OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER

British Columbia
Canada

Order 00-08

INQUIRY REGARDING RECORDS OF THE COLLEGE OF PHYSICIANS AND SURGEONS OF BRITISH COLUMBIA

****** This Order has been subject to Judicial Review ******

David Loukidelis, Information & Privacy Commissioner
March 30, 2000

Order URL: http://www.oipcbc.org/orders/Order00-08.html
Office URL: http://www.oipcbc.org
ISSN 1198–6182

Summary: Applicant had complained to College about a physician's conduct. After College decided not to institute discipline proceedings, applicant sought records of third party expert opinions obtained by College in deciding how to proceed. College not authorized to withhold information under ss. 12(3)(b), 13(1), 15(1)(a) or (c). College not authorized to withhold most information under s. 14. Commissioner has jurisdiction to determine whether privilege has been waived. If s. 14 did apply, no waiver of privilege by College. No other kind of privilege applied to records. *Freedom of Information and Protection of Privacy Act* overrides *Medical Practitioners Act*. Personal information of third party experts required to be withheld under s. 22(1).

Key Words: Advice or recommendations – substance of deliberations of *in camera* meeting – solicitor client privilege – personal information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 12(3)(b), 13(1), 14, 15(1)(a), 15(1)(c), 22(1); *Legal Profession Act*, s. 88(2); *Medical Practitioners Act*, ss. 70(7) – (10).

Authorities Considered: BC: Order No. 50-1995; Order No. 83-1996; Order No. 92-1996; Order No. 114-1996; Order No. 116-1996; Order No. 140-1996; Order No. 163-1997; Order 193-1997; Order No. 201-1997; Order No. 221-1998; Order No. 208-1998; Order No. 252-1998; Order No. 321-1999, Order 00-07. **Ontario:** Order P-161; In Order P-411; Order P-579; Order M-974.

Cases Considered: *Legal Services Society* v. *British Columbia (Information and Privacy Commissioner)* (1996), 140 D.L.R. (4th) 372 (B.C.S.C.*); British Columbia (Minister of*

Environment, Lands and Parks) v. *British Columbia (Information and Privacy Commissioner)* (1995), 16 B.C.L.R. (3d) 64 (B.C.S.C.); *Hodgkinson* v. *Simms* (1989), 33 B.C.L.R. (2d) 129*;*

Municipal Insurance Association of British Columbia v. *British Columbia (Information and Privacy Commissioner)* (1996), 143 D.L.R. (4th) 134 (B.C.S.C.); *Smith* v. *Jones*, [1999] 1 S.C.R. 455; *Descoteaux* v. *Mierzwinski*, [1982] S.C.R. 860; *G.W.L. Properties Ltd.* v. *W.R. Grace & Co. of Canada* (1992), 10 C.P.C (3d) 165 (B.C.S.C.); *B.* v. *Canada*, (1995), 5 W.W.R. 374 (B.C.S.C.); *Upjohn Co.* v. *United States*, 449 U.S. 383 (1981); *Allen* v. *McGraw*, 106 F.3d 582; *Wheeler* v. *Le Marchant* (1881), 12 Ch. D. 675 (C.A.); *Goodman and Carr* v. *Minister of National Revenue* (1968), 70 D.L.R. (2d) 670; *R.* v. *Campbell*, [1999] 1 S.C.R. 565; *Middlekamp* v. *Fraser Valley Real Estate Board*, [1993] 1 W.W.R. 436 (B.C.C.A.); *Gower* v. *Tolko Manitoba Inc.*, [1999] M.J. No. 476 (Q.B.); *Mackin* v. *New Brunswick (Attorney General)*, [1996] N.B.J. 557 (N.B.Q.B.); *Lowry et al.* v. *Canadian Mountain Holidays Ltd. and Kaiser* (1984), 59 B.C.L.R. 137; *Baker* v. *Canada (Minister of Citizenship and Immigration)* (1999), 174 D.L.R. (4th) 193 (S.C.C.); *Unilever PLC* v. *Procter & Gamble Inc.*, [1990] F.C.J. No. 887; *Beale* v. *Nagra*, [1998] B.C.J. No. 2347 (B.C.C.A.); *Susan Hosiery Ltd.* v. *M.N.R.*, [1969] 2 Ex. C.R. 27; *Hammami* v. *College of Physicians and Surgeons of British Columbia* (1997), 36 B.C.L.R. (3d) 17 (B.C.S.C.); *General Accident Assurance Co.* v. *Chrusz*, (1999), 180 D.L.R. (4th) 241 (Ont. C.A.); *Wilson* v. *Favelle*, [1994] B.C.J. No. 1257; *Bank Leu AG* v. *Gaming Lottery Corp.*, [1999] O.J. No. 3949 (Ont. C.J.); *Carleton Condominium Corp.* v. *Shenkman Corp. Ltd.*, [1977] O.J. No. 567; *London Guarantee Insurance Co.* v. *Guarantee Co. of North America*, [1995] O.J. No. 4316; *Mann* v. *North American Automobile Insurance Co.*, [1938] 2 D.L.R. 261; *Griffiths* v. *Mohat*, [1981] 5 W.W.R. 477; *Hongkong Bank of Canada* v. *Gross* (1992), 11 C.B.R. (3d) 300; *Petro–Canada* v. *"Mary J" (The)* (1994), 98 B.C.L.R. (2d) 139; *Belitchev* v. *Grigorov*, [1998] B.C.J. No. 3151; *Cain* v. *Cappon* (B.C.C.A., Unreported, July 20, 1992, CA015841); *Kranz* v. *Attorney General of Canada*, [1999] 4 C.T.C. 93 (B.C.S.C.); *Ed Miller Sales & Rentals Ltd.* v. *Caterpillar Tractor Co.* (1988), 61 Alta L.R. (2d) 319 (Alta. C.A.); *Alberta (Treasury Branch)* v. *Ghermezian*, [1999] A.J. No. 624 (Alta. Q.B.); *Milner* v. *Registered Nurses Association of British Columbia*, [1999] B.C.J. No. 2743 (B.C.S.C.); *R.* v. *Stewart*, [1997] O.J. No. 924 (Ont. C.J.); *R* v. *O'Connor*, [1995] 4 S.C.R. 411; *R.* v. *Stinchcombe*, [1991] 3 S.C.R. 326; *Boulianne* v. *Flynn*, [1970] 3 O.R. 84; *Slavutych* v. *Baker*, [1976] 1 S.C.R. 254 (S.C.C.).

1.0 INTRODUCTION

This case involves five records that contain professional opinions prepared for, or expressed to, the College of Physicians and Surgeons of British Columbia ("College"). Those opinions were provided by experts consulted by the College in connection with a College investigation into the applicant's complaint against a physician, Dr. Doe, who is subject to the College's authority under the *Medical Practitioners Act* ("MPA"). Two of the records are letters written to the College by experts. A third record consists of a report provided by an expert to the College. The last two are records, prepared by a lawyer employed by the College, of interviews with two experts consulted by the College.

On February 15, 1999, the applicant wrote to the College – which is a "local public body" under the Act – and requested access under the *Freedom of Information and Protection of Privacy Act* ("Act") to "any or all written documentation pertaining to your investigation of the wrongful use" of a medical procedure by Dr. Doe. The applicant asked for material provided to the College's experts and any "written conclusions … prepared by the experts, Elaine Peaston [in–house counsel to the College] or any Committee members."

In its March 10, 1999 response to the applicant, the College declined to disclose the "written conclusions" of the outside experts. The College said that ss. 12(3)(b), 13(1), 14, 15(1) and 22(1) of the Act applied to documents and covering letters from the College to the experts and to the resulting "expert opinions". The College noted that the applicant had originally given the College some of the supporting materials it later provided to the experts. The College said this material had been returned to the applicant's lawyer some time before.

As for the experts' "written conclusions", the College told the applicant

> … you have been provided with a summary of all expert opinions in our letters to you dated September 29, 1997, November 17, 1997; and April 24, 1998 in addition to December 7, 1998 [*sic*] letter from the College to Mr. David A. Goult, a copy of which is already in your possession.

Regarding the applicant's request for access to "written conclusions by Elaine Peaston or any Committee members", the College said it could not give the applicant "access to committee minutes, which record the conclusions by the College with respect to your complaint." The College's response letter explains its decision as follows, at p. 2:

> This information is excepted from disclosure pursuant to sections 12(3)(b) and 14 of the Act, and in accordance with the Information and Privacy Commissioner's order number 226. Please note that while the actual minutes of the meetings are being withheld, you have been provided with all the information regarding any findings of each committee meeting with respect to your concerns in the course of the complaint handling process. In this regard, we refer you to the letters that the College provided to you or your legal counsel dated June 25, 1997, November 17, 1997, February 19, 1998, April 24, 1998, June 22, 1998, and October 29, 1998. Since all these findings are already in your possession, we assume you do not need another copy of those letters. If we are incorrect in our assumption, please let us know.

The applicant requested a review, under s. 52 of the Act, of the College's decision. Because the matter was not settled in mediation, a written inquiry was held under s. 56 of the Act. This order flows from that inquiry.

In the inquiry, the applicant and the College both provided submissions and replies. I sought further submissions from the parties on specific legal issues. Submissions were also received in the inquiry from three third parties. A lawyer acting for Dr. Doe said his client concurred with the College's position on all points. One of the physicians who gave his expert opinion to the College about the complaint also sent a letter. That physician objected to disclosure of his opinion on the ground it would identify him – which the physician said would be an "invasion of my privacy" – and also would disclose his expert opinion (which he said would be "a further invasion of my privacy").

Last, one of the other physicians submitted a letter explaining why he had, since providing his opinion to the College, changed that opinion. He said that, after his initial review of the matter at the request of the College, the applicant had provided him with

"more evidence" that "had been withheld from me by the College". He said he had become "certain" that the procedure the applicant alleged had been used on her had, in fact, been performed on her.

2.0 ISSUES

The issues raised in this inquiry are as follows:

1. Was the College authorized by ss. 12(3)(b), 13(1), 14, 15(1)(a) and 15(1)(c) of the Act to refuse to disclose information to the applicant?
2. Was the College required by s. 22(1) of the Act to refuse to disclose personal information to the applicant?

Under s. 57(1) of the Act, the College has the burden of establishing that it was authorized to withhold information under the sections listed above in paragraph one. By contrast, s. 57(2) of the Act requires the applicant to establish that information withheld under s. 22(1) can be disclosed without unreasonably invading the personal privacy of third parties.

In her reply submission, the applicant raised new issues, to which the College took exception. The applicant sought the "exact information and evidence provided to each expert to determine on what they base their opinion". The applicant also sought information as to "who was responsible at the College for providing information and evidence to the experts". I agree with the College that these points are outside the scope of the inquiry under the Act and raise new issues that were not part of the applicant's access request to the College. They are, therefore, not before me. I decline to make any finding or any order on either of these points.

It should also be noted that the applicant submitted a further reply after the close of submissions in this inquiry. The College objected to the admission of this late submission. This material did not purport to address any new issues that had been raised in the College's reply. The parties have had ample opportunity to make representations. While I have not rejected the applicant's late submission altogether, this order is based on the other material before me and not that late submission.

3.0 DISCUSSION

3.1 College's Regulatory Role – The College's submissions in this inquiry contained an overview of its statutory role, under the MPA, in regulating the conduct of physicians in British Columbia. A fairly extensive discussion of that role is also found in Order No. 221-1998, a decision of my predecessor to which the College referred in its submissions.

The College's duties under the MPA include monitoring and enforcing standards of

practice and standards of professional ethics. To this end, the College argued, at pp. 4 and 5 of its initial submission, that

> … [i]t is essential that the College be able to assess the conduct of its members and to provide advice and guidance to members for the purpose of enhancing the provision of medical care and the standard of physician conduct. Often this requires that the College be able to have frank, forthright and detailed communications directly with experts in the course of reviewing concerns and complaints.

A resolution of the College's Executive Committee, made March 11, 1997, confirmed the College's policy that

> … expert reports provided to the College for peer review purposes be maintained in confidence and that except as strictly required by law, the actual report and identity of the expert will not be disclosed.

Although it is not entirely clear from the material before me that reference in the resolution to "peer review" covers the kind of expert reports with which this inquiry is concerned, p. 5 of the College's initial submission contains the following paragraph:

> That [March 11, 1997] policy is based on the College's view that such information must be protected against subsequent disclosure as it could result in harm to the expert, a third party or to the College's mandate and would discourage and impede communications. Section 70(7) to (9) of the MPA recognizes the validity of the College's policy on non-disclosure of experts' reports. It is clearly in the public interest to encourage experts to provide the fullest and most comprehensive information to the College in the course of reviewing the complaints. Unless the College can appropriately protect this information, its experts may no longer be as forthcoming. This would seriously and adversely impact upon the College's ability to carry out its mandate and complaint review processes and thereby fulfill its responsibilities in the public interest.

It appears that the applicant's complaint was dealt with both by the College's Sexual Misconduct Review Committee ("SMRC") and its Ethics and Conduct Review Committee. Only the workings of the SMRC are directly in issue here. This is discussed further below, in the analysis of s. 14 issues.

3.2 Solicitor Client Privilege – Section 14 of the Act says the head of a public body "may refuse to disclose to an applicant information that is subject to solicitor client privilege." The College cited this provision in refusing to disclose information to the applicant.

Both types of common law legal professional privilege incorporated in s. 14 of the Act are in issue in this case, as are the questions of whether the College has waived privilege and whether privilege has otherwise ended. The College has also argued that a statutory privilege under the MPA and a kind of common law professional privilege – under the

so-called Wigmore conditions – apply and should be recognized. I deal with each of these issues separately below.

Evidence Provided by the College

The College's reliance s. on 14 can only be tested against the evidence before me, bearing in mind that s. 57(1) of the Act places the burden of proof on the College to establish that s. 14 applies.

According to the College, all complaints are initially referred to the registrar or designated deputy registrar of the College. These officials carry out preliminary investigations. They can either deal with a minor complaint themselves, refer a complaint to the appropriate standing committee of the College, or in certain cases report the matter to the College's executive committee for possible summary investigation and possible future disciplinary action.

Because it alleged, in part, sexual misconduct by a physician, the applicant's complaint was referred to the SMRC, which is constituted under s. 28 of the MPA. The procedures followed by that committee in addressing complaints are, the College said, set out in Rules 154 through 161 under the MPA. Section 28(2)(d) of the MPA requires the SMRC to do one of six things with such a complaint. One of the options is to "appoint an inquiry committee to act under sections 53 and 60" of the MPA. Rule 159 mirrors s. 28(2)(d) of the MPA.

The College says it obtained expert opinions to assist it in assessing the applicant's complaint that a medical procedure was used on her without her consent. The SMRC subsequently determined that it would not recommend appointment of an inquiry committee and that no further action would be taken. As the College's lawyer put it, at p. 2 of the College's initial submission:

> The applicant filed a complaint with the College alleging sexual harassment and wrongful use of a medical procedure, … , without authorization by a member of the College. The College obtained the opinion of four experts to assist it on the issues arising from the complaint. The College reviewed the complaint and conveyed its decision to the Applicant that an inquiry committee (a disciplinary hearing) would not be ordered and provided reasons for that decision.

As part of its case, the College submitted two affidavits, one open and one *in camera*, sworn by Dr. Morris Van Andel, the College's Deputy Registrar.

The role of the College's in–house counsel is highly relevant to the College's reliance on s. 14. The College did not, however, submit an affidavit sworn by its in–house counsel as to the nature of, or the details surrounding, her involvement in the applicant's complaint. It instead relied on the two affidavits sworn by Dr. Van Andel. Having sworn that he had

personal knowledge of the facts set out in his open affidavit, Dr. Van Andel deposed, at paragraph 3, as follows:

> The College employs a full–time lawyer and she is the College's legal counsel. One of her professional duties is to advise the Sexual Misconduct Review Committee and, therefore, the College on legal issues including whether complaints to the College could be proven before an Inquiry Committee and to assist in the gathering of such evidence to be used as part of the College's case in the event charges proceed to an Inquiry Committee hearing. Pursuant to those duties, the College's legal counsel was directed to obtain opinions from expert witnesses, which opinions are set out in the four documents the applicant requests disclosure of.

Dr. Van Andel's affidavit provided no details as to how or when the College's in–house counsel received instructions in this matter or otherwise as to the nature of her involvement in the applicant's MPA complaint. At p. 8 of the College's initial submission, the College's lawyer on this inquiry asserted that the SMRC directed the College's in–house counsel to obtain expert opinions "so that the SMRC could be properly guided in the exercise of its mandate in considering the complaint" of the applicant. According to counsel's submission, the information gathered by the in–house counsel was needed so the SMRC could decide, under Rule 159(d)(iv), whether an inquiry committee should be appointed to look into the member's conduct. As counsel put it, again at p. 8:

> … the SMRC would not recommend the appointment of an Inquiry Committee unless there was a reasonable prospect that charges could be proven against the member based on the complaint. For that reason, the College's legal counsel gathers evidence for the benefit of the SMRC and provides legal advice to the SMRC on whether disciplinary charges based on a complaint can be proven.

At p. 14, counsel said:

> … the documents in issue were compiled by the College's legal counsel for the purposes of advising her client on whether the SMRC ought to bring disciplinary charges against the member before an Inquiry Committee and are therefore privileged and not subject to disclosure under the Act.

At p. 8 of the College's second supplemental submission, the following passage appears:

> The expert opinions in issue were compiled by the College's legal counsel for the purpose of advising the SMRC on whether a disciplinary hearing into the conduct of the member should be held. Therefore, even if the College could not rely upon other grounds for claiming privilege, since at the time that the expert opinions in issue were sought the potential of a hearing was clearly anticipated, the College is entitled to rely on principles of privilege applicable in the litigation context including litigation privilege.

Review of the Records

It appears the College has concerns about my reviewing the records in issue here. The College provided the records to my office in a sealed envelope and, at paragraph 18 of its initial submission, asked for "written notice of any intention to review the written documents." The College said it had provided the documents in this fashion without "in any way waiving privilege over the documents".

In expressing its concern about preserving privilege over these records, the College referred to comments made by Holmes J. in *Municipal Insurance Association of British Columbia* v. *British Columbia (Information and Privacy Commissioner)* (1996), 143 D.L.R. (4th) 134 (B.C.S.C.). At paragraph 17 of its initial submission, the College cited that case as authority for the proposition that "any discussion of the documents must be done *in camera*".

Municipal Insurance Association involved a decision of my predecessor respecting s. 14 of the Act. Holmes J. reviewed the record in dispute there and, at p. 136, made the following comments:

> I am of the view that where privilege is claimed over a document it ought not to be viewed by the Commissioner or the Court unless evidence and argument establishes a necessity to do so to fairly decide the issue. I am not in favour of automatically viewing the document as that in itself weakens the sanctity of privilege.

Sections 44 and 49 of the Act are relevant here. The former gives the commissioner the power to compel production of records, including those over which solicitor client privilege is claimed. Section 49 requires the commissioner, in effect, to keep information confidential. There is no doubt, in my view, that s. 49 requires the commissioner to respect solicitor client privilege.

Nonetheless, I accept that records over which solicitor client privilege is claimed should, generally speaking, be examined only in cases where the evidence and argument establish it is necessary to do so in order to decide the issue fairly. This is consistent with the practice followed by the courts in similar matters. See, for example, the recent Supreme Court of Canada decision in *Smith* v. *Jones*, [1999] 1 S.C.R. 455, at para. 100 (*per* Cory J. for the majority): "In this Court the entire affidavit of Dr. Smith [*i.e.*, the privileged record] was read and considered." See also *Descoteaux* v. *Mierzwinski*, [1982] S.C.R. 860, at pp. 895–896. In the civil context, see *Middlekamp* v. *Fraser Valley Real Estate Board*, [1993] 1 W.W.R. 436 (B.C.C.A.), *per* McEachern C.J.B.C., at p. 437.

The decision of Lowry J. in *G.W.L. Properties Ltd.* v. *W.R. Grace & Co. of Canada* (1992), 10 C.P.C. (3d) 165 (B.C.S.C.), is also relevant here. One party objected to Lowry J. reviewing documents over which privilege was claimed. Paragraphs 24–26 of the decision deal with this issue:

> Counsel for the plaintiffs strongly opposes the court examining either of the two documents. He contends that the affidavit evidence of the plaintiffs' solicitor

> who examined the documents and who says they are privileged should be accepted in the absence of there being something in the affidavit itself or in material put forward by Cafco to show that the plaintiffs have misconceived the privileged character of the documents or are seeking to shelter documents which ought to be produced. He relies on *Vickery* v. *Canadian Pacific Railway*, [1921] 2 W.W.R. 517 (Sask. Master), and says that Cafco's application is an unwarranted attack on a solicitor's credibility.
>
> I consider that when a party questions whether the whole of a document contains a communication between a solicitor and his client that entails the seeking or giving of legal advice in confidence, the court must now examine the document. Indeed, in *Nabisco Brands* the Federal Court of Appeal said the Supreme Court of Canada has "mandated" that an examination be made. The request for the court's examination must never be made lightly and certainly not as a matter of course. Solicitors bear a serious responsibility to resort to this kind of court intervention only when the circumstances in which the privilege is claimed compel them to do so. But when they do, justice requires that the court's independent assessment be made.
>
> To ask the court to make an assessment of a claim of privilege obviates the necessity of one party having to accept the statement of its adversary, or its adversary's solicitor, about whether relevant evidence is producible. It may be the party's only means of rebutting the prima facie privilege that attaches to communication that is said to be confidential communication between a solicitor and his client for the purpose of facilitating legal advice. To seek the court's examination of a document does not necessarily question a party's credibility or that of its solicitor. Rather, it is to ask the court to determine if the basis for the privilege claimed, which is, in the end, a matter of legal opinion, is sound and applicable to all of the communication in question.

In this case, the College has relied on s. 14 and, in the alternative, on other sections of the Act, notably ss. 13(1), 15(1)(a) and (c), and 22(1). Because I concluded that the College's case respecting all of these claimed exceptions to the right of access, including s. 14, could not be fairly decided based on the evidence and argument before me, it was necessary for me to review the disputed records. I informed the parties of that decision in writing and directed the College, under s. 44(2) of the Act, to produce the records to me.

Description of the Records

As indicated earlier, the records fall into two categories: letters or written reports from medical experts to the College and memos, prepared by the College's lawyer, of interviews with experts.

The first class of record consists of one report and two letters. The report, which was prepared by the physician who made a submission in this inquiry, is labelled as 'confidential'. It has the College's name on its cover page; the cover page also says "Requested by Elaine Peaston, Legal Counsel to the College". The report answers questions posed to the physician about technical aspects of the complaint.

Another record is a letter addressed to the College, to the attention of its in–house counsel. It provides the views of yet another expert on technical questions posed by the College. A further letter – from the expert whose interview by College representatives is the second memo's subject – is addressed to in–house counsel at the College. It expresses the expert's clarification of some of the points raised by one of the College's decisions respecting the applicant's complaint.

The first of the memos prepared by the College's in–house lawyer is an eight page typed record, relating to a meeting between one of the experts, the College's lawyer and two other physicians, who appear to have been employed by or officially associated with the College. That record – which I will call the first memo – consists of the lawyer's record of the expert's views on technical issues, provided in response to a number of questions found in a preparatory letter to him from the College's lawyer. The record reproduces questions put to the expert and records the expert's responses to these questions. The record is not addressed to file or to anyone.

A break in the first memo is indicated visually, half way down the fourth page, by a line of ">><<" symbols. After that break, the memo says the "following are my general notes based on my attendance at the meeting". Four pages of text follow. These pages in part reflect or express counsel's assessment of views offered by this expert. Counsel's assessment relates to the College's conduct of the matter and the chances of the College succeeding in any possible proceedings under the MPA. To some extent, these pages also reflect what appears to have been further discussion, among those at the meeting (including the expert), about the complaint. These pages contain text in which the expert or others speculated about defences Dr. Doe might mount against any MPA proceedings.

The other memo – which I will call the second memo – is a six-page typed "memo to file" that contains in–house counsel's record of another meeting, which was attended by in–house counsel, by another expert consulted by the College and by others. The second memo indicates on its face that it was being copied to the SMRC and to certain named individuals. The other individuals appear to have been employed by or officially associated with the College in the discharge of its functions. This memo does not contain any legal analysis or assessment by the College's lawyer of what was said at the meeting. It records the expert's views on medical matters at the core of the applicant's complaint.

Solicitor Client Communications

Again, s. 14 of the Act says a public body "may refuse to disclose to an applicant information that is subject to solicitor client privilege." Section 14 incorporates the common law of solicitor client privilege. See, for example, *Legal Services Society* v. *British Columbia (Information and Privacy Commissioner)* (1996), 140 D.L.R. (4th) 372 (B.C.S.C.) and *British Columbia (Minister of Environment, Lands and Parks)* v. *British Columbia (Information and Privacy Commissioner)* (1995), 16 B.C.L.R. (3d) 64 (B.C.S.C.).

The first kind of privilege claimed by the College is solicitor client privilege, *i.e.*, the privilege that protects confidential communications between lawyer and client for the purpose of obtaining or giving legal advice. As the College argued it:

> … to the extent that any expert opinions are intertwined with any legal analysis or opinion by counsel for the College and these communications are addressed to the College from its legal counsel ("Direct Communications") these communications are protected by solicitor/client privilege.

This type of privilege was discussed by Burnyeat J. in *Kranz* v. *Attorney General of Canada*, [1999] 4 C.T.C. 93 (B.C.S.C.). Burnyeat J. quoted with approval the following passage from the judgement of Thackray J. in *B.* v. *Canada*, (1995), 5 W.W.R.. 374 (B.C.S.C.):

> As noted above, the privilege does not apply to every communication between a solicitor and his client but only to certain ones. In order for the privilege to apply, a further four conditions must be established. Those conditions may be put as follows:
>
> 1. there must be a communication, whether oral or written;
> 2. the communication must be of a confidential character;
> 3. the communication must be between a client (or his agent) and a legal advisor; and
> 4. the communication must be directly related to the seeking, formulating, or giving of legal advice.
>
> If these four conditions are satisfied then the communication (and papers relating to it) are privileged.
>
> It is these four conditions that can be misunderstood (or forgotten) by members of the legal profession. Some lawyers mistakenly believe that whatever they do, and whatever they are told, is privileged merely by the fact that they are lawyers. This is simply not the case.

Various texts agree with this view. See, for example, R. Manes, *Solicitor Client Privilege in Canadian Law* (Butterworths: Toronto, 1993).

Can the College claim solicitor client privilege of this kind in relation to the disputed records? I have concluded it cannot. This branch of solicitor client privilege does not extend to communications between a third party and a lawyer, or a client, except where the third party is acting as the agent of the client for the purpose of seeking, receiving or implementing legal advice. See *Wheeler* v. *Le Marchant* (1881), 12 Ch. D. 675 (C.A.), *Goodman and Carr* v. *Minister of National Revenue* (1968), 70 D.L.R. (2d) 670, J. Sopinka *et al.*, *The Law of Evidence in Canada,* 2d ed. (Toronto: Butterworths, 1999) at p. 745. See, also, G.D. Watson and F. Au, 'Solicitor-Client Privilege and Litigation Privilege in Civil Litigation' (1998), 77 Can. B. Rev. 315, at p. 322, citing Wigmore:

> Solicitor client privilege is meant to protect only the client's confidences, not those of *third parties*. As Wigmore pointed out,

> Since the privilege is designed to secure subjective freedom of mind for the *client* in seeking legal advice, it has no concern with other persons' freedom of mind nor with the attorney's own desire for secrecy in conduct of a client's case. It is therefore not sufficient for the attorney, in invoking the privilege, to state that the information came somehow to him while acting for the client nor that it came from some particular *third person* for the benefit of the client. [emphasis in original and footnote omitted]

I will first address the three records that were sent by experts to the College or its lawyer. I have concluded that the experts whose opinions are reported in these records were not third parties in a sense that would extend to them the veil of privilege for confidential communications between the College and its lawyer. I find that these records are third party communications that are not covered by this branch of legal privilege. In reaching this conclusion, I have, in addition to the authorities referred to above, considered the reasoning of the Ontario Court of Appeal in the recent decision of *General Accident Assurance Company* v. *Chrusz* (1999), 180 D.L.R. (4th) 241 and the decisions in *Smith* v. *Jones*, above, and *R.* v. *Campbell*, [1999] 1 S.C.R. 565.

In *General Accident*, Doherty J.A., dissenting in part (but not on this issue), held that communications between an external insurance investigator and the insurance company's lawyer were not privileged as confidential solicitor client communications. The court held that privilege will extend to communications in circumstances where the third party employs an expertise in assembling information provided by the client and in explaining that information to the solicitor (as was the case in *Susan Hosiery Ltd.* v. *M.N.R.*, [1969] 2 Ex. C.R. 27). In *General Accident*, the court found that the insurance investigator was a source of outside information, rather than a channel of communication between the solicitor and client.

Doherty J.A. undertook a detailed analysis of whether and when third party communications could fall under the privilege associated with confidential solicitor client communications. He decided that the applicability of privilege should depend upon whether the true nature of the third party's retainer extends to a function which is essential to the existence or operation of the solicitor client relationship. The following passages from his reasons for judgement, found at pp. 282–284, bear quotation at some length:

> Client-solicitor privilege is designed to facilitate the seeking and giving of legal advice. If a client authorizes a third party to direct a solicitor to act on behalf of the client, or the client authorizes the third party to seek legal advice from the solicitor on behalf of the client, the third party is performing a function which is central to the solicitor client relationship. In such circumstances, the third party should be seen as standing in the shoes of the client for the purposes of communications referable to those parts of the third party's retainer.
>
> If the third party is authorized only to gather information from outside sources and pass it on to the solicitor so that the solicitor might advise the client, or if the third party is retained to act on legal instructions from the solicitor (presumably

given after the client has instructed the solicitor), the third party's function is not essential to the maintenance or operation of the solicitor client relationship and should not be protected.

In drawing this distinction, I return to the seminal case of *Wheeler* v. *Le Marchant*, *supra*. In distinguishing between representatives of a client or a solicitor whose communications attracted the privilege and whose communications did not, Cotton L.J. referred to representatives employed by a client "to obtain the legal advice of the solicitor". A representative empowered by the client to obtain that advice stood in same position as the client. A representative retained only to perform certain work for the client relating to the obtaining of legal advice did not assume the position of client for the purpose of client–solicitor privilege.

…

The definition ties the existence of the privilege to the third party's authority to obtain legal services or to act on legal advice on behalf of the client. In either case the third party is empowered by the client to perform a function on the client's behalf which is integral to the client-solicitor function. The agent does more than assemble information relevant to the legal problem at hand.

This functional approach to applying solicitor client privilege to communications by a third party is sound from a policy perspective. It allows the client to use third parties to communicate with counsel for the purpose of seeking legal advice and giving legal instructions in confidence. It promotes the client's access to justice and does nothing to infringe the client's autonomy by opening her personal affairs to the scrutiny of others. Lastly, it does not impair the lawyer's ability to give his undivided loyalty to the client as demanded by the adversarial process. Where the client retains authority to seek legal advice and give legal instructions, these policy considerations do not favour extending client-solicitor privilege to communications with those who perform services which are incidental to the seeking or obtaining of legal advice.

The position of the Divisional Court provides incentive to a client who has the necessary means to direct all parties retained by the client to deposit any information they gather with the client's lawyer so as to shield the results of their investigations with solicitor client privilege. The privilege would thus extend beyond communication made for the purpose of giving and receiving legal advice to all information relevant to a legal problem which is conveyed at a client's request by a third party to a lawyer. This view of client-solicitor privilege confuses the unquestioned obligation of a lawyer to maintain confidentiality of information acquired in the course of a retainer with the client's much more limited right to foreclose access by opposing parties to information which is material to the litigation. Client–solicitor privilege is intended to allow the client and lawyer to communicate in confidence. It is not intended, as one author has suggested, to protect "…all communications or other material deemed useful by the lawyer to properly advise his client…": Wilson, "Privilege in Experts' Working Papers", supra, at p. 371. While this generous view of client-solicitor privilege would create what clients might regard as an ideal environment of confidentiality, it would deny opposing parties and the courts

> access to much information which could be very important in determining where the truth lies in any given case.
>
> I make one further observation. If the Divisional Court's view of client-solicitor privilege is correct, litigation privilege would become virtually redundant because most third party communications would be protected by client-solicitor privilege. To so enlarge client-solicitor privilege is inconsistent with the broad discovery rights established under contemporary pre-trial regimes, which have clearly limited the scope of litigation privilege. The effect of that limitation would be all but lost if client-solicitor privilege were to be extended to communications with any third party whom the client chose to anoint as his agent for the purpose of communicating with the client's lawyer.

In my view, the experts who gave opinions to the SMRC through the College's lawyer were an external source of information rather than a conduit between client and lawyer. The role of conduit, to the extent that it existed, lay with the College's lawyer, who was a channel of communication between the experts and the SMRC. I am unable to conclude that the function of these experts satisfies either the test for privilege formulated by Doherty J.A. in *General Accident* or the policy objectives underlying the shield of privilege.

Indeed, although I have every respect for the importance of the statutory role which the College fulfills in processing and acting upon complaints against its members, in my view the concerns against which Doherty J.A. warns apply here. It would not be a proper use of the confidential solicitor client relationship, and the privilege associated with it, for the College to be able to shield these third party communications by the artifice of funnelling them through counsel for the College.

In *General Accident*, the court found that the insurance investigator's function was to educate the lawyer concerning the claim, so that the insurance company could receive the benefit of the lawyer's informed advice and instruct him accordingly. This function was not integral to the solicitor client relationship and the communications between the investigator and the solicitor were accordingly not privileged. Similarly, the experts here were retained to inform the College's lawyer on medical issues respecting a complaint against a member; their written reports to the College assisted the lawyer to understand the circumstances surrounding the complaint and give legal advice to the SMRC as to its disposition. The experts' opinions may have been important, even critical, to the investigation and processing of the complaint, but they were not integral to the confidential solicitor client relationship between the College and its lawyer.

With respect to *Smith* v. *Jones*, above, I recognize the court treated as privileged the expert psychiatric report obtained by defence counsel concerning the mental condition of the accused. There would otherwise have been no need to decide the main point in that case, *i.e.*, whether a public safety exception to privilege could be invoked. The court was not, however, called upon to analyze what type of legal privilege applied and why. I do not take that decision to stand for the proposition that a report obtained by a lawyer from a third party expert is privileged under the umbrella of the confidential solicitor client relationship.

I turn now to the two memos, each of which was generated by the College's lawyer. These memos record the opinions of medical experts; the second part of the first memo also contains some analysis by, or involving, the College's in-house lawyer. I accept that the College's lawyer intended to provide copies of these memos to the SMRC and that, whether or not the memos were so provided, the information in them was conveyed to the SMRC. However, the memos themselves do not constitute communications between the SMRC and its lawyer. They are memos which record the oral communications of third party experts and, in one case, some discrete analysis by the College's lawyer.

If these views had been recorded by the experts and delivered to the College's lawyer, they would have fallen into the same category as the report and letters I have just analyzed. They would have been external third party communications, not integral to the solicitor client relationship and not privileged as confidential solicitor client communications. Legal advice annotated on the records by the College's lawyer would have been privileged, but the communications from the experts would not have been protected.

If, on the other hand, the College's lawyer had communicated to the SMRC, by memo, in relation to her confidential legal advice, that communication would be privileged. This was the result in *Gower* v. *Tolko Manitoba Inc.*, [1999] M.J. No. 476 (Q.B.). There, a lawyer was hired by an employer to gather the facts on a workplace harassment allegation and advise as to their legal implications. The plaintiff sought production of the report. The Master allowed the motion and ordered production of parts of the report (excluding, notably, the portion of it described as legal analysis). On appeal, however, the Court of Queen's Bench rejected a claim of litigation privilege over the lawyer's report to the employer, but held that the report, in its entirety, was a privileged confidential solicitor client communication. The following passage appears at para. 18 of the report:

> The report contains a summary of information provided to Ms. Janzen [the lawyer] by witnesses, including the complainant and the plaintiff, an assessment of credibility of the various witnesses based on Ms. Janzen's experience as a lawyer, findings of fact made by Ms. Janzen based on her experience as a lawyer and legal analysis and advice based on the findings of fact. One can understand why the plaintiff would seek production of the entire report. It would be relevant for the plaintiff to know what information the investigator assembled, what conclusions she drew, and what advice she gave, as part of an assessment of the good faith of the employer when it chose to discharge the plaintiff. However, the plaintiff is not entitled to production of the report or any part of it. The entire report forms an investigative report leading to legal advice, all of which is properly the subject of legal advice privilege.

The *Gower* case – which is under appeal to the Manitoba Court of Appeal – addressed the status of the lawyer's report to her client. It did not deal with underlying material – working papers or witness statements and documentation gathered by the lawyer for the purpose of her report. In reaching its decision, the court in *Gower* relied on two United States authorities, namely *Allen* v. *McGraw*, 106 F.3d 582, and *Upjohn Co.* v. *United States*, 449 U.S. 383 (1981). These cases held that solicitor client privilege applied to

lawyer-conducted internal corporate or government investigations and *Upjohn* is described in these terms in *Campbell*, above, at para. 50.

I do not consider that *Gower* or these United States cases extend the privilege based on confidential solicitor client communications to lawyer–conducted external investigations or to third party communications. When a lawyer is retained by a corporation or a government department, communications between the lawyer and employees or agents of the client are not third party communications. In any case, *Upjohn* has been criticized for facilitating the practice of improperly channelling communications through corporate or government counsel for the purpose of attracting solicitor client privilege. See the article by Watson and Au, above, at pp. 321–322. See, also, *Campbell*, above, on the need to distinguish when in-house counsel are or are not acting as legal advisors.

I should note *Wilson* v. *Favelle*, [1994] B.C.J. No. 1257, which was referred to in *Gower*. In that case, a Master of the British Columbia Supreme Court held that, because a lawyer had been hired as an investigator, and not as a lawyer, a report she prepared in connection with her investigation of a workplace conduct matter was not privileged. The Master also ordered disclosure of meeting minutes prepared by the lawyer. Without disagreeing with *Wilson*, the court in *Gower* simply concluded that the facts before it were analogous to the facts in *Allen* v. *McGraw*, above, and were "materially different" from the facts in *Wilson*.

The College has also relied upon *Legal Services Society*, above, for the proposition that communications do not have to contain legal advice in order to attract privilege; it is enough if they relate to obtaining a lawyer's advice and are made in confidence. The College has submitted that the two memos to file created by its lawyer are privileged because the expert opinions contained in them are intertwined with confidential legal advice addressed to the SMRC. The expert opinions are therefore communications in relation to a confidential solicitor client relationship, or so the argument goes.

The information in issue in the *Legal Services Society* and the *Municipal Insurance Association* cases – client identities and a lawyer's account for services rendered – was integral, indeed internal, to the solicitor client relationship. Whether or not that information actually disclosed legal advice sought or given, the information did relate directly to the purpose and existence of the solicitor client relationship. The same cannot be said of the memos to file in dispute in this inquiry. The College has a statutory obligation under the MPA to investigate complaints made against its members. The memos to file are the primary records of the expert opinions gathered as part of that investigation process. The College has the right to obtain legal advice in connection with an investigation; this may be very desirable, and confidential communications between solicitor and client in that relation should be protected from disclosure. In this case, however, the College has chosen to have its lawyer actually conduct part of the SMRC's investigation of a complaint. This circumstance does not change, in my view, the substance of the work involved from work in relation to a statutorily mandated investigation to work in relation to, and integral to, a confidential solicitor client relationship.

I am aware that one of the records considered in the *Minister of Environment* case, above, was the minutes of a meeting attended by a solicitor and members of the solicitor's client ministry. The court rejected my predecessor's view that the factual information within the minutes was not part of the privileged communication. It held that "[w]hen a client communicates factual and descriptive information to a solicitor for the purpose of obtaining legal advice, the information forms an integral and indivisive part of the privileged communication."

The memos under consideration in this inquiry differ from the minutes in the *Minister of Environment* case. The minutes in the *Minister of Environment* case recorded a meeting attended by a lawyer for the Ministry and Ministry representatives. That meeting did not include third party expert witnesses and was not part of a statutory investigation. The memos in this inquiry record the evidence of expert witnesses communicated at meetings with the College's lawyer and other College representatives. The communications with the experts are third party communications. The memos are the primary investigative records of the expert's opinions. The fact that the College's lawyer melded her own reflections and analysis into a discrete part of the first memo does not transform the character of the meetings and communications with the experts into meetings and communications within, related to, or integral to the confidential solicitor client relationship between the College and its lawyer.

The effect of the College's argument here is that, by having its lawyer conduct the investigation, the investigative process is subsumed under the solicitor client relationship between the College and its lawyer. This loses sight of the function involved – a statutory complaint investigation process under the MPA – and of the fact that the expert opinions were gathered as an integral part of that investigation process. The College's solicitor client relationship with its lawyer serves to enable the College to discharge its duties and functions; the investigation process under the MPA does not exist to serve a solicitor client relationship between the College and its lawyer.

I therefore conclude that the first memo and the second memo record third party communications from medical experts which were gathered as part of the College's investigation of the applicant's complaint, as well as some legal analysis by the lawyer. They are not communications from solicitor to client (though copies of the memos may, I infer, have been provided to the College through the sending of copies to the SMRC). Nor are they confidential communications in relation to a solicitor client relationship. To the extent that the first memo contains text that reflects the lawyer's legal analysis or advice to the SMRC, the disclosure of that information would reveal, and is in relation to, confidential solicitor client communications. Because that information is privileged, it may be withheld by the College. This information consists of that part of the first memo found after the visual break ">><<"on page four. The memos themselves, as opposed to the information just described, are not privileged as being in relation to a confidential solicitor client relationship.

Litigation Privilege

Canadian law will protect a communication from disclosure if it is a communication between a client, or his or her lawyer, and a third party and the dominant purpose for which the communication came into existence was to prepare for, advise upon or conduct litigation that was underway or in reasonable prospect at the time the communication was created. See, for example, Chap. 3 of Manes, above. As is noted above, this privilege, known as litigation privilege, is incorporated in s. 14 of the Act.

It is broadly recognized that the policies underpinning solicitor client communication privilege and litigation privilege differ. The former kind of privilege – discussed above – protects direct confidential communications between lawyer and client, for the purpose of obtaining legal advice, because of the fundamental importance of their professional relationship. See *Descoteaux* v. *Mierzswinski*, above. By contrast, litigation privilege exists to promote the efficacy of an adversarial system of litigation. The policy foundation for the litigation privilege rule has been put this way, in J. Sopinka *et al.*, above, at p. 745:

> Although this extension [to create litigation privilege] was spawned out of the traditional solicitor–client privilege, the policy justification for it differed markedly from its progenitor. It had nothing to do with clients' freedom to consult privately and openly with their solicitors; rather, it was founded upon our adversary system of litigation, by which counsel control fact–presentation before the court and decide for themselves which evidence and by what manner of proof they will adduce facts to establish their claim or defence, without any obligation to make prior disclosure of the material acquired in preparation of the case.

See, also, *Susan Hosiery Ltd.*, above, at pp. 33 and 34.

The College argued, at p. 14 of its initial submission, that the communications between its lawyer and the experts are privileged because they occurred so the College's lawyer could advise the SMRC on possible MPA proceedings. At p. 2 of its second supplemental submission, the College acknowledged that the decision of the British Columbia Court of Appeal in *Hodgkinson* v. *Simms* (1989), 33 B.C.L.R. (2d) 129, means that

> … [i]n order for such privilege to apply in the context of communications which are strictly third party communications to which no other forms of privilege apply, according to *Hodgkinson* v. *Simms*, there must be "anticipated or pending litigation".

In response to my request for argument on whether MPA disciplinary processes qualify as 'litigation', the College stated, at p. 7 of its second supplemental submission, that:

> Principles of privilege applicable in the civil litigation context are equally applicable in the context of potential disciplinary proceedings such as those contemplated by the MPA. That is so because the civil law and standard of proof apply to professional disciplinary proceedings.

As to the requirement that the litigation be anticipated or pending, the College said that:

> … since at the time that the expert opinions in issue were sought the potential of a hearing was clearly anticipated, the College is entitled to rely on principles of privilege applicable in the litigation context including litigation privilege.

To my mind, whether the civil or criminal standard of proof applies in professional disciplinary proceedings under a given statute is not determinative of whether MPA processes qualify as litigation for the purposes of litigation privilege. There is also no evidence before me to suggest that a "hearing" of some kind was "anticipated" at the relevant time any more than it would be in any other case where a complaint is investigated by the SMRC, in the ordinary course, under the MPA and Rules. Indeed, the evidence suggests the expert opinions were used by the SMRC in considering whether to press ahead with disciplinary charges at all, and there is no evidence that such charges were laid. The record before me supports the conclusion that the College, at most, engaged in an investigative process as a result of which it decided not to take proceedings against Dr. Doe. The above–quoted passage from p. 14 of the College's initial submission is consistent with this conclusion, as are the views expressed by the College in correspondence during the complaint investigation stage. I have also not overlooked the fact that the College's position on this point, as described above, shifted in its reply submission; at p. 10 of the reply, the College said:

> … once the College focused on the actions of the member in issue to inquire whether he might be found guilty of the allegations made by the applicant in this case, litigation in the fullest sense of the word was then in actual progress and not simply in contemplation.

The applicant did not agree that MPA proceedings are litigation for the purposes of the litigation privilege rule. The following passage is from p. 7 of the applicant's second supplemental submission:

> Finally, litigation privilege does not apply to the College's complaint process because it does not involve a private dispute between two private litigants for which it is important to protect the adversarial process. Rather, the nature of the proceedings is one of a public prosecution performed in the public interest. … The College has no vested interest in the outcome of a complaint, including a prosecution of a member as a result of a complaint. Therefore, the policy reasons for litigation privilege do not apply to the College and its lawyer. … As with other professional bodies, given the potential adverse consequences to a member, the College must disclose relevant inculpatory as well as exculpatory communications. … Consequently, litigation privilege cannot apply to the College.

At the very least, the applicant argued, there is no litigation privilege, as regards the College's interests, during the investigative stage of a MPA complaint. The applicant argued that during the investigative phase of a complaint – such as was the case here – the College is simply determining whether the complaint merits an inquiry. According to the applicant, that phase is not adversarial and is not litigation for the purposes of the

litigation privilege rule. None of the cases cited by the applicant directly supports, however, the contention that the College's investigation of a complaint under the MPA is not litigation for the purposes of establishing a claim of litigation privilege.

I summarize the substance of the College's and the applicant's positions as follows. Both parties identify litigation privilege with an adversarial trial system. In the eyes of the College, from the time a complaint under the MPA is made against one of its members, the College engages, as a party, in an adversarial process for the resolution of that complaint. Litigation privilege applies, therefore, to the tasks of investigation and marshalling of the complaint performed by the College's lawyer. In the applicant's eyes, the complaint process under the MPA consists of 'investigation' and 'prosecution' stages, at best, and only the latter is adversarial in nature. The investigation stage is conducted to determine whether a complaint warrants disciplinary action. At the point of taking disciplinary action, the College becomes an adversary as against the member. Prior to that point, the College investigates but cannot be said to have adopted any position in favour of, or opposition to, the member or the complainant. If the College does proceed against a member, the principles of natural justice and procedural fairness require it to disclose to the member the relevant fruits of its investigation. This underscores the inapplicability of litigation privilege to the College's investigative functions under the MPA.

There are several relevant, although not conclusive, cases to consider on this issue. One is *Ed Miller Sales & Rentals Ltd.* v. *Caterpillar Tractor Co.* (1988), 61 Alta L.R. (2d) 319 (Alta. C.A.), a case relied on by the College. In that case, the Director of Investigation and Research, under what was then the *Combines Investigation Act* (Canada), conducted an inquiry which caused the investigation's target, through its legal counsel, to instruct an accountant to prepare certain documents for use in the target's defence. The Director ended his inquiry and did not charge the target. The documents prepared in the target's defence were sought to be produced in subsequent civil litigation which involved the same or similar issues as those investigated by the Director. The Alberta Court of Appeal held that the documents prepared by the target's accountant were protected by litigation privilege. It rejected an argument that the Director's process was not "litigation", at p. 326:

> For Miller it is urged that an inquiry by the Director of Investigation and Research under the *Combines Investigation Act* is not litigation. Alternatively, it is said that, if the documents were ever privileged, that privilege ended once the director terminated his inquiry. In my view, both arguments take too narrow a view of the term "litigation". Once the director focused on the Caterpillar companies to inquire whether they were guilty of offences under the Act, litigation in the fullest sense of the word was then in actual progress let alone in contemplation. The parties could look ahead to many possible procedures. Some under the Act have possible penal consequences; some were civil as this very action establishes. All involved the same issues. The inquiry seems to have resolved itself to the question of the costs of the Caterpillar "no–charge" services and the very same issue appears at the forefront on this action.

> The conclusion of the director's inquiry did not mean that the litigation was ended. Section 39 of the *Combines Investigation Act* expressly provides that civil rights of action remain despite the provisions of the Act. The issues raised by the director were still open to other litigants such as the respondent.

I make three observations about the *Ed Miller* case. First, the above aspect of that case has not been considered in any British Columbia judicial decision of which I am aware. Second, unlike this case, where privilege is being invoked by the College, in *Ed Miller* privilege was invoked by the target of the Director's inquiry. Third, in order to commence an inquiry under the applicable legislation, the Director was statutorily required to have reason to believe that a ground existed for an order against the target or that an offence had been or was about to be committed. No such threshold for the College's investigation of complaints under the MPA has been brought to my attention and I have not found any. For these reasons, I do not consider the decision in *Ed Miller* to be binding upon me or, in any event, to stand for the proposition that litigation privilege applies to a statutory agency when it investigates a complaint of regulatory or professional wrongdoing.

It should be noted that *Ed Miller* was considered in *Alberta (Treasury Branch)* v. *Ghermezian*, [1999] A.J. No. 624 (Alta. Q.B.). Applying a somewhat different approach, the court held, at paras. 18–21, that an appeal of a tax assessment to a review board was not litigation for the purposes of establishing litigation privilege:

> The purpose of granting privilege over documents made in anticipation of litigation is to allow a party to freely prepare its case. This privilege is also necessary to override the requirement in civil litigation that parties exchange all relevant documents. If a party is not afforded the protection provided by litigation privilege, it would be required to forward to its opponent unfavourable information which it has developed while preparing its case. As stated in *The Law of Evidence in Canada* (J. Sopinka, J. Lederman and A. Bryant, Toronto: Butterworths, 1992):
>
> > The adversarial system is based on the assumption that if each side presents its case in the strongest light the court will be best able to determine its truth. Counsel must be free to make the fullest investigation and research without risking disclosure of his opinions, strategies and conclusions to opposing counsel. … Indeed, if counsel knows he must turn over to the other side the fruits of his work, he may be tempted to forego conscientiously investigating his own case in the hope he will obtain disclosure of the research, investigation and thought processes compiled in the trial brief of opposing counsel. (p. 654)
>
> However, if there is no requirement that a party provide all documents to the other side, the need for litigation privilege disappears. The mandatory disclosure requirement is an important aspect of "traditional litigation" insofar as the entitlement to litigation privilege is concerned. Therefore, for the litigation privilege to attach to documents prepared in contemplation of a proceeding which is not traditionally classified as litigation, a party must demonstrate that his opponent has a right to access any material prepared in contemplation of that proceeding. If a certain proceeding does not have a sufficiently similar

> disclosure requirement to that of "traditional litigation", it follows that it should not be characterized as "litigation" for the purpose of finding litigation privilege.
>
> There is no evidence before me that parties involved in a dispute before the Municipal Tax Assessment Board are required exchange relevant documents or make any type of disclosure akin to that in a civil action. As such, the policy justifications underlying litigation privilege are not brought into play in this case. WEM was free to gather any information it required to prior to the hearing, and was able to choose which information it disclosed to the City and to the Board. There is no need for privilege because a party is not required to exchange documents with the opposing parties.
>
> Under this test, it is possible that the material may become privileged if at some point in the regular course of the proceedings the parties become obliged to disclose all relevant documents to the other side. At that point the rationale for instigating litigation privilege would come into play. However, the proceedings in this action did not reach a point where there was any requirement of disclosure, and it is unlikely that such a requirement would ever have come into existence. As such, I find that the Appraisal is not covered by litigation privilege.

I am not, with respect, convinced that the test articulated in *Ghermezian* is necessarily an apt one. Because it focuses only on whether disclosure requirements apply to a proceeding, it ignores the need for an adversarial element to support the existence of litigation privilege. Further, the existence of discovery requirements does not create a static zone of litigation privilege; on the contrary, in a traditional civil litigation context the "modern trend is in the direction of complete discovery", with litigation privilege being "the area of privacy left to a solicitor after the current demands of discoverability have been met": *General Accident*, above, *per* Carthy J.A., at p. 256.

The approach taken in *Ghermezian* would also assume that, if no traditional discovery requirements are attached to a proceeding, then the parties would not be required to make any type of disclosure. This assumption may be valid for private parties who are engaged in a traditionally adversarial judicial or quasi–judicial process. It lacks validity, however, where one of the parties is a disciplinary, regulatory or criminal prosecutor. This is because, as is discussed below, disclosure of relevant evidence – whether damaging or supportive – is a component of both administrative and criminal justice.

In saying this, I am aware of the Ontario Court of Justice decision in *Bank Leu AG* v. *Gaming Lottery Corp.*, [1999] O.J. No. 3949. Like *Ed Miller*, which was not referred to in the decision, *Bank Leu AG* dealt with an investigation by a regulatory agency into certain conduct. Communications had passed between the Gaming Lottery Corp. and its U.S. lawyer respecting an investigation regarding that corporation by the U.S. Securities and Exchange Commission ("SEC"). In later civil litigation between Bank Leu AG and Gaming Lottery Corp., a third party in the litigation sought production of those communications. Citing U.S. cases dealing with similar situations involving the SEC, the Court held that the target of the investigation could claim litigation privilege. I note that, as was the case with *Ed Miller*, *Bank Leu AG* dealt with a claim of privilege by the investigation's target, not by the regulatory agency. Here, the College, as regulatory

agency, is claiming the benefit of privilege. For the reasons already given, I do not consider the decision in *Bank Leu AG* to be binding on me or, in any case, to stand for the principle that litigation privilege can be claimed by a statutory agency investigating a complaint of professional or regulatory wrongdoing.

Fairness principles require the College to disclose information relevant to the conduct of an MPA proceeding it takes against a member. See *Hammami* v. *College of Physicians and Surgeons (British Columbia)* (1997), 36 B.C.L.R. (3d) 17 (B.C.S.C.) and *Milner* v. *Registered Nurses Association of British Columbia*, [1999] B.C.J. No. 2743 (B.C.S.C.). It is true that the court in *Hammami* ordered the College to disclose the member's file "subject to any claims of privilege or of confidentiality and if such claims are advanced then at least the documents upon which such privilege or confidentiality are advanced should be identified." Nothing more about privilege was said and I do not consider that the quoted statement was intended to suggest or establish the legitimacy of a litigation privilege claim by the College in connection with MPA proceedings. The reference was to all potential claims of "privilege or confidentiality", which would include classes such as the privilege protecting the identity of an informer. I think it would be very surprising if, in relation to disciplinary charges against a member, the College could invoke litigation privilege to suppress disclosure of relevant evidence, including the opinion evidence of an expert witness.

Smith v. *Jones*, above, also has some relevance here. As I observed earlier, it is unclear what branch of solicitor client privilege the Supreme Court of Canada considered was applicable to an expert psychiatric opinion obtained by defence counsel in a criminal matter. If litigation privilege applied, the case may be authority for the proposition that proceedings other than civil litigation can be 'litigation'. However, defence counsel, not the prosecution, invoked the privilege. I do not consider this case to decide that litigation privilege would apply to evidence gathered by the police or prosecution. Indeed, the prosecution in a criminal matter would not be given litigation privilege over an expert report which fell under the disclosure standard set in *R.* v. *Stinchcombe*, [1991] 3 S.C.R. 326.

I would add that the application of privilege to an expert report commissioned by defence counsel in a criminal matter – the *Smith* v. *Jones* situation – is consistent, to my mind, with the application of privilege to the accountant's working papers commissioned by counsel for the target company in the *Ed Miller* case. In both cases, the subject of a law enforcement process was able to invoke privilege over third party work–product obtained by the subject's counsel as part of its defence respecting the process. Neither case, on the other hand, establishes that litigation privilege can be claimed over investigative material gathered by a prosecutor or a lawyer for a law enforcement agency.

In reaching this conclusion, I have also kept in mind a case brought to my attention by the College: *R.* v. *Stewart*, [1997] O.J. No. 924 (Ont. C.J.). In *Stewart*, in an attempt to comply with *Stinchcombe*, above, the Crown disclosed hard copy material to the defence, but did not disclose an electronic database into which the same information had been entered along with annotations by Crown counsel and a coding system designed to link related testimony and evidence. The court held that Crown, or investigator, work-product

of this nature did not have to be disclosed to the defence. In my view, *Stewart* turned on the proposition that the Crown disclosure obligation in a criminal context relates to facts, not to the thoughts or theories of investigators or prosecutors. I do not agree with the College's contention that *Stewart* established a Crown work–product privilege.

The following passage from the judgement of L'Heureux–Dubé J. in *R.* v. *O'Connor*, [1995] 4 S.C.R. 411, is referred to in *Stewart*:

> At the same time, however, we must place the considerable disclosure difficulties within their proper context. The considerable disclosure difficulties relate almost entirely to the following: (1) materials which were not in the Crown's possession at the time of the making of the original disclosure order and which, consequently, for reasons that I shall discuss below, the Crown was not under any obligation to produce; and (2) *work product which, provided that it contains no material inconsistencies or additional facts not already disclosed to the defence, the Crown would also not ordinarily be obliged to disclose, were it not for the undertaking which it gave to the defence the weekend before the beginning of the trial.* This was not a case where the Crown failed, for whatever reason, to disclose the fruits of an investigation undertaken by agents of the state. Much confusion was attributable to the fact that the law regarding the disclosure of third parties' private records was highly uncertain, and nobody was quite sure what to do. (emphasis added)

I do not consider the above passage to hold that Crown work-product which need not be disclosed under *Stinchombe* is covered by litigation privilege. It is also clear that L'Heureux-Dubé J. conceived of the work-product which need not be disclosed as distinct from the fruits of the investigation and that she was not addressing circumstances, like here, where a lawyer has also conducted the investigation and to some extent intertwined her 'work-product'.

It is telling, in my view, that neither of the parties to this inquiry, nor my own research, has brought to light any case, directly on point, where a statutory agency has invoked litigation privilege with respect to the fruits of its investigation of an alleged breach of legal, regulatory or professional or occupational standards of conduct. As was observed by the applicant, a body like the College, with its mandate to protect the public interest and the integrity of the practice of medicine, is not in the same position as a private party engaged in private litigation. As it has acknowledged in this inquiry, the College has a statutory mandate to act in the public interest and a duty to investigate complaints against its members, whether or not the College has had a role in initiating those complaints or has reason to believe that member misconduct has in fact occurred. The College's role has more in common with the roles of law enforcement officials and prosecutors engaged in upholding the law than it does with the role of a party to civil litigation. This characterization of the College's function in the MPA complaint process is consistent with the Act's definition of "law enforcement" and with the view, expressed below, that a complaint to the College under the MPA is a law enforcement matter within the meaning of s. 15 of the Act.

It is also notable that s. 15(1)(g) of the Act authorizes a public body to refuse to disclose "any information relating to or used in the exercise of prosecutorial discretion", but the Act's definition of the phrase "exercise of prosecutorial discretion" effectively limits s. 15(1)(g) to the exercise of a duty or power under the *Crown Counsel Act*. The result of this is that, although the College has a law enforcement mandate and the Act makes law enforcement exceptions to disclosure available to it, the exception in s. 15(1)(g) has not been given to the College by the Legislature. Had s. 15(1)(g) applied to the College, the disputed records in this inquiry would have been protected by the section and it would have been unnecessary for the College to advance an argument based upon litigation privilege or other exceptions under the Act. The litigation privilege issue cannot be decided, of course, with a view to filling in an exception from disclosure under s. 15(1)(g) which the Legislature has obviously not chosen to extend beyond criminal and quasi–criminal prosecutions involving the exercise of duties and powers under the *Crown Counsel Act.*

Returning to the purpose of litigation privilege – *i.e.*, to protect the research, investigations and thought-processes of trial counsel – and the nature of the MPA complaint and discipline process, I fail to see how, at the time the disputed records in this inquiry were created or received by the College's lawyer, her client was an adversary of the member or the complainant or indeed was engaged in an adversarial process with anyone. The applicant made a complaint to the College under the MPA. The College was required to investigate the complaint and decide, through the SMRC, whether proceedings against the member were warranted. The College used its lawyer to gather expert medical opinions on the complaint and to advise the SMRC, which decided that proceedings against the member were not warranted.

Litigation privilege serves the preparatory needs of counsel engaged in an adversarial trial process, not the confidentiality of communications between solicitor and client. Considering the College's multiple roles under the MPA – as disciplinary investigator, prosecutor and decision-maker – I conclude that its investigative function bears little, if any, relation to the participation of a party in civil litigation and that litigation privilege therefore cannot be claimed by the College over the disputed records which were received or created by its lawyer.

This conclusion is supported by the fact that the heart of the College's objection to disclosure of the disputed records appears to rest on its belief that experts will not be willing to participate in the MPA complaint review process unless their reports are kept confidential. Dr. Van Andel deposed that "I verily believe the experts will be discouraged from assisting the College if their opinions are not protected from disclosure." This is not a purpose, however, of litigation privilege. See *Boulianne* v. *Flynn*, [1970] 3 O.R. 84, at p. 89:

> …the privilege accorded to reports prepared for the purposes of litigation by experts at the request of a solicitor, rests not on a concern that the expert might otherwise fail to make full disclosure (the litigation being of no personal concern to him) but on the desirability of a solicitor being uninhibited in collecting confidential information and opinions for the purpose of preparing his case for

> trial whether such information and opinions further his case or not. Thus, once the litigation is concluded, the reason for the privilege disappears.

The College has a statutory duty to investigate complaints made against its members. The public and the medical profession rely upon the College in that regard. In this case, the College chose to have its lawyer carry out at least part of the investigation into a complaint. Unlike a participant in litigation, whose interest is to further his or her own case, whatever that may be, the College (and by association its lawyer) must proceed evenhandedly. When the College receives a complaint against a member, the College has no 'case' to favour or advance. Its role, at that stage at least, is to investigate the complaint, not selectively to advance or suppress one side over another. The College's lawyer, carrying out the College's statutory mandate to investigate complaints, therefore would have no reason to conduct a less thorough or fair investigation because of concern that fruits of the investigation might be disclosed (in this case, to the person who complained to the College). The policy justification for litigation privilege is, in my view, not found in these circumstances.

For the reasons given above, I find that litigation privilege does not apply to the disputed records.

Has Any Privilege Ended?

If I am wrong and litigation privilege may be invoked by the College in relation to its investigation of a complaint under the MPA, I have also considered whether 'litigation' has concluded. If it has, the privilege is gone. I have reviewed numerous authorities on this issue, including *Ed Miller*, above; *Ghermezian*, above; *Carleton Condominium Corp.* v. *Shenkman Corp. Ltd.*, [1977] O.J. No. 567; *London Guarantee Insurance Co.* v. *Guarantee Co. of North America*, [1995] O.J. No. 4316; *Mann* v. *North American Automobile Insurance Co.*, [1938] 2 D.L.R. 261; *Griffiths* v. *Mohat*, [1981] 5 W.W.R. 477; *Hongkong Bank of Canada* v. *Gross* (1992), 11 C.B.R. (3d) 300; *Petro-Canada* v. *"Mary J" (The)* (1994), 98 B.C.L.R. (2d) 139; *Belitchev* v. *Grigorov*, [1998] B.C.J. No. 3151; and Sopinka & Lederman, above, at p. 751. From these authorities, a rule emerges that litigation privilege expires when the potential for further litigation associated with the subject-matter of an action ends for that party. For the following reasons, I have concluded that the potential of further litigation has ended for the College in this case.

There is no indication in the material before me of the existence or anticipation of other litigation such as a civil suit involving the member or the applicant in relation to the subject–matter of the applicant's complaint under the MPA. Such a suit, in any event, would not be litigation associated with the College. Neither would criminal charges against Dr. Doe or the applicant (of which there is no suggestion as regards either individual).

There is reference by the College in this inquiry to the possibility of an application for judicial review, by the applicant, of the SMRC's decision not to take further action on her complaint. The College provided me with a letter, written by the applicant in May of 1999, in which she referred to a lawyer who was her "counsel regarding College of

Physicians and Surgeons matters, including the Judiciary Review". In a supplementary submission, the applicant said that she had not started any litigation. There is no indication an application for judicial review has been made. Nor is there any other indication the applicant does intend to bring such an application. Neither is there a commitment the applicant will not do so.

Given the lack of a limitation period under the *Judicial Review Procedure Act*, I accept that an application for judicial review by the applicant could be made at some time. In my view, however, the possibility of such an application does not constitute the continuation of litigation against the College for the purposes of litigation privilege. The College and the SMRC were not in an adversarial relationship with the complainant or Dr. Doe with respect to the investigation of the complaint. I fail to see how that changes if the College and the SMRC anticipate or experience a judicial review of the decision not to direct an inquiry into the applicant's complaint under the MPA.

In Order No. 331-1999, I considered a claim of litigation privilege by a public body exercising an adjudicative function. I concluded that an appeal or judicial review of the public body's decision did not constitute litigation against the public body for purposes of invoking litigation privilege:

> The "Board's experience with the Applicant" appears to have been that he demonstrated himself to be a litigious person, in the sense that he readily brought multiple complaints against police officers and, in relation to his cases, readily challenged or appealed the decisions of the VPD and the Board. There is no evidence before me that the applicant sued anyone, much less the Board or any of its members. Furthermore, none of the cases cited by the Board on litigation privilege, nor any I could find, involved the characterization of an appeal or judicial review of a statutory tribunal's decision as litigation against the tribunal, *i.e.*, the Board. If that were so, any tribunal could be said to contemplate 'litigation' about any of its decisions. Such an application of litigation privilege to adjudicative bodies appears to be unprecedented, as well as unsupported by the policy objective of this privilege.
>
> As a result, and in summary, I find that the Board's function in relation to the applicant's complaints and appeals against VPD police officers under the *Police Act* and the Regulation did not entail an adversarial relationship and thus would not support the litigation privilege claimed.

The situation is not identical in this inquiry because, rather than being strictly adjudicative, the College had an investigative role which was followed by a statutory decision not to proceed further with the complaint. Still, on reasoning analogous to that in Order No. 331-1999, I fail to see how the College could be said to be at risk of continuing or related litigation. The College would have limited standing on a judicial review of the SMRC's decision and would have an obligation to produce the complete record of that decision as required by the court. If litigation privilege existed over any fruit of a complaint investigation, which the SMRC relied upon to dispose of the complaint (*e.g*, the report of an expert witness), this would interfere with production of the record of the SMRC decision for a fair determination of an ensuing application for

judicial review. Even if the court could override the privilege, the prospect of this scenario underscores, to my mind, why as a matter of both practice and principle an application for judicial review of the SMRC decision would not be continued 'litigation' involving the College as adversary. Since I have determined that the College was not engaged in 'litigation' with the member or the applicant, I do not see how that relationship is transformed, from its inception, by the possibility of an application for judicial review of the SMRC's decision.

Has the College Waived Privilege?

The applicant also contended, in the alternative, that the College had, by releasing summaries of the disputed opinions to her during the College's complaint process, waived solicitor client privilege over those records. I invited further submissions from the parties on this issue.

The College said it had never intended, either expressly or implicitly, to waive solicitor client privilege over the disputed records. The College also submitted that

> … the Commissioner has no jurisdiction to consider whether that privilege has been waived and, if so, to then order documents released that are protected from disclosure under section 14 of the Act..

I will deal first with this jurisdictional issue.

Jurisdiction to Decide the Waiver Issue

The College argued, at p. 4 of its further submission, that there is no provision in the Act "which could be construed as allowing waiver of privilege to negate the provision of section 14 of the Act." According to the College, this means "the Commissioner has no ability to override the provisions of section 14 of the Act, even if there was a waiver of privilege." The College's argument leads to the conclusion that a public body could, at common law, waive solicitor client privilege respecting a particular record, but later refuse, under s. 14, to disclose that same record in response to an access request under the Act. Outside the Act, the privilege would have been lost for all purposes, but an access request could be stymied on the basis of an otherwise non-existent solicitor client privilege.

In support of its argument, the College relied on a New Brunswick Court of Queen's Bench decision, *Mackin* v. *New Brunswick (Attorney General)*, [1996] N.B.J. 557. That case involved an access to information request, under New Brunswick's *Right to Information Act*, for a legal opinion. Larlee J. decided that certain actions of the public body in relation to the opinion did not amount to a waiver of solicitor client privilege. The judge went on, at paragraph 16, to make the following passing comments:

> The Act does not refer to waiver. There is no right to information where its release would disclose *legal opinions*. The information sought is protected under paragraph section [*sic*] 6(f). The application is dismissed. [emphasis added]

Again, s. 14 of the Act incorporates the common law rules respecting solicitor client privilege. There is no doubt the principle of waiver of privilege forms part of the common-law of solicitor client privilege. See, for example, Manes, above, at p. 187 and following. For this reason alone, I conclude it is part of my function in an inquiry – in determining whether a public body was authorized by s. 14 to refuse to disclose privileged information – to decide whether that privilege still applies or whether it has been waived by the public body.

Further, s. 56(1) of the Act says the commissioner, in conducting an inquiry such as this, "may decide all questions of fact and law arising in the course of the inquiry." The question of whether or not a disputed record is, for the purposes of s. 14, "subject to solicitor client privilege" falls squarely within this decision-making authority. This conclusion is also consistent with the legislative policy underlying the Act, including s. 14. Finally, the decision in *Mackin*, above, is not binding on me and its result can be explained entirely on the basis of the materially different wording of the statutory exceptions dealt with in that case. Specifically, the New Brunswick exception was for "legal opinions" whether or not privilege over them had been waived, while s. 14 of the Act encompasses the common law of solicitor client privilege, including waiver.

The waiver issue has arisen before under the Act. In Order No. 208-1998, my predecessor rejected an applicant's claim that the Law Society of British Columbia had, for the purposes of s. 14, waived solicitor client privilege over certain records. In Order No. 252-1998, he rejected an applicant's claim that privilege had been waived. Last, waiver of privilege was argued in Order No. 321-1999, but the commissioner decided it did not arise on the facts of the case. There is no way of knowing whether the jurisdictional issue raised by the College in this case was argued in any of those decisions. My predecessor did not mention the point and clearly had no difficulty concluding that waiver is relevant to application of s. 14 in a given case.

A number of decisions under Ontario's freedom of information legislation have dealt with the issue of waiver of privilege. See, for example, Ontario Order P-579 (November 18, 1993) and Order M-974 (July 24, 1997). Ontario's legislative approach to legal privilege is closer to New Brunswick's than to ours. Yet none of the Ontario decisions I have reviewed, including those just cited, leaves any doubt that waiver is relevant in determining whether a record is privileged for the purposes of an access request.

Did the College Waive Privilege Here?

The substantive issue here is whether the College waived any privilege over the disputed records when it disclosed summaries of the experts' opinions to the applicant. The applicant argued, at p. 9 of her second supplemental submission, that waiver occurred when the College disclosed to the applicant "the name and conclusion of at least one of the experts it consulted during the investigation stage". The applicant argued the College could not selectively disclose only some information: the partial disclosure should be treated as a waiver of any privilege that may have existed in respect of all of the record.

In response, the College said that its disclosure of summaries to the applicant did not waive any privilege in the underlying records. The College said, at p. 2 of its first supplemental submission, that there was no express waiver by the College because it did not voluntarily disclose the summaries. It also said that an implied waiver of privilege can be found only where "an objective consideration" of the facts allows one to conclude that the College intended to waive privilege. The College said, again at p. 2, that "[f]airness is the touchstone of such an inquiry." According to the College, the fairness analysis only arises where "part of the actual document in dispute has been disclosed" (p. 2). Here, only summaries of the expert opinions were provided, the College said, so "no issue of implied waiver arises" (p. 2).

On this point, the College relied on *Unilever PLC* v. *Proctor & Gamble Inc*., [1990] F.C.J. No. 887. This is a two–page decision of a Prothonotary of the Federal Court of Canada, explaining a ruling that the production of a summary of a privileged document had not waived privilege over the document itself. In that case, the summary disclosed, and attachments to it, did not reveal the existence of the privileged document from which they were derived; the summary was found to be an independent document and not part of the privileged source document.

The College also relied on the judgement of Finch J. (as he then was) in *Lowry et al.* v. *Canadian Mountain Holidays Ltd. and Kaiser* (1984), 59 B.C.L.R. 137, at p. 12, for its "pragmatic approach" to the waiver issue:

> I do not think it would be in the interests of justice to drive litigants or their professional advisers to these or other means of avoiding the effect of a "single subject matter" rule on the question of waiver. Whether the document relates to a single subject matter or not, it is, in my view, preferable to look at all of the circumstances of the case, and to ask whether the defendants' conduct in disclosing that part of the report concerning factual observations can be taken to mislead either the court or another litigant, so as to require the conclusion that privilege over the rest of the report has been abandoned. In my view, no such conclusion can be drawn from the defendants' conduct in this case, and the plaintiffs' argument based on waiver must fail.

(For a further discussion of this case, and others on the privilege waiver issue, see Order 00-07, which I issued on March 16, 2000.)

Finally, at p. 3 of its first supplemental submission, the College argued that its disclosure of the summaries must be viewed in the context in which that disclosure occurred, *i.e.*, the College's statutory regulatory role under the MPA. According to the College, that context did not support a finding of waiver on the *Lowry* standard; it also satisfied the proposition that no waiver occurs when a statute (or court order) requires disclosure:

> By the MPA and Rules, once the SMRC decides the course of action it will take and that decision is communicated to the complainant, the complainant has the right to appeal that decision and to argue for a different result. Although the MPA and the Rules do not expressly require the SMRC to issue complainants

> reasons for its decisions, principals [*sic*] of fairness and the fact that a complainant has a right of appeal would require that reasons of the SMRC be given to a complainant. In a case such as the one presented to the SMRC by the Applicant, involving experts, adequate reasons could not be given by the SMRC without reviewing the evidence provided by the experts.
>
> For the reason, the provision of summaries of the experts' opinions cannot be seen or characterized as a waiver of solicitor client privilege. Rather, the summaries should be seen in the context in which they were provided, *viz.* an explanation by the SMRC of why it did not recommend the appointment of an Inquiry Committee based upon the expert opinions the College's counsel obtained for the benefit of the SMRC.
>
> In addition, as previously seen, no waiver of privilege occurs when a statute requires disclosure of a privileged document … .

I have some doubt abut the College's contention that implied waiver can only arise where part of a privileged document – as opposed to a summary of the document – has been disclosed. The *Unilever* decision turned on its own circumstances and does not purport to stand for such a proposition generally. I do not find it necessary to decide this issue, however, as I am satisfied that the College's disclosure of summaries of the experts' evidence would not constitute waiver over the records in dispute on this inquiry because the summaries were disclosed as part of the SMRC's duty under the MPA to provide an explanation for its disposition of the applicant's complaint.

The College has submitted that it had a legal duty to provide reasons to the applicant for the SMRC's decision. I accept that contention. Its validity is reinforced by the Supreme Court of Canada's expansion of the standard in this area in *Baker* v. *Canada (Minister of Citizenship and Immigration)* (1999), 174 D.L.R. (4th) 193. I also accept that the SMRC's decision could not be meaningfully explained without disclosure of the evidence provided by the experts.

This state of affairs – that the College understood it had a legal duty to provide reasons for a SMRC decision and that this would involve disclosure of expert evidence the College had gathered – undermines the College's earlier argument that its communications with the experts are confidential and integral to the solicitor client relationship between the lawyer and the SMRC. This is not a case where a party engages in a confidential communication knowing that it may later waive that confidence if it suits its purposes or knowing that a court or statute might subsequently override the confidence. The College knew from the outset that the law would require disclosure of the evidence it was gathering from the expert witnesses. The College argued that disclosure in compliance with fairness requirements did not affect its expectation of confidentiality in relation to s. 70 of the MPA. Here, however, the question is not about the effect of a statutory restriction on admissibility. It is whether communications were confidential for the purposes of common law solicitor client privilege when those communications occurred in the knowledge that their substance would have to be disclosed, as a requirement of fairness, in the College's disciplinary process under the MPA.

Be this as it may, however, at this stage I have assumed, for discussion purposes, that the disputed records are privileged in considering whether privilege was waived by the College's disclosure of the summaries. Viewed from this perspective, the College's disclosure of the summaries pursuant to the legal dictates of procedural fairness under the MPA would not satisfy the requirements for a waiver of privilege. An objective consideration of the College's conduct in complying with the legal requirements for fair SMRC decision–making would not demonstrate an intention, express or implied, by the College to waive privilege. Nor does fairness require a finding of waiver. Therefore, if I am wrong in my conclusions with respect to the application of solicitor client privilege to the disputed records, I would not find that disclosure of the summaries constituted waiver of privilege by the College.

Does Any Other Professional Privilege Apply?

In its second supplemental submission, the College made the following argument, at p. 3, in conjunction with its submissions on *Hodgkinson*:

> However, there need not be "anticipated or pending litigation" in respect of third party communications where claims of privilege can be made on other bases. For example, where a claim for common law privilege (based upon Wigmore's four conditions) or statutory privilege can be made, there need not be "anticipated or pending litigation". In the present case, in addition to a claim for any other type of privilege, a claim for common law privilege can be made in respect of all of the documents, since as stated at paragraph 11 of the original submissions:
>
> (a) the communication with the experts originated in a confidence that they would not be disclosed – this was in accordance with the long standing policy of the College which requires that expert reports provided to the College for peer review purposes be maintained in confidence, and that except as strictly required by law, the actual report and identity of the expert will not be disclosed;
>
> (b) confidentiality is essential to the full and satisfactory maintenance of the relation between the parties as subsequent disclosure could result in harm to the expert, a third party or to the College's mandate and would discourage and impede communications;
>
> (c) the relationship between the parties is one which in the opinion of the community ought to be sedulously fostered because it is clearly in the public interest to encourage experts to provide the fullest and most comprehensive information to the College in the course of reviewing complaints;
>
> (d) the injury which would inure to the relationship by the communication would be greater than the benefit gained for the correct disposal of the litigation because if the College can not appropriately protect this information, experts may no longer be forthcoming and this would seriously and adversely impact upon the College's ability to carry out its

> mandate and complaint review process and thereby fulfill its responsibilities in the public interest.

This submission is based on the four criteria for professional – not necessarily legal professional – privilege formulated by Wigmore. The College advanced this argument in the context of its submissions on s. 14. It did not argue that any other provision of the Act incorporates another professional privilege of the kind described in the passage just quoted.

As is noted above, s. 14 of the Act incorporates only the two branches of legal professional privilege discussed above. In my view, the Legislature did not intend the words "solicitor client privilege" in s. 14 to have any broader meaning than that. The courts have accepted that forms of professional privilege distinct from solicitor client privilege may exist. See, for example, *Slavutych* v. *Baker*, [1976] 1 S.C.R. 254. It is clear, however, that these other kinds of professional privilege are different from solicitor client privilege. Accordingly, even if some kind of common law privilege attached to the disputed records, that privilege is not recognized under s. 14 and the College cannot rely on s. 14 on that basis.

Even if one assumes, for the sake of argument, that the kind of privilege advanced by the College is available under the Act, however, I would not be inclined to give it effect here. At the very least, I am not persuaded that the factor expressed above in paragraph (d) would result in a finding of confidentiality. The above passage from the College's second supplemental submission expresses the College's concern that disclosure of what it says were confidential expert opinions would harm the public interest because "experts may no longer be forthcoming" with opinions for the College. This would, the College argued, harm its ability to discharge its mandate under the MPA. The fact that an expert's opinion may be disclosed to an access applicant does not require confidentiality to be compromised. As the s. 22 discussion below demonstrates, I am satisfied that s. 22(1) of the Act requires the College to refuse to disclose to the applicant personal information of the third party experts. The confidentiality of peer review, or complaint investigation, processes need not be compromised.

Does A Statutory Privilege Apply?

A third argument raised by the College stems from ss. 70(7) through (10) of the MPA, which read as follows:

> …
>
> (7) Subject to the *Ombudsman Act*, each person employed in the administration of sections 51 to 66, including a person conducting an inquiry or investigation, must preserve confidentiality with respect to all matters or things that come to the person's knowledge or into the person's possession in the course of the person's duties except
>
> (a) as may be required in connection with the administration of sections 51 to 66 and any rules relating to those sections, or

> (b) as may be authorized by the executive committee if it considers disclosure to be in the public interest.
>
> (8) A person to whom subsection (7) applies, must not, insofar as the laws of British Columbia apply, give, or be compelled to give, evidence in a court or in proceedings of a judicial nature concerning knowledge gained in the exercise of a power or duty under section 21, 28 or 51 to 66 except in a proceeding under this Act or the rules under section 5.
>
> (9) The records of a person, to whom subsection (7) applies, are not compellable in a court or in proceedings of a judicial nature insofar as the laws or British Columbia apply except in a proceeding under this Act or the rules under section 5.
>
> (10) A person who contravenes subsection (7) commits an offence.

The College argued that s. 70 means the information in the disputed records cannot be disclosed in response to the applicant's access request under the Act. It cited in support the British Columbia Court of Appeal decision in *Beale* v. *Nagra*, [1998] B.C.J. No. 2347. The College's second supplemental submission advanced this argument again and relied further on the decision in *Cain* v. *Cappon* (B.C.C.A., Unreported, July 20, 1992, CA015841). For the following reasons, I have decided that s. 70 does not assist the College here.

First, as was observed above, s. 14 of the Act only incorporates common law solicitor client privilege. The College cannot rely on s. 14 on the basis that it somehow incorporates a statutory privilege under s. 70 of the MPA.

Nor does s. 70 of the MPA, operating independently of s. 14 or the rest of the Act, preclude disclosure of the records in response to an access request. The right of access to records created by the Act is not affected by s. 70. This is because of s. 79 of the Act, which reads as follows:

> If a provision of this Act is inconsistent with or in conflict with a provision of another Act, the provision of this Act prevails unless the other Act expressly provides that it, or a provision of it, applies despite this Act.

This means the rights of access afforded under s. 4 of the Act prevail over any conflicting protection afforded by another statutory provision, such as s. 70 of the MPA, unless the other statute expressly overrides the Act. The statement in the first line of s. 70(7) that the sub-section is "[s]ubject to the *Ombudsman Act*" does not implicitly exclude the Act's operation. It is not the kind of explicit notwithstanding clause required by s.79 of the Act. For an example of such an express override, see s. 88(2) of the *Legal Profession Act*:

> Despite section 14 of the *Freedom of Information and Protection of Privacy Act*, a person who, in the course of carrying out duties under this Act, acquires information, files or records that are confidential or are subject to solicitor client

> privilege has the same obligation respecting the disclosure of that information as the person from whom the information, files or records were obtained.

Since there is no express override in the MPA, it follows that the Act prevails and the issue must be dealt with under the Act alone. If support for this conclusion – which is based on the ordinary meaning of the language used in s. 79 of the Act and in s. 70 of the MPA – were necessary, it is to be found in the legislative history of s. 79 (and of s. 70 of the MPA).

In relation to its s. 70 argument, the College said that s. 70 of the MPA creates an expectation that any information provided to the Committee will be kept confidential "and will not be disclosed, except as required in College proceedings or as authorized by [College's] Executive Committee in the public interest". The College relied on Order No. 226-1998, in which my predecessor made the following observations:

> It seems clear from section 70(7) of the Act that the Committee minutes are to be kept confidential, subject to any exception provided for in the rules relating to the complaint and investigation process. The applicable rule here does not provide an exception but rather reinforces the confidential nature of the proceedings by specifying that "[a]ny discussion with a complainant or a member complained against shall be in camera."

Order No. 226-1998 does not advance the College's case that s. 70 of the MPA trumps the access to information rights created under the Act. As I read that order, including the above passage, my predecessor considered s. 70 to be relevant, in a general sense, to the issue of confidentiality of certain College processes. It does not endorse the College's interpretation of s. 70 as an override of the Act.

The decision in *Beale*, above, also does not assist the College on this point. At p. 11 of that decision, Southin J.A. made the following observation:

> The plain purpose of s. 61 [now s. 70] is to insulate, from the processes of civil litigation, the College and those engaged by it to assist in its processes concerning the quality of medical care in the Province. What the College does or does not do is not to be used in medical malpractice suits.
>
> Whether it is in the public interest to so insulate the College was and is a matter for the Legislature.

For the reasons just given, the Legislature has not extended s. 70 to insulate the College's activities from the rights of access under the Act. The consistency of this with the results in *Beale* and *Cain* – where discovery of documents in civil litigation was involved – does not, with deference, matter.

3.3 *In Camera* Meeting Deliberations – Another argument raised by the College was that disclosure of the records would reveal the substance of deliberations of a meeting authorized to be held *in camera*. Section 12(3)(b) of the Act authorizes the

College to refuse to disclose to an applicant

> … information that would reveal … the substance of deliberations of a meeting of its elected officials or of its governing body or a committee of its governing body, if an Act or a regulation under this Act authorizes the holding of that meeting in the absence of the public.

The College said that because the MPA, and the Rules under it, authorize the SMRC to meet *in camera*, the records in issue here were rightly withheld under s. 12(3)(b). The College cited Order No. 221-1998 in support of this argument. As the College put it, at paragraph 34 of its initial submissions, "release of the documents in issue would reveal the reasons for the deliberations of the SMRC and its decision on the complaint."

The College did not point to any specific authority in the MPA or the Rules for the holding of *in camera* SMRC meetings. No explicit authority was included in the material submitted to me by the College. Rule 145 under the MPA, which was relevant in Order No. 221-1998, deals with another College committee, the Quality of Medical Performance Committee ("QMPC"). The SMRC, apparently, is separately constituted under the Rules and is governed by other Rules. The College did not say how Rule 145, which requires that QMPC meetings be held *in camera*, was relevant to the SMRC's activities. Nor did the College explain how the finding on this point in Order No. 221-1998 might otherwise be extended to the SMRC. The onus lies on the College to make its case respecting s. 12 (3)(b). It has not done so respecting these aspects of s. 12(3)(b).

It is, in any case, clear from s. 12(3)(b) that a public body relying on this section must establish that a given meeting was, in fact, held *in camera* before the section can be relied upon. No evidence was provided by the College that a meeting was held or that it was held *in camera*. The College has, therefore, not made its case on this point either.

Even if the College had, contrary to what I have just found, established that a properly authorized *in camera* meeting had been held by the SMRC regarding the applicant's complaint, I would find that disclosure of the disputed records would not reveal the substance of the SMRC's deliberations. I do not see how these records would, as the College put it, "reveal the reasons for the deliberations of the SMRC and its decision on the complaint." As to the SMRC's "decision on the complaint", the decision is already known. It was communicated to the applicant through the applicant's lawyer.

As for the "reasons for the deliberations" of the SMRC, even if one assumes the SMRC used these records as background in considering the applicant's complaint, it does not mean disclosure would, as required by s. 12(3)(b), reveal the "substance of deliberations" of a SMRC meeting. See, for example, Order No. 114-1996, where my predecessor held that correspondence from third parties did not reveal the substance of what actually was discussed at an *in camera* meeting. See, also, Order No. 326-1999. This is to be contrasted with the situation in Order No. 221-1998, which dealt with actual meeting minutes. In my view, the disputed records would not, if disclosed, reveal the substance of the deliberations of the SMRC at any *in camera* meeting.

For the reasons given above, I find that the College is not authorized to withhold these records from the applicant under s. 12(3)(b) of the Act.

3.4 Advice or Recommendations to SMRC – I also have decided the College has not established that it was authorized by s. 13(1) to withhold information in the records from the applicant. Section 13(1) authorizes a public body to withhold from an applicant "information that would reveal advice or recommendations developed by or for a public body or a minister." The reasons for this finding follow. It should be said, at once, that the views expressed below are not intended to exhaustively interpret what is meant by s. 13(1).

The College's argument on this point is found in the following passage, from paragraph 43 of the College's initial submission:

> Section 13(1) provides that the public body may refuse to disclose information that would reveal advice or recommendations developed by or for a public body. In this case the reports provided by the experts and the College's legal counsel's two memoranda contain advice and recommendations to the SMRC regarding the Applicant's complaint against the College member. The advice or recommendations relate to whether the member's conduct required the College to proceed with disciplinary measures against … [the member]. Therefore, the reports are protected from disclosure by section 13(1).

The disputed records detail expert technical, or medical, findings, opinions or conclusions, expressed by physicians or other experts, based on facts communicated to them by the College, as to whether a particular medical procedure was or was not used on the applicant. Each expert was asked to assess a particular set of facts and decide, applying his or her knowledge and experience, whether a particular thing happened. The expert then communicated his or her conclusions to the College. This kind of expert opinion is not, in my view, "advice or recommendations" for the purposes of s. 13(1).

In my view, the information at issue here, consisting of findings made (and expressed) by individuals, based on their knowledge and expertise, does not qualify as "recommendations" to the College within the meaning of s. 13. The experts in this case did not lay out alternatives for the SMRC to consider in deciding whether to lay MPA charges. Nor did they recommend any courses of action. They provided expert findings on technical issues that the SMRC could use to assess – in light of the MPA, the Rules and any relevant case law – whether the College should lay charges against Dr. Doe.

Nor does the information provided by the experts qualify as "advice" in the sense intended in s. 13. *The Canadian Oxford Dictionary* (Toronto: Oxford University Press, 1998) defines various senses of the word "advice", as follows:

> **1** words offered as an opinion or recommendation about future action; counsel.
> **2** (often in *pl.*) information given; news, esp. communications from a distance.
> **3** formal notice of a transaction.

Of the three senses offered, the first is most appropriate, especially in light of the fact that s. 13(2)(a) excludes "factual information" from the ambit of s. 13(1).

In my view, the word "advice" in s. 13(1) embraces more than 'information'. Of course, ordinary statutory interpretation principles dictate that the word 'advice' has meaning and does not merely duplicate 'recommendations'. Still, 'advice' usually involves a communication, by an individual whose advice has been sought to the recipient of the advice, as to which courses of action are preferred or desirable. The adviser in such cases will say 'In light of all the facts, here are some possibilities, but the one I think you should pursue is as follows.'

In this case, the experts did not recommend or advise that the College choose one course of action over another. They applied their knowledge and expertise to a set of facts and drew conclusions as to whether a particular thing had, in fact, happened or not. The experts' conclusions were evidence considered by the SMRC along with a body of other evidence acquired by the SMRC. It would misperceive the role of these experts to characterize them as 'advisors' and their opinions as 'advice'.

I note in passing that this is consistent with views expressed by my predecessor and expressed in decisions under s. 13 of the Ontario *Freedom of Information and Protection of Privacy Act*. In Order No. 193-1997, my predecessor accepted, at p. 7, the Ministry of Attorney General's argument that s. 13(1)

> … is intended to allow full and frank discussion within the public service, preventing the harm that would occur if the deliberative process were subject to excessive scrutiny.

In Order No. 116-1996 and Order No. 140-1996, he expressed the view that s. 13(1) is intended to protect advice or recommendations made by or for a public body "and intended to be acted upon or at least considered by the public body itself".

Neither Order No. 116-1996 nor Order No. 140-1996 takes away from what was later said by the previous commissioner in the above quote from Order No. 193-1997. It is not enough that information has been put before a public body. The information must be something that can be characterized as "advice or recommendations", bearing in mind the purposes of s. 13(1) and of the Act.

Ontario's s. 13 is similar to s. 13(1) of our Act; it employs the phrase "advice or recommendations" and the section is similar in other ways. In Ontario Order 118 (November 15, 1989), the Ontario commissioner also expressed the view that the phrase "advice or recommendations" is intended to protect "the free flow of advice and recommendations within the deliberative process of government decision–making and policy–making". In Order P-411 (February 15, 1993), an inquiry officer under the Ontario legislation observed, citing Ontario Order 161, held that 'advice' or 'recommendations' refer to suggested courses of action which will ultimately be accepted or rejected by the recipient during a deliberative process.

Similarly, section C.4.4 of the 'Policy and Procedures Manual', issued by the Province's Information, Science and Technology Agency for use by public bodies, states that the phrase "advice or recommendations"

> … refers to the submission of a suggested course of action which will ultimately be accepted or rejected by its recipient during a deliberative process. Advice must contain more than mere information.

In summary, the information in dispute here is in the nature of findings, expressed by experts, in response to technical questions posed by the College. It does not, in my view, qualify as advice or recommendations under s. 13(1).

I find that the College is not authorized by s. 13(1) of the Act to refuse to disclose this information to the applicant.

3.5 Harm To Law Enforcement Interests – The College also argued that the records in issue are protected from disclosure under ss. 15(1)(a) and (c) of the Act. Section 15(1)(a) authorizes a public body to refuse to disclose information "if the disclosure could reasonably be expected to … harm a law enforcement matter". Section 15(1)(c) authorizes a public body to refuse to disclose information "if the disclosure could reasonably be expected to

> … harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement.

The first point made by the College was that disclosure of the records could reasonably be expected to harm a "law enforcement matter" within the meaning of s. 15(1)(a) of the Act. Schedule 1 of the Act defines the term "law enforcement" as follows:

> "law enforcement" means
>
> (a) policing, including criminal intelligence operations,
>
> (b) investigations that lead or could lead to a penalty or sanction being imposed, or
>
> (c) proceedings that lead or could lead to a penalty or sanction being imposed.

I accept that the College has a law enforcement mandate under the MPA. This does not mean, however, that the College's mandate authorizes the College to apply s. 15(1)(a) to the records in issue here. The College must still prove a reasonable expectation of harm from disclosure of the specific records in dispute.

At paragraph 51 of its argument, the College noted that it "has a discretion regarding how to proceed with its investigation when it receives a complaint" that may lead to disciplinary proceedings. The College quoted the following passage from p. 5 of Order No. 163-1997:

> I have discussed in previous orders what I regard as an important principle inherent in any consideration of the right of access and the right of a public body

> to withhold information which is that public bodies should be able to conduct complaint investigation and subsequent disciplinary proceedings within a zone of confidentiality subject only to the obligation to provide an applicant with his or her own information. I previously noted that public bodies which have the primary responsibility for process and complaints are entitled to a considerable amount of discretion and confidentiality. (See especially Order No. 144-1997, January 17, 1997; and Order No. 158-1997, April 10, 1997.)

The College then contended, at paragraph 50, that it

> … has exercised its discretion against disclosure of the experts' opinions and that decision should be respected as it is in the best position to know when disclosure may adversely affect its law enforcement mandate and the effectiveness of its investigative techniques.

This would require me to not fulfill my duties in inquiries under the Act. That course of action is not open to me. It is clear from s. 2(1)(e), and from Part 4, of the Act – notably from ss. 56 and 58 and the duties they impose on the commissioner – that the Legislature intended access to information decisions of public bodies such as the College to be subject to independent review. The College's decision will be affirmed only if the College establishes its case for harm under s. 15(1) based on the evidence it adduces.

I should also note that it is doubtful my predecessor intended, in the above passage from Order No. 163-1997, to say that self–governing bodies are entitled to be treated differently from other public bodies covered by the Act. My predecessor actually rejected a similar contention by the College in Order No. 221-1998. At p. 23, my predecessor made clear his view that the legislative intent in extending the Act to self-governing professions was to make their decisions on access to information subject to independent review.

The College's evidence that disclosure of the information would cause the two kinds of s. 15(1) harm identified above is found in paragraphs 5 and 6 of the open affidavit of Dr. Van Andel:

> Based upon my experience in dealing with complaints to the College, I verily believe that experts will be discouraged from assisting the College if their opinions are not protected from disclosure.
>
> I verily believe that the maintenance of confidentiality with respect to the College's investigative and complaints review processes is essential to the fulfilment of the College's mandate. Disclosure of the information sought by the Applicant will harm and seriously impede the College's investigative, complaints and review procedures and techniques, and thereby the College's ability to fulfil its law enforcement and public interest mandate under the *Medical Practitioners Act* and the *Rules*.

I have already reproduced the College's argument on s. 15(1). The College did not

identify information in the records the disclosure of which could reasonably be expected to lead to either of the feared kinds of harm under s. 15(1).

In this case, the material before me indicates that the College has – in the exercise of its mandate under the MPA – decided not to go ahead with disciplinary proceedings against Dr. Doe. As I understand it, the complaint against Dr. Doe is, at this time, at an end. As was noted earlier, there is no indication in the material before me that the applicant has actually sought judicial review of the College's handling of the complaint. There is no way of being sure the applicant will not initiate such proceedings. Still, the College has not shown how disclosure of the disputed records could reasonably be expected to harm either an investigation or a proceeding, as described in the law enforcement definition, in light of the existing circumstances. Even if judicial review proceedings were instituted, it is not clear to me how those proceedings would necessarily lead to a reasonable expectation of harm to an investigation or proceeding within the meaning of s. 15(1)(a).

My predecessor held, in at least one case, that an investigation or proceeding referred to in the Act's law enforcement definition had to be either under way or in reasonable prospect before the matter could be characterized as a "law enforcement matter" for the purposes of s. 15(1)(a). See Order No. 140-1996, at pp. 7 and 8, where an investigation by a self-governing profession had been completed. The commissioner ruled that s. 15(1)(a) could not be used to protect records relating to the completed law enforcement matter. See also Order No. 116-1996, at p. 9. These cases must be contrasted with Order No. 163-1997, where the commissioner agreed that s. 15(1)(a) could be relied upon where an investigation was still under way.

I make no comment, in this case, on the issue of whether a law enforcement matter must be under way or be in reasonable prospect before s. 15(1)(a) can apply. There is no evidence before me that a law enforcement matter – either an investigation or a proceeding – has at any time relevant to the applicant's access request been under way or in reasonable prospect. Even if the College had shown that a law enforcement matter was alive or might come alive, however, I find the College has not proven a reasonable expectation of "harm" to any such investigation or proceeding.

Nor do I think the College was entitled to rely on s. 15(1)(c) of the Act here. In my view, the term "investigative techniques and procedures" is intended to protect technologies and technical processes used in law enforcement. Use by the College of confidential interviews with experts, or the confidential gathering of opinions from experts, does not in my view qualify as an investigative technique or procedure for the purposes of s. 15(1)(c) of the Act. See Order No. 50-1995 and Order No. 83-1996.

In any case, the College has not, in my view, established on the evidence before me a reasonable expectation of harm to techniques or procedures from disclosure of the records in dispute. The College's materials show that it used confidential interviews with experts – and received confidential correspondence from some of them – for the purpose of dealing

with the applicant's complaint under the MPA. But I fail to see how disclosure of the records could reasonably be expected to harm that approach to complaint investigations.

I find, for the reasons just given, that the College is not authorized by s. 15 of the Act to refuse to disclose information to the applicant.

3.6 Protection of Personal Information – Section 22(1) of the Act requires a public body such as the College to refuse to disclose personal information "if the disclosure would be an unreasonable invasion of a third party's personal privacy". The definition of "personal information" in Schedule 1 to the Act provides that the name of an individual is that individual's personal information. Here, the College says that s. 22(1) prevents it from disclosing to the applicant the names of the experts who provided opinions to the College for the purposes of the complaint against the third party physician.

In its initial submissions, the College said that, in refusing disclosure under s. 22(1), it "considered all of the circumstances relevant to its complaints investigation process and the provisions of the Act" (paragraph 51). It went on to say, again at paragraph 51, that the College should, as a local public body,

> … be able to conduct its review of complaints within a zone of confidentiality and, within appropriate limits, to protect information which is provided expressly to facilitate such reviews and to thereby fulfil the College's responsibility to act in the public interest.

The College did not elaborate on what it meant by the "appropriate limits" within which it should be entitled to protect information. Those limits are, of course, the ones laid down by the Legislature in the Act. It is not open to the College to use s. 22(1) as a shield to protect its confidential processes. Either the section applies to personal information and *requires* the College to withhold it or it does not. It is not a discretionary exception to be invoked by the College on the basis of what it perceives to be sound policy regarding its complaint investigation and disciplinary duties under the MPA.

Under s. 57(2) of the Act, the burden lies on the applicant to prove that disclosure of such third party personal information would not be an unreasonable invasion of the third parties' privacy. The applicant's initial submission on this point was as follows:

> As the victim in this case and one who knows the truth, I believe I am entitled to learn the identity of the experts on whom the College based their opinion. How else can one identify and confirm their expertise? And how is one to determine the fairness of the College investigation?

The applicant also claimed to have learned the identity of two of the four experts.

As was indicated above, the lawyer for Dr. Doe made a submission in this inquiry. He adopted the College's argument on all issues, including the s. 22(1) issue. In addition, as

was noted above, one of the four experts submitted that disclosure of that expert's identity would be an unreasonable invasion of that individual's personal privacy.

The College submitted that experts provide information to the College for the purposes of its complaint investigation process "with the understanding that their opinions are given in confidence" (paragraph 51). I have already referred to the College's March 11, 1997 affirmation of its policy of confidentiality, which the College argues applies here. Having considered the matter carefully, I find that the College received the experts' opinions, and their names, in confidence.

I also find that the College is required by s. 22(1) to withhold the names of the experts and any other information that would identify them. Personal information relating to the educational, employment or occupational history of third party experts must also be withheld. The applicant is, for the reasons outlined above, entitled to see the experts' opinions, but she is not entitled to know who the experts are. This conclusion has been arrived at in light of all the relevant circumstances of which I have been made aware, including the circumstances found in s. 22(2) of the Act. Among other things, I have considered the scheme for regulation of the medical profession under the MPA and the Rules, including as regards participation by experts in processes such as the one in issue here.

It does not follow, of course, that the College was required by s. 22(1) to withhold all of the records. Severance of identifying and other personal information, as contemplated by s. 4(2), would eliminate the s. 22(1) issue. Further, this conclusion relates only to personal information of the third party experts consulted by the College. It does not cover the names of College employees, or members, found in the records or the name of Dr. Doe (which is already, beyond any doubt, known to the applicant). The College did not raise s. 22(1) in relation to the identity of such individuals. Nothing in the material before me supports the conclusion that the names of those other individuals must be withheld.

4.0 CONCLUSION

For the reasons given above,

1. having found that the College is not authorized by any of ss. 12(3)(b), 13(1), 14, 15(1)(a) or 15(1)(c) of the Act to refuse to disclose information to the applicant, subject to the orders in paragraphs 2 and 3, below, under s. 58(2)(a) of the Act I require the College to give the applicant access to the disputed records;

2. having found that the College is authorized by s. 14 of the Act to refuse to disclose to the applicant that portion of the first memo on pp. 4 through 8 that is described above, under s. 58(2)(b) of the Act I confirm the decision of the College to refuse to disclose that information, which is circled on the copy of the record returned by me to the College along with its copy of this order; and

3. having determined that the College is required by s. 22(1) of the Act to refuse to disclose to the applicant personal information of or respecting the third parties who provided opinions to the College, under s. 58(2)(c) of the Act I require the College to refuse to give the applicant access to personal information of those third parties.

March 30, 2000

David Loukidelis
Information and Privacy Commissioner
for British Columbia