

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

**WARNING**

**Publication Restrictions**

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

**INQUIRY: IC1631  
MEMBER A**

**REASONS FOR DECISION OF THE INQUIRY PANEL  
ON SECOND STAGE PRODUCTION ISSUES**

**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 or about May, 1994, had failed to maintain appropriate boundaries with a particular patient ("the Complainant") in several different ways.

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 (the Panel) 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 which was sought by Member A included, but was 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, Counsellor A and Counsellor B;
- 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;

- 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 certain employers.

Subsequently, Member A limited the time period for which he was requesting the printout of patient services from Manitoba Health to the period from January 1, 1995 to January 1, 1998, and withdrew the request for the employment records outlined in item v) above.

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, primarily to enable counsel for Member A to serve the Complainant with the Notice of Motion and all supporting materials. Following service of the Notice of Motion and supporting materials on the Complainant, she retained counsel who attended on her behalf at the hearing on May 23, 2012.

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 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.

In addition to the Notice of Motion for production and disclosure dated March 20, 2012, affidavits were filed by Member A on the one hand, and by the

College on the other hand. Written motions briefs and authorities were also submitted separately by all counsel. The above-noted written materials were supplemented by oral submissions by all counsel on May 23, 2012.

Following the May 23, 2012 hearing on the motion for production and disclosure, the Panel reserved its decision and provided extensive written Reasons for its decision, which Reasons were dated and issued July 6, 2012. A formal Order based on the Panel's written Reasons was subsequently issued on July 18, 2012.

In summary, the Panel decided that:

- i) The type of production and disclosure sought by Member A was "third party" disclosure, not "first party" disclosure;
- ii) The procedure for third party disclosure and production which will apply in this case is a procedure based on Section 278 of *The Criminal Code of Canada* (the *Code*) as interpreted and outlined in *R v. Mills [1999] 3 S.C.R. 688* (hereinafter referred as to "*Mills*"). The procedure contemplates a two stage analysis prior to the production of records to any of the parties. First, the Panel is required to determine whether the records should be produced to the Panel for review by the Panel. If it is determined that any records should be reviewed by the Panel, the Panel proceeds to the second stage of the analysis, wherein it reviews the records in question, and determines whether the records should be produced to the parties, and if so, on what terms.
- iii) At the first stage of the analysis, the party seeking disclosure and production has the onus of satisfying the 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.
- iv) At the second stage of the analysis, the Panel, having received and reviewed the documents that it has ordered to be produced to itself, must again be satisfied that the documents in question are “likely relevant” to an issue in the proceedings, and that production of them to the party requesting them “is in the interests of justice”. If so, the Panel will then order that those documents be produced to the parties and will specify the terms, if any, on which the documents are to be produced.

As a result of its decision, the Panel ordered, among other things, that the third parties outlined below were to provide certain records if the records were in their possession, in the manner more particularly set out in the Panel’s formal Order issued on July 18, 2012:

- a) 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;
- b) Dr. A – any records relating to the Complainant from 1994 through to January 1, 1998;
- c) Dr. B and Dr. C. – any records from 1992 relating to the Complainant;
- d) Manitoba Health – a print-out of Patient Services relating to the Complainant from January 1, 1995 to January 1, 1998; and

- e) Counsellor A and Counsellor B – any entries or excerpts from the 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;
- f) Counsel for Member A – to produce the documents/records which he had received from Dr. C.

The Panel's written Reasons dated July 6, 2012, and the issuance of the formal Order on July 18, 2012 represented the completion by the Panel of the first stage of the two stage process contemplated by *Mills* and ordered by the Panel.

Responses were received from each of the third parties referred to in subparagraphs a) through f) above. A summary of those responses is set forth in the immediately following section of these Reasons.

After receiving those responses, the Panel then met to undertake the second stage of the process and analysis 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.

These Reasons outline the basis for the decisions made by the Panel at the second stage of the documentary production process. They should be read in conjunction with the Reasons dated July 6, 2012, and the formal Order issued on July 18, 2012.

## **RESPONSES RECEIVED FROM THIRD PARTIES**

Responses were received from all of the third parties, or their representatives, to whom the Order of July 18, 2012 had been directed. The responses received are summarized below:

- i) The Complainant - Counsel for the Complainant responded on her behalf, advising in part as follows:

“My client advises that there was only one electronic version of this letter which she kept stored on her computer. That letter was revised electronically and no previous copies were kept. My client further advises that she kept no hard copies of the prior versions of the complaint letter. In the circumstances, there are no prior versions of the complaint letter available and therefore none can be produced.”

- ii) Counsellor A – Counsellor A provided un-redacted copies of her records relating to the counselling of the Complainant.
- iii) Counsellor B - The Winnipeg Regional Health Authority (the WRHA) provided redacted copies of Counsellor B’s records and notes; the redactions generally appeared to omit the names of other individuals (e.g. family members) who may have been mentioned in the records.
- iv) Dr. A - Dr. A responded by letter advising, in part, as follows:

“Please be advised that as discussed with you over the phone, I have personally attended the Clinic where the above mentioned records were kept and I have been unable to obtain them.

They no longer have these available. I can only stipulate that they have been destroyed.”

Dr. A had called counsel to the Panel prior to sending the letter outlining her efforts to locate the records. The Panel believes that Dr. A has a reasonable basis for concluding that the records have been destroyed.

- v) Dr. B - Dr. B had earlier advised that he was no longer in possession of any documents, records or notes relating to the Complainant and accordingly, Dr. B was not asked to provide anything further.
- vi) Dr. C - Dr. C responded to the Panel's Order by providing a brief two paragraph letter dating from the early 1990s.
- vii) Manitoba Health - Manitoba Health provided the requested printout of patient services from January 1, 1995 to January 1, 1998.
- viii) Counsel for Member A - Mr. Ferbers provided a copy of the communications from Dr. C, which were the same communications which Dr. C had provided directly to the Panel.

### **SECOND STAGE PRODUCTION ANALYSIS**

In terms of the documents which had been received from the third parties in response to the Order of July 18, 2012, the Panel reviewed each of the documents in detail. The Panel conducted its review with specific reference to the contents of each document, and considered whether the document was likely relevant to an issue in the proceedings and whether production of the document in question was necessary in the interests of justice.

Within the context of those two broad considerations, the Panel had specific regard to the specific factors and criteria which had been referred to in the written and oral submissions of the parties, and the Complainant at the May



23, 2012 hearing. Some of those factors and criteria were considered and applied by the Panel when determining whether a specific document would “likely be relevant” to an issue in the proceedings, and some of them were considered and applied by the Panel when determining whether production of a specific document would be “in the interests of justice”.

The Panel ultimately determined that none of the documents which had been produced to it as a result of its Order of July 18, 2012 ought to be produced to Member A or to the College, except limited portions of the records of Counsellor A and Counsellor B. Subject to those two limited exceptions, the Panel concluded that none of the records produced by the third parties fulfill the requirements set forth in *Mills* and the jurisprudence thereunder.

The Panel’s reasoning is summarized below, firstly in relation to the documents (other than those received from the Counsellors) which it has decided will not be produced, secondly in relation to the portions of the records of the Counsellors which it has decided will not be produced, and thirdly in relation to the portions of the records of the Counsellors which the Panel has decided will be produced to Member A and the College.

With respect to the documents, other than those received from the Counsellors, the Panel’s reasons are set forth below.

1. Earlier versions of the letter of complaint to the College - the Panel was satisfied on the basis of the information forthcoming from the Complainant, through her counsel, that no prior versions of the complaint letter are currently available. Therefore, the Panel decided not to issue an order requiring production of any prior versions of the letter of complaint.

2. Medical records from Dr. B - on the basis of information provided by Dr. B, the Panel was satisfied that he was no longer in possession of any documents, records or notes relating to the Complainant. Therefore, the Panel decided not to issue an order requiring production of Dr. B's documents, records or notes relating to the Complainant.
3. Medical records from Dr. C - Dr. C provided the Panel with a one page letter dated August 28, 1992 addressed to Member A. The Panel concluded that the letter related to a brief and unremarkable medical consultation with respect to a condition that would not be relevant to any of the actual issues in these proceedings or any issues which are likely to arise in these proceedings. The Panel therefore decided not to order production of the letter in question.
4. A printout from Manitoba Health of patient services relating to the Complainant from January 1, 1995 to January 1, 1998 - Manitoba Health provided the requested printout. It is computer generated and provides a summary of "physician services" provided to the Complainant from June 12, 1995 to December 4, 1997, for which benefits were paid by Manitoba Health. The printout lists the physicians who provided such services and in most cases provides a very brief and general description of the service provided by the physician.

As noted in the Reasons issued by the Panel dated July 6, 2012, one of the important submissions made on behalf of Member A was that pursuant to an approved protocol, his office destroyed all of his records relating to the Complainant in or about 2004, several years before her complaint was made to the College. Member A therefore submits that since he has no personal recollection of the dates or purposes of the Complainant's attendances upon him and has no

records upon which he can rely, he requires the physician's records related to the services listed in the Manitoba Health 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.

As noted in the Reasons dated July 6, 2012, 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. 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 Panel understands that the phrase "case specific" means documents which are likely relevant to a specific issue in the case in question.

The 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 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.

The Manitoba Health printout itself is not "case specific". Rather, the printout is a means whereby a determination may be made,

whether or not there are medical records originating between January 1, 1995 and January 1, 1998 which ought to be reviewed by the Panel, (and subject to that review, potentially produced to the parties), because of their “likely relevance” to a specific issue in the proceedings, and because it is “in the interests of justice” to do so.

Consequently, the Panel reviewed the printout on an item by item basis. While conducting that review, the Panel considered the issue of whether any of the medical services referred to in the printout would be likely relevant to a specific issue in the proceedings. The Panel defined “likely relevant” by referring to the precise allegations in the Notice of Inquiry. Those allegations refer primarily to factual occurrences, as opposed to medical procedures or practices.

However, the Panel also concluded that “likely relevance” cannot simply be limited to the allegations in the Notice of Inquiry, but must also include consideration of issues likely to be raised by Member A in the defence of the allegations in the Notice of Inquiry, such as the medical or clinical context of the Complainant’s attendances upon him, the delay on the part of the Complainant in filing the complaint, and the reasons for that delay, and the reliability of the evidence generally, given the passage of time.

In addition, the Panel reviewed the printout with a view to determining whether disclosure and production of records related to the medical services referred to in the printout would be “in the interests of justice”. When doing so, the Panel specifically considered the factors listed in Section 278.5(2) of the *Criminal Code*, including the extent to which the record will be necessary for Member A to make a full answer and defence. During their consideration of this factor, the Panel was mindful of Member A’s

argument that because his records relating to the Complainant were destroyed in or about 2004, he requires the records relating to the physician's services provided between January 1, 1995 and January 1, 1998 in order 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. The Panel was also mindful that Dr. A's records for that period are not available and have likely been destroyed.

Upon reviewing all of the entries in the Manitoba Health printout, the Panel concluded that the services referred to in the printout were in two general categories, namely:

- i) Services related to attendances or consultations which are clearly irrelevant to any of the actual issues in the proceedings because they were entirely unrelated to any of the medical conditions, examinations or procedures which are likely to be referred to in the evidence at the hearing on the merits of the allegations in the Notice of Inquiry;
- ii) Services related to attendances or consultations which occurred between February, 1996 and December, 1997. Some of the medical services which were provided during that period are also clearly irrelevant to the actual issues in these proceedings because they were entirely unrelated to any of the medical conditions, examinations or procedures which are likely to be referred to in these proceedings. Furthermore, given the time period in which all of the services were provided (February, 1996 to December, 1997), relative to the termination of the doctor/patient relationship between Member A and the Complainant in May, 1994, any records with respect to those attendances

would be of limited value to Member A in putting the Complainant's medical situation in context, or assisting him in understanding what may have occurred during the Complainant's attendances upon him.

Equally importantly, the production of the records in question would disclose substantial amounts of the personal health information of the Complainant, thereby undermining the privacy rights of the Complainant.

Therefore, the Panel decided not to order production of the Manitoba Health printout to the parties, because the medical services referred to in the printout are not likely to be relevant to any of the actual issues in the proceedings, and because production of the printout is not in the interests of justice.

5. Medical records from Dr. A from 1994 to January 1, 1998 - the Panel had initially ordered those records to be produced for the Panel's review because those records may have been useful in establishing the Complainant's health status and the type of medical advice she was seeking and the type of medical services she had been receiving during a period immediately after she had stopped seeing Member A, and shortly after the period in which Member A's alleged misconduct had occurred. The Panel had been prepared to review those records and to consider whether they would be useful in providing a medical or clinical context for the Complainant's attendances upon Member A and an explanation for some or all of his alleged misconduct. However, the Panel was satisfied on the basis of the information provided in Dr. A's letter, and in her telephone call to the Panel's lawyer, that any records she made with respect to the Complainant from 1994 through to January 1, 1998 had likely been destroyed by the clinic with which

Dr. A had formerly been associated. Therefore, the Panel decided not to issue an order requiring production of Dr. A's records from that period.

6. Information received from counsel for Member A - the information received from counsel for Member A is the same letter as was received directly from Dr. C dated August 28, 1992. On the basis outlined earlier in these Reasons, the Panel decided not to order production of that letter.

With respect to the portions of the records of the Counsellors which the Panel has decided will not be produced, the Panel's reasons are set forth below.

7. The Counsellors' records – Counsellor A is a counsellor in the United States who saw the Complainant in a professional capacity over a period of months in 2009.

Counsellor B is a counsellor in Winnipeg who saw the Complainant in a professional capacity in the latter half of 2010 and the first half of 2011.

The Counsellors both produced their respective records to the Panel in response to the Order of July 18, 2012. The Panel reviewed both sets of records to determine whether any of the documents comprising those records are likely relevant to an issue in the proceedings and whether production of any or all of the records is necessary in the interests of justice.

The Panel found guidance with respect to the meaning of the phrase "likely relevance" in the comments of Madam Justice Steel of the 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)”

As noted in the Panel’s earlier Reasons issued on July 6, 2012, a person seeking access to records must also contend with the provision of 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)”

On the basis of the foregoing, the Panel is satisfied that the onus on Member A to establish that the Counsellors' records are “likely relevant” to an issue in these proceedings is a significant one. It is not sufficient for Member A to

assert that the records may be relevant. The Panel has concluded that Member A must show that the records sought likely contain evidence relevant to an actual issue in the proceedings.

The majority of both sets of records deal with matters that are unrelated to any interactions the Complainant may have had with Member A while she was his patient between 1991 and 1994, or any interactions she may have had in 1994 and 1995 after she ceased being his patient.

Given that the onus on Member A to demonstrate likely relevance is a significant one, the Panel readily concluded that the majority of both sets of records are not likely to be relevant to an actual issue in these proceedings.

Furthermore, with respect to the “interests of justice” requirement, the records of the Counsellors with respect to the Complainant do contain information which is very personal, and with respect to which she had and has a reasonable expectation of privacy and has strenuously asserted her privacy rights. In addition, production of most of the records of the Counsellors is not necessary to enable Member A to provide a full answer and defence to the allegations against him in the Notice of Inquiry.

The Panel therefore decided not to order production of the counselling records of either Counsellor, except to a limited extent as outlined more particularly below.

The Panel did conclude that limited portions of the counselling records are likely relevant to an issue in the proceedings and that the production of those portions of the counselling records is necessary in the interests of justice.

In relation to the likely relevant criteria as applied to both sets of counselling records, the Panel defined “likely relevance” by referring to the precise allegations in the Notice of Inquiry, but also by considering issues likely to be raised by Member A in the defence of those allegations. As noted earlier in these Reasons, such defences are likely to include evidence with respect to the medical or clinical context of the Complainant’s attendances upon him, and the reliability of the evidence generally given the passage of time. It is also very likely that Member A’s defence will involve arguments related to the significant delay in the complaint being made to the College (the complaint was not filed until November, 2010) and the reasons for that delay.

Counsellor A’s records contain specific reference to Member A and statements with respect to his actions towards the Complainant, and the effect of those actions upon her. The records also mention a possible complaint against Member A. Counsellor A’s notes also refer to certain other matters which may have impacted upon the Complainant’s decision to make a complaint to the College, and the timing of her complaint.

Counsellor B’s records also contain references to the alleged actions of Member A towards the Complainant and the effects of those actions upon her, and specific notations related to issues associated with the initiation of the College’s complaint process.

Although the information in the counselling records relates to some of the issues which will likely be the subject of evidence at the hearing of the merits of this matter, the Panel specifically considered Section 278.3(4) of the *Criminal Code* before deciding whether those portions of the counselling records ought to be produced.

Section 278.3(4) is set out in full earlier in these Reasons. It sets forth eleven types of assertions which may be made by a party seeking production of records which are not sufficient on their own to establish that the record is likely relevant to an issue in the proceedings.

Several of the assertions in Section 278.3(4) of the *Criminal Code* are potentially applicable in this case.

The purpose of Section 278.3(4) of the *Criminal Code* is to prevent speculative and unmeritorious requests for production. However, its provisions do not prevent a person who is accused of misconduct from relying on one or more of the enumerated assertions, if there is an appropriate evidentiary and informational foundation to do so.

In this case, Member A denies all wrongdoing. It is expected that he will raise issues relating to the *bona fides* of the Complainant, and the veracity and accuracy of her allegations, given the delay in filing her complaint. He has stated that although he has few if any independent recollections of his specific interactions with the Complainant as a patient, he has indicated that some of the specific allegations against him involve conduct that was blameless and will be understood as blameless, if placed in the appropriate medical context. Member A is in a challenging position with establishing such a defence by reason of the destruction of his files, undertaken pursuant to a standard and acceptable protocol after ten years had elapsed since the Complainant ceased being a patient.

In that unusual context, the Panel must decide whether the counselling records, referring to the conduct which is the subject matter of the proceedings, which records were made approximately 15 years after the conduct occurred, but within 18 months of the complaint being made to the College, are likely relevant

to an actual issue in the proceedings. The Panel must also decide whether the portions of the counselling records referring to the initiation of the complaint process with the College are likely relevant to an actual issue in the proceedings.

In the specific factual context of this matter, the Panel has concluded that limited portions of the counselling records do meet the likely relevance threshold. Specifically, the Panel has concluded that the following portions of those records are likely relevant to one or more of the defences which will probably be raised by Member A in these proceedings:

- i) Counsellor A's records containing general references to Member A's actions towards the Complainant which form the subject matter of the allegations in the Notice of Inquiry, and the effect of those actions upon her;
- ii) Counsellor A's records refer to a possible complaint against Member A;
- iii) Counsellor A's records refer to other matters which may have had an effect upon whether or not the Complainant would make a complaint to the College and the timing of any such complaint;
- iv) Counsellor B's records contain references to Member A's actions towards the Complainant which form the subject matter of the allegations in the Notice of Inquiry, and the effect of those actions upon her;
- v) Counsellor B's records contain issues associated with the initiation of the College's complaint process.

The Panel recognizes however that although it has concluded that those portions of the counselling records meet the likely relevance threshold, the Panel must also be satisfied that production of those records is necessary in the interests of justice.

Section 278.5(2) of the *Criminal Code* sets forth a series of factors which are to be considered in determining whether production of records 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.

The Panel considered all of the above-noted factors in relation to the portions of the counselling records which it has determined are "likely relevant" to an issue in the proceedings. The Panel was particularly conscious that the records created by the counsellors 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 was also very cognizant that counselling records can be highly subjective documents, which do not purport to be a precise record of objective facts but rather a description of the patient's emotional state and psychological condition at the time the record was made.

The highly personal nature of the counselling records and the subjective nature of such records are factors which operate to limit the production of any portion of the counselling records, regardless of their relevance.

However, another factor listed in Section 278.5(2) of the *Criminal Code* operates to encourage the production of the limited portions of the counselling records which the Panel has concluded are likely relevant to one or more issues in these proceedings. That factor is the extent to which those portions of the records are necessary to enable Member A to make a full answer and defence.

Issues relating to the delay in filing the complaint, the reasons for that delay, the reasons for the complaint being made when it was, and reliability of the evidence generally given the lapse of time between the alleged misconduct of Member A and the filing of the complaint, are all issues which are likely to arise during these proceedings, and which will likely be relevant to Member A's defence of the allegations.

The portions of the records of the Counsellors which the Panel has determined are likely relevant, relate directly to one or more of those issues. The Panel has concluded that the production of those portions of the records, subject to the deletion of two brief entries from Counsellor A's records, is important to Member A's ability to make a full answer and defence, and the ability of both

Member A and the College to assess the strengths and weaknesses of some or all of the arguments which are likely to be advanced by Member A in his defence.

The two brief entries in Counsellor A's records, which the Panel has determined are likely relevant to one or more issues in the proceedings, but which nonetheless should not be produced, are entries which contain highly personal details of the Complainant's life, with respect to which she would have had and would continue to have a high expectation of privacy. Furthermore, the Panel is satisfied that production of those two brief entries is not necessary to enable Member A to make a full answer and defence.

Another factor referred to in Section 278.5(2) of the *Criminal Code* was also important to the Panel in its deliberations with respect to the portion of the counselling records under consideration, namely the potential probative value of those portions of the records. While it is not clear at this stage whether the relevant portions of the records will help or hinder one party's case or the other, it is likely that those portions of the records, and any additional testimony with respect to them will have some probative value, one way or the other. The portion of the records in question, if ultimately introduced into evidence, may assist the Panel in its assessment of issues relating to the delay in filing the complaint, the reasons for that delay, and the reliability of the evidence generally.

Consideration of the various factors relating to the "interests of justice" requirement, calls for a balancing of various competing factors, some of which favour production of a portion of the counselling records, and some of which do not. The Panel, having undertaken the exercise of balancing those competing factors has concluded that the portions of the counselling records as earlier described, but subject to the deletion of two brief entries from the Counsellor A's records, should be produced to Member A and to the College, because those



portions of both sets of the records are likely relevant to an actual issue in the proceedings and because their production is necessary in the interests of justice.

### **PROCESS ISSUES**

The parties and the Complainant have jointly requested that the Panel include reference in its Reasons on the Second Stage Production issues, to a process to be followed in this case with respect to the production of the third party records. Although the Panel has not received submissions from the parties or the Complainant on this process, and is therefore not able to assess whether such a process will be necessary or appropriate in all cases, the Panel recognizes its utility in this case. The process which has been requested by the parties and the Complainant, and which will apply to the records produced by the third parties to the Panel, and particularly the records which the Panel has ordered to be produced to the parties, shall be the following:

- i) There shall be no distribution of records or information about the content of the records produced by the third parties to the Panel shared with the parties, until the parties have had an opportunity to review these Reasons, and to make submissions or a Joint Recommendation to the Panel with respect to any terms or conditions which should be included in the Panel's Order relating to use, duplication and transmission of the records;
- ii) Following receipt of such submissions, and/or a Joint Recommendation with respect to such terms or conditions to be included in the Order, the Panel may issue further Reasons for Decision with respect to any terms or conditions to be included in a formal Order;

- iii) A formal Order reflecting the Panel's Reasons for Decision, including any terms or conditions on the use, duplication, and transmission of the records, will be prepared and submitted to the Panel to be signed by the members of the Panel or the Chair on the Panel's behalf;
- iv) Prior to delivery of any records to the parties pursuant to the Order, the parties should be given an opportunity to indicate whether they have any intent to seek Judicial Review, and if a party does intend to seek Judicial Review, the parties, either by way of consent or, if need be, following submissions to the Panel, may request a Stay of the Order pending determination of the Judicial Review Application.

DATED this 21<sup>st</sup> day of November, 2012.