Sazant v. The College of Physicians and Surgeons of Ontario

[Indexed as: Sazant v. College of Physicians and Surgeons of Ontario]

113 O.R. (3d) 420

2012 ONCA 727

Court of Appeal for Ontario,
Simmons, R.P. Armstrong and Pepall JJ.A.
October 30, 2012

Charter of Rights and Freedoms -- Search and seizure -- Statutory power of search -- Power granted to College of Physicians and Surgeons investigators in s. 76(1) of Health Professions Procedural Code to issue summons without prior judicial authorization not violating s. 8 of Charter -- Canadian Charter of Rights and Freedoms, s. 8 -- Health Professions Procedural Code, s. 76(1).

Professions -- Physicians and surgeons -- Discipline -- Delay -- Lengthy delay in commencing disciplinary proceedings against doctor for sexual abuse attributable to decision by College of Physicians and Surgeons to await outcome of criminal proceedings before moving forward with misconduct investigation -- Delay not giving rise to abuse of process -- College's decision reasonable -- Delay not inordinate -- Doctor not suffering significant prejudice as result of delay.

Professions -- Physicians and surgeons -- Discipline -- Investigations -- Power to issue summons set out in s. 76(1) of Health Professions Procedural Code not limited to matters

directly related to "practice of medicine" as defined in s. 3 of Medicine Act -- Summons power extending to [page421] investigations of professional misconduct -- Medicine Act, 1991, S.O. 1991, c. 30, s. 3 -- Health Professions Procedural Code, Sch. 2 of the Regulated Health Professions Act, 1991, S.O. 1991, c. 18, s. 36, s. 76(1).

The appellant, who practised family and sports medicine, was alleged to have sexually abused three boys between 1970 and 1991. Although one of the boys complained to the police in 1991, criminal charges were not laid until 1998, when the second complainant came forward. The college monitored the progress of the criminal proceedings until the charges involving the second complainant were stayed in 2004. The college then appointed investigators under s. 75(1)(a) of the Health Professions Procedural Code to investigate whether the appellant had committed an act of professional misconduct or was incompetent. Under s. 76(1) of the Code, a college investigator has the same investigatory powers as a commission under the Public Inquiries Act, 2009, S.O. 2009, c. 33, Sch. 6. Those powers include the power to issue a summons without prior judicial authorization. An investigator issued summonses to the police and the Attorney General of Ontario to obtain material from police files and Crown briefs relating to the criminal charges. The material obtained under the summonses was not adduced in evidence before the Discipline Committee, but the college relied upon that material in initiating the proceedings before the committee. At the Disciplinary Committee hearing, the appellant challenged the constitutionality of the summons power in s. 76(1) of the Code and also requested a stay of proceedings on the basis of abuse of process arising from inordinate delay. The committee dismissed both applications and ultimately found that the appellant had engaged in disgraceful, dishonourable or unprofessional conduct of a sexual nature. The Divisional Court dismissed the appellant's appeal from the committee's rulings and disposition. The appellant appealed.

Held, the appeal should be dismissed.

The summons power provided by s. 76(1) of the Code is not limited to matters directly related to the "practice of

medicine" as that term is defined in s. 3 of the Medicine Act, 1991. Section 76(1) should be given a broad and purposive interpretation to enable an investigator to carry out his or her duty to investigate. The power "to inquire into and examine the practice of the member to be investigated" in s. 76(1) must include the power to inquire into whether the member has committed acts of professional misconduct.

The summons power in s. 76(1) of the Code does not violate s. 8 of the Canadian Charter of Rights and Freedoms when used by investigators appointed under s. 75(1)(a) of the Code. When so used, the summons power is a reasonable power, properly constrained by the requirement that it be used solely to obtain information that is relevant to a duly-authorized investigation into specified professional misconduct, and further restricted by the requirement that the information sought cannot be privileged. To appoint investigators under s. 75(1)(a), the registrar of the college must believe on reasonable and probable grounds that the member to be investigated has committed an act of professional misconduct or is incompetent. When appointing investigators under s. 75(1)(a), the registrar should provide a brief description of the act(s) of professional misconduct he or she believes on reasonable and probable grounds were committed. The failure of the registrar in this case to specify the act(s) of professional misconduct did not affect the constitutionality of the s. 76(1) summons power. The fact that a constitutional power is exercised in a manner that may be unconstitutional does not make the power unconstitutional; rather, it may give rise to a remedy under s. 24 of the Charter. In any event, the use of the summons power did not violate the appellant's s. 8 Charter rights as the wording of the s. 75(1)(a) appointment [page422] made it clear that the proposed investigation related to allegations that the appellant had engaged in sexual impropriety with adolescent males and that reasonable and probable grounds existed to believe that he had engaged in such activity, and the material summonsed did not extend beyond the scope of those allegations. Moreover, the fact that the s. 76(1) summons power may give an investigator access to documents and information that could only be obtained through a warrant in other contexts carried very little weight. In the context of a self-governing

professional regulatory scheme where the regulator has reasonable and probable grounds to believe that a member has committed an act of professional misconduct, a member has a limited expectation of privacy in relation to an authorized investigation.

The Discipline Committee did not err in dismissing the application for a stay of proceedings. The mere passage of time, without more, does not give rise to an abuse of process. Rather, the reviewing court must adopt a contextual approach that takes account of all of the circumstances surrounding the delay. The delay in this case was not inordinate. It would have been impractical and unfair to the appellant for the college to pursue misconduct charges in respect of one or more of the complainants until after the criminal proceedings had been fully resolved. The appellant failed to demonstrate that he suffered actual, significant prejudice caused by the delay in the college proceedings of a magnitude that would bring the administration of justice into disrepute.

Cases referred to

Blencoe v. British Columbia (Human Rights Commission), [2000] 2 S.C.R. 307, [2000] S.C.J. No. 43, 2000 SCC 44, 190 D.L.R. (4th) 513, 260 N.R. 1, [2000] 10 W.W.R. 567, J.E. 2000-1872, 141 B.C.A.C. 161, 81 B.C.L.R. (3d) 1, 23 Admin. L.R. (3d) 175, 3 C.C.E.L. (3d) 165, [2000] CLLC 230-040, 77 C.R.R. (2d) 189, 99 A.C.W.S. (3d) 1024, revg [1998] B.C.J. No. 1092, 160 D.L.R. (4th) 303, [1998] 9 W.W.R. 457, 107 B.C.A.C. 162, 49 B.C.L.R. (3d) 216, 7 Admin. L.R. (3d) 220, 53 C.R.R. (2d) 189, 79 A.C.W.S. (3d) 787 (C.A.), revg [1998] B.C.J. No. 320, [1999] 1 W.W.R. 139, 49 B.C.L.R. (3d) 201, 35 C.C.E.L. (2d) 41, 77 A.C.W.S. (3d) 373 (S.C.), consd

Misra v. College of Physicians and Surgeons of Saskatchewan, [1988] S.J. No. 342, 52 D.L.R. (4th) 477, [1988] 5 W.W.R. 333, 70 Sask. R. 116, 36 Admin. L.R. 298, 11 A.C.W.S. (3d) 111 (C.A.); Stinchcombe v. Law Society of Alberta, [2002] A.J. No. 544, 2002 ABCA 106, 212 D.L.R. (4th) 675, 303 A.R. 67, 44 Admin. L.R. (3d) 36, 113 A.C.W.S. (3d) 539; Thomson v. College of Physicians and Surgeons of British Columbia, [1998] B.C.J. No. 1750, 65 B.C.L.R. (3d) 209, 10 Admin. L.R. (3d) 201, 56 C.R.R. (2d) 133, 81 A.C.W.S. (3d) 375, distd

Other cases referred to

Baron v. Canada, [1993] 1 S.C.R. 416, [1993] S.C.J. No. 6, 99 D.L.R. (4th) 350, 146 N.R. 270, J.E. 93-242, 78 C.C.C. (3d) 510, 18 C.R. (4th) 374, 13 C.R.R. (2d) 65, [1993] 1 C.T.C. 111, 93 D.T.C. 5018, 37 A.C.W.S. (3d) 1297, 18 W.C.B. (2d) 355; Bell ExpressVu Limited Partnership v. Rex, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, 2002 SCC 42, 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, J.E. 2002-775, 166 B.C.A.C. 1, 100 B.C.L.R. (3d) 1, 18 C.P.R. (4th) 289, 93 C.R.R. (2d) 189, REJB 2002-30904, 113 A.C.W.S. (3d) 52; British Columbia Securities Commission v. Branch, [1995] 2 S.C.R. 3, [1995] S.C.J. No. 32, 123 D.L.R. (4th) 462, 180 N.R. 241, [1995] 5 W.W.R. 129, J.E. 95-848, 4 B.C.L.R. (3d) 1, 97 C.C.C. (3d) 505, 7 C.C.L.S. 1, 38 C.R. (4th) 133, 27 C.R.R. (2d) 189, 54 A.C.W.S. (3d) 662, 27 W.C.B. (2d) 442; Finney v. Barreau du Qubec, [2004] 2 S.C.R. 17, [2004] S.C.J. No. 31, 2004 SCC 36, 240 D.L.R. (4th) 410, 321 N.R. 361, J.E. 2004-1254, 16 Admin. L.R. (4th) 165, 24 C.C.L.T. (3d) 1, 131 A.C.W.S. (3d) 543, REJB 2004-65746; [page423] Gore v. College of Physicians and Surgeons (2009), 96 O.R. (3d) 241, [2009] O.J. No. 2833, 2009 ONCA 546, 95 Admin. L.R. (4th) 99, 310 D.L.R. (4th) 354, 251 O.A.C. 49; Hunter v. Southam Inc., [1984] 2 S.C.R. 145, [1984] S.C.J. No. 36, 11 D.L.R. (4th) 641, 55 N.R. 241, [1984] 6 W.W.R. 577, J.E. 84-770, 33 Alta. L.R. (2d) 193, 55 A.R. 291, 27 B.L.R. 297, 14 C.C.C. (3d) 97, 2 C.P.R. (3d) 1, 41 C.R. (3d) 97, 9 C.R.R. 355, 84 D.T.C. 6467; Katzman v. Ontario College of Pharmacists, [2002] O.J. No. 4913, 223 D.L.R. (4th) 371, 49 Admin. L.R. (3d) 134, 119 A.C.W.S. (3d) 488 (C.A.), revg [2001] O.J. No. 586 (Div. Ct.); Krop v. College of Physicians and Surgeons of Ontario, [2002] O.J. No. 308, 156 O.A.C. 77, 111 A.C.W.S. (3d) 616 (Div. Ct.) [Leave to appeal to S.C.C. refused [2002] S.C.C.A. No. 382]; P. (D.) v. Wagg (2004), 71 O.R. (3d) 229, [2004] O.J. No. 2053, 239 D.L.R. (4th) 501, 187 O.A.C. 26, 184 C.C.C. (3d) 321, 46 C.P.C. (5th) 13, 120 C.R.R. (2d) 52, 130 A.C.W.S. (3d) 1098 (C.A.); Pharmascience Inc. v. Binet, [2006] 2 S.C.R. 513, [2006] S.C.J. No. 48, 2006 SCC 48, 2006 SCC 48, 273 D.L.R. (4th) 193, 353 N.R. 343, J.E. 2006-2096, 151 A.C.W.S. (3d) 717, EYB 2006-110506; R. v. Jarvis, [2002] 3 S.C.R. 757, [2002] S.C.J. No. 76, 2002 SCC 73, 219 D.L.R. (4th) 233,

295 N.R. 201, [2003] 3 W.W.R. 197, J.E. 2002-2111, 8 Alta. L.R. (4th) 1, 317 A.R. 1, 169 C.C.C. (3d) 1, 6 C.R. (6th) 23, 101 C.R.R. (2d) 35, [2003] 1 C.T.C. 135, 2002 D.T.C. 7547, 55 W.C.B. (2d) 118; R. v. McKinlay Transport Ltd., [1990] 1 S.C.R. 627, [1990] S.C.J. No. 25, 68 D.L.R. (4th) 568, 106 N.R. 385, 39 O.A.C. 385, 55 C.C.C. (3d) 530, 76 C.R. (3d) 283, 47 C.R.R. 151, [1990] 2 C.T.C. 103, 90 D.T.C. 6243, 10 W.C.B. (2d) 16; R. v. Power, [1994] 1 S.C.R. 601, [1994] S.C.J. No. 29, 165 N.R. 241, J.E. 94-649, 117 Nfld. & P.E.I.R. 269, 89 C.C.C. (3d) 1, 29 C.R. (4th) 1, 2 M.V.R. (3d) 161, 23 W.C.B. (2d) 194; R. v. Wigglesworth, [1987] 2 S.C.R. 541, [1987] S.C.J. No. 71, 45 D.L.R. (4th) 235, 81 N.R. 161, [1988] 1 W.W.R. 193, 24 O.A.C. 321, 61 Sask. R. 105, 28 Admin. L.R. 294, 37 C.C.C. (3d) 385, 60 C.R. (3d) 193, 32 C.R.R. 219, 3 W.C.B. (2d) 130; Rocket v. Royal College of Dental Surgeons of Ontario, [1990] 2 S.C.R. 232, [1990] S.C.J. No. 65, 71 D.L.R. (4th) 68, 111 N.R. 161, J.E. 90-962, 40 O.A.C. 241, 47 C.R.R. 193, 21 A.C.W.S. (3d) 958; Rosenberg v. College of Physicians and Surgeons of Ontario, [2006] O.J. No. 4380, 275 D.L.R. (4th) 275, 216 O.A.C. 357, 152 A.C.W.S. (3d) 736 (C.A.); Stanley v. Ontario (Health Professions Appeal and Review Board), [2003] O.J. No. 2196, 172 O.A.C. 56, 5 Admin. L.R. (4th) 112, 123 A.C.W.S. (3d) 762 (Div. Ct.); Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 425, [1990] S.C.J. No. 23, 67 D.L.R. (4th) 161, 106 N.R. 161, J.E. 90-575, 39 O.A.C. 161, 54 C.C.C. (3d) 417, 29 C.P.R. (3d) 97, 76 C.R. (3d) 129, 47 C.R.R. 1, 10 W.C.B. (2d) 7

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Canadian Charter of Rights and Freedoms, ss. 7, 8, 11(b), 24, (2), 52

Health Systems Improvements Act, 2007, S.O. 2007, c. 10

Medicine Act, 1991, S.O. 1991, c. 30, s. 3

Public Inquiries Act, R.S.O. 1990, c. P.41, Part II, ss. 7, 11

Public Inquiries Act, 2009, S.O. 2009, c. 33, Sch. 6, s. 33, para. 13

Regulated Health Professions Act, 1991, S.O. 1991, c. 18, s. 36 [as am.], Sch. 2, Health Professions Procedural Code, ss. 28, 75, (1), (a), 76, (1), (3.1), 77 [as am.], (1)

Rules and regulations referred to

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Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 39.03
Authorities referred to
Driedger, Elmer A., Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983)
Law Society of Upper Canada, Rules of Professional Conduct, rule 2.04 [page424]
Steinecke, Richard, A Complete Guide to the Regulated Health Professions Act, looseleaf (Toronto: Canada Law Book, 2001)

APPEAL from the judgment of the Divisional Court (Jennings, Swinton and Sachs JJ.), [2011] O.J. No. 192, 2011 ONSC 323, 21 Admin. L.R. (5th) 252 (Div. Ct.) dismissing the appeal from a decision of the Discipline Committee of the College of Physicians and Surgeons of Ontario, [2009] O.C.P.S.D. No. 5.

Marie Henein and Matthew Gourlay, for appellant.

Scott C. Hutchison and Vicki A. White, for respondent.

Matthew P. Sammon, for intervenor Dr. Leonard Kelly.

J. Thomas Curry and Jaan E. Lilles, for intervenor Dr.

Allan Beitel.

Robin K. Basu, for intervenor Attorney General of Ontario.

The judgment of the court was delivered by

SIMMONS J.A.: --

A. Introduction

[1] The issues on this appeal concern the constitutionality of the summons power contained in s. 76(1) of the Health Professions Procedural Code [Sch. 2 of the Regulated Health Professions Act, 1991, S.O. 1991, c. 18] (the "Code") when used

by investigators appointed under s. 75(1)(a) of the Code and whether delay by the College of Physicians and Surgeons of Ontario [the "College"] in investigating and prosecuting allegations of professional misconduct against the appellant amounts to an abuse of process.

[2] The appellant, Dr. Marvin Sazant, practised family and sports medicine in Toronto for 47 years.

[3] In 2009, following a lengthy hearing before the College's Discipline Committee, the appellant's licence to practise medicine was revoked.

[4] The Discipline Committee found that between 1970 and 1991, the appellant engaged in disgraceful, dishonourable or unprofessional conduct of a sexual nature with three young boys ranging in age from eight to 14, one of whom was a patient. The Discipline Committee dismissed allegations involving a fourth complainant as not proven.

[5] One of the boys complained to the police in 1991. No charges were laid by police until 1998, when a second complainant -- the former patient of the appellant -- came forward. The police laid additional charges in 1999 when the third complainant came forward. [page425]

[6] Consistent with its practice, rather than conducting its own investigation of the allegations as they came to light, the College monitored the progress of the criminal proceedings. It was only after the charges involving the second complainant, the appellant's former patient, were stayed in 2004 that the College changed the status of the appellant's file from "monitoring" to that of an investigation.

[7] After the status of the appellant's file was changed, the College appointed investigators to investigate whether the appellant had committed an act of professional misconduct or was incompetent. The investigators were appointed under s. 75(1)(a) of Code.

[8] Under s. 76(1) of the Code, a College investigator has

the same investigatory powers as a commission under the Public Inquiries Act, 2009, S.O. 2009, c. 33, Sch. 6. Such powers include the power to issue, without prior judicial authorization, a summons to any person, requiring that person to give or produce relevant evidence to the investigator.

[9] During the course of the College's investigation of the appellant, one of its investigators issued summonses to the Toronto Police Service and to the Attorney General of Ontario to obtain material from police files and Crown briefs relating to the criminal charges that were laid against the appellant. Although the material obtained under the summonses was not adduced in evidence before the Discipline Committee, it is undisputed that the College relied upon such material in initiating proceedings before the Discipline Committee.

[10] At the Discipline Committee hearing, the appellant challenged the constitutional validity of the summons power contained in s. 76(1) of the Code, and therefore the propriety of the proceedings commenced in reliance on the summonsed materials. The appellant also requested a stay of proceedings on the basis of abuse of process arising from inordinate delay. The Discipline Committee dismissed both requests.

[11] The appellant appealed to the Divisional Court on several grounds. On January 17, 2011, the Divisional Court dismissed the appellant's appeal from the Discipline Committee's various rulings and disposition.

[12] Although the appellant raised many grounds on his leave application to this court, leave was granted in respect of two issues only:

(i) does s. 76(1) of the Code, which grants College investigators power to issue summonses without prior judicial authorization, violate s. 8 of the Canadian Charter of Rights and Freedoms; and [page426]

(ii) did the discipline proceedings constitute an abuse of process due to the length of time it took the College to investigate and prosecute the allegations against the appellant?

[13] As was the case in the Divisional Court, in this court the appellant is joined in his challenge to the constitutionality of s. 76(1) of the Code by Dr. Leonard Kelly and Dr. Allan Beitel (the "intervenor doctors").

[14] Discipline proceedings are outstanding against the Intervenor Doctors at the College, but have not yet proceeded pending the outcome of this constitutional challenge.

[15] In addition to supporting the appellant's constitutional argument, the intervenor doctors also raise an alternative argument that, in accordance with the language of s. 76(1) of the Code, the summons power provided by that section should be limited to matters relating to the "practice" of the member to be investigated -- that is, the diagnosis, treatment and prevention of disease.

[16] The Attorney General for Ontario intervenes in support of the College's position that s. 76(1) is constitutional.

[17] For the reasons that follow, I would dismiss the appeal.

B. Background

(1) The allegations against the appellant, the complaints to the police and the progress of the criminal charges

(a) Complainant J.H.

[18] As I have said, the appellant was initially investigated by the Toronto Police Service in December 1991 when 12-year-old J.H. gave a statement to the police alleging one incident of sexual touching.

[19] The police subsequently executed a search warrant at the appellant's home and advised the College about their investigation. At the time, police officers expressed concerns about J.H.'s credibility. Nonetheless, in January 1992, the appellant entered into an undertaking with the Crown agreeing to (i) forfeit his firearms; (ii) participate in two years of psychiatric counselling; and (iii) refrain from having contact with persons under the age of 16 except for the purpose of his medical practice. In exchange, it was agreed that the police would take no further action with respect to the complaint.

[20] Despite this agreement, criminal charges were subsequently laid against the appellant in respect of J.H. in November 1998, after police received another complaint about sexual misconduct by the appellant, this time from a former patient. [page427] However, the charges relating to J.H. were stayed in 2000 because of the 1992 undertaking the appellant gave to the Crown.

[21] In his testimony before the Discipline Committee, J.H. alleged that, on one occasion in 1991, the appellant deliberately touched his penis for 10 to 20 seconds. J.H. also described incidents in which he and another boy tied the appellant to a bed with ropes and drank alcoholic coolers, and another incident in which the appellant tied him (J.H.) to the bed, tickled his sides and legs, and hit him lightly with a belt. In its decision on the merits, the Discipline Committee determined that items seized during the police's 1991 search of the appellant's home, including bondage magazines, pre-cut lengths of rope and an empty box of coolers in the appellant's bedroom refrigerator, were consistent with J.H.'s version of events.

(b) Complainant G.M.

[22] In January and July 1998, 34-year-old G.M. provided statements to police alleging that he had been subjected to multiple incidents of sexual abuse by the appellant between 1972 and 1978, both as a patient of the appellant in his office and as a visitor to the appellant's home.

[23] As mentioned, in November 1998, criminal charges were laid against the appellant with respect to the complaints made by G.M. and J.H.

[24] In April 2004, the Crown stayed the criminal charges involving G.M. while it awaited the outcome of an appeal to the Supreme Court of Canada in relation to charges involving a third complainant. [See Note 1 below]

[25] Before the Discipline Committee, G.M. testified that he began seeing the appellant as a physician with his parents when

he was between six and eight years old. The appellant was friendly with his parents and often came to their home for lunch on Sundays. Over time, the appellant began having G.M. to his home.

[26] G.M. alleged that on one occasion the appellant fondled his testicles when he attended the appellant's office. He also claimed that the appellant abused him at the appellant's home following outings the two would take together. In particular, he [page428] claimed that on multiple occasions over a number of years, the appellant undressed him, tied him to the bed, masturbated over him and fondled his genitals.

(c) Complainant B.M.

[27] After hearing media reports about the appellant's arrest in relation to J.H. and G.M., in November 1998, B.M. complained to police about two incidents that occurred in 1981 or 1982. Criminal charges were laid with respect to B.M.'s complaint in March 1999.

[28] Following a preliminary inquiry, the appellant was discharged in relation to B.M.'s allegations. However, in late 2004, the Supreme Court of Canada allowed a Crown appeal from the discharge and the charges were remitted to the preliminary inquiry judge. In 2005, the appellant was committed for trial. In April 2006, the charges involving B.M. were stayed for unreasonable delay.

[29] Before the Discipline Committee, B.M. testified that he first met the appellant when the appellant coached his YMCA basketball team. The appellant befriended B.M. and talked to him about various problems the boy was having. The appellant sometimes took B.M. to lunch and eventually began having B.M. over to his house. On two occasions, the appellant kissed B.M., tied him to a bed and forced B.M. to perform oral sex on him.

(2) The College's investigation of the appellant

[30] Both of the issues raised on appeal concern the process by which the College investigated the allegations against the appellant. For this reason, a detailed review of that process is required.

(a) 1991-1998, 1998-2004: Monitoring and undertakings

[31] As I have said, the College first learned about allegations involving the appellant in December 1991, when the police notified the College about J.H.'s complaint. The College opened a file in respect of the J.H. allegations in January 1992, but it was noted in the file that the police had determined not to proceed with charges due to a lack of evidence and because the appellant had agreed to get psychiatric treatment. Intermittent contacts with the police revealed no further complaints. The College officially closed its file concerning the J.H. allegations in early 1998.

[32] However, in November 1998, the College was advised that the appellant had been arrested and charged in relation to the complaints by both G.M. and J.H. The College learned about the additional charges involving B.M. in March 1999. [page429]

[33] In April 1999, a College investigator asked the investigating police officer to contact the complainants and see if they would consent to the police sharing their statements with the College. The investigating officer said he would do so but there is no indication in the record that he did. In any event, the College did not receive copies of the complainants' statements to the police in response to this request.

[34] At the College's request, in June 1999, the appellant voluntarily signed an undertaking not to see patients under the age of 16 without another adult present. Six months later, the appellant signed a further undertaking not to see patients under the age of 16 except in the presence of an adult acceptable to the College who was aware of the pending charges and who agreed to report any untoward conduct to the registrar of the College.

[35] As already noted, rather than conducting its own investigation of the allegations as they came to light, the College monitored the progress of the criminal proceedings. This was in keeping with the College's practice of not pursuing discipline proceedings against members while criminal charges

covering the same allegations are outstanding.

(b) 2004: From "monitoring" to an investigation

[36] In 2004, after the charges in respect of G.M. were stayed, the College changed the status of the appellant's file from "monitoring" to an investigation.

[37] In September 2004, Tom McNamara, an employee of the College's Investigations and Resolutions Department, wrote to the Toronto Police Service and requested copies of five itemized occurrence reports concerning Dr. Sazant. He explained that the request was made pursuant to a memorandum of understanding between the Toronto Police Service and the College respecting "disclosure and exchange of information". He later forwarded a signed consent from G.M. allowing the police to release a copy of G.M.'s statements to the College.

(c) March 2005: The College appoints an investigator under s. 75(1)(a) of the Code

[38] When the police failed to provide the requested information, Mr. McNamara prepared a memorandum to the registrar of the College with supporting material seeking an appointment of investigators under s. 75(1)(a) of the Code to investigate whether the appellant had committed an act of professional misconduct. The supporting material included the transcript of the preliminary inquiry into charges against the appellant relating to G.M., a summary of an interview between [page430] Mr. McNamara and G.M. conducted in November 2004, and an occurrence report from the Toronto Police Service documenting its investigation into allegations regarding the appellant and J.H. in 1991.

[39] After reviewing the material provided, the registrar confirmed that he had reasonable grounds to believe that the appellant had committed an act of professional misconduct. Ultimately, as was required under s. 75(1)(a), the Executive Committee of the College approved the appointment of investigators, and in March 2005, Mr. McNamara and others were formally appointed as investigators under s. 75(1)(a) of the Code.

(d) April-June 2005: The summonses are issued

[40] Following his appointment as an investigator, Mr. McNamara issued a summons to the Toronto Police Service under s. 76(1) of the Code requesting that the following items be produced: five itemized occurrence reports concerning Dr. Sazant; the undertaking that led to the withdrawal of the charges relating to J.H.; all police interviews with G.M.; and a copy of any letters and writings exchanged between G.M. and the appellant.

[41] Mr. McNamara was advised by a representative of the Toronto Police Service that he should seek some of the requested material from the Attorney General's office because criminal charges had been laid. Accordingly, Mr. McNamara issued an amended summons to the Toronto Police Service and an additional summons to the Attorney General. In both summonses, he requested a complete copy of the Crown brief, the appellant's criminal record and a list of any informations or charges reflected on the criminal record.

[42] In a subsequent conversation with counsel at the Crown Law Office, Mr. McNamara clarified that, at that time, he was only interested in material relating to G.M. -- in particular, he sought three police interviews of G.M. and a letter written by the appellant to G.M. before G.M. contacted the police.

[43] The package of material Mr. McNamara received several weeks later from the Crown Law Office included information relating not only to G.M., but also to J.H., B.M. and a fourth complainant. Rather than contacting the Crown Law Office, Mr. McNamara simply retained all of the material.

(e) November 2004-January 2006: The investigator's contact with the complainants

[44] After speaking to a police detective who agreed to get in touch with G.M., Mr. McNamara spoke to G.M. by telephone in October 2004. In November 2004, Mr. McNamara met with [page431] G.M. in Nova Scotia. G.M. provided a written complaint about the appellant.

[45] In July 2005, Mr. McNamara sent a letter to the

appellant, formally advising him of the investigation into G.M.'s allegations and asking for his patient records. He also invited the appellant to provide any comments he wished to make to the College.

[46] In October 2005, Mr. McNamara interviewed J.H. Shortly after, J.H. formally complained to the College. Mr. McNamara notified the appellant of J.H.'s complaint and invited any response.

[47] In January 2006, Mr. McNamara spoke with B.M., who advised that he would be willing to be a witness regarding the appellant. However, B.M. did not provide a formal complaint.

(f) March 2006: The notice of hearing is issued

[48] On March 21, 2006, a notice of hearing was issued to the appellant alleging that he was guilty of professional misconduct

-- by conduct or an act relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional; and

-- by engaging in sexual impropriety with patients.

[49] Around the time the notice of hearing was issued, the College imposed conditions on the appellant preventing him from seeing any patient under 16 years of age. This condition was published in the College's public register.

(3) The Discipline Committee proceedings

[50] In April 2007, just before the scheduled start of the appellant's discipline hearing, the appellant moved for a stay on the ground that the delay in proceeding was an abuse of process. The motion was dismissed and the hearing began at the end of June 2007.

[51] Two days into the hearing proper, the appellant brought a further motion to stay the proceedings, this time raising constitutional issues, including his claim that the summons

power in s. 76(1) of the Code violates the Charter. The Discipline Committee heard this motion in the spring of 2008 after the evidence on the merits of the discipline charges had been led. The Discipline Committee released its decision dismissing the constitutional challenge on February 20, 2009, concurrent with the release of its decision on the merits. [page432]

(4) The Discipline Committee's findings on the merits

[52] The Discipline Committee was unable to determine whether the events G.M. described as taking place in the appellant's office actually occurred. Apart from that evidence, the Discipline Committee accepted the evidence of J.H., G.M. and B.M. concerning sexual misconduct by the appellant and rejected the appellant's evidence as not believable.

[53] In making its findings, the Discipline Committee dealt with the allegations of each complainant separately. After doing so, the Discipline Committee went on to find that the evidence concerning the use of ropes and the appellant's pattern of forming and nurturing relationships with the complainants met the test for admission as similar fact evidence.

C. The Facts Relating to Drs. Kelly and Beitel

(1) Dr. Leonard Kelly

[54] Dr. Kelly is a family doctor. In May 2005, the College issued a notice of hearing alleging that between 1999 and 2002, Dr. Kelly was in possession of electronic images of child pornography. As I explained earlier, Dr. Kelly's case has not yet gone to the Discipline Committee.

[55] The misconduct allegations against Dr. Kelly arose from a criminal charge that was eventually withdrawn because of concerns about the validity of a search warrant.

[56] In 2001, police obtained a warrant to search Dr. Kelly's credit card statements based on information gathered as part of an international child pornography investigation. It was later revealed that much of that information was incorrect. However, even after this came to light, the police continued to rely on

the discredited information to obtain further search warrants.

[57] One of those warrants was used to search Dr. Kelly's home and to seize the hard drive of his personal computer. Dr. Kelly was subsequently charged with one count of possession of child pornography. In September 2004, the charge was withdrawn because the Crown concluded that the search warrant may have been invalid.

[58] The police returned the computer hard drive to Dr. Kelly but kept a mirror copy as well as other information that may have been illegally obtained.

[59] The College opened a file on Dr. Kelly in 2001 and monitored the status of the criminal charge. After the charge was withdrawn in 2004, Mr. McNamara requested access to the information held by the police. The police advised him that the requested material had likely been seized unlawfully. They later [page433] agreed to provide him with the material if they were presented with a summons under s. 76(1) of the Code.

[60] After being appointed as an investigator under s. 75(1)(a), Mr. McNamara issued a summons to the police and received credit card statements and a description of the material on Dr. Kelly's hard drive. The College issued a notice of hearing into allegations of professional misconduct in May 2005.

[61] Dr. Kelly brought an application in the Superior Court of Justice seeking, among other things, a declaration that s. 76(1) of the Code is unconstitutional. His application was adjourned on consent and he was granted intervenor status to argue the issue on Dr. Sazant's appeal to the Divisional Court.

(2) Dr. Allan Beitel

[62] Dr. Beitel is a psychiatrist. In July 2005, he was notified that the College had initiated an investigation under s. 75(1)(a) of the Code due to allegations that he had conducted himself in a manner unbecoming the profession and had failed to maintain the standards of practice of the profession. The allegations arose out of criminal charges laid against Dr.

Beitel for possession of property obtained by crime, possession of child pornography and accessing child pornography.

[63] In 2003, Dr. Beitel took a laptop computer in for repairs. A store employee noted that the computer had been flagged as stolen and called police. Dr. Beitel maintained that the computer was his. When the police arrived, they seized the computer without a warrant and later examined the hard drive. Dr. Beitel did not consent to the seizure or to the examination.

[64] Following the police examination of his computer, Dr. Beitel was charged with possession of child pornography. News of his arrest was reported in the Toronto Sun, which brought the matter to the College's attention. Consistent with its usual practice, the College opted to monitor progress of the criminal charges before embarking on its own investigation.

[65] Further searches of Dr. Beitel's residence in 2004 led to additional charges, including fraud and breach of recognizance. Following a preliminary inquiry in 2005, Dr. Beitel was committed for trial on five counts: possession of stolen property; possession of and accessing child pornography; and two counts of breach of recognizance (the "first indictment").

[66] After the Crown Law Office failed to respond to numerous requests for information about the pending charges, Mr. McNamara, who had been appointed as a College investigator under s. 75(1)(a), issued a summons to the police requesting copies of the Crown brief and all anticipated exhibits prepared [page434] for the prosecution of Dr. Beitel. The police did not provide the information, citing concerns about the process for disclosure of the Crown brief set out in P. (D.) v. Wagg (2004), 71 O.R. (3d) 229, [2004] O.J. No. 2053 (C.A.).

[67] In 2008, after further searches of Dr. Beitel's residence by the police, new charges were laid against him for breach of recognizance and perjury (the "second indictment").

[68] In 2009, the charges in the first indictment were stayed

at the Crown's request due to the length of time that had passed, and in the light of the outstanding charges on the second indictment.

[69] In October 2011, a Superior Court judge held that the 2008 searches of Dr. Beitel's home violated his rights under s. 8 of the Charter and excluded the evidence obtained during those searches under s. 24(2).

[70] There is nothing in the appeal record to indicate that the police or the Crown has supplied information to College investigators pursuant to the summons that was issued.

[71] Like Dr. Kelly, Dr. Beitel brought his own application in the Superior Court challenging the constitutionality of s. 76(1). That application was adjourned on the same terms as Dr. Kelly's.

D. The Summons Power Issue

(1) The statutory framework

[72] Under s. 75 of the Code, the registrar of the College may appoint an investigator if, among other reasons, the registrar has reasonable and probable grounds to believe that a member has committed professional misconduct or is incompetent. The Executive Committee of the College must also approve the appointment. The full text of s. 75(1) is set out in Appendix A. Section 75(1)(a) reads as follows:

> 75(1) The Registrar may appoint one or more investigators to determine whether a member has committed an act of professional misconduct or is incompetent if,
>
> (a) the Registrar believes on reasonable and probable grounds that the member has committed an act of professional misconduct or is incompetent and the Executive Committee approves of the appointment. [See Note 2 below] [page435]

[73] It is the appointment of an investigator that triggers the summons power under s. 76 of the Code. At the relevant time, that provision stated:

76(1) An investigator may inquire into and examine the practice of the member to be investigated and has, for the purposes of the investigation, all the powers of a commission under Part II of the Public Inquiries Act. [See Note 3 below]

[74] Part II of the Public Inquiries Act, R.S.O. 1990, c. P.41, s. 7, provided:

7(7) A commission may require any person by summons,

(a) to give evidence on oath or affirmation at inquiry; or

(b) to produce in evidence at inquiry such documents and things as the commission may specify,

relevant to the subject-matter of the inquiry and not inadmissible in evidence under section 11.

[75] Section 11 of the Public Inquiries Act provided: "[n]othing is admissible in evidence at an inquiry that would be inadmissible in a court by reason of any privilege under the law of evidence".

[76] It is also noteworthy that s. 77 of the Code allows a justice of the peace to issue a search warrant on an application by an investigator, upon the investigator showing reasonable and probable grounds that (a) the target of the investigation has committed an act of professional misconduct or is incompetent; and (b) there is something relevant to the investigation at the place identified in the application.

[77] Section 77(1) reads as follows:

77(1) A justice of the peace may, on the application of the investigator made without notice, issue a warrant authorizing an investigator to enter and search a place and examine any document or thing specified in the warrant if the justice of the peace is satisfied that the investigator has been properly appointed and that there are reasonable and probable grounds established upon oath for believing that,

(a) the member being investigated has committed an act of professional misconduct or is incompetent; and

(b) there is something relevant to the investigation at the place. [page436]

(2) Other relevant legislation

[78] Section 3 of the Medicine Act, 1991, S.O. 1991, c. 30 addresses the scope of the practice of medicine. It provides:

> 3. The practice of medicine is the assessment of the physical or mental condition of an individual and the diagnosis, treatment and prevention of any disease, disorder or dysfunction.

[79] Section 1 of O. Reg. 856/93, enacted under the Medicine Act, 1991, lists various acts that constitute professional misconduct for the purposes of the Code. Section 1(1), paras. 33 and 34 state the following:

> 1(1) The following are acts of professional misconduct for the purposes of clause 51(1)(c) of the Health Professions Procedural Code:
>
> . . . . .
>
> 33. An act or omission relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.
>
> 34. Conduct unbecoming a physician.

(3) The interpretation issue

[80] As I have said, in addition to supporting the appellant's challenge to the constitutionality of the s. 76(1) summons power, the intervenor doctors also raise an alternative argument that, properly interpreted, the summons power provided by that section is limited to matters directly related to the "practice of medicine" as that term is defined in s. 3 of the Medicine Act, 1991 -- essentially, the assessment, diagnosis, prevention and treatment of disease. As the proper interpretation of the section could affect its constitutionality, I will deal with the interpretation issue first.

(a) The Divisional Court's reasons on the

interpretation issue

[81] The Divisional Court dealt with this issue succinctly at paras. 172 to 175 of its reasons. In essence, the court held that the intervenor doctors' proposed interpretation is inconsistent with the purposes of the legislative scheme, general principles of statutory interpretation and the special principles of interpretation applicable to professional discipline statutes. In addition, the court said that the intervenor doctors' proposed interpretation would lead to absurd results.

[82] The Divisional Court explained, at para. 172, that the legislature has granted the College "a wide range of powers and imposed upon it significant duties". This includes oversight over [page437] a wide range of activities that constitute "professional misconduct", including "infamous, disgraceful or improper conduct in a professional respect" and "engaging in conduct unbecoming a physician". "Given the wide range of conduct encompassed by the legislation", the court went on, "and keeping in mind that the purpose of the legislation is the protection of the public, to 'inquire into and examine the practice of the member' necessarily means examining any matter that could expose members of the public to risk" (emphasis added).

[83] The Divisional Court went on to note that the scope of powers granted under s. 76(1) of the Code was considered by the Court of Appeal in Gore v. College of Physicians and Surgeons (2009), 96 O.R. (3d) 241, [2009] O.J. No. 2833, 2009 ONCA 546 (C.A.). The question in that case was whether an investigator appointed under s. 75 has the power to observe members as they perform the medical procedures that make up their practice. The appellant doctors had argued that recognizing such a power would violate their patients' privacy. This court rejected that argument. It held, at para. 17, that "it would take clear words to deprive the investigator of power necessary" to carry out the important task of protecting the public.

[84] The Divisional Court further held, at para. 174, that to

restrict the investigator's power under s. 76(1) to "a narrow range of activity involving only the assessment, diagnosis, prevention and treatment of disease" could lead to absurd results. The justices explained:

> For example, a College investigator who is investigating an allegation that a psychiatrist is engaging in sexual relations with the patient would be prevented from using s. 76(1) to obtain records such as hotel receipts, airline tickets or e-mails sent on personal computers for the purpose of setting up assignations. Similarly, the College could not use its powers under s. 76(1) to investigate allegations that a physician is engaging in illicit drug use outside of the office or is selling drugs. The personal records of physicians who use their positions of trust to take money from vulnerable patients could also not be investigated through the use of the s. 76(1) summons power if this narrow reading were correct.

[85] The court concluded, at para. 175: "Without the information discussed above, the College might be hampered in its ability to protect the public by obtaining the evidence necessary to prosecute the physician for his or her behaviour."

(b) The intervenor doctors' argument on appeal

[86] On appeal to this court, the intervenor doctors rely, in particular, on the plain language of s. 76(1), noting that it provides that "an investigator may inquire into and examine the practice of the member". [page438]

[87] As I have already explained, s. 3 of the Medicine Act, 1991 describes the scope of the practice of medicine as the "assessment of the physical or mental condition of an individual and the diagnosis, treatment and prevention of any disease, disorder or dysfunction".

[88] According to the intervenor doctors, having regard to the specific language of these provisions, there was no basis for the Divisional Court to incorporate a broad notion of protecting the public from professional misconduct into the s. 76(1) summons power.

[89] Unlike s. 77 of the Code, which permits a justice of the peace to issue a search warrant where there are reasonable and probable grounds for believing a member has committed an act of professional misconduct, s. 76(1) makes no reference to "professional misconduct".

[90] Moreover, given that the Divisional Court found the s. 76(1) summons power constitutional having regard to a member's diminished expectation of privacy that arises from engaging in a regulated activity, it only makes sense that the summons power must be restricted to matters directly related to the regulated activity. Otherwise, s. 76(1) would allow unjustified intrusions into members' private lives.

[91] Finally, the intervenor doctors submit that to hold otherwise would not produce absurd results. Section 77 of the Code permits an investigator to obtain a search warrant to investigate matters involving professional misconduct falling outside a member's practice.

(c) Discussion

[92] I would not give effect to these submissions.

[93] The modern approach to statutory interpretation requires that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": Bell ExpressVu Limited Partnership v. Rex, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, 2002 SCC 42, at para. 26, citing Elmer A. Driedger, Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983), at p. 87.

[94] Applying this approach to the case at bar, I agree with the Divisional Court that the main purposes of the Regulated Health Professions Act, 1991, and the Code, are the proper regulation of the medical profession and the protection of the public.

[95] Having regard to these broad and important purposes and

the overall legislative scheme, in my view, the obvious purpose of s. 76(1) of the Code is to extend the summons power [page439] created by the Public Inquiries Act to investigations authorized under s. 75(1).

[96] As I have explained, s. 75(1)(a) of the Code permits the registrar to appoint an investigator "to determine whether a member has committed an act of professional misconduct".

[97] In O. Reg. 856/93, "professional misconduct" is broadly defined to include, for example [in s. 1(1), para. 34], "conduct unbecoming a physician" and [in s. 1(1), para. 33] "an act or omission relevant to the practice of medicine that . . . would reasonably be regarded by members as disgraceful, dishonourable or unprofessional" (emphasis added).

[98] Clearly, the aim of this broad definition is to ensure that members are, and remain, fit to carry out their practice according to the standards the profession sets for itself. Fitness in this context includes conduct in the physician's private life that reflects on his or her integrity: Richard Steinecke, A Complete Guide to the Regulated Health Professions Act, looseleaf (Toronto: Canada Law Book, 2001), at 6:60.20(6).

[99] Bearing this in mind, in my view, s. 76(1) must not be read narrowly, as restricting an investigator's power under the section to inquiring into and examining matters described in s. 3 of the Medicine Act, 1991 as falling within the scope of the practice of medicine. Rather, s. 76(1) should be given a broad and purposive interpretation to enable an investigator to carry out his or her duty to investigate. This in turn assists the College in its statutory mandate to properly regulate the profession and protect the public.

[100] Considered in this way, the power "to inquire into and examine the practice of the member to be investigated" must include the power to inquire into whether the member has committed acts of professional misconduct.

[101] The Supreme Court of Canada has consistently emphasized the need for courts to interpret professional discipline

statutes with a view to ensuring that such statutes protect the public interest in the proper regulation of the professions: see, e.g., Rocket v. Royal College of Dental Surgeons of Ontario, [1990] 2 S.C.R. 232, [1990] S.C.J. No. 65, at p. 249 S.C.R.; Finney v. Barreau du Qubec, [2004] 2 S.C.R. 17, [2004] S.C.J. No. 31, 2004 SCC 36, at para. 40.

[102] As the court put it unequivocally in Pharmascience Inc. v. Binet, [2006] 2 S.C.R. 513, [2006] S.C.J. No. 48, 2006 SCC 48, at paras. 36-37:

> The importance of monitoring competence and supervising the conduct of professionals stems from the extent to which the public places trust in them.
>
> . . . . . [page440]
>
> In this context, it should be expected that individuals with not only the power, but also the duty, to inquire into a professional's conduct will have sufficiently effective means at their disposal to gather all information relevant to determining whether a complaint should be lodged.

(Emphasis added)

[103] As the Divisional Court observed, the intervenor doctors' proposed interpretation would leave College investigators without the powers necessary to carry out their important duties. This is precisely the approach that Pharmascience instructs against.

[104] In the circumstances, I see no error in the Divisional Court's conclusion that the s. 76(1) summons power is not limited to matters directly related to the "practice of medicine" as described in s. 3 of the Medicine Act, 1991.

(4) The constitutional issue

(a) The appellant's position before the Divisional Court

[105] Section 8 of the Charter states: "Everyone has the right to be secure against unreasonable search and seizure."

[106] Before the Divisional Court, the appellant acknowledged

that the level of protection afforded by s. 8 is informed by the claimant's "reasonable expectation of privacy", and that "reasonableness" varies with the context. He further accepted that a person has a diminished expectation of privacy in the regulatory sphere versus the criminal or quasi-criminal sphere. Nevertheless, the appellant argued that the s. 76(1) summons power infringes s. 8 because it fails to strike the appropriate balance between the member's interest in being left alone and the government's interest in protecting the public.

[107] As a starting point, the appellant submitted that the breadth and scope of the s. 76(1) summons power "knows no bounds".

[108] According to the appellant's interpretation, following his or her appointment, a College investigator acts alone, effectively as a commission of inquiry of one. The investigator issues the summons, it is returnable before the investigator, and he or she rules on issues of relevance and privilege. Unlike commissions of inquiry under the Public Inquiries Act, which are conducted in public and therefore provide procedural protections for the exercise of the summons power, investigations under the Code are conducted in private and provide no similar protections.

[109] Further, the appellant contended that, unlike commissioners, College investigators are not judicial officers -- nor are they subject to regular supervision in their exercise of the summons power. [page441]

[110] Moreover, the summons power is not limited to documents created in the course of the regulated activity or to regulated actors.

[111] Rather, the documents that can be compelled include records that may contain highly personal information belonging to a member or to third parties, including cellphone records, psychiatric records, bank records and school records. The people who can be summonsed also include members of the public.

[112] In effect, the appellant argued that investigators are

unconstrained, unrestricted and entirely unreviewed in their use of the summons power to compel production of any document anywhere, or to compel any person to give evidence.

[113] The appellant also noted that there are few parallels between the purposes and functions of a commission of inquiry and a College investigation. While a commission of inquiry cannot establish either civil or criminal liability, a College investigation may lead to proceedings before a panel of the Discipline Committee and can result in a member's licence being revoked or suspended.

[114] As noted in Hunter v. Southam Inc., [1984] 2 S.C.R. 145, [1984] S.C.J. No. 36, the purpose of s. 8 of the Charter is to prevent unreasonable searches before they happen.

[115] In Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 425, [1990] S.C.J. No. 23, at p. 499 S.C.R., Wilson J. summarized the four criteria set forth in Hunter v. Southam that must be satisfied for search and seizure legislation to withstand Charter scrutiny in the criminal/ quasi-criminal context:

(a) a system of prior authorization, by an entirely neutral and impartial arbiter who is capable of acting judicially in balancing the interests of the State against those of the individual;
(b) a requirement that the impartial arbiter must satisfy himself that the person seeking the authorization has reasonable grounds, established upon oath to believe that an offence has been committed;
(c) a requirement that the impartial arbitrator must satisfy himself that the person seeking the authorization has reasonable grounds to believe that something which will afford evidence of the particular offence under investigation will be recovered; and
(d) a requirement that the only documents which are authorized to be seized are those which are strictly relevant to the end offence under investigation.

[116] The appellant contended that the s. 76(1) summons power

meets none of these criteria. While he acknowledged that different standards apply in the regulatory context than in the [page442] criminal context, he argued that the s. 76(1) summons power is most often used by investigators dealing with criminal conduct.

[117] Having regard to the context and the breadth and scope of the s. 76(1) summons power, the appellant submitted that a proper balance can only be struck by requiring prior authorization for a summons to be valid. Moreover, a requirement for prior authorization could reasonably be imposed without frustrating a College investigator's duties. Section 77 of the Code already provides a process by which an investigator may obtain a judicially authorized warrant.

(b) The Divisional Court's reasons concerning the constitutional issue

[118] After a detailed review of the appellant's and the intervenor doctors' arguments, the Divisional Court began its discussion of the constitutional issue by reviewing the basic principles of a s. 8 Charter analysis that apply in this case:

-- compelling production through a summons constitutes a "seizure" under s. 8: Thomson Newspapers;

-- the freedom to be protected from "unreasonable" search and seizure enshrined in s. 8 can be expressed as a positive entitlement to a "reasonable" expectation of privacy: Hunter v. Southam; and

-- a person's reasonable expectation of privacy varies depending on the context. The standard of reasonableness that prevails in the criminal context will usually not be appropriate in an administrative or regulatory context. The greater the departure from the realm of criminal law, the more flexible will be the standard of reasonableness: Thomson Newspapers.

[119] In rejecting the appellant's constitutional challenge to s. 76(1) of the Code, the Divisional Court examined the s. 76(1) summons power through the lens of four contextual factors: the nature of the context in this case; the nature of

the power granted under the statute; the nature of the regime; and the specific context at issue.

(i) The nature of the context in this case -- criminal/quasi-criminal or regulatory?

[120] The Divisional Court rejected the appellant's argument that the s. 76(1) summons power is being used in a realm where the departure from criminal law is not great. Although the [page443] summons power was used in this case to investigate conduct that is considered criminal, the scheme of the Code and the Regulated Health Professions Act is not quasi-criminal in nature. The court held, at para. 149, that the summons power exists "not to collect evidence with a view to laying a criminal charge, but rather to take proceedings against the doctor in a regulatory context for the purpose of removing or restricting his licence to practise medicine".

[121] Further, relying on R. v. Wigglesworth, [1987] 2 S.C.R. 541, [1987] S.C.J. No. 71 and R. v. Jarvis, [2002] 3 S.C.R. 757, [2002] S.C.J. No. 76, 2002 SCC 73, the court noted that the fact that the same act may also give rise to a criminal consequence does not mean that when the act is dealt with in the regulatory context, the context of the regulatory proceedings is criminal or quasi-criminal. Here, the proceedings were focused on determining whether the appellant should be disqualified from practising medicine. Thus, they could not be considered criminal or quasi-criminal in nature.

(ii) The nature of the power -- summons versus search warrant

[122] The Divisional Court observed that in contrast to the circumstances under consideration in Hunter v. Southam, where officials were authorized to enter into premises for the purposes of conducting a search and seizure without prior judicial authorization, the s. 76(1) summons power is much less intrusive. The subject of the summons has the opportunity to seek judicial review of the summons before being obliged to answer it and before any intrusion has taken place. The Supreme Court of Canada confirmed the importance of this distinction with respect to documentary production in British Columbia Securities Commission v. Branch, [1995] 2 S.C.R. 3, [1995]

S.C.J. No. 32 when it said, at para. 60, that "[t]he demand for production of documents contained in the summonses is one of the least intrusive of the possible methods which might be employed to obtain documentary evidence".

(iii) The regime within which the summons power is granted

[123] The Divisional Court noted that the statutory regime in which the s. 76(1) summons power operates provides various protections to the person being investigated before the power can be exercised.

[124] Under s. 75(1)(a) of the Code, an investigator -- the person entitled to use the summons power -- must be appointed by [page444] the registrar of the College. Before the registrar can seek the appointment of an investigator, the registrar must have a belief, based on reasonable and probable grounds, that the member has committed an act of professional misconduct.

[125] Moreover, before the registrar can appoint an investigator, the registrar must seek the approval of the Executive Committee. The Executive Committee is a body that can and does exercise quasi-judicial discretion in this and other contexts, including imposing interim suspensions. Thus, s. 75 creates certain parallels to the preconditions for a reasonable search that emerged from Hunter v. Southam and Thomson Newspapers -- namely, reasonable and probable grounds to believe that an act of misconduct has been committed and the review of that belief by a body capable of exercising quasi-judicial powers.

[126] In addition, an investigator's power to summons under s. 76(1) is not unbridled. It is restricted to evidence that is both relevant to the inquiry he or she is conducting and that would not be inadmissible because of any privilege under the law of evidence. A requirement that the evidence be relevant to the subject matter of the inquiry also parallels the preconditions for a reasonable search set out in Hunter and Thomson.

[127] Further, the s. 76(1) summons power is no greater than

the power that exists under the Rules of Civil Procedure, R.R.O. 1990, Reg. 194. Under rule 39.03, civil litigants may summons a third party to give evidence before an examiner in aid of a motion or application.

[128] Finally, the Divisional Court noted that 61 Ontario statutes confer the summons power under Part II of the Public Inquiries Act -- suggesting that the power is not extraordinary when the context at issue is not criminal or quasi-criminal.

(iv) The specific context at issue

[129] In this regard, the Divisional Court noted that the s. 76(1) summons power is exercised in the context of a self-governing professional regulatory scheme.

[130] In Pharmascience, the Supreme Court of Canada emphasized the important public protection responsibilities of professional regulators and the need for them to have effective means to carry out their duties.

[131] The Divisional Court observed that members of the medical profession often have access to the most private parts of people's lives, both emotionally and physically. If doctors abuse the trust placed in them by the public and by their patients, the impact of the violation can be enormous. The court concluded, at para. 166: [page445]

> Given this, it is not unreasonable to expect doctors to have a very limited expectation of privacy when it comes to allowing their regulator to ensure that they are carrying out their practices in a manner that will not expose the public to risk. An individual chooses to become a doctor and in so doing accepts that his or her activities will be supervised and monitored. Not only does this benefit the public, but it also benefits the member by preserving the integrity of his or her profession.

(c) The appellant's position in this court

[132] On appeal to this court, the appellant essentially repeats his position in the Divisional Court that the s. 76(1)

summons power is an unconstrained, unrestricted, unreviewed and unnecessary search power that is not justified by the regulatory context in which it is found.

[133] The appellant acknowledges that the key question in assessing the constitutionality of s. 76(1) under s. 8 of the Charter is a modification of the question that was framed by La Forest J. in Thomson Newspapers, at p. 508 S.C.R., that is:

> What degree of privacy can those subject to investigation under [s. 75 of the Code] reasonably expect in respect of the activities and matters with which such investigation may be concerned?

[134] The appellant submits that to answer this question, the court must conduct a contextual analysis that includes consideration of (i) the scope of the legislation that creates the investigative power; (ii) the context at issue; (iii) the purpose of the investigation; and (iv) the nature of the documents and other information that may be compelled.

[135] The appellant argues that the Divisional Court failed to conduct such an analysis, and, in particular, failed to recognize that the power in issue is completely unrestricted by the regulatory scheme in which it is found.

[136] The appellant contends that, having regard to the broad definition of professional misconduct, the reach of the summons power is essentially limitless.

[137] Moreover, the appellant reiterates that while the scheme may be, strictly speaking, regulatory -- as opposed to criminal or quasi-criminal -- the purpose of an investigation is to determine whether disciplinary charges should be brought. Such charges may result in professional disqualification and a high level of social stigma, akin to that found in the criminal context.

[138] Concerning the scope of the authorized investigation and the nature of the documents and information that can be compelled, the appellant emphasized the evidence of Dr. Patrick

McNamara, the medical director of the Investigations and Resolutions Department of the College (no relation to the investigator, Mr. McNamara). [page446] Dr. McNamara had supervisory responsibility for the College's investigation of the appellant.

[139] During cross-examination on his affidavit, Dr. McNamara indicated that investigators have discretion to determine the scope of their investigation. Further, he confirmed that the summons power has been used to obtain a wide range of documents, which, in other contexts, attract significant expectations of privacy. These include, for example, computer records, insurance company records, medical and pharmacy records, post-secondary school records, banking records, hotel records and cellphone records.

[140] Dr. McNamara also confirmed that there is no obligation on an investigator to notify either a member or a third party with a potential privacy interest in summonsed documents of the existence of the summons.

[141] In addition, Dr. McNamara acknowledged that the summons power extends to compelling a witness to provide evidence and has been used to obtain evidence from third parties -- for example, the son of a physician who was alleged to have had a sexual relationship with a patient. In that case, the physician's son was unwilling to speak with a College investigator unless he was served with a summons.

[142] Dr. McNamara also acknowledged that there is no internal procedure for authorizing the issuance of the summons through the Executive Committee, the Complaints Committee or the registrar.

[143] An investigator is not required to hold his "inquiry" in a specific location; there is no obligation on the investigator to take notes or record what is stated during an examination; there is no requirement that examinations be conducted under oath; there is no neutral third party to review whether documents produced or evidence given at an "inquiry" are relevant; and the investigation is not conducted in a

public forum. If a person refuses a summons, he or she may be cited for contempt.

[144] Dr. McNamara testified that in 2006, investigations involving sexual impropriety made up only about 1 per cent of the total investigations conducted. Moreover, of approximately 2,500 investigations conducted in 2006, about 60 summonses were issued by a College investigator.

[145] The appellant concedes that the Hunter v. Southam requirements are not universally applicable and that the level of protection afforded by s. 8 in a given context must be responsive to the level of privacy reasonably expected by the claimant. However, he contends that the s. 76(1) summons power constitutes an [page447] unjustified departure from the Hunter v. Southam standard of reasonableness in that evidence is compelled

-- without any prior authorization or review by anyone;

-- without requiring reasonable and probable grounds;

-- without requiring prior evidence that the search will afford evidence of the particular offence; and

-- without limiting the documents seized based on relevance and without requiring a report or review by a justice or by any reviewing body.

[146] In addition to arguing that the Divisional Court failed to conduct the necessary contextual inquiry mandated by the regulatory quartet of cases that followed Hunter v. Southam in the Supreme Court of Canada, the appellant submits that the Divisional Court made several errors in concluding that the regulatory context in which the s. 76(1) summons power is found justifies such a significant departure from the Hunter v. Southam standard.

[147] First, the Divisional Court erred by overemphasizing the criminal/regulatory distinction drawn in Thomson Newspapers and R. v. McKinlay Transport Ltd., [1990] 1 S.C.R. 627, [1990]

S.C.J. No. 25. Instead, the Divisional Court should have heeded the comments of Sopinka J. in Baron v. Canada, [1993] 1 S.C.R. 416, [1993] S.C.J. No. 6, at p. 444 S.C.R., that the criminal/regulatory distinction is "useful" but not determinative.

[148] Second, the Divisional Court erred by placing undue emphasis on the Supreme Court's comments concerning the nature of a summons power in Branch without acknowledging that the summons power at issue in that case was restricted to business-related documents. This, the appellant contends, distinguishes it from the sweeping summons power challenged here.

[149] Third, the Divisional Court erred by relying on McKinlay Transport for the proposition that a summons is by its nature less intrusive than a search. The appellant contends that this distinction only holds "when the target of the summons is the same person who holds a privacy interest in the requested evidence". It does not apply when the material sought is in the hands of third parties, because those third parties are unlikely to challenge the summons.

[150] Finally, the appellant argues that the s. 76(1) summons power is unnecessary. The College resorts to the summons power in only a small minority of cases. Moreover, most other provinces [page448] do not have provisions analogous to s. 76(1) in their respective medical regulatory statutes.

(d) Discussion

[151] For the purposes of my analysis, I assume, but do not decide, that the appellant has standing under s. 8 of the Charter to challenge the constitutionality of the s. 76(1) summons power when used by investigators appointed under s. 75(1)(a) of the Code and, if successful, to seek a declaration of invalidity under s. 52 of the Charter.

[152] I do not accept the appellant's submissions that the s. 76(1) summons power violates s. 8 of the Charter when used by investigators appointed under s. 75(1)(a) of the Code.

[153] The appellant's claim that the s. 76(1) summons power

is an overbroad, unrestricted power rests in part on the assertion that, once investigators are appointed under s. 75(1)(a), the s. 76(1) summons power confers on the investigators an unlimited power to conduct a free-wheeling "fishing expedition" into any and all aspects of a member's private life. He argues that this is demonstrated in this case by the general language of the appointment of investigators, authorizing them to investigate whether the appellant had committed an act of professional misconduct or was incompetent.

[154] Contrary to this assertion, in my opinion, a proper interpretation of the relevant statutory provisions demonstrates that, when used by investigators appointed under s. 75(1)(a) of the Code, the s. 76(1) summons power is a reasonable power, properly constrained by the requirement that it be used solely to obtain information that is relevant to a duly authorized investigation into specified professional misconduct, and further restricted by the requirement that the information sought cannot be privileged.

[155] It is important to remember that, in this case, the s. 76(1) summons power was triggered by the appointment of investigators under s. 75(1)(a) of the Code.

[156] To appoint investigators under s. 75(1)(a), the registrar must believe on reasonable and probable grounds that the member to be investigated has committed an act of professional misconduct or is incompetent. It is that act (or acts) of professional misconduct or incompetence that the investigators are authorized to investigate. In this regard, counsel for the College acknowledged in oral argument before us that it is the practice of the College to seek a new appointment of investigators under s. 75(1)(a) of the Code where investigators uncover matters unrelated to the originally authorized investigation. I repeat the text of s. 75(1)(a) of the Code for ease of reference: [page449]

> 75(1) The Registrar may appoint one or more investigators to determine whether a member has committed an act of professional misconduct or is incompetent if,
>
> (a) The Registrar believes on reasonable and probable

grounds that the member has committed an act of professional misconduct or is incompetent and the Executive Committee approves of the appointment.

(Emphasis added)

[157] Importantly, by its terms, the s. 76(1) summons power is restricted to matters relevant to the authorized investigation:

> 76(1) An investigator [i.e., appointed under s. 75(1)] may inquire into and examine the practice of the member to be investigated and has, for the purposes of the investigation, all the powers of a commission under Part II of the Public Inquiries Act.

(Emphasis added)

[158] Section 7 in Part II of the Public Inquiries Act establishes the requirement for relevance:

> (1) A commission may require any person by summons,
>
> (a) to give evidence on oath or affirmation at the inquiry; or
>
> (b) to produce in evidence at the inquiry such documents and things as the person or body conducting the inquiry may specify,
>
> relevant to the subject matter of the inquiry and not inadmissible in evidence under section 11.

(Emphasis added)

[159] Read together, these provisions make it clear that the scope of the s. 76(1) summons power is limited to matters relevant to the authorized investigation -- and that the authorized investigation relates to the acts of professional misconduct or incompetence the registrar formed reasonable and probable grounds to believe the member committed. Finally, s. 11 of the Public Inquiries Act (now s. 33, para. 13 of the Public Inquiries Act, 2009) restricts the testimony and documents that may be summonsed to evidence that is not privileged.

[160] In my view, it follows from these conclusions

concerning the proper interpretation of s. 75(1)(a) and s. 76(1) that, when appointing investigators under s. 75(1)(a), the registrar should provide a brief description of the act(s) of professional misconduct he or she believes on reasonable and probable grounds were committed. [See Note 4 below] Such a requirement serves two important purposes. [page450]

[161] First, it ensures that the necessary prerequisite to the appointment of investigators -- namely, the formation of reasonable and probable grounds to believe that the member has committed an act of professional misconduct or incompetence -- has been satisfied.

[162] Second, it ensures that the scope of the investigation authorized under s. 75(1)(a) is clearly defined and that the corollary summons power under s. 76(1) can be exercised only to obtain information relevant to the authorized investigation.

[163] The notion that the registrar should provide a brief description of the misconduct to be investigated when appointing investigators under s. 75(1)(a) of the Code is neither novel nor particularly controversial. In his text on the Regulated Health Professions Act, Richard Steinecke offers the following precedent for an appointment under s. 75(1)(a), at p. 5-72:

> I, [name of Registrar] . . . appoint [investigator's name] to inquire into and examine the conduct or actions of [name of member] pursuant to ss. 75 to 79 of the Health Professions Procedural Code to ascertain whether [name of member] has committed an act of professional misconduct [add, where necessary, "or is incompetent"] in respect of [insert a brief description of the type of concerns being investigated and the time period covered by the investigation] . . . .

(Italics in original; bold added)

[164] That said, I agree with counsel for the College that the requirement that the registrar describe the acts of professional misconduct or incompetence he or she formed reasonable and probable grounds to believe were committed should not be interpreted in a manner that would frustrate the

College's ability to carry out its statutory mandate.

[165] So, for example, if the registrar authorizes an investigation based on reasonable and probable grounds to believe that a member is having sexual relations with an adult patient, the investigators' use of the s. 76(1) summons power is limited to that investigation. However, if the investigators uncover evidence that the member has had sexual relations with another, [page451] previously unknown, adult patient, a new appointment may not be necessary, given that the nature of the misconduct falls within the category of sexual misconduct with a patient. On the other hand, if, during the same investigation, the investigators uncovered evidence of unrelated misconduct -- for example, that the member is trafficking narcotics in unrelated circumstances -- a new appointment would be required before the investigators could resort to the s. 76(1) summons power to pursue this new avenue.

[166] I reject any suggestion that the failure of the registrar in this case to specify the act(s) of professional misconduct he formed reasonable and probable grounds to believe the appellant committed affects the constitutionality of the s. 76(1) summons power. The fact that a constitutional power is exercised in a manner that may be unconstitutional does not make the power unconstitutional; rather, it may give rise to a remedy under s. 24 of the Charter.

[167] In any event, I am not persuaded that the use of the summons power in this case violated the appellant's s. 8 rights.

[168] Although the wording of the s. 75(1)(a) appointment of investigators was very general, the material submitted to the registrar in support of the request for an appointment made it clear that the proposed investigation related to allegations that the appellant had engaged in sexual impropriety with adolescent males and that reasonable and probable grounds existed to believe that the appellant had engaged in such activity. Equally important, the material summonsed did not extend beyond the scope of those allegations.

[169] In addition, the Discipline Committee found that the appellant did not have a reasonable expectation of privacy in the summonsed material. He therefore lacked standing to assert an individual s. 8 claim or to seek a s. 24(2) Charter remedy. That ruling is not part of the subject matter of this appeal. The Divisional Court dismissed this ground of appeal and this court did not grant leave on this issue.

[170] Accordingly, contrary to the appellant's submissions in this regard, rather than being an overbroad, unrestricted power, I conclude that the s. 76(1) summons power is a limited power, restricted to the scope of the investigation authorized under s. 75(1)(a) -- namely, the act(s) of professional misconduct or incompetence the registrar formed reasonable and probable grounds to believe the member committed.

[171] I also reject the appellant's arguments that the Divisional Court failed to conduct a proper contextual analysis or made any [page452] other error of law in its analysis of the constitutionality of the s. 76(1) summons power.

[172] From its recitation of the appellant's arguments and its reasons, it is apparent that the Divisional Court was well aware of the appellant's position concerning the scope of the legislation, the context at issue, the purpose of the investigation and the nature of the documents and other information that may be compelled.

[173] Like I do, the Divisional Court concluded that the scope of the investigation and the nature of the documents and other information that may be compelled is properly constrained, restricted and reviewed by (i) the restrictive scope of the investigation that is authorized; (ii) the limiting factors of relevance and privilege; and (iii) the requirement that the Executive Committee review the registrar's initial determination of reasonable and probable grounds before the appointment is approved.

[174] Moreover, the fact that the s. 76(1) summons power may give an investigator access to documents and information that could only be obtained through a warrant in other contexts

carries little weight. For the purposes of s. 8 of the Charter, it is the claimant's reasonable expectation of privacy that defines the scope of the constitutional protection. In the context of a self-governing professional regulatory scheme where the regulator has reasonable and probable grounds to believe that a member has committed an act of professional misconduct, a member has a limited expectation of privacy in relation to an authorized investigation.

[175] Practising a profession such as medicine is not a right; rather, it is a privilege conferred by statute where a person possesses the necessary qualifications and undertakes to abide by the governing regulatory regime.

[176] In this regard, s. 1(1), paras. 33 and 34 of O. Reg. 856/93 make it clear that, as the regulator of a self-governing profession, the College relies on standards established by its members to determine what types of conduct will constitute acts of professional misconduct. This includes conduct that in other contexts -- including in other professional regulation contexts -- might otherwise be considered private.

[177] So, for example, a consensual sexual relationship between a physician and a patient is prima facie considered professional misconduct under the Code and is punishable by mandatory revocation of the physician's licence: Rosenberg v. College of Physicians and Surgeons of Ontario, [2006] O.J. No. 4380, 275 D.L.R. (4th) 275 (C.A.). By contrast, there is no such automatic prohibition on lawyers having sexual relations with clients: [page453] see Law Society of Upper Canada, Rules of Professional Conduct, rule 2.04.

[178] I repeat the relevant sections of the Medicine Act regulation, O. Reg. 856/93 for ease of reference:

> 1(1) The following are acts of professional misconduct for the purposes of clause 51(1)(c) of the Health Professions Procedural Code:
>
> . . . . .
>
> 33. An act or omission relevant to the practice of medicine that, having regard to all the

circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.

34. Conduct unbecoming a physician.

[179] Where conduct would be regarded as professional misconduct by other members of the profession, it can hardly be surprising to a member that he or she would be subject to investigation by the regulator where the regulator has reasonable grounds to believe that the member has engaged in such conduct.

[180] Moreover, once the grounds for a professional misconduct investigation exist, a member has a professional duty to co-operate with the regulator's investigation: s. 76(3.1) of the Code. Viewed in this light, it is difficult to understand the nature of the member's reasonable expectation of privacy concerning matters relevant to the investigation.

[181] As for members of the public, they are not the target of the investigation and an investigator has a broad duty of confidentiality in relation to the information they provide. This duty is set out in s. 36 of the Regulated Health Professions Act, 1991, and reproduced in Appendix B.

[182] Further, I reject the appellant's arguments that the Divisional Court erred by overemphasizing the criminal/ regulatory distinction drawn in Thomson Newspapers and McKinlay Transport, and the distinctions that exist between a summons and a search warrant.

[183] In my view, the Divisional Court properly recognized that these were important, but not conclusive, factors in the necessary contextual analysis.

[184] On the facts of this case, the crucial factors were (i) the context at issue -- that of a self-governing professional regulatory scheme; (ii) the requirement for the registrar to certify that he or she has reasonable and probable grounds to believe the member has committed an act of professional misconduct; and (iii) the requirement that the Executive

Committee of the College review and approve that decision.

[185] In my opinion, the Divisional Court correctly held that the s. 76(1) summons power, as it arises in the context of [page454] investigators appointed under s. 75(1)(a) of the Code, does not contravene s. 8 of the Charter.

[186] As for the issues raised by the fact situations involving the intervenor doctors, it remains to be determined whether the College could, through the use of the summons power, obtain and rely on information in the hands of the Crown or the police that was seized unlawfully.

[187] In my view, that issue is properly determined on an application under ss. 8 and 24(2) of the Charter. As I have said, the fact that the summons power may be exercised in a manner that violates the Charter does not itself render the power unconstitutional.

E. The Abuse of Process Issue

(1) Introduction

[188] As I have explained, the appellant brought his initial motion for a stay of proceedings in April 2007, shortly before the discipline hearing was to begin. At the motion, he argued that the delay in bringing this matter forward amounted to an abuse of process.

[189] The Discipline Committee heard the initial abuse of process motion over four days in April and May 2007 -- it dismissed the motion in June 2007.

[190] The appellant renewed the abuse of process motion about a year later, after the presentation of the evidence on the merits was completed. In February 2009, the Discipline Committee released its decision dismissing the renewed motion concurrent with its findings on the merits.

[191] Before the Discipline Committee, it was undisputed that there had been a lengthy delay in bringing the appellant's case forward and that the delay was in large part attributable to the College's decision to await the outcome of the criminal

proceedings before moving forward with its own misconduct investigation and prosecution.

[192] The notice of hearing in respect of all the allegations was issued in March 2006. This was

-- more than 15 years after the College first learned about J.H.'s allegations and more than five years after the criminal proceedings in relation to J.H. had come to an end;

-- more than seven years after the College first learned about G.M.'s allegations and almost two years after the criminal proceedings in relation to G.M. had come to an end; and [page455]

-- more than seven years after the College first learned about B.M.'s allegations, and about a month before the criminal proceedings in relation to B.M. were stayed.

[193] Despite the length of the delay, the Discipline Committee found that it did not constitute an abuse of process. In reaching its conclusion, the Discipline Committee relied heavily on the leading case of Blencoe v. British Columbia (Human Rights Commission), [2000] 2 S.C.R. 307, [2000] S.C.J. No. 43, 2000 SCC 44.

[194] As Blencoe was crucial to the Discipline Committee's analysis, I will review it in some detail.

(2) Blencoe

[195] The main issues before the Supreme Court of Canada in Blencoe were whether the Charter applies to the actions of the British Columbia Human Rights Commission and whether the British Columbia Court of Appeal was correct in holding that the respondent's s. 7 rights to liberty and security of the person were violated by state-caused delay in a human rights proceeding.

[196] Although the Supreme Court determined that the Charter applies to the actions of the commission, it concluded that the Court of Appeal erred in holding that the delays in that case

deprived the respondent of his s. 7 Charter rights.

[197] As part of his discussion of the s. 7 issue, Bastarache J., writing for the majority, noted, at para. 88, that s. 11(b) of the Charter "has no application in civil or administrative proceedings" and that there is no "constitutional right outside the criminal context to be 'tried' within a reasonable time".

[198] After determining the s. 7 issue, Bastarache J. turned to the question of whether the respondent was entitled to a remedy pursuant to administrative law principles.

[199] At the outset of this discussion, Bastarache J. explicitly rejected the proposition that delay in bringing forward an administrative proceeding can, on its own, constitute an abuse of process. He explained, at para. 101: "[D]elay, without more, will not warrant a stay of proceedings as an abuse of process at common law. Staying proceedings for the mere passage of time would be tantamount to imposing a judicially created limitation period" (citations omitted).

[200] Rather, Bastarache J. held [at para. 101]: "In the administrative law context, there must be proof of significant prejudice which results from an unacceptable delay." He proceeded to explain that this prejudice can take two different forms. [page456]

[201] First, Bastarache J. noted that it is well-established that the passage of time may taint the quality of the evidence presented at the administrative hearing such that a stay of proceedings is required.

[202] At para. 102, he explained: "Where delay impairs a party's ability to answer the complaint against him or her, because, for example, memories have faded, essential witnesses have died or are unavailable, or evidence has been lost," the proceedings may be rendered unfair and a stay of proceedings will be appropriate.

[203] In Blencoe, the application judge [[1998] B.C.J. No.

320, 49 B.C.L.R. (3d) 201 (S.C.)] had rejected the respondent's claims of prejudice impacting the fairness of the hearing (including allegations that two witnesses had died and that the memories of many witnesses may have faded) as "vague assertions that fall far short of establishing an inability to prove facts necessary to respond to the complaints". Bastarache J. found that the respondent had not established any basis upon which to interfere with the application judge's findings in this regard.

[204] At para. 115, Bastarache J. concluded, that even if the passage of time has not affected the fairness of the hearing, a second form of prejudice, such as psychological harm or stigma attaching to a person's reputation, can be sufficient to give rise to an abuse of process.

[205] However, to give rise to an abuse of process, delay in such circumstances must be "inordinate" and cause "actual prejudice of such magnitude that the public's sense of decency and fairness is affected". [See Note 5 below]

[206] Moreover, this personal form of prejudice must be directly caused by the delay in the administrative proceedings, and not by the underlying events giving rise to those proceedings.

[207] Bastarache J. explained, at para. 122, that the determination of whether a delay has become inordinate "is not based on the length of the delay alone, but on contextual factors" such as the nature and complexity of the case, the purpose and nature of [page457] the proceedings, and the applicant's role in contributing to or waiving the delay.

[208] Quoting L'Heureux-Dub J. in R. v. Power, [1994] 1 S.C.R. 601, [1994] S.C.J. No. 29, at p. 616 S.C.R., he held that the court must find that the proceedings would be "unfair to the point that they are contrary to the interests of justice". He noted that cases of this nature will be "extremely rare" (at para. 120) and will merit a stay of proceedings only in "the clearest of cases" (at para. 118).

(3) The appellant's initial motion for a stay of

proceedings

[209] Before the Discipline Committee, the appellant argued that the College's delay in bringing his case forward caused both types of prejudice discussed in Blencoe, and that a stay was the only appropriate remedy.

[210] After reviewing the relevant passages of Blencoe and the chronology of the proceedings, the Discipline Committee began its analysis by noting that while pre-complaint delay is not the fault of the College, an abuse of process will occur if the member is prejudiced in making full answer and defence.

[211] The Discipline Committee observed that at the time the College was notified of the criminal investigations involving the appellant, it was the practice for administrative bodies to await the outcome of criminal charges before proceeding with discipline hearings.

[212] The Discipline Committee acknowledged that in three "benchmark" cases, discipline proceedings that awaited the outcome of criminal proceedings were stayed because of inordinate delay: Stinchcombe v. Law Society of Alberta, [2002] A.J. No. 544, 2002 ABCA 106, 212 D.L.R. (4th) 675; Misra v. College of Physicians and Surgeons of Saskatchewan, [1988] S.J. No. 342, 52 D.L.R. (4th) 477 (C.A.); and Thomson v. College of Physicians and Surgeons of British Columbia, [1998] B.C.J. No. 1750, 65 B.C.L.R. (3d) 209 (S.C.).

[213] In Stinchcombe and Misra, the discipline proceedings were stayed in part because the professionals involved had been suspended and therefore deprived of their livelihood during the lengthy periods of delay.

[214] By contrast, the Discipline Committee held that the appellant's case was clearly distinguishable because the practice restrictions imposed on him were not tantamount to a suspension.

[215] The initial voluntary undertaking that he gave to the College (which required him to have another adult present when

he examined patients under age 16) conformed to his bail conditions. He subsequently agreed to a modification of the [page458] undertaking requiring that the adult present during medical examinations had to be pre-approved by the College. Finally, the conditions that the College imposed when the appellant's case was referred to the Discipline Committee were not of the magnitude of a suspension (the College prohibited the appellant from seeing any patients under age 16).

[216] The Discipline Committee found that these practice restrictions did not cause any significant prejudice. The appellant's own evidence was that by 2000, he had almost no children in his practice, and that he continued to maintain a "vibrant" practice even as the discipline proceedings got underway in 2007.

[217] The Discipline Committee explained that in the third "benchmark" case, Thomson, discipline proceedings were stayed due to delay in part because the professional had requested a timely hearing on the merits and the disciplinary body had refused. Again by contrast, the Discipline Committee observed that the appellant had not requested an earlier discipline hearing on the merits of the allegations against him.

[218] Further, although s. 28 of the Code states that a panel of the Complaints Committee is required to make a decision regarding a complaint within 120 days, this time frame is a guideline not a mandatory requirement: Katzman v. Ontario College of Pharmacists, [2001] O.J. No. 586 (Div. Ct.), revd on other grounds [2002] O.J. No. 4913, 223 D.L.R. (4th) 371 (C.A.).

[219] In the end, the Discipline Committee found that it was not practical to proceed with the discipline hearing in this case until all of the complainants' cases were completed in the criminal courts. Further, the Discipline Committee concluded that the delay of 14 months from the date on which the charges against B.M. were stayed (April 2006) to June 2007 was not excessive and that the overall delay was not inordinate. The

Discipline Committee said:

> It would not have been practical, nor desirable from a fairness point of view, for [the appellant] to face a discipline hearing at the same time that he was required to answer to criminal charges. It was also more practical for the College to await the results of the criminal trial, as a subsequent lengthy discipline hearing on the merits of the allegations may not have been required had [the appellant] been convicted. The criminal process took a considerable period of time, as there were delays due to appeals to the Court of Appeal and the Supreme Court of Canada, with the result that both [the G.M. and the B.M.] cases were stayed.
>
> . . . . .
>
> A conviction on just one of the allegations would have obviated the need for hearing. Moreover, investigating the complainants independently may have tainted the criminal proceedings. Scheduling discipline hearings would have been difficult given the constraints with the criminal court process. [page459]
>
> . . . . .
>
> Since first learning of [the J.H.] allegations in 1991, the College investigations department has kept a file on [the appellant] and, although it was not always active, the investigations department monitored the physician at times, and monitored the subsequent criminal proceedings as well. The complexity of the cases with multiple complainants in the ensuing criminal process contributed to the delay. The time required for a regulatory College to investigate and process complaints and for the hearings to be scheduled all contributed to the time delay. Some of the delay has also been due to [the appellant's] motions that have preceded the scheduled discipline hearing in June 2007. Although the time in bringing these allegations to the Discipline Committee has been lengthy, it has not been inordinate.

[220] The Discipline Committee then turned to the issue of whether the appellant had demonstrated significant prejudice to his right to a fair hearing caused by delay or other relevant

factors.

[221] The appellant itemized several forms of prejudice which he claimed he had suffered:

-- he was forced to sell his office building in 2004 due to personal financial circumstances resulting from his legal fees;

-- he was precluded from acting as the ringside doctor for amateur boxing events because of practice restrictions;

-- he found the practice restrictions humiliating to explain to patients and their parents;

-- media coverage had been humiliating and a source of distress;

-- he suffered from anxiety and depression;

-- he was deprived of the evidence of various witnesses who died between 1982 and 2005; and

-- he was deprived of the evidence of the layout of his house and his clinic because they were demolished or destroyed in 1995 and 1997, respectively.

[222] The Discipline Committee considered each of these claims and rejected the appellant's assertion that he had suffered significant prejudice. With the exception of the last two claims, the Discipline Committee was not persuaded that the College proceedings, as opposed to the criminal proceedings, were a significant contributing factor to any prejudice the appellant suffered. Concerning the alleged loss of evidence, the Discipline Committee was satisfied that the appellant had adequate alternate sources of evidence with respect to any of the lost evidence that was of any significance. [page460]

[223] Although the delay between the alleged professional misconduct and the hearing was lengthy, the Discipline Committee was not satisfied that the appellant's right to make full answer and defence had been substantially prejudiced, nor

did he experience significant personal prejudice as a result of the administrative delay. Having regard to the nature of the case, the purpose and nature of the proceedings and the public interest in ensuring that the issues were dealt with, the Discipline Committee concluded that this was not an appropriate case for a stay of proceedings.

(4) The appellant's renewed motion for a stay

[224] After he testified, the appellant renewed his motion for a stay of proceedings based on abuse of process. He argued that the complainants had provided new evidence bearing on the significance of the lost evidence and the prejudice suffered as a result of pre-charge delay.

[225] The College argued that it was apparent from the appellant's testimony that he had a clear recollection of his interactions with the complainants and was not at all hampered in raising a defence to the allegations.

[226] The Discipline Committee remained satisfied that the appellant had adequate alternate sources of evidence with respect to any significant aspects of the lost evidence.

(5) The Divisional Court's reasons

[227] The appellant appealed the dismissal of his stay motions to the Divisional Court along with his appeal on the merits. At the outset of its analysis, the Divisional Court noted that deference was owed to the facts found by the Discipline Committee respecting prejudice and the impact of the delay on the hearing process. However, the Discipline Committee was required to be correct with respect to the legal principles that apply to the appellant's claims of abuse of process and denial of natural justice.

[228] The Divisional Court addressed four main issues in its reasons:

-- was the delay inordinate;

-- was there a denial of natural justice because of lost evidence;

-- was the investigative delay an abuse of process; and

-- did the delay amount to an abuse of process that would bring the administration of justice into disrepute? [page461]

[229] Concerning the inordinate delay issue, the Divisional Court was satisfied that the Discipline Committee set out the correct legal test and considered the appropriate factors in concluding that the delay was not inordinate.

[230] Although the Divisional Court observed that the delay between criminal charges and the disciplinary action by the College was lengthy and gives rise to concern, it agreed with the Discipline Committee's conclusion that it was reasonable for the College to await the outcome of all the criminal proceedings before pursuing disciplinary proceedings.

[231] Concerning the lost evidence issue, the Divisional Court noted that the Discipline Committee was in the best position to determine the impact of the lost evidence on the fairness of the proceeding. The court went on to hold that the Discipline Committee's conclusion that the appellant did not suffer significant prejudice as a result of lost evidence was reasonable. Accordingly, the Discipline Committee's finding that delay in this case did not amount to a denial of natural justice was correct.

[232] Concerning the investigative delay issue, the Divisional Court agreed with the Discipline Committee that s. 28 of the Code did not impose a deadline for the investigation in this case. Citing Stanley v. Ontario (Health Professions Appeal and Review Board), [2003] O.J. No. 2196, 172 O.A.C. 56 (Div. Ct.), at para. 16, the Divisional Court stated there are no statutory guidelines or time limits on the investigation of matters reported to the Executive Committee of the College.

[233] The Divisional Court also agreed with the Discipline Committee that the decisions in Misra and Stinchcombe do not assist the appellant in this case. This is not one of the clear cases where there has been real prejudice to the appellant's

ability to make full answer and defence.

[234] Finally, the Divisional Court rejected the appellant's submission that the negative impact of the delay on his reputation, his mental health and his lifestyle generally was so serious as to bring the administration of justice into disrepute. As the Discipline Committee had done, the Divisional Court noted that the appellant was not subject to a suspension during the lengthy pre-hearing period. On the contrary, even under practice restrictions, the evidence showed that the appellant maintained a very healthy practice comprised mainly of elderly patients. The Divisional Court also agreed with the Discipline Committee's conclusion that most of the stigma and stress the appellant experienced arose from the criminal proceedings, not from the delay in the College proceedings. [page462]

[235] The Divisional Court concluded by holding that the public interest was served by considering the allegations against the appellant on the merits. It explained, at paras. 227-28:

> Here, there were very serious allegations that four young boys had been sexually abused. The College was acting in the public interest by investigating and taking disciplinary action in order to protect other patients or potential patients of the appellant. As well, the complainants had an interest in having their complaints determined on the merits.
>
> We conclude that this is not one of the rare cases where the delay was so inordinate that proceeding with the disciplinary hearing has brought the system of administrative justice into disrepute. The committee did not err in refusing to stay the proceedings on the ground of inordinate delay.

(6) The appellant's position in this court

[236] In his written submissions to this court, the appellant takes issue with the reasonableness of the Discipline Committee's factual findings regarding the impact of the lost evidence as well as the correctness of its legal conclusions

regarding the abuse of process claim. In oral argument before us, counsel for the appellant submitted that even if the findings on lost evidence were reasonable, it was open to us to conclude that the delay was simply too long, and the impact on the appellant too great, to be considered acceptable.

(7) Discussion

[237] In my view, the appellant has failed to identify any reversible error in the Divisional Court's review of the Discipline Committee's findings concerning the impact of the delay on the fairness of the appellant's hearing. As was noted by the Divisional Court, and as has been acknowledged by the appellant, the Discipline Committee was in the best position to determine that issue and its findings are entitled to considerable deference.

[238] Accordingly, I do not propose to review all of the pieces of lost evidence the appellant submits impaired his ability to respond fully to the allegations against him. Suffice it to say, I agree with the Divisional Court's conclusion that the committee's findings were reasonable in the circumstances.

[239] To take but one example, the appellant submits that the death of his mother during the period of "pre-charge delay" prejudiced his ability to defend himself against the allegations of sexual misconduct.

[240] In dismissing the initial motion for a stay in June 2007, the Discipline Committee observed that the appellant's mother passed away years before the College learned of any of the allegations against him. The committee also observed that it was [page463] difficult to conclude that the appellant had been significantly prejudiced by the loss of her potential evidence since, although the appellant lived with his mother at the relevant time, there was no suggestion that she was actually present when the abuse occurred.

[241] In its reasons dismissing the renewed abuse of process motion following the hearing of evidence, the Discipline Committee acknowledged that the appellant's mother might have

been able to speak to some of the issues that arose in the complainants' testimony. However, it went on to note that some of this evidence was elicited in cross-examination of the complainants, and in any event, the committee had determined that the appellant's mother was not present during any of the incidents of abuse. Most importantly, the committee reiterated that there could be no prejudice arising from the College's investigative delay given that the appellant's mother died nearly a decade before the first allegations against the appellant were raised.

[242] The Divisional Court agreed with the Discipline Committee's findings respecting this and other pieces of lost evidence. I see no reason to interfere with its conclusion.

[243] With regard to the appellant's argument that the delay in this case was simply too long to be countenanced regardless of the impact of the lost evidence, three points must be borne in mind.

[244] First, as I explained earlier, Blencoe makes it clear that the mere passage of time, without more, does not give rise to an abuse of process. Rather, the reviewing court must adopt a contextual approach that takes account of all of the circumstances surrounding the delay.

[245] In this case, that context included allegations against the appellant involving multiple complainants who were likely to be called as similar fact witnesses in each of the criminal proceedings. As the Discipline Committee held, it would have been impractical and unfair to the appellant for the College to pursue misconduct charges in respect of one or more of these complainants until after the criminal proceedings had been fully resolved.

[246] Second, and importantly, the appellant failed to demonstrate that he suffered actual, significant prejudice caused by the delay in the College proceedings of a magnitude that would bring the administration of justice into disrepute.

[247] Again, the Discipline Committee found that the practice

restrictions imposed on the appellant were not particularly onerous, were consistent with his bail restrictions, and on his own evidence did not prevent him from maintaining a "vibrant" practice. Similarly, the committee found that whatever stress [page464] and stigma the appellant experienced arose primarily from the fact of the allegations and the criminal charges, not from the College's delay in bringing the matter forward. These findings were upheld as reasonable by the Divisional Court and the appellant has failed to demonstrate any basis upon which this court should revisit them.

[248] Finally, as the Divisional Court observed, there was a strong public interest in having the appellant's case considered on the merits. The allegations against the appellant were extremely serious. The various criminal charges were stayed for reasons that had nothing to do with the strength of the evidence against him. The College has not just the right but the duty to protect the public from members who may pose a danger. In my view, a stay of discipline proceedings in these circumstances would not enhance public confidence in the administration of justice; it would imperil it.

F. Conclusion

[249] For the foregoing reasons, the appeal is dismissed. No costs were sought or awarded in the Divisional Court. Similarly, no costs are sought or awarded in this court.

Appeal dismissed.

Appendix A

Health Professions Procedural Code, being Schedule 2 to the Regulated Health Professions Act, 1991, S.O. 1991, c. 18

Investigators

75(1) The Registrar may appoint one or more investigators to determine whether a member has committed an act of professional misconduct or is incompetent if,

(a) the Registrar believes on reasonable and probable grounds that the member has committed an act of professional misconduct or is incompetent and the Executive Committee approves of the appointment;

(b) the Executive Committee has received a report from the Quality Assurance Committee with respect to the member and has requested the Registrar to conduct an investigation; or

(c) the Complaints Committee has received a written complaint about the member and has requested the Registrar to conduct an investigation. [page465]

Appendix B

Regulated Health Professions Act, 1991, S.O. 1991, c. 18

Confidentiality

36(1) Every person employed, retained or appointed for the purposes of the administration of this Act, a health profession Act or the Drug and Pharmacies Regulation Act and every member of a Council or committee of a College shall keep confidential all information that comes to his or her knowledge in the course of his or her duties and shall not communicate any information to any other person except,

(a) to the extent that the information is available to the public under this Act, a health profession Act or the Drug and Pharmacies Regulation Act;

(b) in connection with the administration of this Act, a health profession Act or the Drug and Pharmacies Regulation Act, including, without limiting the generality of this, in connection with anything relating to the registration of members, complaints about members, allegations of members' incapacity, incompetence or acts of professional misconduct or the governing of the profession;

(c) to a body that governs a health profession inside or outside of Ontario;

(d) as may be required for the administration of the Drug Interchangeability and Dispensing Fee Act, the Healing Arts Radiation Protection Act, the Health Insurance Act, the Independent Health Facilities Act, the Laboratory and Specimen Collection Centre Licensing Act, the Ontario Drug Benefit Act, the Coroners Act. the Controlled Drugs and Substances Act (Canada) and the Food and Drugs Act (Canada);

(e) to a police officer to aid an investigation

undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

(f) to the counsel of the person who is required to keep the information confidential under this section;

. . . . .

(j) with the written consent of the person to whom the information relates.

Reports required under Code

(1.1) Clauses (1)(c) and (d) do not apply with respect to reports required under section 85.1 or 85.2 of the Code.

Definition

(1.2) In clause (1)(e),

"law enforcement proceeding" means a proceeding in a court or tribunal that could result in a penalty or sanction being imposed. [page466]

Limitation

(1.3) No person or member described in subsection (1) shall disclose, under clause (1)(e), any information with respect to a person other than a member.

No requirement

(1.4) Nothing in clause (1)(e) shall require a person described in subsection (1) to disclose information to a police officer unless the information is required to be produced under a warrant.

. . . . .

Not compellable

(2) No person or member described in subsection (1) shall be compelled to give testimony in a civil proceeding with

regard to matters that come to his or her knowledge in the course of his or her duties.

Evidence in civil proceedings

(3) No record of a proceeding under this Act, a health profession Act or the Drug and Pharmacies Regulation Act, no report, document or thing prepared for or statement given at such a proceeding and no order or decision made in such a proceeding is admissible in a civil proceeding other than a proceeding under this Act, a health profession Act or the Drug and Pharmacies Regulation Act or a proceeding relating to an order under section 11.1 or 11.2 of the Ontario Drug Benefit Act.

Notes

Note 1: The stay was apparently entered by the Crown when the trial judge refused to grant a Crown request for an adjournment. A memo to file by a College investigator suggests the Crown hoped to lift the stay and reinstitute the prosecution if the charges involving the third complainant could "catch up" within a one-year period.

Note 2: In 2009, s. 75 was amended to transfer the approval function from the Executive Committee to the Inquiries, Complaints and Reports Committee: Health Systems Improvements Act, 2007, S.O. 2007, c. 10. This change took place after the time period at issue in this appeal and the parties made no mention of it.

Note 3: The wording of this section was recently amended to conform to the new Public Inquiries Act, 2009, which came into force on June 1, 2011. The section now reads: "An investigator may inquire into and examine the practice of the member to be investigated and section 33 of the Public Inquiries Act, 2009 applies to that inquiry and examination." For the purposes of this appeal, nothing turns on this change to the statutory language.

Note 4: In Krop v. College of Physicians and Surgeons of Ontario, [2002] O.J. No. 308, 156 O.A.C. 77 (Div. Ct.), leave to appeal refused [2002] S.C.C.A. No. 382, the Divisional Court rejected the proposition that the appointment of an investigator requires that the registrar spell out a specific act or acts of professional misconduct to avoid "fishing expeditions". The court held, at para. 17, that it was "neither unfair nor unreasonable to direct an investigation of the member's practice as opposed to itemizing each act". The court explained that the appointment is an administrative, not a criminal process, that initiates an investigation and not a prosecution. Dr. Krop did not seek leave to appeal on this aspect of the Divisional Court's decision, and, in any event, the constitutional dimension of the issue was not raised or discussed in that case.

Note 5: The minority in Blencoe would have concluded that unreasonable delay is not limited to situations that bring the administrative system into disrepute either by prejudicing the fairness of the hearing or by otherwise "rising above a threshold of shocking abuse". Rather, it was prepared to recognize that, depending on the circumstances of the case, a delay may be unreasonable but fall short of the threshold required to justify a stay of proceedings. In such a case, a lesser remedy such as an order for an expedited hearing and/or for costs would be appropriate: Blencoe, at para. 155.
