Case Name:

Coffey v. College of Licensed Practical Nurses of Manitoba

Between
Paul Coffey, Appellant, and
College of Licensed Practical Nurses of Manitoba, Respondent

[2008] M.J. No. 116

2008 MBCA 33

Docket: AI07-30-06592

Manitoba Court of Appeal

M.A. Monnin, M.H. Freedman and A.D. MacInnes JJ.A.

Heard: October 16, 2007.
Judgment: April 1, 2008.

(70 paras.)

Health law -- Health care professionals -- Discipline -- Evidence -- Punishment -- Particular professions -- Nurses -- Professional misconduct -- Appeal by licensed practical nurse and member of the College of Licensed Practical Nurses of Manitoba from a decision of a panel of the discipline committee of the College finding him guilty of professional misconduct and conduct unbecoming a licensed practical nurse -- Conduct in question involved solicitation that contained false, inaccurate and misleading information, which was circulated outside of the membership -- Appeal dismissed -- Decision of the Panel fell clearly within the "range of possible, acceptable outcomes which were defensible in respect of the facts and law".

Professional responsibility -- Discipline -- Appeals and judicial review -- Grounds -- Professional misconduct -- Appeal by licensed practical nurse and member of the College of Licensed Practical Nurses of Manitoba from a decision of a panel of the discipline committee of the College finding him guilty of professional misconduct and conduct unbecoming a licensed practical nurse -- Conduct in question involved solicitation that contained false, inaccurate and misleading information, which was circulated outside of the membership -- Appeal dismissed -- Decision of the Panel fell clearly within the "range of possible, acceptable outcomes which were defensible in respect of the facts and law".

Professional responsibility -- Professions -- Health care -- Nurses -- Appeal by licensed practical nurse and member of the College of Licensed Practical Nurses of Manitoba from a decision of a panel of the discipline committee of the College finding him guilty of professional misconduct and conduct unbecoming a licensed practical nurse -- Conduct in question involved solicitation that contained false, inaccurate and misleading information, which was circulated outside of the membership -- Appeal dismissed -- Decision of the Panel fell clearly within the "range of possible, acceptable outcomes which were defensible in respect of the facts and law".

Appeal by licensed practical nurse and member of the College of Licensed Practical Nurses of Manitoba from a decision of a panel of the discipline committee of the College finding him guilty of professional misconduct and conduct unbecoming a licensed practical nurse. The Panel imposed a reprimand and costs. The appellant was engaged in a dispute with the College involving fees charged to members. He sued the College in a small claims action, and lost. He appealed to the Court of Queen's Bench, and lost. He then attempted to solicit support from other members for the convening of a special meeting of the College to deal with fees and other matters. It was aspects of that solicitation that led the College to direct an investigation into the appellant's conduct and then to lay charges. The principal problems with the solicitation, from the College's perspective, were that it contained false, inaccurate, erroneous and misleading information in respect of staff salaries, and that it circulated outside the licensed practical nurse membership. In the Panel's opinion, those factors, taken together, brought the profession into disrepute and constituted unprofessional conduct. The appellant maintained that any errors he made in the solicitation were no more than errors in judgment, not in any way rising to the level warranting professional discipline. He argued that he had been punished because he had challenged the College, and had made life difficult for those administering the affairs of the college.

HELD: Appeal dismissed. The decision of the Panel fell clearly within the "range of possible, acceptable outcomes which were defensible in respect of the facts and law". The degree of deference to the Panel's decision intended by the Act to be shown by the court on appeal of that decision was fairly high. The standard of review was therefore reasonableness. The appellant had the burden of persuading the court that "there is no line of analysis within the ... reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived". The reasons of the Panel demonstrated that it considered all of the evidence before it. The appellant knew that the Union mailing list included non-licensed practical nurses. Moreover, in his evidence the appellant acknowledged that non-licensed practical nurses were among the persons who would receive the solicitation. Second, there was evidence that the solicitation contained false information relating to staff salaries. That false information impugned the integrity of the College's officers and staff.

Statutes, Regulations and Rules Cited:

Licensed Practical Nurses Act, C.C.S.M., c. L.125, s. 4(5), s. 47

Counsel:

S. Green, Q.C. for the Appellant.

C.P. McNicol for the Respondent.

The judgment of the Court was delivered by

M.H. FREEDMAN J.A.:--

OVERVIEW

1 The appellant is a licensed practical nurse (LPN), and a member of the College of Licensed Practical Nurses of Manitoba (the College) continued by *The Licensed Practical Nurses Act*, C.C.S.M., c. L.125 (the *Act*). A panel (the Panel) of the discipline committee of the College found him guilty of professional misconduct and conduct unbecoming an LPN, and imposed a reprimand and costs. He has appealed the findings of the Panel, pursuant to a right of appeal contained in s. 47 of the *Act*. For the reasons which follow, it is my opinion that his appeal must be dismissed.

2 The appellant was engaged in a dispute with the College involving fees charged to members. He sued the College in a small claims action, and lost. He appealed to the Court of Queen's Bench, and lost. He then

attempted to solicit support from other members for the convening of a special meeting of the College to deal with fees and other matters. It was aspects of that solicitation that led the College to direct an investigation into the appellant's conduct and then to lay charges. The principal problems with the solicitation, from the College's perspective, were (i) that it contained false, inaccurate, erroneous and misleading information in respect of staff salaries, and (ii) that it was circulated outside the LPN membership. In the Panel's opinion, these factors, taken together, brought the profession into disrepute and constituted unprofessional conduct.

3 The appellant acknowledged that he had been a thorn in the side of the administration of the College, but said that he was simply exercising his right, as a member, to challenge that administration. Any errors he made in the solicitation were no more than errors in judgment, not in any way rising to the level warranting professional discipline. He argued that he had been punished because he had challenged the College, and had made life difficult for those administering the affairs of the College.

FACTS

4 The appellant became a member of the College in 1993. His dispute with the College relating to fees commenced about ten years later. His complaint was that, as a consequence of the College changing the registration year for members, all members had been charged twice for the month of December 2002. The College disagreed, and its view prevailed in the court process.

5 Even before the matter went to court there was tension between the appellant and the College. The appellant had sought information from the College but he was not satisfied with what it gave him. In response to one request he made in September 2003, the College turned the matter over to its lawyers. They wrote to the appellant on November 24, 2003, as follows:

> The College has attempted on numerous occasions to explain to you the changes made to the registration year and the fact that there has been no duplication of licensing fees paid by the members for the month of December 2002 as you suggest. ...
>
> Notwithstanding the explanations of the College, you continue to convey misleading or false information to other members and to the public concerning the change in registration year and the payment of licensing fees.
>
> The College considers your ongoing conduct in this regard to be unbecoming of a member. Accordingly, be advised that unless you immediately cease and desist from making any further false or misleading statements concerning the registration fee and change in registration year, and/or if you continue to persist in your complaints concerning the College regarding this matter, the College will have no alternative but to consider formal charges against you for conduct unbecoming a member.

6 The appellant continued to request information from the College. For example, in March 2005, shortly before the Queen's Bench decision was released, the appellant wrote the College asking for minutes of board meetings for four years, annual reports, budgets, and a variety of other data. This was met by the College with a response from its lawyers on March 17, 2005, as follows:

> In your correspondence you request a great deal of information, some of which is not generally made available to members, some of which has yet to be generated and some of which dates back six years. To the extent the requested information has been provided through publications and annual reports, it has previously been made available to you. To the extent that it will be contained in future publications and reports, you will have access to same. As for the information which is contained in documents which are not generally made available to members, such disclosure has not and will not be made. With some 2,600 members, you should readily understand that the College does not have the time or resources to search out copies and furnish, again, the information

> which you have requested, spanning the period from 1999 to 2005. Therefore, on behalf of the College, we must respectfully declined [*sic*] your request.
>
> Over the past several years, you have embarked upon a form of personal attack against and/or made unreasonable inquiries concerning various staff/representatives of the College. An inordinate amount of time and energy has been consumed in dealing with your numerous assertions and requests. Your continual contact by telephone and by mail has caused various staff and Board members of the College to feel harassed and threatened. This situation cannot continue.
>
> We have been asked by the College to advise you that College staff will no longer respond to your calls and that all future communications with the College or any staff or Board members thereof is to be directed to the writer. Should you fail to comply with this request, further action will be considered. ...

7 The decision of the Queen's Bench judge, to the effect that the College had not double-charged fees to its members, was issued on April 20, 2005. The appellant was not happy with this decision. Other correspondence followed, and then on July 14, 2005, the appellant wrote to the College. He enclosed with his letter the solicitation referred to earlier. In his letter to the College he said that he was exercising his right to solicit five per cent of the membership to request a meeting. Section 4(5) of the *Act* requires the Board to convene a special general meeting if five per cent of the members so request.

8 The solicitation runs several pages, and very little of it is relevant for these purposes. What is relevant is now reproduced:

> **ATTENTION LPNs**
>
> ***Request for Special Meeting of CLPNM***
>
> Please pass this information to an LPN, feel free to photocopy. Are you aware you had two registrations for December 2002? Are you aware no nurses paid a late fee in 2002? Are you aware we paid six staff 405 thousand dollars to operate our College in 2004 and there was a 49% increase in salaries over a two-year period? ... Whether you **approve or disapprove** of the following resolutions please sign this request if you believe CLPNM should hold a special meeting to decide these matters as per our Legislated rights LPN ACT 4(5). Please return signed request to:
>
> Paul Coffey
>
> ...
>
> [original emphasis]

9 There followed six resolutions, dealing mainly with salaries and fees.

10 The appellant was the president of his local chapter of the Manitoba Nurses' Union (the Union). The Union comprises persons who are LPNs, registered nurses and registered psychiatric nurses. As the local president, he had a mailing list with the names and addresses of all local presidents. In the Panel's decision it was found that: "[h]e had available to him a list of approximately 600 members of the Union, which would include all of the local presidents, vice-presidents, secretaries, etc. He testified that he randomly chose 50 members and mailed them his solicitation."

11 Some of the recipients of the solicitation were not LPNs (i.e., they were either registered nurses or registered psychiatric nurses). The solicitation caused some concern at the Union level, and a few days after it had been sent out, the president of the Union sent a memo to all board members and

regional/local/worksite presidents, stating:

> Recently a member of the Manitoba Nurses' Union circulated information and a petition requesting a special meeting of the College of Licensed Practical Nurses of Manitoba.
>
> **The information was not circulated by, nor was it an initiative of the Manitoba Nurses' Union.**
>
> [original emphasis]

12 The College then wrote to the appellant and put an investigation in motion. Subsequently, charges were laid.

THE CHARGES AND THE HEARING

13 The charges against the appellant are dated May 12, 2006, and are several pages in length. The essence of the charges is that the appellant was guilty of professional misconduct and conduct unbecoming an LPN in the two main respects referred to earlier, namely, by circulating information about salaries which he knew or ought to have known was false, and by circulating his solicitation to persons who were not LPNs.

14 Under the *Act*, a panel is composed of three members of the discipline committee, one of whom is a public representative (not an LPN or a health professional). The Panel was constituted to hear evidence in this matter. At the hearing, the College witnesses testified about the inaccurate salary information in the solicitation, and in particular that any increase in salaries did not come close to the 49 per cent increase over two years alleged by the appellant. This evidence, which does not appear to have been seriously called into question, was that staff received no increase from 1997 to 2001, an eight per cent increase in 2002 and a five per cent increase in 2003.

15 At the material time Lynn Marks was the president of the College. She testified that it was a surprise and a shock to see that the fee dispute with the appellant had not ended with the judicial decision and that he was still engaged in the fight. The administration was upset with the inaccuracies and with the distribution of the document to non-LPNs. She said that the untruths were going "to cause problems and undermine the power of the Board." She said that LPNs were offended by the content of the solicitation. Moreover, registered nurses who received the solicitation were offended by the material and the manner in which it was sent.

16 In his evidence, the appellant acknowledged that when he sent out the solicitation, he realized that nurses other than LPNs would receive it. As to the salary information he put in his solicitation, and his knowledge of any inaccuracy, he said that he had tried to be correct and he did not accept that the data were inaccurate.

THE PANEL'S DECISION

17 The Panel noted that the appellant had the right to solicit members of the College to convene a meeting. It found that his continuation of the fee battle by soliciting a meeting was not improper. But, it also found on the evidence before it, that the "contents of the [solicitation] were false, inaccurate, erroneous and misleading in a number of respects," that the appellant "chose inflammatory and intemperate language and that his motive was to discredit the executive and the staff of the College as part of his ongoing battle arising out of his failed court action ..."

18 Further, the Panel concluded that it was irresponsible and unprofessional of the appellant to have made inflammatory allegations of a 49 per cent salary increase without ensuring that what he was stating was accurate. The Panel said that there were a number of allegations in the solicitation that (unjustifiably) impugned the integrity of officers and staff of the College, and that was "the core of the Panel's concern."

19 The Panel found that it was unacceptable for the appellant to have circulated the solicitation to persons who were not LPNs, but this was an error in judgment only, according to the Panel, and by itself would not constitute unprofessional conduct.

20 However, that circulation, coupled with the false contents of the document, became "unprofessional conduct because it brings the entire profession into disrepute." The Panel found that:

> ... [T]he Member is guilty of professional misconduct and conduct unbecoming a licensed practical nurse because his behaviour is inconsistent with the standard of integrity and professionalism expected of a licensed practical nurse. The battle in which the Member has engaged himself, and the manner in which he has chosen to advance his position, is damaging to the College and to the Member. This must stop. The Member's conduct has put undue stress on the College and has resulted in a waste of the economic and personnel resources of the College that could have been better used in more meaningful work.

THE ARGUMENTS ON APPEAL

The Appellant

21 The appellant's counsel said that there was no doubt that the appellant had been a problem for the administrators of the College, and that his dispute over one month's fees was one that most people would not have pursued. But he had the right to do what he did, and the response of the College was, unreasonably and improperly, to charge him with unprofessional conduct.

22 The College acted as it did, he said, because of the difficulties and the expense the appellant had caused them. Yet a member of a profession has the right to engage in a battle with his governing body. The College was exercising its powers to prevent him from exercising his political prerogatives.

23 Counsel argued that the information in the solicitation represented the appellant's honest belief regarding factual matters. In his testimony he had denied knowing that any of the information was inaccurate. No one had complained to the College, and it acted purely on its own initiative. The appellant had written to the College apologizing that two persons who were not LPNs had "inadvertently" received the solicitation.

24 The appellant's conduct was not dishonourable or disgraceful, and there was a complete absence of the moral turpitude that is required to sustain the Panel's findings. At worst, he committed an error of judgment not justifying professional sanction. He was simply "exercising his right to Freedom of Speech as guaranteed by [the] Charter of Rights and Freedoms."

25 The appellant's counsel said that the appropriate standard of review was correctness.

The College

26 The College functions in the public interest, its counsel said, and as part of its duties it can investigate and discipline members. The *Act* refers to, but does not define, "professional misconduct" and "conduct unbecoming"; thus a panel in a discipline matter has the responsibility of deciding whether particular conduct falls within those terms, and whether it may be a basis for sanction. In so deciding, a panel is entitled to considerable deference from this court; the standard of review is reasonableness.

27 On the standard of review, counsel relied on this court's decisions in *College of Licensed Practical Nurses (Man.) v. Filipchuk*, 2004 MBCA 139, 190 Man. R. (2d) 64, and *Law Society of Manitoba v. Frohlinger* (1997), 118 Man. R. (2d) 89. The questions raised in this appeal involve matters of mixed fact and law, said counsel, and the Panel was in the best position to decide such questions. In any case, its decision should not be set aside unless it was unreasonable.

28 The reasons of the Panel, argued counsel, more than adequately meet the standard of reasonableness. They demonstrate the required line of analysis leading from the evidence to the conclusion,

so as to withstand attack by the appellant.

29 In his factum, counsel dealt with the reasonableness of the penalty. The only aspect of the penalty that had been raised by the appellant (and then only very briefly in his factum, without written argument on the point, and it was not raised at all in his notice of appeal or oral argument) was the imposition of $2,000 costs. Again, said counsel for the College, the standard is reasonableness, and its decision to impose these costs was clearly reasonable.

DECISION

(A) Standard of Review

30 In *Filipchuk*, a panel of this court concluded (albeit without articulating a detailed standard of review analysis) that the standard applicable to the decision of a discipline panel of the College, involving findings of professional misconduct, was reasonableness. That standard has also been found to apply in this province in the case of the discipline of professionals other than LPNs (see, e.g., *Frohlinger, Snider v. Manitoba Association of Registered Nurses* (2000), 142 Man. R. (2d) 308 (C.A.), *Bermel v. Registered Psychiatric Nurses Association (Man.)*, 2001 MBQB 223, 159 Man. R. (2d) 33).

31 I will add that in cases where, for example, bias or natural justice may be an issue, which is not this case, the standard of review will be correctness. See, e.g., *Histed v. Law Society of Manitoba*, 2006 MBCA 89, 208 Man. R. (2d) 44, *Pierce v. Law Society of British Columbia*, 2002 BCCA 251, 168 B.C.A.C. 94. The standard of correctness has recently been applied in a case involving professional misconduct where the constitutionality of the decision was the main focus of the appeal; again, not this case. See *Whatcott v. Saskatchewan Association of Licensed Practical Nurses*, [2008] S.J. No. 11, 2008 SKCA 6, at para. 36.

32 Counsel for the appellant argued that while the standard of reasonableness would apply in respect of a decision involving conduct of an LPN during the course of performing the work of an LPN, where the conduct relates to a dispute with his governing body, the standard should be correctness. In support of this proposition he relied on the majority decision of the Ontario Divisional Court in *White et al. v. Ontario Association of Professional Engineers* (2006), 210 O.A.C. 160. In that case, the majority found that, in relation to a disciplinary decision involving a communication by one engineer about the work of another engineer, the standard of review was correctness. In *White*, the majority did not articulate a standard of review analysis, so as to demonstrate how its standard of review decision was reached. Even so, the decision does not support the appellant's argument that if the conduct involves a dispute with the administration rather than a matter involving a patient, the standard of review of the Panel's decision should be correctness.

33 Nevertheless, in view of the position advanced by the appellant, I will briefly analyze the relevant factors and reach a conclusion on the standard of review. See, e.g., *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, and *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247. This ought not to be necessary in future cases involving the College where similar questions arise. See *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, 2008 SCC 9, at para. 57.

34 *Dunsmuir* is a very recent case involving judicial review, in which the Supreme Court collapsed the standards of reasonableness *simpliciter* and patent unreasonableness into the single standard of reasonableness. *Dunsmuir* did not involve a statutory appeal, such as arises here, but the Supreme Court had previously made it clear that (*Dr. Q.* at para. 21):

> ... The term "judicial review" embraces review of administrative decisions by way of both application for judicial review and statutory rights of appeal. In every case where a statute delegates power to an administrative decision-maker, the reviewing judge must begin by determining the standard of review on the pragmatic and functional approach [now renamed the "standard of review analysis": *Dunsmuir*, at para. 63].

It was held to have been legal error in *Dr. Q.* for the reviewing judge to have conducted a review without

recourse to the administrative law standard of review principles, which the judge had done because the statute in question granted a right of appeal. *Dunsmuir* (at para. 64) reaffirms the factors that are to be taken into account on judicial review.

35 There are four factors to consider. I will review them in the order noted in *Dunsmuir* (at para. 64) but in so doing I will observe that the factors are not necessarily of equal weight.

36 As to the first factor, there is no privative clause in the *Act*, which provides for a broad right of appeal. This would suggest a very limited degree of deference and a standard of correctness.

37 The next factor relates to the purpose of the Panel "as determined by interpretation of ..." the *Act*. The *Act* states that (at s. 4(2)): "[t]he college must carry out its activities and govern its members in a manner that serves and protects the public interest." The discipline process plays a central role in the fulfillment of that aim. The decisions of panels facilitate the achievement of the goals of the *Act*. All this points to a fairly high degree of deference to a panel's decision, again suggesting a standard of reasonableness.

38 Third, and importantly, we must consider the nature of the question. The question before the Panel was whether the appellant's conduct, in circulating information it found to have been false, to persons beyond the LPN membership, for motives it found to have been calculated to discredit the administration, constituted professional misconduct or conduct unbecoming, as charged. This is a heavily fact-laden question, with some legal aspects to it. I agree with the College's counsel that this question is one of mixed fact and law.

39 In *Dunsmuir*, Bastarache and LeBel JJ., for the majority, said: "questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness" (at para. 51). On this factor in the analysis a high degree of deference is called for, suggesting a standard of reasonableness.

40 The last factor, according to the *Dunsmuir* categories, involves an assessment of the expertise of the Panel, which should be considered in relation to the court's expertise, on the issues in question. It seems to me that even though the conduct of the appellant involved activities outside his workplace, and did not raise questions about his professional competence or practices, a panel of the discipline committee would be better placed than a court to assess whether that particular conduct brought the LPN profession into disrepute. Even though this Panel included one lay person (whose presence would be expected to bring an important perspective to the work of the Panel; see *Ryan* at para. 32), I think that the dicta of this court in *Law Society of Manitoba v. Savino* (1983), 23 Man. R. (2d) 293, is very much apt: "No one is better qualified to say what constitutes professional misconduct than a group of practicing barristers who are themselves subject to the rules established by their governing body" (at para. 18). See also the comments of Cory J., as he then was, in *Re Milstein and Ontario College of Pharmacy et al. (No. 2)* (1976), 13 O.R. (2d) 700 (H.C.J. Div. Ct.): "Members of the profession can best determine whether the conduct of a fellow member has fallen below the requisite standards" (at p. 707). A high degree of deference, suggesting a reasonableness standard, is owed on the basis of this factor.

41 Weighing all factors, I conclude that the degree of deference to the Panel's decision intended by the *Act* to be shown by this court on appeal of that decision, is fairly high. I conclude that the standard of review on the main question is reasonableness.

42 The issue of costs at the penalty stage is either a question of mixed fact and law, or perhaps more likely a question of fact alone. In either case, a high degree of deference is owed, and the standard of review is reasonableness.

(B) Was the Decision Reasonable?

43 It will be useful to reiterate certain principles in relation to my analysis of the decision of the Panel. They should not be in dispute, as they are derived from a number of decisions of the Supreme Court.

44 In *Ryan*, Justice Iacobucci said (at para. 46):

> Judicial review of administrative action on a standard of reasonableness involves deferential self-discipline. A court will often be forced to accept that a decision is reasonable even if it is unlikely that the court would have reasoned or decided as the tribunal did ....

45 He continued (at para. 47):

> ... The standard of reasonableness basically involves asking "After a somewhat probing examination, can the reasons given, when taken as a whole, support the decision?" ... Deference is built into the question since it requires that the reviewing court assess whether a decision is basically supported by the reasoning of the tribunal or decision-maker, rather than inviting the court to engage *de novo* in its own reasoning on the matter. ...

46 One further general principle is apposite. When examining a decision on the standard of reasonableness, a court must bear in mind that there may often be more than one response from the tribunal that would be reasonable. Unlike the standard of correctness, which admits of one right response only, the standard of reasonableness contemplates the distinct possibility of more than one reasonable response. See *Ryan* at para. 51. See also *Dunsmuir* (at para. 47):

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

47 The appellant has the burden of persuading us that "there is no line of analysis within the ... reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived" (*Ryan*, at para. 55).

48 The reasons of the Panel demonstrate that it considered the evidence before it. That evidence included the following:

i. The appellant knew that his solicitation would be likely to be received by nurses who, while members of the Union, were not LPNs;
ii. concern had been expressed by some persons who had received the solicitation as to how the appellant had obtained their home addresses;
iii. the manner of circulation created the impression that the solicitation was endorsed by the Union;
iv. registered nurses were offended by the content of the solicitation and by the manner by which it was sent;
v. the information about staff salaries in the solicitation was significantly inaccurate;
vi. the appellant said that he made the solicitation as accurate as possible; and
vii. the inaccuracies in the solicitation were going to cause problems for the College.

49 Based on this and all the other evidence, the Panel reached certain conclusions. I agree with the synthesis constructed by counsel for the College, that there were three fundamental findings made by the Panel that led it to its decision.

50 First, the appellant knew that the Union mailing list included non-LPNs. This is apparent from the

statement at the outset of the solicitation, "Please pass this information to an LPN ..." Moreover, in his evidence the appellant, albeit somewhat grudgingly, acknowledged that non-LPNs were among the persons who would receive the solicitation.

51 Second, the solicitation contained false information relating to staff salaries. The appellant had testified that he tried to be accurate, but the Panel concluded that the information was false, that he had acted irresponsibly in disseminating false information, and that his motive was to discredit the executive and staff (see the quotation from the Panel's decision, in para. 17 above). The Panel found that it was "irresponsible and unprofessional to make such inflammatory allegations without ensuring they are accurate ..."

52 Third, the false information impugned the integrity of the College's officers and staff.

53 Each of these essential findings can be linked to the evidence. Each finds some support in the evidence. That there might possibly be some evidence on one or more of these matters that might tend to point in a different direction (although I would be hard-pressed to identify that evidence) is not relevant. It is clearly the role of the Panel, and not of this court, to weigh and evaluate all the evidence. Put another way, the evidence can support the findings made by the Panel. Perhaps different findings on one or more points could have been made on the evidence, but it was clearly open to the Panel on the basis of the evidence to make the findings it did. Thus, the findings were reasonable.

54 I conclude that there exists the required line of analysis within the reasons of the Panel that could reasonably lead it from the evidence to its conclusions.

55 The appellant argued that it was not reasonable for the Panel to conclude that the conduct of the appellant, even if that was conduct of which it disapproved, amounted to "professional misconduct" and "conduct unbecoming" a member. He said that this was essentially a dispute with the administration over governance matters, and that his conduct, which the College might have found an annoyance, could not reasonably be construed as unprofessional.

56 There is little doubt that the stance taken by the appellant on the fee issue was aggravating to the College. As early as 2003, it had warned him that the position he had taken and was communicating was conduct unbecoming and that if he did not stop it might charge him. See para. 5 above.

57 Then, shortly before the Queen's Bench judgment, in response to his request for more information, the College advised him that it did not have the time or resources to respond to his request, that doing so had already taken an inordinate amount of time and energy, that staff and board members felt harassed and threatened by him, and that "[t]his situation cannot continue." See para. 6 above.

58 The Panel's decision itself reflects and reiterates this position. The Panel said, undoubtedly based on the evidence of College witnesses, that "[t]he battle in which the Member has engaged himself, and the manner in which he has chosen to advance his position, is damaging to the College and to the Member. This must stop. The Member's conduct has put undue stress on the College ..." See para. 20 above.

59 The appellant had the right to challenge the College on the fee issue, even though his persistence appears to have caused stress to the College. He had the right to pursue the matter in court, as he did. He had the right to request information from the College, although if he became repetitive or unreasonable in his requests, the College could decline to continue to provide the information. He had the right to seek a general meeting of LPNs. He had the right to solicit LPNs for that purpose. These propositions seem to me to be uncontroversial and incontrovertible.

60 The appellant argued that he was sanctioned because of his attacks on the College about the fee issue. If that were so the decision of the Panel could not survive. But his assertion is not borne out by the findings of the Panel, or by the evidence which supports those findings. In fact, he was sanctioned because, in the course of exercising his rights described above, he committed two fundamental improprieties. Taken together, those two improprieties constituted a legitimate basis for discipline.

61 First, he carelessly or recklessly (in my view it matters not which) included in his solicitation, material

false information about staff salaries, in a manner which the Panel quite reasonably found could only have been intended to discredit the College in the eyes of members. Second, he carelessly or recklessly circulated that false information to registered nurses and registered psychiatric nurses, thereby unjustifiably damaging the College.

62 Thus, the sanction by the Panel, although arising from a fee dispute which, by itself, would clearly not be a permissible foundation for a sanction, was imposed for the appellant's careless or reckless behaviour which unjustifiably damaged the College. That was, in my view, a permissible basis for the imposition of a professional sanction.

63 "Professional misconduct" and "conduct unbecoming" are not defined in the *Act*. I do not think that it is necessary that they be defined, either in the *Act* or elsewhere, including in its decision, for the Panel to have been justified in reaching its conclusions. As Cromwell J.A. recently pointed out in *Psychologist Y v. Board of Examiners in Psychology (N.S.)*, 2005 NSCA 116, 236 N.S.R. (2d) 273: "a 'charge' of misconduct need not necessarily be based on a written code" (at para. 39). The lengthy notice of charges against the appellant gave him ample detail of the nature of the complaints he had to meet.

64 A member's relationship and dealings with his governing body may properly provide the context for charges of unprofessional conduct. Lawyers have been properly disciplined for failure to respond to letters from their governing body, a matter having nothing to do with competence or dealings with clients (see, e.g., *Nova Scotia Barristers' Society v. Saunders* (1982), 55 N.S.R. (2d) 1 (S.C.A.D.)). Here, the appellant has been properly disciplined for the improprieties in and relating to his solicitation, and for the consequences of them, a matter having nothing to do with his professional competence.

(C) Charter of Rights and Freedoms

65 Finally, there was a very brief mention in the appellant's factum and oral argument that his conduct was protected by the freedom of expression provisions of the *Charter of Rights and Freedoms*. In an appropriate case, such an assertion can raise complex issues. A very recent illustration is found in this court's decision in *Histed v. Law Society of Manitoba*, [2007] M.J. No. 460, 2007 MBCA 150. (This is a different case than that involving the same parties, cited in para. 31 above.) In that case, a lawyer wrote to opposing counsel and described a named judge as a "bigot." The Law Society convicted him of professional misconduct. On appeal he argued that his opinion was protected by the *Charter* provisions on freedom of expression.

66 In a comprehensive decision, Steel J.A. found that the *Charter* applied to *The Legal Profession Act*, C.C.S.M., c. L.107, and to the panel decision. I have no doubt that an analogous finding could be made in this case. Moreover, in that case the Law Society conceded that its restrictions on the appellant's freedom of speech violated the *Charter*'s provisions. But it argued, and this court agreed (see para. 46), that freedom of expression was not an absolute right, and that the restrictions on the appellant were justified by virtue of s. 1 of the *Charter* as a limit that was reasonable in a free and democratic society.

67 The appellant in the present case mentioned the *Charter* only in a cursory way in his factum, did not refer to any sections of the *Charter* including s. 1, and did not refer to any cases on the *Charter*. The *Charter* was only noted in passing during the oral presentation of counsel. The College, understandably, did not deal with the *Charter* in its material or argument, since the appellant had not raised any *Charter* argument of substance requiring a response. In my opinion, this is not an appropriate case for the kind of detailed consideration of complex *Charter* issues such as undertaken in the recent *Histed* decision.

(D) Conclusion on Main Decision of Panel

68 Thus, in my opinion, the decision of the Panel falls clearly within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (see reference to *Dunsmuir* in para. 46 above). We should not interfere.

(E) Conclusion on Panel's Decision on Costs

69 There is also a comment in the appellant's material that the imposition of costs was inappropriate. The

Panel noted that the College had incurred some $20,000 in costs, and imposed a costs order of about ten per cent. In my opinion, such an order easily meets the test of reasonableness. See *Filipchuk*, where the majority of this court held that a costs order of $10,000 (coincidentally also about ten per cent of the costs actually incurred) imposed by a discipline panel of the College was reasonable.

CONCLUSION

70 For the foregoing reasons, I would dismiss the appeal, with costs to the College.

M.H. FREEDMAN J.A.
M.A. MONNIN J.A.:-- I agree.
A.D. MacINNES J.A.:-- I agree.

cp/e/qlbxr/qlprp/qlcas