COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Scott v. College of Massage Therapists of British Columbia,* 2016 BCCA 180

Date: 20160425
Docket: CA42771

Between:

Trevor James Scott

Respondent
(Petitioner)

And:

College of Massage Therapists of British Columbia

Appellant
(Respondent)

And:

College of Physicians & Surgeons of British Columbia

Intervenor

And:

Registered Massage Therapists' Association of British Columbia

Intervenor

And:

West Coast Women's Legal Education and Action Fund

Intervenor

Before: The Honourable Chief Justice Bauman
The Honourable Madam Justice Garson
The Honourable Madam Justice Fenlon

On appeal from: An order of the Supreme Court of British Columbia, dated April 14, 2015 (*Scott v. College of Massage Therapists of British Columbia*, Vancouver Registry S151065).

Counsel for the Appellant:	A.R. Westmacott, Q.C. and L. Fong
Counsel for the Respondent:	J.M. Green
Counsel for the Intervenor, College of Physicians & Surgeons of British Columbia:	N. Iyer
Counsel for the Intervenor, Registered Massage Therapists' Association of British Columbia:	S. Nicoll
Counsel for the Intervenor, West Coast Women's Legal Education and Action Fund:	L. Waddell and K. Cooper
Place and Date of Hearing:	Vancouver, British Columbia January 4, 2016
Place and Date of Judgment:	Vancouver, British Columbia April 25, 2016

Written Reasons by:
The Honourable Chief Justice Bauman

Concurred in by:
The Honourable Madam Justice Garson
The Honourable Madam Justice Fenlon

Summary:

A complaint of sexual misconduct during a massage therapy session led an inquiry committee of the College of Massage Therapists of British Columbia to impose interim conditions on the registered massage therapist pending a full hearing of the discipline committee. Reconsideration by the inquiry committee confirmed the interim conditions, but a judge of the Supreme Court quashed the orders since there was insufficient evidence to establish that the alleged conduct took place. The College appeals on the basis that it was reasonable for the inquiry committee to take action to protect the public without determining the merits of the underlying allegation.

Held: appeal allowed. The extraordinary actions of imposing interim conditions or suspension under s. 35 of the Health Professions Act may be taken where there is a prima facie case supporting the index allegation, and where, based on the material before the inquiry committee, the public requires immediate protection. There will be no "mini trial", but the inquiry committee may receive evidence from the registrant that the complaint is manifestly unfounded or manifestly exaggerated.

Reasons for Judgment of the Honourable Chief Justice Bauman:

I. INTRODUCTION

[1] Inquiry committees under s. 35 of the *Health Professions Act*, R.S.B.C. 1996, c. 183 (the "*Act*") have the jurisdiction to take action "necessary to protect the public during the investigation of a registrant or pending a hearing of the discipline committee".

[2] Here, a complaint of sexual misconduct during a therapy session was brought against a registered massage therapist.

[3] This appeal considers the proper approach of an inquiry committee under s. 35 of the *Act*, and the extent to which that committee weighs the evidence giving rise to any concern for the future safety of the public. Guidelines for the exercise of the s. 35 power based on English jurisprudence considering a similar legislative scheme are discussed.

II. FACTS

[4] The respondent, Trevor James Scott, is a massage therapist, registered with the appellant College of Massage Therapists of British Columbia (the "College"). The College received a complaint on 8 October 2014 from a female patient (the "Patient") who alleged that Scott had engaged in sexual misconduct while he was treating her.

[5] In her complaint, the Patient asserted that during a massage therapy session on 3 October 2014 Scott masturbated and twice put his penis on her left wrist. The Patient did not make any complaint to Scott and did not say anything about the alleged incident to Scott or to anyone else at the clinic.

[6] The Patient attended the police immediately after her massage therapy session. She told the police that she heard Scott unzip his pants and "play with his penis" while massaging her with his other hand. After about ten minutes Scott started using both hands again to massage her. The Patient told police that ten more minutes elapsed before Scott unzipped his pants a second time and put what she believed to be his penis on her wrist. She stated that she did not see Scott masturbating and did not see Scott place his penis on her wrist. The Patient told the police that she did not want Scott to be spoken to or to have charges laid. She indicated that she simply wished to have the complaint on file in the event that future complaints concerning this registrant were received. The police took no action.

[7] Pursuant to s. 33 of the *Act*, the College's inquiry committee appointed an investigator who interviewed the Patient. The Patient told the investigator that she knew Scott was masturbating because "of the manner in which he was massaging her back with one hand" and by his breathing. She said he twice put his penis on her wrist while her wrist was covered with a sheet. The Patient said that she knew the difference between a penis and a finger: "A penis is more rubbery… it was just floppy"; "a finger, you could feel the bone; this was just a flop".

[8] She said that Scott masturbated twice, and that the first time was for a period of 20 minutes. She initially said that she felt his penis on her wrist ten minutes from

the beginning of the massage, but later said that it was ten minutes after Scott started masturbating. The Patient said that she kept her eyes closed because she was afraid that she would see his penis.

[9] On 10 October 2014, the inquiry committee received the police report. On 15 October 2014, the inquiry committee received a summary of the investigator's interview with the Patient.

[10] Section 35 of the *Act* allows the inquiry committee to take certain steps during the investigation or pending a hearing of the discipline committee:

> 35 (1) If the inquiry committee considers the action necessary to protect the public during the investigation of a registrant or pending a hearing of the discipline committee, it may, by order,
>
> (a) impose limits or conditions on the practice of the designated health profession by the registrant, or
>
> (b) suspend the registration of the registrant.
>
> (2) An order of the inquiry committee under subsection (1) must
>
> (a) be in writing,
>
> (b) include reasons for the order,
>
> (c) be delivered to the complainant, if any, and to the registrant, and
>
> (d) advise the registrant of the registrant's right to appeal the order to the Supreme Court.
>
> …
>
> (5) A registrant against whom action has been taken under subsection (1) may appeal the decision to the Supreme Court and, for those purposes, the provisions of section 40 respecting an appeal from a decision of the discipline committee apply to an appeal under this section.

[11] On 16 October 2014, the inquiry committee conducted an *ex parte* hearing. The inquiry committee considered the factors identified in *Aris v. Ontario College of Teachers*, 2011 ONSC 1202, for assessing whether there was an immediate risk to the public necessitating extraordinary action: the seriousness of the alleged conduct, whether any measures were currently in place to protect the public, and the probability of harm. In this case, the inquiry committee found the alleged conduct to be "extremely serious". It identified a "lack of measures" to protect the public, saw "no evidence to indicate that Scott would not present a real risk to other female

patients", and found "no other explanation or special circumstances that exist which convinces the Panel that there is no risk to other female patients". The inquiry committee concluded that Scott "may pose a real risk to the public safety that necessitates extraordinary action".

[12] The inquiry committee issued orders placing conditions on Scott's practice: that he not treat female patients without a chaperone present, and that a notice is placed in all treatment rooms indicating the chaperone requirement. On 17 October 2014, the inquiry committee provided Scott with a copy of the decision.

[13] Scott sought reconsideration. He provided submissions and an affidavit in which he denied any sexual misconduct. Scott submitted that he massaged the Patient with one hand in order to apply only light pressure in accordance with the therapy plan he outlined to the Patient, and that the Patient had a strong odour which required Scott to cover his face with a towel. Scott denied the Patient's allegations in their entirety; he denied that he unzipped his pants and masturbated, that he became sexually aroused, and that he put his penis on the Patient's wrist.

[14] Scott submitted that the inquiry committee failed to provide procedural fairness when it provided him with virtually no notice of the 16 October 2014 hearing. Scott submitted further that even on the limited evidence available to it, the inquiry committee was aware that there were no previous complaints against Scott; had the inquiry committee had Scott's additional information before it, the result would have been different. Scott submitted that in an *ex parte* hearing, counsel for the College was required to make balanced and fair submissions, rather than presenting only the College's side of the arguments.

[15] On 7 January 2015, the same inquiry committee found that Scott was afforded procedural fairness because the *Act* is silent on providing notice and because Scott had an opportunity to respond and request reconsideration. The committee noted that Scott did not provide case law supporting the conclusion that a *prima facie* case exists only where the registrant admits of the complaints, has been criminally convicted of sexual assault, has more than one complaint before the

College, or has a history of complaints with the College. The inquiry committee found that it is permitted to rely on the evidence of one complainant and that such evidence does not need to be supported by that of another witness.

[16] The inquiry committee found that even though Scott submitted an alternate explanation, its role was not to determine which version of events it preferred. Rather, its role was to "decide if interim action is necessary to protect the public while facts are in dispute and not yet finally determined by the Discipline Committee following a hearing with full procedural rights."

[17] The inquiry committee confirmed and continued the orders of 16 October 2014, and also required Scott to place a notice in his office and on his website indicating the chaperone requirement.

III. DECISION UNDER APPEAL

[18] Scott sought in the Supreme Court to have the inquiry committee's decision and orders quashed. Section 40(8) of the *Act* provides that such an appeal "must be a review on the record unless the court is satisfied that a new hearing or the admission of further evidence is necessary in the interests of justice."

[19] Scott denied all the allegations. He said that he treated the Patient twice during normal working hours with an assistant in the adjacent room. He averred that he used one hand at times during the massage in order to apply the appropriate amount of pressure. He pointed out that there have never been any other complaints against him. He argued that the orders – based on unsworn, untested allegations that the Patient only "heard", but did not see, him masturbating – could have "career destroying" consequences for him.

[20] Scott also sought to have the investigative stage of the complaint process expedited.

[21] The College argued that the inquiry committee reached a reasonable, transparent, and intelligible conclusion about a *prima facie* case of an immediate risk

to public safety. They drew a balance by imposing conditions rather than a suspension.

[22] The judge reviewed the jurisprudence and found that the evidentiary requirements for exercising s. 35 interim powers to suspend or impose limits on practice, depend on the urgency of the situation. To take extraordinary measures, there must be a *prima facie* case showing immediate risk to the public. The standard of proof must fall between the assertion of an unsubstantiated allegation, and the evidence considered at a full hearing (*Hannos v. Registered Nurses Association of British Columbia*, [1996] B.C.J. No. 138 (S.C.)). The risk of harm to the public must be real and not speculative (*Hannos*).

[23] The judge found, at para. 52, that the inquiry committee did not apply the standard of proof outlined in *Hannos*, but instead:

> They relied completely on the complainant's unsubstantiated statement in determining whether there was any risk to the public. Her complaint is based on what she thought she heard and felt, not what she saw. As noted by the Inquiry Committee, the complainant did not observe the petitioner masturbating, nor did she observe him putting his penis on her wrist. There is simply insufficient evidence to establish that the petitioner was masturbating rather than the complainant imagining that was what he was doing.

[24] The judge did not accept that the inquiry committee clearly assessed the plausibility of what Scott said. The judge noted that the massage session lasted 50 minutes "during which time the complainant could easily have opened her eyes or looked to see whether her suspicions as to what the petitioner was doing [were] correct" (at para. 54). The judge found that "the Inquiry Committee accepted the complainant's allegations without any assessment of the plausibility of her account, or the fact she gave different versions of what took place to the police and the interviewer" (at para. 54).

[25] The judge quashed the orders.

IV. GROUNDS OF APPEAL

[26] The College submits that the chambers judge erred:

a) in law by failing to apply a reasonableness standard of review to the s. 35(1)(a) decision;

b) in finding that the s. 35(1)(a) decision was not reasonable; and

c) in law in concluding that an allegation of sexual misconduct cannot be substantiated for the purpose of interim action under s. 35(1)(a) if the alleged misconduct is not observed visually but is detected through other senses.

V. SUBMISSIONS

[27] The appellant College submits that the judge erred by failing to apply a reasonableness standard of review, by embarking on her own evaluation of the evidence, and by finding that the decision was not reasonable. The inquiry committee has no authority, says the College, to make conclusive findings of fact. Rather, its role is to determine if the allegations warrant interim action. The *Act* does not stipulate an evidentiary test, argues the College, but rather confers discretion regarding whether to take action to protect the public.

[28] The College takes the position that the *Hannos* test, relied upon by the judge, provides no guidance to an inquiry committee in the face of uncorroborated allegations against a health care professional with no criminal record or previous disciplinary history. The *Hannos* test is prosecutorial in nature and incompatible with the statutory role of the inquiry committee. The College instead relies on the English Court of Appeal decision in *Perry v. Nursing and Midwifery Council*, [2013] EWCA Civ 145, for the principle that an investigating committee must not "seek to decide the credibility or merits of a disputed allegation" – that is to be left to the discipline committee.

[29] The College submits further that the judge erred by concluding that sexual misconduct cannot be sustained, for the purposes of a s. 35 interim action, if the

alleged misconduct was detected by senses other than sight. Non-visual evidence has been accepted in criminal cases of sexual assault, and in regulatory cases involving allegations of sexual misconduct by health professionals. The College, and the intervenor West Coast Legal Education and Action Fund, submit that the judge failed to address the possibility that the Patient was too fearful or traumatized to look at Scott. This failure disregards the vulnerable state of a female patient alone with a therapist in a treatment room.

[30] Scott responds that the standard advanced by the College would allow a health college to "inflict grievous reputational and financial harm on a health professional on the basis of one, unproven, unsworn, untested complaint." Indeed, the intervenor Registered Massage Therapists' Association of British Columbia ("RMTBC") agrees that it was not open to the inquiry committee to determine that a *prima facie* case exists solely on the basis of there being "some evidence" to support the complaint. In order to establish a *prima facie* case, the inquiry committee was required to consider evidence from both the Patient and Scott. RMTBC submits that where someone's livelihood is at stake, a high standard of natural justice is required (*R.(J.) v. College of Psychologists of British Columbia*, [1994] 107 DLR (4th) 335)(B.C.S.C.).

[31] RMTBC submits also that the "strong *prima facie* case" requirement that exists when suspension is contemplated (identified in *Derry v. College of Physicians and Surgeons*, 2002 BCSC 946) should apply when restrictions on practice are contemplated in cases where there is potential for allegations of sexual misconduct to be published on social media. The potential for reputational damage requires it.

[32] Scott says that the judge did not "re-weigh" the evidence. Rather, Scott says that the judge considered evidence which the inquiry committee refused to consider: Scott's side of the story, the absence of a complaint history or criminal record, and Scott's cooperation during the investigation. In *R.(J.)*, Chief Justice Esson held that the lack of a record of sexual abuse was a factor that went against there being a risk to the public.

[33] Scott submits that the inquiry committee erred by not considering the plausibility of the Patient's allegations (*Hanson v. College of Teachers*, 1993 CanLII 1035 (B.C.C.A.)) in light of Scott's background, the close physical proximity of Scott's wife and other medical professionals, the consequences of the alleged behaviour, the Patient's statements that she underwent "years of counselling" before being able to "put trust in a man", and the decision by the RCMP to not pursue an investigation. Scott further argues that the inquiry committee erred by not considering the lack of corroboration for the Patient's idiosyncratic or implausible story, or the failure of investigators to interview anyone at the clinic other than the Patient.

[34] Scott submits that there is nothing in the written decision of the inquiry committee that would allow this Court to understand why it made its decision. Requisite intelligible reasons were not provided. An assessment of the internal consistency and coherence of the information provided by the Patient is not sufficient to meet the standard of providing "intelligible reasons" as outlined in *Dunsmuir v. New Brunswick*, 2008 SCC 9. Rather, the inquiry committee was required to explain why it rejected Scott's evidence that he was of no risk to the public.

VI. ANALYSIS

[35] I begin by noting that the petition before the Supreme Court was said in part to be founded on this legal basis:

> [34] Finally, the Inquiry Committee adopted a [procedurally] unfair and legally incorrect view of how it could proceed in circumstances where Mr. Scott was cooperating with the College in this matter. The Inquiry Committee could not here ignore procedural fairness and the procedures set out in the *HPA,* deny Mr. Scott a hearing in the circumstances where his professional reputation and practice are at risk, and then say, as a remedy after it has made an improper decision, built on an improper procedure, that he might have that decision reconsidered later on. The Inquiry Committee's reconsideration decision continued upon an errant view of the law of procedural fairness when it failed to rescind its previous decision for want of procedural fairness.

[36] The judge in her reasons noted this argument, what I will term the procedural fairness issue, at para. 25 of her oral reasons for judgment but did not deal with it in light of her principal conclusions, which I have outlined above.

[37] Not surprisingly, the procedural fairness issue was not a ground of appeal raised by the College in its application for leave to appeal and it was not otherwise raised by Scott, so it is not an issue before this Court on the appeal. However, I will observe that, in my view, in the circumstances of this case, the inquiry committee should have ensured that Scott had a reasonable opportunity to attend the initial s. 35 hearing in person with or without counsel.

[38] I turn to the issues before us. I will proceed to discuss the jurisprudence under s. 35 of the *Act* and kindred legislative provisions and I will express my preference for a proper application of that section. I will consider what the inquiry committee decided and its reasons therefor, and why I have concluded that on a proper approach to s. 35 what it has decided cannot be said to be unreasonable. I will then identify why I have concluded that the judge erred in her approach to the issue of the interim action by the inquiry committee.

[39] A review of the cases decided under s. 35 of the *Act* usually begins with a reference to *Hannos,* a decision of Madam Justice Allan in the British Columbia Supreme Court. That case considered an order under s. 24 of the *Nurses (Registered) Act*, R.S.B.C. 1979, c. 302 – an act that was in force at a time when many of the health professions were regulated under their own legislation prior to the compendious *Health Professions Act*. Section 24 was very similar to s. 35 of the *Act* which is part of a generic discipline process applicable to sundry health professions.

[40] Madam Justice Allan concluded that the standard of proof necessary to suspend a professional in the public interest will depend upon the urgency and other circumstances of the particular case (at para. 34). The applicable standard of proof on an interim application (as distinct from a hearing on the merits of the allegations) “will fall somewhere between the assertion of one or more unsubstantiated allegations and the high standard which is required with respect to the evidence

considered at the full hearing of the merits of the case" (at para. 35). In the judge's view "mere allegations without any evidence to substantiate them" are insufficient: "although the public interest is paramount, the risk of harm must be real and not speculative" (at para. 39).

[41] The cases suggest that it must be always remembered that an interim suspension of the right to practice one's profession is an extraordinary remedy that ought to be used sparingly: *Dr. Larre v. College of Psychologists of British Columbia*, 2007 BCSC 416 (at para. 20, quoting with approval *Patton v. College of Dental Surgeons of British Columbia,* [1996] B.C.J. No. 2864 (S.C.)).

[42] As noted, *Larre* and *Hannos* were cases of an interim suspension. Here we do not have an interim suspension but we have the interim imposition of conditions including the requirement for a chaperone and notification to the public of that fact. Those conditions, on the evidence (and obviously so), have had a very significant effect on the practice of this therapist. In terms of impact, I do not see much difference between an actual suspension and the conditions imposed on this practitioner.

[43] The requirement in *Hannos* of evidence demonstrating a real risk of harm beyond mere speculation is consistent with the approach in Ontario under similar legislation: *Liberman v. College of Physicians and Surgeons of Ontario*, 2010 ONSC 337; *Yazdanfar v. College of Physicians and Surgeons of Ontario*, [2009] O.J. No. 2478 (Div. Ct.), and cases cited therein.

[44] I would suggest that the question under s. 35 to which the evidentiary burden is directed is whether the action is necessary to protect the public during the investigation of a registrant – that is, it is directed to the risk of harm. Of course in considering that question, the inquiry committee will be considering the evidence going to the index allegations, but the inquiry committee is not engaged in deciding the merits of those allegations; that is for the discipline committee at the hearing on the merits.

[45] To what issue the evidentiary burden under s. 35 is directed is an important question. In the context of this case, the final question for the discipline committee is: "Did the therapist do it?" And the question before the s. 35 inquiry committee: "Is action necessary to protect the public in the interim?"

[46] Clearly in answering the latter question the inquiry committee will consider the case against the registrant involved in the former question. When one talks, as *Hannos* does, and as I will expand upon below, of a *prima facie* case, one should be saying that in the context of the first question not the second. As for the second question, the inquiry committee must decide it one way or the other; it must consider any proposed interim measures as "actions necessary to protect the public" during the interim period.

[47] The standard of proof suggested by *Hannos* represents a broad spectrum indeed and its breadth was the subject of submissions before us from the respondent College and the intervenor College of Physicians and Surgeons of British Columbia.

[48] Those submissions urge this Court to provide more definitive guidance to inquiry committees acting under s. 35 of the *Act*.

[49] The College of Physicians and Surgeons, in helpful submissions, concluded (at para. 39 of its factum):

> Accordingly, the Intervenor College submits that the determination of whether to take interim action under s. 35 should be informed by two questions. First, considering all of the circumstances, including the seriousness of the allegations, the urgency of the situation, the available evidence and the potential for obtaining additional relevant evidence, is some interim action necessary to protect the public? The answer to this question must be guided solely by the public interest, not the interests of the registrant. Second, if so, what measures (whether practice limits, conditions, or a suspension) are least intrusive to the registrant while being sufficient to protect the public? The answer to this question must be informed by both the public and the registrant's interests.

[50] I do not agree completely with the thrust of this submission because it does not appear to properly acknowledge, as it should, that an interim suspension or the

imposition of onerous conditions on continued practice are potentially devastating for the professional. Hence the admonition that the risk of harm must be real and the s. 35 remedy (at least at these extremes) is extraordinary and to be resorted to sparingly. These considerations implicitly include the interests of the registrant throughout all stages of the s. 35 process. The two-stage approach suggested by the College of Physicians and Surgeons strikes me as artificial and formalistic. A holistic approach to the exercise of the s. 35 power seems to me more realistic and better serving the interests of the public and the registrant.

[51] It was suggested on the matter of guidance, that the English Court of Appeal's decision in *Perry* had much to commend itself to the discussion on the s. 35 process. I agree.

[52] *Perry* involved the interim suspension of a health professional pending a hearing on the merits of the complaint that his fitness to practice as a nurse was impaired.

[53] The *Health Act 1999* considered in *Perry* gave the investigating committee an interim suspension power similar to, but broader than, that under consideration at bar.

[54] Article 31(2) of the legislation provided:

> (2) Subject to paragraph (4), if the Committee is satisfied that it is necessary for the protection of members of the public or is otherwise in the public interest, or is in the interests of the person concerned, for the registration of that person to be suspended or to be made subject to conditions, it may -
>
> > (a) make an order directing the Registrar to suspend the person's registration (an "interim suspension order") or
> >
> > (b) make an order imposing conditions with which the person must comply (an "interim conditions of practice order") during such period not exceeding eighteen months as may be specified in the order.

[55] The Court noted the guidelines developed by the professional body there at bar to assist the panel making an interim order. Many of these guidelines are reflected in the case law developed under s. 35 of the *Act* and similar legislation in

other provinces. I note and rephrase these guidelines which, in my view, are apposite in respect of s. 35 interim proceedings:

> (i) For an order to be necessary for the protection of the public the inquiry committee must be satisfied that there is a real risk to patients, colleagues or other members of the public if an order is not made. It is not enough for the panel to consider that an order is merely desirable.
>
> (ii) The inquiry committee should consider the seriousness of the risk to members of the public if the registrant were allowed to continue practicing without restriction. This includes consideration of the seriousness of the allegation, the nature of the evidence and the likelihood of the alleged conduct being repeated if an interim order were not imposed.
>
> (iii) The inquiry committee should take into account the impact which an order may have on the registrant: an order will impact upon the registrant's right to practice his or her profession and may also impact financially and on the registrant's reputation. The inquiry committee must balance the need for an interim order against the consequences for the registrant and satisfy itself that the consequences of the order are not disproportionate to the risk from which the panel is seeking to protect the public.
>
> (iv) When considering an interim order, the inquiry committee is not making findings of fact or making findings as to whether the allegations are or are not established. It is sufficient for the inquiry committee to act, if it takes the view that there is a *prima facie* case and that the *prima facie* case, having regard to such material as is put before it by the registrant, requires that the public be protected by an interim order.
>
> (v) As regards the amount of evidence before the inquiry committee, one would expect the allegation to have been made or confirmed in writing, whether or not it has yet been reduced to a formal witness statement. The inquiry committee will need to consider the source of the allegation and its potential seriousness. An allegation that is trivial or clearly misconceived should not be given weight.
>
> (vi) If the inquiry committee decides that an interim order is necessary it should not automatically impose an interim suspension but should first consider whether an interim conditions of practice order would be sufficient and proportionate.

[56] The Court in *Perry* went on to consider whether the process adopted by the investigating committee there was procedurally fair. As I have said, the procedural fairness issue is not before us so I do not comment on the circumstances that would call for a full hearing in the case of an interim suspension under s. 35 (see in this regard among others *R.(J.)*, *supra*). Rather, in the extract from *Perry* that follows, I stress the guidance provided on the weighing of the evidence by a committee considering the exercise of a s. 35-like power (at paras. 19 and 20):

> [19] What is required by fairness depends on the nature of the inquiry being conducted by the tribunal in question. The statutory function of the Committee relevant in this appeal is its duty to determine whether to make an interim order, and the statutory right of the registrant under Article 26 of the Nursing and Midwifery Council (Fitness to Practise) Rules Order of Council to give "any relevant evidence in this regard" refers to evidence relevant to that question. For this purpose the Committee must decide whether, on the basis of the allegation and evidence against the registrant, including any admission by him, it is satisfied that an order is necessary for the protection of the public, or otherwise in the public interest or in the interests of the registrant himself. The Committee must of course permit both parties to make their submissions on the need for an interim order and, if one is to be made, its nature and its terms. For that purpose it must consider the nature of the evidence on which the allegation made against the registrant is based. It is entitled to discount evidence that is inconsistent with objective or undisputed evidence or which is manifestly unreliable. The Committee may receive and assess evidence on the effect of an interim order on the registrant, and the registrant is entitled to give evidence on this. The registrant may also give evidence, if he can, to establish that the allegation is manifestly unfounded or manifestly exaggerated; but the Committee is not otherwise required to hear his evidence as to whether or not the substantive allegation against him is or is not well-founded: that is not the issue on the application for an interim order. [Emphasis added.]
>
> [20] What the Committee cannot do, and should not do, is to seek to decide the credibility or merits of a disputed allegation: that is a matter for the substantive hearing of the allegation by the Conduct and Competence Committee, pursuant to Article 27 of the Order. Necessarily, at the interim stage, the Committee must not and cannot decide disputed issues of fact in relation to the substantive allegations. The Committee must also be extremely cautious about rejecting or discounting evidence on the basis that it is incredible or implausible. In the course of argument I mentioned the Challenor case in the 1960s, when allegations by demonstrators against the Vietnam War that bricks had been planted on them by a police officer were dismissed as self-serving and incredible, only later to be found to be true.

[57] I have highlighted the limited role for the committee in weighing and discounting evidence before it. The *Perry* guidelines discussed above in turn speak of the burden before the committee in these words:

> It is sufficient for the panel to act, if they take the view that there is a prima facie case and that the prima facie case, having regard to such material as is put before them by the registrant, requires that the public be protected by an interim order ...

[58] I prefer these observations of the role of the inquiry committee in assessing the record before it to the suggestion in some of the cases that there must be a strong *prima facie* case (see for example *Derry, supra*). I will expand upon this point below.

[59] I turn to the reasons of the inquiry committee here and consider them against the backdrop of these observations on the proper approach to the s. 35 jurisdiction.

[60] The initial reasons after the *ex parte* hearing are dated 17 October 2014.

[61] On the "Standard of Proof" the committee cited and applied *Hannos*. The inquiry committee said (A.B. at 68-69):

> The Complainant's allegations fall on the serious end of the sexual misconduct spectrum, which is a basis for the College to consider taking extraordinary action to protect the public on an urgent basis. The College is not seeking to suspend the Respondent's practice but to require a chaperone be present for all visits with female patients.
>
> IC Counsel argued that the standard of proof to be met where the allegations are serious in nature and the College is not seeking an outright suspension of the registrant's practice is one of a *prima facie* case of immediate risk to the public, and specifically a risk to female patients. The Panel agrees.
>
> The Panel considered the following factors, as set out in *Aris v. Ontario College of Teachers*, 2011 ONSC 1202, in assessing whether there is an immediate risk to the public safety that necessitates extraordinary action under section 35(1) of the Act:
>
> 1. the seriousness of the alleged unprofessional conduct;
> 2. whether any measures are currently in place to protect the public; and
> 3. the probability of harm.

[62] The inquiry committee continued (A.B. at 69-70):

> While the Inquiry Committee does not have the jurisdiction to make final determinations of fact as does the Discipline Committee, it must make a "provisional assessment of the facts" (*Health Professions Review Board Decision No. 2010-HPA-0003(a), (§24), cited with approval at (§48 of Health Professions Review Board Decision No. 2011-HPA-0036(b)*). IC Counsel urged the Panel to consider the reliability of the witness evidence, in this case the Complaint and the Interview Summary, by considering the statements' internal and external consistency, the plausibility of the complaint and motivation. The Panel is cognizant that it has not heard from the Respondent regarding the allegations at this time.
>
> To this end, the Panel considered the detailed nature of the Complaint, which clearly described conduct which, if proven or admitted, would constitute sexual misconduct. While the Complainant did not actually see the Respondent's penis, she described motions and heard sounds consistent with him unzipping his pants, and then removing his penis and fondling it. Parenthetically, the Panel noted that many massage therapy techniques are performed while the patient is "face down" on the table. Thus, it would not be unusual for a Complainant to never see the actual misconduct. Nor would this, alone, be sufficient reason to dismiss a complaint at this stage of the investigation.
>
> The Panel also considered the fact that while the Complainant did not confront the Respondent at the time of the conduct, she immediately reported it to the RCMP and went to her doctor because she was upset by what had happened. Although she asked the RCMP to not pursue a criminal investigation, the fact that she wanted to ensure that the police had a record of this conduct in case it happened again is consistent with the Complainant's. There is some question about whether the second masturbation incident was reported to the RCMP, but in the absence of clear evidence on this point, the Panel declined to comment on it, noting only that we were working with summaries of the complaint to the RCMP and the interview summary and not actual statements. The Panel notes however, that a single act of masturbation is sufficient to warrant taking extraordinary action.
>
> The Panel is satisfied that the alleged unprofessional conduct is sufficiently serious to warrant taking extraordinary action to protect the public.

[63] In my view, with one important exception, the committee here has properly instructed itself on the correct approach to assessing the record before it on a s. 35 application. While the committee did not refer to *Perry*, in my view, it proceeded in the spirit of the *Perry* guidelines which I have found apt. I add a slight proviso: the "provisional assessment of the facts" to be undertaken by the inquiry committee and which this inquiry committee described in the quoted portions of its reasons, should

be directed to the issue identified in *Perry*: whether the complaint is manifestly unfounded or manifestly exaggerated.

[64] Where the inquiry committee has erred (and it was a temporary lapse as I will demonstrate) is in this paragraph quoted above:

> IC Counsel argued that the standard of proof to be met where the allegations are serious in nature and the College is not seeking an outright suspension of the registrant's practice is one of a *prima facie* case of immediate risk to the public, and specifically a risk to female patients. The Panel agrees.

[65] As I have discussed, the evidentiary burden under s. 35 is directed to the question of whether interim action is necessary to protect the public. To reiterate, the inquiry committee must decide this issue one way or the other. Hence, it is wrong to say, as the inquiry committee said in the quoted paragraph, that "the standard of proof … is one of a *prima facie* case of immediate risk to the public …".

[66] That is not the standard of proof to apply in the context of the immediate risk assessment. In fairness to the inquiry committee, it is here repeating what the court in *Hannos* said, but that court misspoke in this context.

[67] At para. 21 of *Hannos*, the Court said:

> [21] Before the Association invokes the extraordinary powers of section 24, it must establish a prima facie case that the member poses an immediate risk to the public such that his or her registration should be suspended prior to a hearing on the merits. The incidents alleged in the October 2 letter, which the Panel characterized as an immediate risk to the public, included incidents which indicated a lack of basic nursing knowledge, several examples of serious medication errors, and concerns as to Ms. Hannos' integrity and honesty.

[68] Although this could be possibly read in two ways, I have concluded that the court is here inadvertently conflating the questions of the strength of the case supporting the index allegations with the case for "immediate risk of harm to the public". This is wrong. As I have discussed, the two questions are distinct. The strength of the case in the former question is relevant in affirmatively answering the latter. While the inquiry committee repeated the error in the noted paragraph, it is

clear that it was properly distinguishing between the two questions as is demonstrated by its reasons in the reconsideration decision.

[69] The reconsideration decision is dated 7 January 2015. The hearing took place by teleconference on 2 December 2014. Scott was represented by legal counsel.

[70] Scott stressed before the committee the fact that he had denied the allegations, had no criminal record for sexual assault and no previous complaint history with the College.

[71] The committee rejected the suggestion that s. 35 requires there to be multiple complaints or a previous history of misconduct before the inquiry committee can invoke the s. 35 jurisdiction.

[72] The inquiry committee then dealt with Scott's final submission (A.B. at 208):

> Lastly, the Respondent argued that [the] Inquiry Committee applied an incorrect standard of proof in making its Order. The Respondent has cited a case called *Hanson v. College of Teachers*, 1993 CanLII 1035 (BCCA) in support of his argument. However, in that case the registrant was appealing a final suspension imposed by the discipline committee after a full discipline hearing, whereas in the case at hand, the Respondent is seeking a reconsideration of an order which allows him to continue to practice, albeit with interim limits and conditions. Absent any case law directly on point, this Panel reconfirms its original decision to base extraordinary action on a *prima facie* case for conduct which, in all the circumstances, discloses an immediate risk to the public. While the Respondent has provided an alternate explanation for events, the task of the Inquiry Committee under section 35 is not to decide whether it prefers the version of events put forward by the Complainant or by the Respondent. Rather, this Panel must decide if interim action is necessary to protect the public while facts are in dispute and not yet finally determined by the Discipline Committee following a hearing with full procedural rights.

[73] I agree with the inquiry committee: its task under s. 35 is not to decide whether it prefers the version of events put forward by the complainant or the registrant; it must make the decision on interim action "while facts are in dispute and not yet finally determined by the Discipline Committee following a hearing with full procedural rights."

[74] The inquiry committee continued (A.B. at 210):

> On review of this statement, this Panel concluded that the *prima facie* case has still been met, thus warranting extraordinary action. In the Order, this Panel set out its conclusion that the Complainant's allegations are both clear and cogent and supported by the investigation and interviews. The Respondent has presented an alternate version of events, but this alternate version does not cause this Panel to question its original conclusion of a *prima facie* case. This panel's conclusion about a *prima facie* case is not a decision about what happened; it is a decision that the evidence supporting the Complaint, standing alone, is strong enough to justify action necessary to protect the public.

[75] Again, I believe that this is essentially the correct approach. But I do note the limited weighing of the two versions of events contemplated by *Perry*. The inquiry committee should discount evidence that is inconsistent with objective and undisputed evidence or which is manifestly unreliable. The committee should consider any evidence led by the registrant to establish that the allegation is manifestly unfounded or manifestly exaggerated. But the committee is not otherwise required to consider the registrant's evidence as to whether or not the substantive allegation against him or her is or is not well founded; that is not the issue on the s. 35 application.

[76] Further, these extracts from the reconsideration decision make it clear that the inquiry committee was properly considering the *prima facie* case criterion in the context of the index allegations being strong enough to justify action necessary to protect the public.

[77] Let me return to my observation that I prefer the standard "*prima facie* case" in the context of the index allegations to what the *Derry* court called for – "a strong *prima facie* case" where a suspension is being considered under s. 35. First, I see no justification for a different burden where an actual suspension is considered versus most onerous conditions on practice as in the case at bar. Second, to the extent that one can define what a strong *prima facie* case is, it creates too high a threshold for action under s. 35.

[78] There are various definitions in the cases of what a "strong *prima facie* case" means. It is clear that a "strong *prima facie* case" is an onerous criterion. In *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, Lord Diplock rejected it as a requirement (generally, but with some exceptions) for an interlocutory injunction. He likened it to a standard requiring the court to undertake what, in effect, is a preliminary trial of the action (at 406).

[79] In *Unitel Communications Inc. v. Bell Canada*, [1994] 17 B.L.R. (2d) 63 (Ont. Ct. J.), Mr. Justice Winkler (as he then was) likened the standard to a "mini trial" at an interlocutory stage.

[80] A "*prima facie* case" on the contrary is one "which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer" (*Ontario (Human Rights Commission) v. Simpson Sears Ltd.*, [1985] 2 S.C.R. 536 at 558).

[81] In the context of s. 35, the inquiry committee should be satisfied that there is a *prima facie* case supporting the index allegations, and that having regard to such material as is put before it by the registrant, the public requires protection through an interim order. There will be no "mini trial" on the index allegations before the inquiry committee. However, as *Perry* stated, the inquiry committee in considering the evidence on which the allegation is made against the registrant (at para. 19):

> … is entitled to discount evidence that is inconsistent with objective or undisputed evidence or which is manifestly unreliable. The Committee may receive and assess evidence on the effect of an interim order on the registrant, and the registrant is entitled to give evidence on this. The registrant may also give evidence, if he can, to establish that the allegation is manifestly unfounded or manifestly exaggerated; but the Committee is not otherwise required to hear his evidence as to whether or not the substantive allegation against him is or is not well-founded: that is not the issue on the application for an interim order.

[82] Before I leave this aspect of the analysis, I want to return to *Hannos*. At para. 35 of her reasons, the judge there said:

> [35] However, it does not follow that the Respondent was required to meet a high standard of proof of the allegation on a hearing pursuant to section 24.

> In my view, the applicable standard of proof on an interim application will fall somewhere between the assertion of one or more unsubstantiated allegations and the high standard which is required with respect to the evidence considered at the full hearing of the merits of the case.

[83] On first reading I was unsure as to which issue the judge was positing a sliding scale standard of proof: that is, was it to the case of the index allegation or was it to the case of the need to protect the public. On closer reading it is clearly directed to the former because the judge is speaking of the regulator not necessarily having to meet "a high standard of proof of the allegation" on the s. 35-like hearing. In that light, I respectfully disagree that there should be a sliding scale for the standard. I have said that the inquiry committee must be satisfied that there is a *prima facie* case for the index allegation (assessed in the manner described in *Perry*).

[84] That being so, the committee would then consider whether that case and the other information before it, lead it to conclude that interim action is "necessary to protect the public during the investigation … or pending a hearing of the discipline committee". In reaching that conclusion the inquiry committee should proceed in the manner described in para. 55 of these reasons always against the backdrop that, as the marginal heading to s. 35 makes clear, it is concerned with extraordinary action to protect the public and a suspension or onerous conditions on continued practice are remedies to be invoked sparingly in light of the consequences to the registrant.

[85] I turn to the decision of the judge on appeal.

[86] In my view, para. 52 of her reasons is central to the judge's conclusion that the inquiry committee's interim order was unreasonable. Having agreed that the committee correctly referred to the standard of proof set out in *Hannos*, the judge continued (at para. 52):

> [52] However, in my view it is apparent the Inquiry Committee did not apply that standard of proof. They relied completely on the complainant's unsubstantiated statement in determining whether there was any risk to the public. Her complaint is based on what she thought she heard and felt, not what she saw. As noted by the Inquiry Committee, the complainant did not observe the petitioner masturbating, nor did she observe him putting his

> penis on her wrist. There is simply insufficient evidence to establish that the petitioner was masturbating rather than the complainant imagining that was what he was doing. [Emphasis added.]

[87] I leave aside the criticism that some of the statements made here and elsewhere in the judge's reasons may arguably reflect the myth of the "ideal complainant" in sexual assault cases. The highlighted sentence, however, starkly identifies the judge's error. She was weighing the evidence to determine if it was sufficient to establish that the petitioner was engaging in sexual misconduct. That is not the job of the inquiry committee on a s. 35 application and with respect, it is not the job of the court on an appeal therefrom.

[88] To the same effect is Scott's argument before us. His central submission is that the College's position amounts to saying that the inquiry committee does not need to consider any exculpatory evidence offered by the health professional. Indeed, in oral submissions Scott suggested that in the case of "he said, she said", it was incumbent on the inquiry committee to say why, to explain why in detail, it rejected his version of events. This suggests that the inquiry committee is engaged in deciding between the two versions of events. It is not; it is error to suggest that it should be. That would be tantamount to deciding the merits of the case. That is not the job of the inquiry committee. Its task, as characterized by the committee at bar, is to make "a provisional assessment of the facts" to consider the reliability of the evidence, its internal and external consistency, the plausibility of the complaint, and motivation. This is in aid of determining whether the complaint is manifestly unfounded or manifestly exaggerated (*Perry*). The inquiry committee's mandate is not, as the judge would characterize it (and Scott would as well), to test the sufficiency of the evidence to establish his sexual misconduct. In my view, the judge erred in her approach in reviewing the decision of the inquiry committee. No proper basis has been demonstrated for determining that the inquiry committee's disposition is other than "reasonable" as that standard has been defined in the cases.

VII. DISPOSITION

[89] I would allow the appeal, and order that the matter be remitted back so that the inquiry committee can proceed as appropriate in light of the length of time that Scott has been practicing on an unrestricted basis, the delay in holding a full hearing before the disciplinary committee, and the reasons herein.

"The Honourable Chief Justice Bauman"

I agree:

"The Honourable Madam Justice Garson"

I agree:

"The Honourable Madam Justice Fenlon"