Coordinator for the Complaints and Investigation Department of the College sworn April 3, 2012;

iv) The Supplementary Affidavit of C.M. sworn April 5, 2012;

v) The Supplementary Affidavit of C.M. sworn April 16, 2012;

vi) The Affidavit of Service of a legal assistant employed by counsel for Member A, sworn May 15, 2012 outlining the manner in which the Complainant was served with Member A's Notice of Motion and supporting materials, and also outlining the manner in which Manitoba Health, and the various individuals referred to in Member A's Notice of Motion were provided with notice of the Notice of Motion;

vii) Further Affidavit of C.M. sworn May 22, 2012.

In addition to the above-noted motion and affidavits, the Inquiry Panel also reviewed and considered the written Motions Briefs and authorities submitted by counsel for Member A, counsel for the College and counsel for the Complainant, and considered the very thorough and helpful oral submissions of all counsel.

## THE MOTION FOR PRODUCTION AND DISCLOSURE

### First party v. third party disclosure

The motion for production and disclosure brought by Member A was strenuously opposed by both the College and the Complainant. It was the position of both the College and the Complainant that none of the documents sought by Member A ought to be disclosed or produced.

One of the critical, determinative issues in this case is whether Member A is seeking "first party" disclosure and production (that is to say production from the College as the prosecutorial authority, of all of the documents it has or could have in its possession by virtue of the investigative and subpoena powers under *The Medical Act* and pursuant to the authorization provided by the Complainant)

or “third party” disclosure and production (that is to say production of documents from third parties, such as Manitoba Health, and the physicians, counsellors and employers identified in Member A’s motion).

The distinction between “first party” and “third party” production is critical in this case, because the “test” to determine whether disclosure and production is required is very different depending on whether disclosure and production is being sought from a first party, i.e. the College itself, or from third parties, such as the parties identified in Member A’s motion.

The leading case relating to first party disclosure and production, i.e. the disclosure and production required from a prosecutorial authority, is the Supreme Court of Canada’s decision in *R. v. Stinchcombe [1991] 3 S.C.R. (326)* (hereinafter referred to as “*Stinchcombe*”). *Stinchcombe* was a criminal case involving charges against a lawyer of breach of trust, theft and fraud. The headnote to the case contains an accurate and useful summary of the essential elements of the case and the nature of the disclosure obligation which is to be fulfilled by a prosecutorial authority:

> “The Crown has a legal duty to disclose all relevant information to the defence. The fruits of the investigation which are in its possession are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done. The obligation to disclose is subject to a discretion with respect to the withholding of information and to the timing and manner of disclosure. Crown counsel has a duty to respect the rules of privilege and to protect the identify of informers. A discretion must also be exercised with respect to the relevance of information. The Crown’s discretion is reviewable by the trial judge, who should be guided by the general principle that information should not be withheld if there is a reasonable possibility that this will impair the right of the accused to make full answer and defence. The absolute

> withholding of information which is relevant to the defence can only be justified on the basis of the existence of a legal privilege which excludes the information from disclosure. …
>
> Subject to the Crown's discretion, all relevant information must be disclosed, both that which the Crown intends to introduce into evidence and that which it does not, and whether the evidence is inculpatory or exculpatory."

Relying on *Stinchcombe*, counsel for Member A submits that the College's duty to disclose information in its possession is triggered when a request for disclosure is made by the member, or his lawyer. According to counsel for Member A, when such a request is made, the prosecution must make full and complete disclosure of any documents in its possession, power or control, which might be useful to the defence unless there is a reason why such material should not be disclosed. According to Member A, the College bears the onus of convincing the Inquiry Panel that the information sought is clearly irrelevant or privileged.

The College and the Complainant forcefully reject the suggestion that *Stinchcombe* sets forth the test for the disclosure and production of the types of documents being sought by Member A. They submit that there is now a well-defined procedure and an entirely different test for the production of documents and records relating to complainants in sexual assault cases. Those procedures are set forth in Section 278 of the *Criminal Code of Canada* ("the Code") and two cases, namely *R. v. O'Connor [1995] 4 S.C.R. 411* (hereinafter referred to as "O'Connor") and, more importantly, *R. v. Mills [1999] 3 S.C.R. 668* (hereinafter referred to as "*Mills*").

According to the College and the Complainant, the procedure contemplates a two-stage analysis prior to the production of records to an

accused, or in this case, to Member A. First, the Inquiry Panel is required to determine whether the records should be reviewed by the Panel. Secondly, if it is determined that the records should be reviewed by the Panel, then the Panel is required to determine whether the records should be produced to the party seeking production, and if so on what terms.

As part of the first stage of the analysis, the party seeking disclosure and production has the onus satisfying the Inquiry Panel that:

a) The records in question are “likely relevant” to an issue in the proceedings; and

b) Production of the records is necessary in the interests of justice.

At the second stage of the analysis, the Inquiry Panel, having received and reviewed the documents it has ordered to be produced to itself, must again consider whether the documents in question are “likely relevant” and whether production of them to the parties requesting them “is in the interest of justice”. If so, the Inquiry Panel will then order that those documents be provided to the parties.

Although *Stinchcombe, O’Connor* and *Mills* were all criminal cases, there is ample authority for the proposition that the disclosure and production tests outlined in criminal cases apply to disciplinary proceedings being conducted in front of administrative tribunals, (see for example the *College of Physicians & Surgeons (Ontario) v. Lee, CarswellOnt. 3189)*. For the purposes of this motion, the Inquiry Panel has proceeded on the basis that the tests outlined in *Stinchcombe, O’Connor* and *Mills* apply to disciplinary proceedings being conducted before administrative tribunals.

The College acknowledges that as the prosecutorial authority in this case, it has a “first party” disclosure obligation to disclose to Member A, “the fruits” of its investigation, which includes all of the information, whether inculpatory or exculpatory, which it has obtained during the course of its investigation, conducted at the direction of the Investigation Committee. The College says that it has made such disclosure, and has fully complied with its disclosure and production obligations.

Counsel for Member A acknowledged that they have received some disclosure from the College, but say that it has not fulfilled the College’s first party disclosure obligations as set forth in *Stinchcombe*.

Member A’s argument that the College has not fulfilled its first party disclosure and production obligation, and that the documents identified in his notice of motion should form part of the disclosure and production obligation of the College is based on the proposition that all of the documents being sought are within the College’s possession, power or control. Although it is generally understood that the documents being sought by Member A, or the vast majority of them, are not in the College’s possession, Member A maintains that they are in the College’s power or control by virtue of:

i) Sections 45(3) and 59.2 of *The Medical Act*.

Section 45(3) of *The Medical Act* stipulates:

> **“Records and information**
>
> 45(3) A person conducting an investigation may
>
> (a) require the member who is the subject of the investigation to produce any records, documents and things in his or her possession or under his

> or her control that may be relevant to the investigation;
>
> (b) require any other member of the college to produce any records, documents and things in his or her possession or under his or her control that may be relevant to the investigation; …

Section 59.2 of *The Medical Act* stipulates:

> **Witnesses**
>
> 59.2(1) Any person, other than the member whose conduct is the subject of the hearing, who in the opinion of the panel has knowledge of the complaint or matter being heard is a compellable witness in any proceeding before the panel.
>
> **Notice to attend and produce records**
>
> 59.2(2) The attendance of witnesses before a panel and the production of records may be enforced by a notice issued by the registrar requiring the witness to attend and stating the date, time and place at which the witness is to attend and the records, if any, that the witness is required to produce."

ii) The Complainant had provided the College with an authorization dated November 25, 2010, enabling the College to obtain from various parties "any and all information which may be requested relative to my past/present, mental, physical or other condition, history and/or treatment including the results of any diagnostic procedures".

Although that authorization was subsequently revoked by the Complainant, it remained operative on January 16 and 30, 2012, when Member A made requests for disclosure from the College (after receiving the College's initial disclosure) and on March 21, 2012, when Member A's motion for disclosure and production was served on the College.

> Counsel for Member A submit that a comprehensive and fair and balanced investigation of the matters complained of by the Complainant should have included an effort to obtain all of the records identified in Member A's motion for disclosure and production, particularly after Member A, through his counsel, had made requests for additional disclosure on January 16 and 30, 2012.

Further, or in the alternative, Member A submits that if the medical records of the physicians, and the notes and records of the counsellors who have seen the Complainant are not within the College's control, they are within the Complainant's control, because they comprise part of her personal health information to which she is entitled pursuant to the provisions of *The Personal Health Information Act* (PHIA).

The College and the Complainant reject all of the arguments relied upon by Member A to characterize this case as a first party disclosure case.

To rebut those arguments, the College argues that:

i) None of the cases relied upon or referred to by counsel for Member A referred to the concept of documents being in the "possession, power or control" of the prosecuting authority. Most of the applicable cases refer only to "possession", some such as *O'Connor* refer to "possession or power", but none refer to an additional element of "control". Moreover, none of the records being sought are in the possession of the College, and neither the authorization from the Complainant nor the provisions of subsection 45(3) or Section 59.2 of *The Medical Act* result in the College having power or control over the documents in question.

ii) Member A suggests that the Investigation Committee, or its investigator, ought to invoke subsection 45(3) of *The Medical Act* to compel members of the College to produce the medical records which he seeks. However, the intent of subsection 45(3) is to authorize the College's investigators to compel members who are the subject of an investigation and other members of the College who might have relevant information to provide such records and documents to the investigator. Subsection 45(3) of *The Medical Act* does not contemplate the extensive use of that subsection to obtain the medical records of a complainant from any physician who may have provided care to such a patient. Pre-hearing disclosure from third parties, including physicians, is obtained where necessary through an entirely different process, as set forth in *O'Connor*, and particularly *Mills*.

iii) With respect to Section 59.2 of *The Medical Act*, that section provides for a mechanism by which witnesses' attendance may be compelled, and by which witnesses may be required to produce records at a hearing. Section 59.2 is not a substitute for the procedures set forth in *O'Connor* and *Mills* by which an accused member may attempt to obtain documents from a third party at a much earlier stage of the proceedings.

iv) To the extent that Member A argues that certain medical and counselling records are in the Complainant's possession, power or control, and suggests that the Inquiry Panel can order the Complainant to obtain such records, which would then in turn be disclosed and produced to Member A, the College responds that the Complainant is not a party to these proceedings, and therefore the Panel has no authority or jurisdiction to order the Complainant to obtain records.

v) Although Member A has referred to PHIA to argue that the Complainant has control over her medical and counselling records, the Inquiry Panel has no authority or jurisdiction to compel her to exercise whatever rights she might have under PHIA to obtain those records. Moreover, the Complainant has unequivocally stated that she does not want Member A to have access to her medical and counselling records, and so her consent to make those records available, whether pursuant to PHIA or otherwise has not, and will not be forthcoming.

vi) In any event, the Complainant's authorization dated November 25, 2010, was revoked on April 3, 2012, and therefore cannot now be utilized by the College to obtain the documentation which Member A seeks.

In addition to endorsing and adopting all of the above-noted arguments of the College, counsel for the Complainant also advances the following arguments in opposition to Member A's submissions that this is a "first party" disclosure case:

i) The Complainant's letter dated November 6, 2010 (part of Exhibit F to the Affidavit of C.M. sworn April 3, 2012) asks the College to keep all of her personal information private, and not to disclose such information to Member A. Moreover, the Complainant did not have independent legal advice when she provided the authorization dated November 25, 2010. On the basis of the College's letter to the Complainant dated November 19, 2010 (Exhibit D to the Affidavit of C.M. sworn April 3, 2012), a reasonable inference arises that the Complainant believed the authorization was being provided in order to be "helpful" to the College's investigation. In view of all of those factors, the Complainant's authorization cannot be construed

as an informed waiver of her right to preserve the privacy of her personal information and personal health information as required in *Mills*.

ii) Treating Member A's request for production and disclosure of the documents identified in his notice of motion as a request from a "first party", would entirely negate the effect of Section 278 of the Code, and the common law principles articulated in *O'Connor* and *Mills* with respect to the production of private records in sexual assault complaints.

The arguments of the College and the Complainant, as noted above, rebutting Member A's contention that this is a "first party" production case, are compelling and persuasive.

However, there is an additional overriding factor which has convinced the Inquiry Panel that Member A's request in this case is effectively a request for third party disclosure and production, namely the legislative and jurisprudential history of the relevant statutory provisions, and the relatively recent developments in the common law.

Following the decisions in *Stinchcombe* and *O'Connor*, amendments were made to the Code, which came into force on May 12, 1997. The amendments are currently set forth in Section 278 of the Code. Subsections 278.1, 278.3(4) and 278.5 are particularly noteworthy. Those provisions directly address the issue of when and how accused persons may have access to the private records of complainants in sexual assault and related types of cases.

The *Mills* case involved a direct challenge to the constitutionality of major portions of Section 278 of the Code, and the Supreme Court of Canada ruled that the provisions in question were valid and constituted "a constitutional response to

the problem of production of records of complainants or witnesses in sexual assault cases". The procedure outlined in Section 278 of the Code, as commented and elaborated upon by the Supreme Court of Canada in *Mills*, replaces the formerly applicable common law principles as set forth in *O'Connor*.

Some of the allegations against Member A outlined in the Notice of Inquiry are in the nature of, or analogous to a complaint of sexual assault, or analogous to the other offences to which Section 278 of the Code applies.

Section 278 and *Mills* address the delicate and important balance between an accused's right to make full answer in defence, and a complainant's right to privacy in sexual assault types of cases and sets forth a blueprint whereby those competing rights are able to co-exist without one negating the other.

The definition of "record" in Section 278.1 of the Code states in part that:

> "'Record' means any form of record that contains personal information for which there is a reasonable expectation of privacy and includes, without limiting the generality of the foregoing, medical, psychiatric, therapeutic and counselling … records …"

This definition covers most of the records being sought by Member A in this case, including the Manitoba Health printouts, the counselling records and the medical records of the other physicians who saw the Complainant.

The Inquiry Panel has concluded that the types of production and disclosure sought by Member A is "third party" disclosure and not "first party" disclosure. The Panel considers the arguments of the College and the Complainant rebutting and negating Member A's contention that this is a first party disclosure case, as set forth above, to be correct. The Panel is also satisfied that to rule otherwise would be to effectively ignore the statutory

provisions which have been enacted by Parliament and the common law principles as set forth in *Mills*, which have been specifically developed to apply to sexual assault and related types of cases.

## THE *MILLS* TEST

Having decided that Member A's request is in fact a request for third party disclosure and production does not resolve the issue of what documents are to be disclosed and produced. It merely establishes that the test to be applied, and the process to be followed to obtain the sought after disclosure and production are those set forth in *Mills*. However, the determination that this case involves a request for third party disclosure and production is important because *O'Connor* and *Mills* establish that the party seeking disclosure must show that there is a likelihood that the information is logically probative to an issue in the proceedings, which is the reverse of the *Stinchcombe* test relating to first party production, whereby the prosecutorial authority must justify any refusal to disclose.

As referred to earlier, the *Mills* process involves two distinct stages. The first stage involves the determination as to whether the record should be produced to the Inquiry Panel. The second stage involves the Panel itself reviewing the records to determine whether, and to what extent the records should be produced to the parties.

At the first stage of the process in this case, the Inquiry Panel must consider two distinct issues:

i) Whether Member A has established that the records which he seeks will "likely be relevant" to the issues at the hearing and to the allegations in the Notice of Inquiry;

ii) Whether the production of the records is necessary “in the interests of justice”.

Counsel for Member A argues that at the first stage of the process, meeting the threshold of “likely relevance” and demonstrating that production of the documents will be “in the interests of justice” is not an overly onerous burden. The threshold is simply a requirement to prevent the defence from engaging in speculative, fanciful, disruptive, unmeritorious, obstructive and time consuming requests for production.

In contrast, counsel for both the College and the Complainant say that the threshold, even at the first stage of the process is much higher, and that each of the two elements of the test are to be rigorously applied and separately and independently fulfilled.

In support of that proposition, counsel for the Complainant refers to a decision of Madam Justice Steel of the Court of Queen’s Bench (as she then was) in *R. v. Pinder*, wherein she stated:

> “Now, what is the meaning of “likely relevance”? I believe that all are agreed that the onus is on the accused. You need not prove relevance beyond a shadow of a doubt. You need not even prove it on a balance of probabilities. But I believe that the onus is a significant one, and I refer to Madam Le-Heureux Dube in *O’Connor* on page 298 where she says, beginning at paragraph 142,
>
> > “The burden on an accused to demonstrate likely relevance is a significant one. The accused must show by adducing some evidence, whether by means of affidavit or *viva voce* evidence that in the particular records being requested there is a significant possibility that there will be some information which would relate to a particular material issue at trial.

> Moreover, there are a number of assertions listed in subsection 278.3(4) which are not sufficient on their own to establish that the record is likely relevant to an issue at trial.
>
> So, for example, the record may relate to the incident that is the subject matter of the proceeding and may so be stated, but that is insufficient in and of itself." (underlining added)"

Furthermore, a person seeking access to records must contend with the provision of Section 278.3(4) of the Code, which sets out a series of factors which on their own cannot establish that a record meets the "likely relevance" test. Given its importance, Section 278.3(4) is set forth below in its entirety:

> "**278.3(4)** Any one or more of the following assertions by the accused are not sufficient on their own to establish that the record is likely relevant to an issue at trial or to a competence of a witness to testify:
>
> (a) that the record exists;
>
> (b) that the record relates to medical or psychiatric treatment, therapy or counselling that the Complainant or witness has received or is receiving;
>
> (c) that the record relates to the incident that is the subject matter of the proceedings;
>
> (d) that the record may disclose a prior inconsistent statement of the Complainant or witness;
>
> (e) that the record may relate to the credibility of the Complainant or witness;
>
> (f) that the record may relate to the reliability of the testimony of the Complainant or witness

> merely because the Complainant or witness has received or is receiving psychiatric treatment, therapy or counselling;
>
> (g) that the record may reveal allegations of sexual abuse of the Complainant by a person other than the accused;
>
> (h) that the record relates to the sexual activity of the Complainant with any person, including the accused;
>
> (i) that the record relates to the presence or absence of a recent complaint;
>
> (j) that the record relates to the Complainant's sexual reputation; or
>
> (k) that the record was made close in time to a complaint or to the activity that forms the subject matter of the charge against the accused.
>
> (underlining added)"

The primary purpose of subsection 278.3(4) is to prevent speculative and unmeritorious requests for production. However, as noted in *Mills*, the subsection does not entirely prevent an accused from relying on the factors listed, but simply prevents reliance on bare assertions of the listed matters where there is no other evidence and they stand on their own. As also noted in *Mills*, these provisions prevent speculative myths, stereotypes, and generalized assumptions about sexual assault victims and classes of records from forming the entire basis of an otherwise unsubstantiated order for production of private records. Where any one of the listed assertions is made and supported by the required evidentiary and informational foundation, "the trial judge remains the ultimate arbiter in deciding whether the likely relevance threshold is met".

Nonetheless, the Inquiry Panel is satisfied that the onus on Member A to establish that the documents he seeks to have disclosed and produced are "likely relevant" to an issue in these proceeding is a significant one. It is not sufficient for Member A to assert that the records may be relevant. Rather, the Inquiry Panel agrees with submissions of both counsel for the College and the Complainant that Member A must show that the records sought likely contain evidence relevant to an actual issue in the proceedings.

The Inquiry Panel also recognizes that Section 278.5 of the Code added a separate and independent requirement before a review of the records should be undertaken, namely that such a review be necessary "in the interests of justice". Section 278.5(2) sets forth a series of factors which are to be considered in determining whether production of the record will be in the interests of justice. Those factors are:

a) the extent to which the record is necessary for the accused to make a full answer and defence;

b) the probative value of the record;

c) the nature and extent of the reasonable expectation of privacy with respect to the record;

d) whether production of the record is based on a discriminatory belief or bias;

e) the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates;

f) society's interest in encouraging the reporting of sexual offences;

g) society's interest in encouraging the obtaining of treatment by complainants of sexual offences; and

h) the effect of the determination on the integrity of the trial process.

Having received the benefit of comprehensive briefs from counsel for Member A, the College and the Complainant, and very helpful oral submissions from those counsel, the Inquiry Panel is left to determine whether the double test to be met of "likely relevance" and whether documentary production is "in the interests of justice" at the first stage of the process, is a relatively low threshold, which is simply to prevent speculative obstructive requests for production, or a significantly higher threshold, involving a rigorous application of both elements of the test.

Although the Panel is satisfied that the threshold is significantly higher than suggested by counsel for Member A, the *Mills* decision itself provides useful guidance in directing a reasonable and practical approach, at the first stage of the process, i.e. when the Inquiry Panel is determining what records should be produced to and reviewed by the Panel itself.

The court in *Mills* stated that:

> "Our jurisprudence has recognized on several occasions "the danger of placing the accused in a 'Catch-22' situation as a condition of making full answer and defence" … This is an important consideration in the context of records production as often the accused may be in the difficult position of making submissions regarding the importance to full answer defence of records that he or she has not seen. Where the records are part of the case to meet, this concern is particularly acute as such a situation very directly implicates the accused's ability to raise a doubt concerning his or her innocence. … Where the records to which the accused seeks access are not part of the case to meet, however, privacy and equality considerations may require that it be more difficult for accused persons to gain access to therapeutic or other records."

With specific reference to the second element of the test, "necessary in the interests of justice", at the first stage of the process, the court in *Mills* stated that:

> "Section 278.5(1) is a very wide and flexible section. It accords the trial judge great latitude. …
>
> The requirement that production be "necessary in the interests of justice" at this stage refers to whether production to the judge is necessary in the interests of justice. That is a phrase capable of encompassing a great deal. It permits the judge to look at factors other than relevancy, like the privacy rights of complainants and witnesses in deciding whether to order production to himself or herself. Where the privacy right in a record is strong, and the record is of low probative value or relates to a peripheral issue, the judge might decide that non-disclosure will not prejudice the accused's right to full answer and defence and dismiss the application for production.
>
> However, pursuant to the first factor of Section 278.5(2) the judge must consider the accused's right to make full answer and defence. If the judge concludes that it is necessary to examine the documents at issue in order to determine whether they should be produced to enable the accused to make full answer and defence, then production to the judge is "necessary in the interests of justice". … If a record is established to be "likely relevant" and, after considering the various factors, the judge is left uncertain about whether its production is necessary to make full answer and defence, then the judge should rule in favour of inspecting the document. …"

## THE APPLICATION OF THE *MILLS* TEST TO THE DOCUMENTS REQUESTED

Having identified *Mills* as setting forth the process to be followed in considering Member A's requests for disclosure and production, and the tests to be applied when determining those requests, the Inquiry Panel will outline its

decision in relation to each of the categories of documents being sought by Member A. The Panel will not provide an in depth analysis of all of the arguments and counterarguments put forward by Member A, the College and the Complainant, nor an analysis of each of the factors listed in Section 278.5(2) of the Code. The Panel has carefully considered all of the arguments put forward and the factors listed in Section 278.5(2). It will simply provide its decision and a brief summary of the basis therefore, in relation to the documents requested, emphasizing that the decisions outlined below are the Panel's decisions at the first stage of the process with respect to documents which may be produced to the Panel itself for review.

The Panel recognizes that before it reviews any documents which it may order to be produced, it should first provide the parties who are in possession of those documents with an opportunity to make any submissions they may wish with respect to the production of those documents. Thereafter, with respect to any documents which it orders to be produced, the Panel will proceed to the second stage of the *Mills* test. The second stage will involve the Inquiry Panel reviewing the documents and determining if they are "likely relevant" and whether production of them to Member A is necessary "in the interests of justice", having again considered all the arguments of Member A, the College, and the Complainant, and the factors delineated in Section 278.5(2) of the Code, in light of the actual contents of the documents.

*A. All versions of the Complainant's letters of complaint which have not been included in the College's disclosure documents, including any versions stored electronically.*

The Affidavit of Member A sworn March 20, 2012 establishes that the College had received more than one version of the complaint from the Complainant. The Affidavit of the Coordinator for the Complaints and Investigation Department of the College sworn April 3, 2012 provides details as

to the circumstances whereby that occurred and indicates that, to the best of the College's knowledge, the only difference between the complaint letter which Member A has received and any prior version or versions received by the College is that reference to the Complainant's married name, and current contact information have been deleted from the copy provided to Member A.

The Panel has decided that in relation to the first stage of the *Mills* analysis, previous versions of the Complainant's letter of complaint which have been previously sent to the College, by their nature satisfy both the "likely relevant" and "in the interest of justice" thresholds. It is very likely that such letters contain information (even if it is identical to the information contained in the final version of the complaint letter) which is fundamental to the allegations being made against Member A and therefore, the "likely relevant" part of the test is met. The privacy interest of the Complainant cannot operate to prevent disclosure and production, because by sending such versions of the complaint letter to the College, the Complainant must be taken to have understood that the contents thereof would potentially be disclosed to Member A.

The Inquiry Panel recognizes that the previous version or versions of the letter may be identical (except for the married name and current contact particulars of the Complainant) to the final version of the complaint letter. Nonetheless, for the purpose of a review by the Panel, an order is hereby granted requiring the Complainant to produce any and all prior versions of the complaint letter, including any versions stored electronically, which have been previously sent to the College and returned to the Complainant.

*B. Any and all counselling records relating to discussion or disclosure of the allegations, including records of the Complainant's counsellors in the United States and Winnipeg.*

A critical issue in these proceedings, although not directly referred to in the Notice of Inquiry, will be the delay between May, 1994 when the Complainant ceased being a patient of Member A's, and November 6, 2010, the date of her complaint to the College. Issues relating to the reasons for that delay, the reasons for the complaint being made when it was, and the reliability of the evidence, given the significant lapse of time, are bound to arise during these proceedings. Those issues are directly related to Member A's ability to mount a defence to the charges.

The Committee has therefore concluded that the counselling records will likely be relevant to one or more of those issues.

However, the Inquiry Panel is very mindful that with respect to the "interests of justice" threshold, the records created by the counsellors will likely contain information with respect to the Complainant which is very personal and with respect to which she has strenuously asserted her privacy rights. The Inquiry Panel is also very cognizant of the issue that counselling records can be highly subjective documents, which are frequently not intended to be factually accurate, but are rather a record of the patient's emotional state and psychological condition at the time the record was made.

While recognizing the highly personal nature of the contents of the counselling records, the Inquiry Panel believes that the proper balance between Member A's right to make full answer and defence, and the Complainant's right to privacy, at the first stage of the *Mills* process can best be achieved by an order requiring the Counsellors to produce to the Inquiry Panel for its review any entries or excerpts from their records relating to their counselling of the Complainant which contain either direct references to Member A, or any references which can be reasonably interpreted as being related to allegations by the Complainant against a physician with respect to a failure to maintain

appropriate boundaries when providing medical care between November, 1991 and May, 1994. Only once those records have been produced for review by the Inquiry Panel will the Panel be able to make a considered and meaningful assessment of all of the factors delineated in Section 278.5(2) of the Code.

C. *Any and all medical records of the Complainant relevant to the allegations, including any records dating back to the Complainant's attendance upon physicians since arriving in Winnipeg prior to her first attendance upon Member A in 1991 and records subsequent to May, 1994 relating to any attendances by the Complainant upon physicians for gynaecological issues, including prescription of birth control pills, irregular periods or other such issues, including the records of the physicians identified by name in the Manitoba Health billing records.*

Attached as Exhibit I to the Affidavit of Member A sworn March 20, 2012 is a letter from Manitoba Health dated March 7, 2011 to the College and an attached "Patient History" printout. The printout is computer generated and provides a summary of "physician services" provided to the Complainant from January, 1990 to December, 1993. The printout lists all of the physicians from whom information is sought and who are referred to in Member A's notice of motion. The printout also provides a very brief and general description of the category of services provided by each physician.

One of the important submissions made on behalf of Member A is that pursuant to an approved protocol, his offices destroyed all of his records relating to the Complainant in or about 2004, several years before her complaint was made to the College. He therefore says that since he has no personal recollection of the dates or purposes of the Complainant's visits with him and has no records upon which he can defend himself, he requires the physicians' records listed in the printout to put the Complainant's medical situation in context, and to assist him in reconstructing what may have occurred during the Complainant's attendances upon him.

This argument is not a common one, but some guidance is available from the decision of the Ontario Superior Court of Justice (Divisional Court) in *College of Physicians & Surgeons of Ontario v. Dr. Henry Shiu-Yuen Au et al (2005) CanLII 2037 (ON SCDC)*. In that case, Dr. Au was facing allegations of sexual abuse by 19 complainants over an extended period of time. In some cases, due to the passage of time, Dr. Au had no records relating to his treatment of some of the complainants. However, in the *Au* case, records from other physicians were ordered to be produced, but only records which were likely to be relevant and which were "case specific". The Inquiry Panel understands the phrase "case specific" to mean documents which are likely relevant to a specific issue in the case in question.

The Inquiry Panel finds that the "case specific" consideration is a useful criterion to apply in this case, and one that is consistent with the commentary in *Mills* relating to the "likely relevant" test. However, the Inquiry Panel recognizes that Member A is in an awkward and challenging position in terms of defending himself as a result of having no medical records available relating to his treatment of the complainant, because those records were destroyed after more than 10 years had elapsed following the termination of the doctor/patient relationship. Therefore, while the Panel believes that generally there should be a "case specific" consideration operating to demonstrate that the records being sought will be "likely relevant" to an actual issue in the proceedings, the rigour with which the standard is to be applied at the first stage of the *Mills* process may be lessened somewhat in circumstances in which no medical records are available to the physician as a result of the records being legitimately destroyed due to the passage of time. Moreover, an actual issue in the proceedings could be an issue directly related to one of the allegations in the Notice of Inquiry, or an issue which is likely to arise in the defence of those allegations, such as the reliability of testimony, given the passage of time.

Bearing those comments in mind, the Inquiry Panel's decision with respect to the records of the following physicians is outlined below:

i) Drs. D, E and F - According to the "Patient History" printout, all of those physicians saw the Complainant prior to her becoming a patient of Member A, and did not see the Complainant while she was a patient of Member A. There was no indication of anything in those physician's records being "case specific" to the issues in this case. Therefore, the Inquiry Panel declines to grant any order with respect to the records of those physicians.

ii) Drs. G, H and I - Those physicians were Directors of medical laboratories and likely would not have had any direct contact with the Complainant.

While the results of any tests ordered from those laboratories might be of use to Member A in reconstructing his records or reminding him of the medical issues which he was addressing in relation to the Complainant, there is no indication of anything likely being contained in those records or test results that would be case specific to an issue in these proceedings. Therefore, the Inquiry Panel declines to grant any order with respect to the records or test results of those physicians.

iii) Dr. B - The consultation with Dr. B was for hair and follicle disease and occurred in 1992, during the period the Complainant was seeing Member A. While on the one hand it is difficult to appreciate how such a consultation would be "likely relevant" to any of the issues in, or likely to arise in the proceedings, the consultation did occur at a time material to the allegations in the Notice of Inquiry. The Inquiry Panel also has a concern about the intrusion on the Complainant's privacy, which an order directed at Dr. B would

produce. However, to the extent that the Notice of Inquiry makes allegations about sexual touching and sexual advances, and that Member A denies all such allegations, the production of Dr. B's record, if it still exists, is arguably relevant to the ability of Member A to defend those allegations by attempting to provide a medical context for some of his actions towards the Complainant. With respect to the degree of intrusion on the Complainant's right of privacy, it is not possible to strike the balance between Member A's ability to make full answer and defence, and the Complainant's privacy rights without knowing what is specifically contained in the record in question.

At the first stage of the *Mills* process, the Inquiry Panel wants to avoid placing Member A in the "Catch-22" situation referred to in *Mills* and to avoid prematurely depriving him of a potential defence, particularly in light of his office's legitimate destruction of the Complainant's medical records.

Accordingly, the Inquiry Panel orders Dr. B to produce his records relating to the Complainant, if they still exist, to this Inquiry Panel for its review.

iv) Dr. C - The consultation with Dr. C, according to the printout, was for an "other acquired deformity". It also occurred in 1992 during the period that the Complainant was seeing Member A. It is not possible to determine the nature and character of the Complainant's consultation with Dr. C from the cryptic references in the printout. However, the Inquiry Panel's reasoning in relation to the records of Dr. C is the same as its reasoning in relation to the records of Dr. B.

The Inquiry Panel repeats that at the first stage of the *Mills* process, the Committee wants to avoid placing Member A in a "Catch-22" situation and to avoid prematurely depriving him of an arguable potential defence. Accordingly, the Inquiry Panel orders Dr. C to produce his records relating to the Complainant, if they still exist, to the Inquiry Panel for its review.

v) Dr. A - The Complainant began seeing Dr. A in July, 1994, shortly after she stopped seeing Member A. She saw Dr. A several times in 1994. It is likely Dr. A would have taken a thorough medical history of the Complainant and conducted a physician examination of the Complainant shortly after she became her patient.

Dr. A's records relating to the Complainant are likely relevant to establishing the Complainant's health status and the type of medical advice she was seeking, and the type of medical services she was receiving during a time period shortly following the period in which Member A's alleged misconduct occurred. Although those issues may not be directly relevant to the allegations against Member A contained in the Notice of Inquiry, they are relevant to establishing some of the background facts and identifying some of the medical issues which obtained shortly after the alleged misconduct had taken place. The records will likely be helpful to the Panel in understanding the factual and medical circumstances at a critical time, which will in turn assist the Panel in assessing the evidence that will be directly relevant to the allegations in the Notice of Inquiry and to Member A's defence of those allegations. As with the records of Dr. B and Dr. C, the records of Dr. A will arguably be relevant to the ability of Member A to defend those allegations by attempting to provide a medical context for some of his actions towards the Complainant.

> The Inquiry Panel recognizes that Dr. A's records, if they exist, will likely contain sensitive personal health information and other private and personal information of the Complainant. However, at this first stage of the *Mills* process, the Inquiry Panel believes disclosure and production of those records to the Inquiry Panel will strike the correct balance between enabling Member A to make full answer and defence and respecting the Complainant's privacy rights.
>
> Accordingly, the Inquiry Panel orders Dr. A to produce her records relating to the Complainant, if they still exist, to the Inquiry Panel for its review.

*D. Manitoba Health printout of patient services for services dated between January 1, 1995 and the present.*

At the hearing on May 23, 2012, counsel for Member A amended his request. Member A is now seeking a printout of patient services from January 1, 1995 to January 1, 1998.

It is very unlikely that the printout itself will be "case specific", and therefore it is similarly unlikely that the printout will meet the "likely relevant" threshold. The provision of the printout will also involve an intrusion on the Complainant's privacy, without any obvious balancing feature which might demonstrate that production of the printout will be "in the interests of justice".

However, the printout will almost certainly not be evidence in the cause, nor would it be produced for that purpose. The printout will be the means whereby the parties will attempt to determine whether there may be other medical records which originated between 1995 and 1998, which ought to be

reviewed because of their likely relevance, and because it is in the interests of justice to do so.

The Inquiry Panel has concluded that the printout of patient services from January 1, 1995 to January 1, 1998 will be useful in making the determination referred to in the preceding paragraph. Accordingly, the Inquiry Panel orders Manitoba Health to produce the patient services printout relating to the Complainant from January 1, 1995 to January 1, 1998 to the Inquiry Panel for its review.

*E. Any employment records relating to the Complainant's employment.*

At the hearing on May 23rd, counsel for Member A withdrew the request for these employment records on the basis that the Complainant had agreed through her counsel to make reasonable attempts to determine whether such records were available. In the result, the Inquiry Panel will not be making any order with respect to the employment records.

**PROCEDURAL ISSUES**

As noted above, the College raised objections to the process utilized by Member A's legal counsel to provide notice of Member A's motion for disclosure and production to the individuals other than the Complainant. Hereafter, those individuals will be referred to as the "third parties".

Member A's legal counsel did not serve a copy of the Notice of Motion and the supporting materials (which were voluminous) on the third parties. Instead, he wrote to the third parties by letter dated April 25, 2012 indicating that he was acting for a physician who had been charged with professional misconduct (Member A was not named) and who had brought a motion before an Inquiry Panel of the College for production of documents which might be relevant to the

physician's defence. The letter also contained a brief explanation of the disclosure process.

The letter to the third parties disclosed the identity of the Complainant and indicated that the recipients of the letter had been identified as trustees of some of the potentially relevant documents. The letter concluded by advising the recipients that May 23rd had been set as a date for the first stage of the documentary production process and informing the recipients that if they wished to object to the production of the documents in their possession, they should appear on May 23rd. The letter also stated that if they intended to appear at the hearing, they would be provided with further particulars of the motion.

Counsel for the College raised serious objections to this process, pointing out that the letter dated April 25th did not constitute proper notice, and was not in compliance with the procedures contemplated by the Code, or by *O'Connor* and *Mills*.

The College's specific criticisms of the process utilized by Member A's legal counsel were that:

i) The third parties should have received a copy of the Notice of Motion (if not the remainder of the supporting materials) but with reference to the name of the Complainant, and potentially, Member A omitted;

ii) The third parties should have been advised that the Complainant was objecting to the production of the records.

The College was particularly alarmed by something which occurred as a result of the process followed by Member A's legal counsel. In at least one case, a doctor who had received the letter from Member A's legal counsel, and who

had apparently misunderstood its contents, sent a copy of medical records in that doctor's possession relating to the Complainant, to Member A's legal counsel.

Other doctors who had received the letter from Member A's legal counsel replied indicating that their records relating to the Complainant had been destroyed. Counsel for the College was understandably concerned that the doctor who had provided the records in his possession relating to the Complainant had done so in breach of PHIA. Counsel for the College also indicated that the mere fact of providing health care is protected information under PHIA, and that therefore the doctors who replied confirming that they had treated the Complainant, but that their records were destroyed, had also arguably committed a breach of PHIA.

Counsel for the College was also insistent that the medical records which had been forwarded to Member A's legal counsel by one of the doctors who had received his letter, should be produced to the Inquiry Panel, and the Inquiry Panel should then determine whether or not those medical records should be produced to all of the parties.

Member A's legal counsel resisted the suggestion that the doctors who had replied indicating that their records relating to the Complainant had been destroyed, had breached the provisions of PHIA. Member A's legal counsel pointed out that the fact that they had treated the Complainant was already known to the parties to these proceedings by virtue of the printout, which was part of Exhibit I to the Affidavit of Member A sworn March 20, 2012. Member A's legal counsel. Member A's legal counsel therefore argued that a simple response indicating that their records relating to the Complainant had been destroyed could not constitute a breach of PHIA.

With respect to the medical records he had received from one of the physician recipients of his letter, Member A's legal counsel, having discussed the matter with the Complainant's legal counsel, did not think it was appropriate for him to simply produce those records to the Inquiry Panel for its review, but thought that the Panel should make an independent decision with respect to those records in the same way as it would with respect to the other records that are the subject of Member A's motion.

Counsel for the College has asked the Inquiry Panel to address each of the above-noted issues in order to provide some direction for future cases. The Inquiry Panel agrees that some procedural direction may be beneficial.

As a starting point, the Inquiry Panel accepts that Member A's legal counsel proceeded in good faith when he sent his letter to the third parties. Service of the Notice of Motion and all of the voluminous supporting materials (including several affidavits and briefs, including authorities) would have been ponderous and expensive. It is very likely that most of the recipients would not have had the time or inclination to read all of the materials.

However, the Inquiry Panel has concluded that there were three flaws in the process by which the third parties were notified of Member A's motion for production and disclosure. They were:

i) Subsection 278.3(5) of the Code contemplates actual service of the "application" on both the prosecutor and the person who has possession or control of the record. In this case, actual service of the Notice of Motion issued by Member A on the third parties would have been the most closely analogous method of providing the requisite notice to third parties. There are very good reasons why third parties in such circumstances should be served with the

Notice of Motion, the most important of which is that the third parties are entitled to know the precise nature of the relief being sought (i.e. in this case, disclosure and production of specific categories of documents) and the nature of the proceedings in which the relief is being sought. The safest and most direct way of achieving that result is to serve the actual Notice of Motion along with a brief but informative covering letter. If counsel seeking disclosure and production of documents believes that certain information should be redacted from the Notice of Motion or not referred to in the covering letter (i.e. to protect the personal information of either the physician, the complainant, or both) those issues can be discussed with opposing counsel, or a direction can be sought from the Inquiry Panel, before the materials are served.

ii) The third parties receiving the notice should have been advised in the covering letter, or otherwise, that the Complainant was opposed to the disclosure and production of the records. That information would have been very useful to the third parties because that was an important and relevant fact in relation to the motion and might have influenced the manner in which the third parties responded to the motion.

iii) The third parties receiving the notice should have been encouraged to consider their position under PHIA.

The Inquiry Panel does not consider it necessary to issue any formal order in these proceedings in relation to the process by which counsel for Member A provided notice to third parties of the motion for production and disclosure. However, recognizing that some direction from this Inquiry Panel may be useful in future cases involving similar circumstances, the Inquiry Panel wishes to formally express its view that henceforward, in cases in which disclosure and

production of documents and records in the possession of third parties is being sought, the following protocol should be followed:

i) The parties seeking such production should file a Notice of Motion before the appropriate Inquiry Panel, outlining with particularity the nature of the relief sought by the motion, and the grounds for the motion;

ii) The Notice of Motion and all supporting materials should be served on the opposing party (or parties) and on the Complainant;

iii) The Notice of Motion and an accompanying letter should be served on the third party recipients, advising those recipients of:

a) the nature of the proceedings in which disclosure is being sought;

b) the disclosure process to be utilized;

c) the position of the Complainant, if it is known, with respect to disclosure and production;

d) the importance of the third parties considering their own position under PHIA.

The above-noted protocol may not be comprehensive or entirely appropriate in all cases. Counsel involved may choose to confer with opposing counsel to determine if an agreement can be reached as to the details of the protocol. Alternatively, directions may be sought from the appropriate Inquiry Panel.

However, an issue on which the Inquiry Panel does think it is necessary to issue an order, relates to the records which have been provided to Member A’s

legal counsel by one of the doctors who received Member A's legal counsel's letter dated April 25, 2012.

As a result of that doctor's actions, Member A's legal counsel has unintentionally come into possession of those records. Had the process contemplated by the Code and discussed in *Mills* been followed more closely, it is unlikely that Member A's legal counsel would have received the documents unless and until the Inquiry Panel had received and reviewed the documents, and satisfied itself that production to Member A was appropriate on the basis outlined in *Mills*.

In these circumstances, the Inquiry Panel has determined that it should receive a copy of the records in question.

Accordingly, the Inquiry Panel orders that those documents/records be produced by counsel for Member A to the Inquiry Panel, on the same basis as the other documents which are to be produced hereunder, i.e. as part of the first stage of the *Mills* process.

**DECISION AND ORDER**

Following a careful review and consideration of the materials submitted to it, and the oral submissions of the parties and the Complainant, the Inquiry Panel has decided that some of the documentation being sought by Member A, should be provided to the Inquiry Panel for its review pursuant to the first stage of the *Mills* process. However, before receiving and reviewing the documents, the Inquiry Panel has also decided that it should provide the third parties, who are in possession of the documents, with an opportunity to make any submissions they may wish with respect to the production of those documents.

The Inquiry Panel accepts the recommendation of counsel for the College that those third parties, including the Complainant, should be served with a notice which:

i) requires them to produce the records specified herein, in a sealed envelope, and

ii) affords them the opportunity to make submissions if they wish, with respect to whether the records should be produced and reviewed by the Inquiry Panel.

If any of the parties served with such notice do not have any documents relating to the Complainant, by virtue of the documents having been destroyed, or otherwise, those parties should provide a memorandum in a sealed envelope to the Inquiry Panel indicating that they no longer have any documents relating to the Complainant and if the records have not been destroyed, also indicating their knowledge as to the present whereabouts of the documents.

1. The Inquiry Panel therefore orders that each of the parties listed below be served with a Notice requiring them to produce the records described in the Notice relating to the Complainant, to the Inquiry Panel care of legal counsel to the Panel in a sealed envelope no later than August 7, 2012 and that those parties should also be afforded an opportunity to attend before the Inquiry Panel, if they wish, to make a submission with respect to whether the records should be produced to and reviewed by the Inquiry Panel, at a date and time specified in the Notice for that purpose. If the parties served with the Notice do not have any documents in their possession relating to the Complainant, they should provide a memorandum in a sealed envelope indicating that they no longer have any documents relating to the Complainant in their possession and outlining their knowledge, if any, as to the present whereabouts of such

documents. The parties to be served with the Notice and the documents to be produced are:

i) The Complainant - any and all prior versions of the letter of complaint dated November 6, 2001 against Member A, including any versions stored electronically, which prior versions were previously sent to the College and returned to the Complainant.

ii) Counsellor A - any entries or excerpts in her records relating to Counsellor A's counselling of the Complainant which contain either direct references to Member A, or any references which can be reasonably interpreted as being related to allegations by the Complainant against a physician with respect to a failure to maintain appropriate boundaries between November, 1991 and May, 1994.

iii) Counsellor B - any entries or excerpts in her records relating to Counsellor B's counselling of the Complainant which contain either direct references to Member A, or any references which can be reasonably interpreted as being related to allegations by the Complainant against a physician with respect to a failure to maintain appropriate boundaries between November, 1991 and May, 1994.

iv) Dr. B - any and all medical records from 1992 relating to the Complainant.

v) Dr. C - any and all medical records from 1992 relating to the Complainant.

vi) Dr. A - any and all medical records relating to the Complainant.

vii) Manitoba Health - the patient services printout for medical services provided to the Complainant between January 1, 1995 and January 1, 1998.

2. The Inquiry Panel also orders that counsel for Member A produce the documents/records which they received from one of the doctors who received Member A's legal counsel's letter dated April 25, 2012, to the Inquiry Panel in a sealed envelope no later than July 31, 2012.

DATED this 6th day of July, 2012.