NOVA SCOTIA COURT OF APPEAL
Citation: ***Patient X v. College of Physicians & Surgeons***, 2015 NSCA 41

Date: 20150430
Docket: CA 428606
Registry: Halifax

Between:

Patient X

Appellant

v.

College of Physicians and Surgeons of Nova Scotia

Respondent

and

Dr. Y

Intervenor

Restriction on Publication: Under Inherent Jurisdiction

Judges:	Bryson, Bourgeois, and Van den Eynden, JJ.A.
Appeal Heard:	April 2, 2015, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs, per reasons for judgment of Bourgeois, J.A.; Bryson and Van den Eynden, JJ.A. concurring
Counsel:	Patient X, appellant in person
	Marjorie A. Hickey, Q.C. and Danielle Kershaw, for the respondent
	Andrew J. Sowerby and Liam Gillis (Articled Clerk) for the Intervenor, Dr. Y

Restriction on Publication:

A ban on publication in relation to the contents of this file has been placed.

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Reasons for judgment:

[1] This is an appeal brought by Patient X, a self-represented litigant, from a judicial review decision of the Supreme Court. Patient X had made a complaint against a physician, Dr. Y, to the College of Physicians and Surgeons ("the College"). An Investigation Committee struck under the *Medical Act*, S.N.S. 1995-96, c. 10 dismissed the complaint. On the judicial review, Patient X had asked the Supreme Court to order that her complaint proceed to a hearing. The Supreme Court declined to do so, and dismissed Patient X's judicial review application.

[2] In the court below, Patient X requested that her identity be protected given the nature of the issues before the court, including her medical history. A similar request was granted in this Court. Although not taking an active role in the court below, Dr. Y was joined as an intervenor in this appeal.

Background

[3] On April 29, 2009, Patient X attended a medical appointment with Dr. Y, a respirologist. Referred by her family physician due to ongoing breathing issues and chest discomfort, the appellant underwent pulmonary functioning testing prior to her meeting with Dr. Y. When they met, he undertook a physical examination of Patient X, and he discussed the test results with her.

[4] On September 12, 2011, Patient X filed a complaint about Dr. Y with the College. She alleged that Dr. Y had touched her right breast in a sexual manner during the physical examination. She also complained that Dr. Y had referred to her as being "black" when describing the differences in lung capacity between persons of different racial groups. Patient X said Dr. Y's manner of describing "black" lungs was racially insensitive and inappropriate.

[5] The College notified Dr. Y of the complaint. He responded in writing denying any sexual touching, although he indicated that he may have made incidental contact with Patient X's breasts in the course of doing the chest examination. He also responded that he meant no disrespect when referencing Patient X as being "black" when describing the differences in lung capacity in different racial populations. Patient X was given the opportunity to respond to Dr.

Y's letter. She did, and her written response was received by the College on November 3, 2011.

[6] After a further written response from Dr. Y, the complaint was referred to an Investigation Committee. The Investigation Committee requested further information from both Dr. Y and Patient X. They met separately with the Investigation Committee on July 24, 2012. Patient X had a support person with her, Mr. Fraser. It is noted that one of the Committee members was Dr. William Stanish, a physician who had earlier treated Patient X for orthopedic issues.

[7] Minutes of the July 24, 2012 Investigation Committee meeting were prepared, including the content of the interviews with both Patient X and Dr. Y. Those minutes further document the Committee's discussion following the interviews and the decision to dismiss Patient X's complaint. The Investigation Committee prepared a written decision, dated August 20, 2012 finding "there to be insufficient evidence to suggest professional misconduct, incompetence or conduct unbecoming by" Dr. Y. The decision was sent to Patient X and Dr. Y.

[8] Patient X disagreed with the decision made by the Investigation Committee. With the help of her legal counsel, Ms. Hoyte, Q.C. of the Dalhousie Legal Aid Service, Patient X filed a "Notice for Judicial Review" with the Supreme Court on October 1, 2012. Only the College was named as a respondent in the judicial review, Dr. Y was not.

[9] It is helpful to quote from the "Notice for Judicial Review" in terms of what Patient X submitted was problematic with the Investigation Committee's decision:

> The applicant seeks review on the following grounds:
>
> 1. The Committee's decision to dismiss the complaint without a hearing, where the credibility of the parties was the primary issue, did not allow for an adequate assessment of the evidence and was not procedurally fair.
>
> 2. The written reasons provided by the Committee were insufficient and indicate that the evidence of the parties was not sufficiently weighed.
>
> 3. The Committee's decision to dismiss the appeal was not within the range of reasonable outcomes. The Committee could not adequately weigh the evidence and assess the credibility of the parties at the investigation stage only. The Committee also did not give weight to the fact that the physician member should exercise a greater degree of cultural sensitivity as a person of power in the doctor-patient relationship as well as society in general. Furthermore, the Committee did

> not give weight to the fact that the physician member failed to have a nurse present during the examination despite noting the patient's history of anxiety in his clinical assessment letter.
>
> 4. Other grounds as may appear.

[10] It is equally important to note what Patient X was asking the Supreme Court to do at the end of the judicial review. Her Notice states:

> The applicant requests an order for a hearing under the *Medical Act*, S.N.S. 1995-96, c. 10, s. 58.

[11] There were two appearances prior to the judicial review hearing to deal with procedural matters. A motion for directions was held on October 10, 2012 with Associate Chief Justice Smith, at which time various dates, including for the judicial review hearing, were set. Further, a motion brought by Patient X for a publication ban was heard and granted by Justice Hood on December 4, 2012. Patient X was represented by counsel on both occasions. Dr. Y did not request to be added as a respondent on the judicial review, but his lawyers were present to monitor proceedings on his behalf.

[12] The judicial review was heard by Justice Hood on April 9, 2013. She had the benefit of having received, in advance of the hearing, factums from both Patient X's and the College's lawyers. In the factum filed on behalf of Patient X, the issues to be determined by Justice Hood were set out as follows:

> 8. Patient X seeks judicial review of the Committee's decision to dismiss her complaint on the following procedural and substantive grounds:
>
> 1. The Committee's fact-finding process was flawed. Specifically, the failure to allow for cross-examination of Doctor Y, and possibly other witnesses, did not allow for an accurate finding on the credibility of Patient X versus Doctor Y, the primary issue in dispute with respect to the allegation of sexual misconduct.
> 2. The presence of Dr. William Stanish (of whom Patient X is a former patient) on the Committee raises a reasonable apprehension of bias.
> 3. The reasons of the Committee are insufficient to demonstrate that its decision is justifiable, transparent, and intelligible, as required by *Dunsmuir v. New Brunswick*, 2008 SCC 9. Specifically, the Committee entirely failed to consider and address the evidence of Patient X that Doctor Y touched her inappropriately. It also failed to address the relevant issue of whether or not Doctor Y should have had

> a nurse present in the examination room in light of Patient X's mental health concerns.

[13] The factum filed on behalf of Patient X concluded by requesting that the Investigation Committee decision be quashed, with a new committee to be struck, permitting cross-examination of witnesses. In the alternative, Patient X requested that the court find the Investigation Committee decision to be unreasonable.

[14] At the conclusion of the hearing, Justice Hood reserved her decision. On May 29, 2013, she released a written decision (reported at 2013 NSSC 165) in which she dismissed Patient X's application for judicial review. Her reasons for doing so are discussed later in this decision.

[15] In June 2014, Patient X wanted to file an appeal of Justice Hood's decision. Because she was out of time in terms of the deadline set out in the *Civil Procedure Rules*, she made a motion to extend the time for filing her appeal. The motion was granted by Fichaud, J.A. on June 26, 2014. The order made note of the grounds of appeal as follows:

> AND UPON being satisfied that, despite poorly worded draft grounds of appeal, prepared with no legal assistance, the Applicant's proposed submission to the Court of Appeal includes that the judge erred by ruling that the Decision of the Investigation Committee satisfied the standards of judicial review and procedural fairness;

[16] Patient X has continued to advance her appeal without the assistance of legal counsel. On June 27, 2014, she filed her Notice of Appeal setting out the following grounds of appeal:

1) "The Court was racial prejudice"

2) "cohesion of testimony"

3) "withhold of evidence".

[17] In her Notice of Appeal she asks this Court to award her damages, including punitive damages, for pain and suffering arising from sexual assault, racial prejudice and the violation of her constitutional rights.

Preliminary considerations

[18] Patient X has made a motion for the introduction of fresh evidence. There is also a dispute with respect to what constitutes the proper appeal record before this Court. I will address both of these matters now.

The "Record"

[19] Patient X filed an Appeal book. The College filed a Supplementary Appeal book, as it asserts the materials filed by Patient X did not contain the complete record of the material which had been before the lower court. In correspondence filed with the Court in advance of the hearing, Patient X expressed the view that only the Appeal book she filed should be considered by the Court.

[20] Civil Procedure Rule 90.30(2) sets out the mandatory contents of an Appeal book. The requirements can be modified upon agreement between the parties (Rule 90.30(4)), or by order of a judge (Rule 90.30(5)). Neither happened here.

[21] Upon review, it is clear that the Appeal book provided by Patient X was lacking many required documents. For example, it did not contain the pleadings nor the extensive "Record" filed in the Supreme Court, which consisted of 29 separate tabs of documents. Neither the factums filed in the court below, nor any affidavits, were included in the Appeal book filed by Patient X. These are all materials which this Court requires to understand what occurred in the previous proceeding, and to be able to consider the issues before us on appeal. I am satisfied that the Supplemental Appeal book filed by the College is a more full and accurate record of the materials which were before the court below, and complies with Rule 90.30.

[22] Related to this point, a preliminary matter of concern to the parties was dealt with at the outset of the appeal hearing. There is disagreement between the parties as to what affidavits were before Justice Hood on the judicial review. The dispute centers on two affidavits, both purportedly sworn by Patient X, on November 8, 2012 and December 3, 2012. Patient X says the earlier affidavit was the one before Justice Hood, not the latter one. The College submits that the earlier affidavit, although filed with the court, was withdrawn by Patient X's counsel on December 4, 2012, during the publication ban hearing. It was replaced with the affidavit sworn on December 3rd.

[23] Patient X is highly suspicious as to how this exchange of affidavits occurred. She says that the later affidavit was never signed by her, and it was placed before the court below by her former legal counsel improperly. There is no complete transcript of what occurred on December 4th in terms of the affidavits, as the recording of the hearing was restricted due to it being a publication ban motion. What was available to help determine this issue was the file, sealed by Justice Hood, containing the unredacted versions of the documents filed with the court.

[24] This file was made available to the parties for their review in advance of the appeal hearing. It contains a number of affidavits, including the two in question. There is an affidavit from Patient X, sworn November 8, 2012. It has a handwritten notation on it from Justice Hood reading "*December 4/12 affidavit was replaced. Not to be used in the Judicial Review*". Further, there is an original affidavit, purportedly sworn by Patient X on December 3, 2012. It bears a court stamp indicating "*Document filed on the record in Civil Chambers on Dec 4/2012*". It appears to be initialled by the chambers clerk. The original ink signature on the December 3rd affidavit purporting to be that of Patient X, appears identical to earlier affidavits she acknowledges were sworn by her.

[25] Based on the materials in the sealed file, I am satisfied that on December 4, 2012, a new affidavit was filed with the court by Patient X, through her counsel, for the purposes of the judicial review. That new affidavit, sworn on December 3rd, was intended to replace the earlier affidavit sworn on November 8th. It is that later affidavit, which was properly before Justice Hood, and which forms part of the record before this Court. In any event, I have also reviewed the contents of the November 8th affidavit. I am of the view, that nothing contained in that document would have changed the outcome of the judicial review, or the appeal before this Court.

Fresh evidence motion

[26] On October 30, 2014, Patient X filed a motion for fresh evidence. She seeks to have introduced the following:

a) An affidavit sworn on October 8, 2014 in which Patient X sets out factual background relating to her interaction with Dr. Y, her view of the Investigation Committee meeting of July 24, 2012, and her summary of the Investigation Committee decision;

b) Medical records relating to Patient X;

c) A document entitled "Judge's Error's" which appears to set out various alleged errors in the lower court decision; and

d) A document Patient X refers to as "college meeting with Patient X sexual assault and racial comments and damage". It appears to contain Patient X's recollection of the July 24, 2014 meeting with the Investigation Committee. It also included a document entitled "Sexual Assault: 'Boundary Violation-Sexual'".

[27] The affidavit filed by Patient X in support of the motion is brief. She did not file written submissions in support of her motion to admit fresh evidence. Both the College and Dr. Y submit that the material Patient X seeks to have admitted is not proper fresh evidence. The College also raises concern about a variety of other documents filed by Patient X either in her Appeal book, as part of her factums or by way of correspondence. The College says these materials should not be considered by the Court, as they do not meet the legal test for the admission of fresh evidence.

[28] This Court can consider evidence which was not before the court below. Civil Procedure Rule 90.47(1) provides:

> (1) The Court of Appeal, on the motion of a party, may on special grounds authorize evidence to be given to the Court of Appeal on the hearing of an appeal on any question as it directs.

[29] The "special grounds" upon which this is allowed, is limited. The burden rests with Patient X to establish the material she wants this Court to consider is allowable fresh evidence. This Court relies upon a test set out by the Supreme Court of Canada in **Palmer v. The Queen**, [1980] 1 S.C.R. 759 to determine whether "special grounds" exist. Applied here, this Court must ask whether (1) Patient X, with the exercise of due diligence could have produced the evidence at the judicial review; (2) the fresh evidence is relevant to the issues properly before the Court; (3) the fresh evidence is credible; and (4) the fresh evidence could have reasonably affected the result at the judicial review hearing. It is also essential that the fresh evidence be in admissible form. If the fresh evidence submitted does not satisfy all of the above conditions, it will not be admitted.

[30] I am satisfied that none of the "fresh evidence" submitted by Patient X should be considered by this Court. None of it meets the conditions set out above. The vast majority of the material submitted by Patient X has nothing to do with the issues Justice Hood was asked to decide. Some of it falls within the realm of submission, and is not "evidence" at all. The only material in admissible form is the affidavit of Patient X, sworn October 8, 2014. I am not convinced that any of the information contained in that affidavit would have affected the outcome of the narrow issues before Justice Hood. Further, it is all information which could have been introduced at the judicial review hearing.

Issues before the Court

[31] Usually setting out the issues this Court has to decide on an appeal is fairly straightforward. In this matter, more explanation is needed.

[32] Patient X has done an admirable job of expressing to this Court her concerns about how she was treated by Dr. Y and the previous decision-makers involved in this matter. She has expressed how the alleged actions of Dr. Y have impacted her in a negative way. In her written submissions, she reminded this Court how many people are still victimized by overt and more subtle forms of racism. It is clear from her submissions that Patient X believes that the outcome of the two lower decisions are rooted in the fact that she is of African-Canadian descent, and the existence of systemic discrimination.

[33] Throughout her submissions, Patient X makes it clear that on this appeal she is seeking monetary damages from Dr. Y and from the hospital where she attended for her appointment. She also seeks damages from the College because it "intentionally justified Dr. Y's actions" and for "their (colleges) own actions [of] sexual misconduct and racial comments". Finally, she seeks damages against the College's and Dr. Y's lawyers for negligence and breach of her privacy rights in terms of how they provided her with documentation relating to this appeal.

[34] Civil Procedure Rule 90.11 provides this Court with a discretion to hear and consider an issue not set out in a Notice of Appeal. It provides:

> **90.11**(1) An appellant may not rely on any ground of appeal not specified in the notice, unless the Court of Appeal or a judge of the Court of Appeal permits otherwise.

[35] Many of the issues raised by Patient X not only are absent from the Notice of Appeal, but were never before Justice Hood as part of the judicial review application. As a general rule, matters which were not before the court below, cannot be raised on appeal, subject to a very narrow exception. In **Shin Han F & P Inc. v. Canada-Nova Scotia Offshore Petroleum Board**, 2014 NSCA 108, Justice Farrar wrote:

> [81] The appellant asks that this Court consider an issue not raised in the Notice for Judicial Review and not argued before the reviewing judge. It says that there is a reasonable apprehension of bias affecting the Board's decision. It argues that the Board was an active, adversarial participant before the Committee. It further argues the general counsel of the Board acted as an advocate for the Board before the Committee and was also a voting member of the Board and one of the ultimate decision-makers.
>
> [82] The appellant acknowledges that the general rule is that new issues cannot be raised on appeal. In support of its argument it says that this is an exception to the general rule and relies upon the Supreme Court of Canada decision in **Quan v. Cusson**, 2009 SCC 62 where the Court held:
>
> > [37] Further guidance as to the appropriate test is provided by *Wasauksing First Nation v. Wasausink Lands Inc.* (2004), 184 O.A.C. 84, relied on by Sharpe J.A. below. There, the Ontario Court of Appeal explained the circumstances in which an exception will be made to the rule:
> >
> > > An appellate court may depart from this ordinary rule and entertain a new issue where the interests of justice require it and where the court has a sufficient evidentiary record and findings of fact to do so. [para. 102]

[36] On the judicial review of the Investigation Committee's decision, it was not Justice Hood's role to re-consider the information before the Committee and decide whether or not there was truth to Patient X's allegations. She was not asked to do so, nor was she asked to determine whether an assault took place, or whether Patient X had been subject to racial discrimination. Justice Hood was not asked to consider whether any type of monetary damages should be awarded to Patient X. It is important to remember that the only thing Patient X requested of Justice Hood was that she order her complaint proceed to a hearing under s. 58 of the *Medical Act*, or in the alternative, a new Committee be struck, and she be afforded the right to cross-examine.

[37] It is equally important to note that the Investigation Committee had no authority to award damages to Patient X, even if it had found misconduct on Dr. Y's part. On the judicial review, Justice Hood was only permitted to review the decision made by the Investigation Committee. She had no authority to broaden the nature of the matter before her to consider awarding damages.

[38] Although the new issues raised by Patient X are serious, they are simply allegations. There is neither a sufficient evidentiary record, nor findings of fact, which would allow the Court to consider claims which were beyond what was before the court below in the judicial review. It is worth noting here, that none of the "fresh evidence" proposed by Patient X, would have helped to create a sufficient evidentiary record, upon which the new issues could have been decided.

[39] Considering both Patient X's submissions and the order of Justice Fichaud, I view the issues before the Court to be as follows:

1) Can Patient X raise an allegation of ineffective assistance of counsel on this appeal?

2) Did Justice Hood err by failing to consider Patient X's claim that the Investigation Committee was biased due to the involvement of Dr. Stanish?

3) Should the decision below be set aside because Justice Hood was racially biased?

4) Did Justice Hood err in finding Patient X was afforded procedural fairness, and specifically, that she had no right of cross-examination before the Investigation Committee?

5) Did Justice Hood err in concluding the reasons of the Investigation Committee were adequate, and that the decision fell within the range of reasonable outcomes?

[40] As the first two issues can be dealt with summarily, I will deal with them now.

Can Patient X raise an allegation of ineffective assistance of counsel on this appeal?

[41] Throughout her submissions, Patient X makes clear that she believes she was not properly represented in the court below. Although the ineffective assistance of legal counsel can sometimes be a valid ground of appeal, there is a protocol which requires the lawyer in question be notified of the allegation, and be given the opportunity to respond (**R. v. West**, 2009 NSCA 63; **R. v. Hobbs**, 2009 NSCA 90 and **R. v. Fraser**, 2011 NSCA 70). That has not been done here. Even if it was, it is well-established that the ineffective assistance of counsel is an available ground of appeal in only the very narrowest of civil matters (**W.(D.) v. White**, [2004] O.J. No. 3441 (C.A.), leave to appeal refused at [2004] S.C.C.A. No. 486; **M.W. v. Nova Scotia (Community Services)**, 2014 NSCA 103). This is not such a case. It cannot be raised by Patient X as a valid ground of appeal.

Did Justice Hood err by failing to consider Patient X's claim that the Investigation Committee was biased due to the involvement of Dr. Stanish?

[42] I turn now to Patient X's concerns about Dr. Stanish being on the Investigation Committee. She says that his presence on the Committee resulted in the decision being biased, and fundamentally flawed. Patient X says Justice Hood erred by not considering this concern.

[43] Based on the record before this Court, that argument has no merit. Although the issue of bias due to Dr. Stanish's presence on the Investigation Committee was raised in Patient X's factum filed in advance of the judicial review hearing, this argument was withdrawn. Because it was withdrawn, Justice Hood cannot be criticized for not considering it. The transcript of the judicial review hearing shows the following exchange between Justice Hood and Patient X's co-counsel:

> **THE COURT:** Okay. What about the issue about bias?
>
> **MR. CURRIE ROBERTS:** We will not be addressing the issue of bias in our oral submissions today.
>
> **THE COURT:** So is it not before . . . no longer before me?
>
> **MR. CURRIE ROBERTS:** Yes, My Lady.
>
> **THE COURT:** Okay. Thank you.

[44] Later, the transcript discloses the following exchange between the court and counsel for the College:

> So looking at what I now understand are the two issues, and given the statements made this morning to Your Ladyship, I will not plan, unless Your Ladyship otherwise wants me to make any submissions on the allegation of bias issue, but I understand . . .
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> **THE COURT:** I understand that it is withdrawn.
>
> **MS. HICKEY:** . . . it's withdrawn.
>
> **THE COURT:** It's withdrawn.

[45] From the above, it is clear that Justice Hood believed that the issue of bias in relation to Dr. Stanish, was no longer being put forward by Patient X. It is clear from the record, this issue was being abandoned. Before this Court, Patient X says she filed no formal documents to withdraw this issue before Justice Hood, and it should have been considered. With respect, there was no need to file anything. The representation of her legal counsel made to the court, on the record, that an issue was no longer being pursued, was all that was required in the context of this case.

Standard of Review

[46] I now turn to the standard of review. Much has been written about this legal term. In most matters, it simply means the types of lens the Court wears to look at whether the decision-maker being reviewed, made a mistake that justifies setting aside or changing their decision. The standard of review changes, depending on the nature of the decision that is being considered.

[47] There is no "traditional" standard of review with respect to allegations of judicial bias. As will be explained later, if the Court finds there was a reasonable apprehension of bias, none of the decisions made by Justice Hood can be allowed to stand.

[48] With respect to the issues which relate to the substance of what Justice Hood decided, the appropriate standard of review that this Court must apply has been set out by the Supreme Court of Canada in **Agraira v. Canada (Public Safety and Emergency Preparedness)**, 2013 SCC 36. There, Justice LeBel wrote:

> [45] The first issue in this appeal concerns the standard of review applicable to the Minister's decision. But, before I discuss the appropriate standard of review, it will be helpful to consider once more the interplay between (1) the appellate standards of correctness and palpable and overriding error and (2) the administrative law standards of correctness and reasonableness. These standards should not be confused with one another in an appeal to a court of appeal from a judgment of a superior court on an application for judicial review of an administrative decision. The proper approach to this issue was set out by the Federal Court of Appeal in *Telfer v. Canada Revenue Agency*, 2009 FCA 23, 386 N.R. 212, at para. 18:
>
> > Despite some earlier confusion, there is now ample authority for the proposition that, on an appeal from a decision disposing of an application for judicial review, the question for the appellate court to decide is simply whether the court below identified the appropriate standard of review and applied it correctly. The appellate court is not restricted to asking whether the first-level court committed a palpable and overriding error in its application of the appropriate standard.
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> [46] In *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23, at para. 247, Deschamps J. aptly described this process as "'step[ping] into the shoes' of the lower court" such that the "appellate court's focus is, in effect, on the *administrative* decision". [Justice LeBel's emphasis]
>
> [47] The issue for our consideration can thus be summarized as follows: Did the application judge choose the correct standard of review and apply it properly?

[49] Based on the above, for both of the substantive decisions made by Justice Hood, it is necessary for this Court to ask firstly, whether she chose the appropriate standard of review, and secondly, whether she then proceeded to apply it properly.

Analysis

Was the hearing judge racially prejudiced?

[50] In alleging the hearing judge was racially prejudiced, Patient X is, in legal terms, saying Justice Hood was biased. This is a serious allegation, which if established, would result in a successful appeal. It is an unwaivering requirement that all judges, hearing every dispute, must be unbiased. Our entire system of justice rests upon the bedrock principle of impartiality.

[51] A reviewing court does not need to determine whether a judge is actually biased. The mere reasonable appearance or apprehension of bias, is sufficient to

have a decision set aside. This Court has recently had the opportunity to confirm the longstanding approach to such an allegation. In **C.B. v. T.M.**, 2013 NSCA 53, Oland, J.A. wrote:

> [31] If a reasonable apprehension of bias arises from a judge's words or conduct, then the judge has exceeded his or her jurisdiction and erred in law: *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 at ¶ 99. In *C.H.D.* at ¶ 25, Hamilton J.A., for this court set out the test for reasonable apprehension of bias:
>
> > **25** The test for a reasonable apprehension of bias is set out in **R. v. R.D.S.**, [1997] 3 S.C.R. 484:
> >
> > [31] The test for reasonable apprehension of bias is that set out by de Grandpré J. in Committee for Justice and Liberty v. National Energy Board, [1978] 1 S.C.R. 369. Though he wrote dissenting reasons, de Grandpré J.'s articulation of the test for bias was adopted by the majority of the Court, and has been consistently endorsed by this Court in the intervening two decades: see, for example, *Valente v. The Queen*, [1985] 2 S.C.R. 673; *R. v. Lippé*, [1991] 2 S.C.R. 114; *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267. De Grandpré J. stated, at pp. 394-95:
> >
> > > ... the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information ... [T]hat test is "what would an informed person, viewing the matter realistically and practically and having thought the matter through conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."
> >
> > The grounds for this apprehension must, however, be substantial and I ... refus[e] to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience". [Justice Oland's emphasis]
>
> [32] In *S. (R.D.)* at ¶ 35, the Supreme Court of Canada observed that according to its Commentaries on Judicial Conduct (1991), the Canadian Judicial Council stated at p. 12:
>
> > True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.
>
> [33] According to *S. (R.D.)*, to successfully assert that a judge might be partial, one must demonstrate that the beliefs, opinions, or biases held by the judge prevent him or her from setting aside any preconceptions and reaching a decision based only on the evidence:

> 113 Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. See *Stark, supra*, at paras. 19-20. Where reasonable grounds to make such an allegation arise, counsel must be free to fearlessly raise such allegations. Yet, this is a serious step that should not be undertaken lightly. [Justice Oland's emphasis]

[52] In her oral submissions, Patient X points to two things which she says gives rise to an apprehension that Justice Hood was biased. Firstly, Patient X submits that in stating in her decision that it was "racially medically appropriate for contact" to be made with her breast, Justice Hood was demonstrating racial bias. Secondly, by stating in the decision that Patient X had withdrawn allegations of racial discrimination against the Investigation Committee, when she had not, Justice Hood was being racially prejudiced.

[53] With respect, I cannot accept either of these arguments. I have carefully reviewed Justice Hood's decision, and it simply does not contain the statements Patient X relies upon. At no point in her decision, does Justice Hood state that it was justified that Patient X's breasts were touched due to her race. She says nothing that could come close to such an interpretation.

[54] Further, nowhere does Justice Hood state that the allegations of racial discrimination made by Patient X against the Investigation Committee were withdrawn. The closest she comes to making such a statement is as follows:

> [66] Patient X does not raise any concern about the Investigation Committee's decision about the racial remarks. Rather, she says in her brief that the reasons are deficient because: (1) they do not reveal why the Investigation Committee discarded Patient X's statements on Dr. Y's sexual misconduct; and (2) they do not mention the PTSD issue at all.

[55] Earlier in this decision, the issues that Patient X brought before the court on judicial review were outlined. Nowhere in either the Notice filed with the court, or in her factum, did Patient X raise an issue regarding the Investigation Committee's finding that the use of the term "black" by Dr. Y did not amount to misconduct.

The statement made by Justice Hood at paragraph 66 of her decision was an accurate statement of what issues were, and were not, placed before her. Patient X may wish that the racial bias of the Investigation Committee had been placed before the court below, but the record shows it was not. No reasonable apprehension of bias arises from Justice Hood merely reviewing, accurately, the issues Patient X had placed before her.

[56] In her written submissions, Patient X relies heavily on Justice Hood's written reasons in support of her allegation of bias. Patient X points out the occasions in the decision where Justice Hood references race. All however, are in the context of explaining the nature of the complaint made by Patient X, and the Investigation Committee's finding on the issue. Justice Hood made no independent remarks about race generally or Patient X's race specifically.

[57] Patient X uses terms like "racial profiling", "systemic racism" and "racial discrimination". However, there is absolutely nothing in the record before this Court to raise even a hint that in reaching her conclusions, Justice Hood was motivated or influenced by any of them. This ground of appeal fails.

Did Justice Hood err in finding Patient X was afforded procedural fairness, and specifically, that she had no right of cross-examination before the Investigation Committee?

[58] To answer the above, I must consider two questions. In deciding what level of procedural fairness Patient X was entitled to, did Justice Hood choose the correct standard of review? Once chosen, was the standard of review applied appropriately?

[59] With respect to the standard of review, Justice Hood concluded as follows:

> [13] Whether Patient X should have had an opportunity to cross-examine Dr. Y is an issue of procedural fairness. As noted by Justice Saunders at para. 78 of *Osif v. College of Physicians and Surgeons of Nova Scotia*, 2009 NSCA 28: "[t]he law is clear that issues of procedural fairness do not involve any deferential standard of review". A tribunal must correctly accord to all participants the procedural rights to which each is entitled.

[60] **Osif** was an appeal of a judicial review involving the same legislative scheme as here – that found in the *Medical Act*, and remains good authority.

Recently, in **Jono Developments Ltd. v. North End Community Health Association**, 2014 NSCA 92, leave to appeal refused, [2014] S.C.C.A. No. 527, this Court noted the approach to be applied where procedural fairness concerns are raised. Justice Farrar wrote:

> [41] The reviewing judge correctly identified the principle that no standard of review analysis governs judicial review, where the complaint is based upon a denial of natural justice or procedural fairness. (See for example, **T.G. v. Nova Scotia (Minister of Community Services)**, 2012 NSCA 43, leave to appeal refused, [2012] S.C.C.A. No. 237, at ¶90).
>
> [42] Instead, a court will intervene if it finds an administrative process was unfair in light of all the circumstances. This broad question, which encompasses the existence of a duty, analysis of its content and whether it was breached in the circumstances, must be answered correctly by the reviewing judge (see: **T.G. v. Nova Scotia (Minister of Community Services)**, **supra**, at ¶8; **Communications, Energy and Paperworkers Union of Canada, Local 141 v. Bowater Mersey Paper Co. Ltd.**, 2010 NSCA 19, ¶28; **Nova Scotia (Community Services) v. N.N.M.**, 2008 NSCA 69, ¶40; and **Kelly v. Nova Scotia Police Commission**, 2006 NSCA 27, ¶21-33.

[61] In concluding a tribunal must "correctly" afford participants with the procedural rights to which they are owed, Justice Hood identified the correct standard of review.

[62] To determine whether the Investigation Committee provided the "correct" level of procedural fairness, Justice Hood had to identify what level of fairness Patient X was entitled to. Both parties structured their submissions to the court in accordance with the well-recognized factors outlined in **Baker v. Canada (Minister of Citizenship and Immigration)**, [1999] S.C.J. No. 39.

[63] Justice Hood used the **Baker** factors as a "helpful guide" to identify the procedural rights owed to a complainant before an Investigation Committee struck under s. 53 of the *Medical Act*. She noted as follows:

> [15] In *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, Justice L'Heureux-Dubé said in para. 46 that: "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case."
>
> [16] She expanded on this in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39 [*Baker*], where she identified at paras. 21-28 a

> non-exhaustive list of five factors that are helpful to consider when deciding the level of procedural fairness that must be accorded to a party. These factors are: (1) the nature of the decision; (2) the nature of the statutory scheme; (3) the significance of the interests; (4) the legitimate expectations of the person challenging the decision; and (5) the previous procedural choices of the administrative decision maker. The overarching requirement, however, is fairness, and those factors are not a rigid formula. As Justice L'Heureux-Dubé said in para. 22:
>
> > . . .underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

[64] After a comprehensive analysis, Justice Hood concluded that the factors in the matter before her, pointed to a low level of procedural fairness. Further, she concluded that the fact the complaint engaged issues of credibility did not serve to increase the level of procedural fairness owed to Patient X, nor mandate the right to cross-examination.

[65] Patient X has not attempted to argue that Justice Hood erred in reaching the above conclusion. Her focus was on the other concerns outlined earlier in this decision. Despite the lack of argument on this point from the appellant, I have carefully reviewed the analysis undertaken by Justice Hood, and the authorities upon which she relied.

[66] I am satisfied that the conclusion reached by Justice Hood was correct and adopt the careful and insightful analysis undertaken by her at paragraphs 18 through 58 of her decision.

Did Justice Hood err in concluding the reasons of the Investigation Committee were adequate, and that the decision fell within the range of reasonable outcomes?

[67] As with the previous issue, Patient X did not address the adequacy of the reasons, nor how Justice Hood erred in her approach or conclusions. As this inquiry clearly falls within the ground of appeal identified by Justice Fichaud in his order of June 26, 2014, it will be considered.

[68] I must first determine whether Justice Hood chose the correct standard of review in relation to this issue. At paragraphs 59 through 62 of her decision, she sets out the standard as follows:

> [59] In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury)*, 2011 SCC 62, the Supreme Court of Canada considered the argument that a failure to provide sufficient reasons was a breach of procedural fairness. At para. 22, Justice Abella said the following:
>
> > It is true that the breach of a duty of procedural fairness is an error in law. Where there are no reasons in circumstances where they are required, there is nothing to review. But where, as here, there *are* reasons, there is no such breach. Any challenge to the reasoning/result of the decision should therefore be made within the reasonableness analysis. (emphasis in original)
>
> In other words: although a failure to give any reasons at all may in some cases be a breach of procedural fairness, an inquiry into the quality of those reasons should ultimately be done by assessing the reasonableness of the decision.
>
> [60] As such, reasons are adequate if, when examined in their context, they tell the parties why the decision was made and permit judicial review. In *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47, Justices Bastarache and LeBel said that:
>
> > In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
>
> [61] The Supreme Court of Canada later elaborated on these remarks in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury), supra*, where Justice Abella said at para. 16 that:
>
> > . . . if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.
>
> [62] It is also important to evaluate those reasons in the context of the particular decision-maker. Members of an investigation committee are typically doctors, not lawyers. As Justice Murphy, writing *ex officio* for the Court of Appeal in *Hills v. Nova Scotia (Provincial Dental Board)*, 2009 NSCA 13 said at para. 41: "[c]ourts recognize that when members of discipline tribunals are not lawyers, their decisions should not be subject to excessive scrutiny". He went on in paras. 41 and 42 to approve a number of other statements to the same effect, including the following passage (at para. 42) from *Trotter v. College of Nurses (Ontario)*, [1991] OJ No 348 (Div Ct): "[i]t is not fatal to a decision that specific

> mention is not made of certain evidence; nor is it fatal if specific reasons are not given before its rejection . . .". Ultimately, an investigation committee is not writing for the court. The sufficiency of its reasons must be assessed in that context.

[69] I am satisfied that Justice Hood identified the correct standard of review with respect to the adequacy of the Investigation Committee's reasons.

[70] I must now determine whether Justice Hood properly applied the above standard to the issue before her. In her analysis, Justice Hood identified the two complaints raised by Patient X about the reasons given by the Investigation Committee. I have already concluded earlier that Justice Hood's identification at paragraph 66 of her decision of the issues raised by Patient X, was accurate and complete.

[71] At the judicial review, the only issues raised by Patient X about the adequacy of the Investigation Committee's reasons were that they failed to explain why her description of Dr. Y's sexual misconduct towards her was not accepted; and that the decision failed to address her concern that Dr. Y did not properly recognize her mental health issues.

[72] Justice Hood first addressed the adequacy of the reasons with respect to the sexual misconduct complaint. She undertook an analysis which considered the position advanced by both Patient X and the College. She noted:

> [73] Indeed, although Patient X characterized the touching as "fondling", she does not appear to have described the extent of the contact in sufficient detail to distinguish it from appropriate incidental contact. According to the minutes of the meeting, Patient X said in her interview that she was "not sure how long Dr. [Y] was touching her breasts. s[*sic*]he was trying to think of other things . . ." As such, the College submits that the Committee did not disbelieve Patient X's recollection of the events, just her interpretation of them.
>
> [74] While it could be argued that that is simply a credibility finding by another name, it is worth noting that in *Devgan v. College of Physicians and Surgeons of Ontario*, (2005), 193 O.A.C. 357, 2005 CanLII 2325 (Ont. S.C.(Div. Ct.)), Justice Then said at para. 54 that: "[W]hile it is preferable to give reasons for rejecting the credibility of a witness, a failure to do so does not constitute reversible error".

[73] Justice Hood concluded:

> [77] It is true that the reasons of the Investigation Committee in this case leave something to be desired. However, I must be careful not to assess these reasons as if they were written by a lawyer. It is clear enough from the reasons that the Investigation Committee concluded that the material before them could not prove that Dr. Y's contact with Patient X's breasts was sexually motivated. Whether it was implicitly based on a credibility finding or not, the decision in this case reaches an intelligible conclusion within the range of acceptable outcomes.

[74] I agree with Justice Hood's observation that the reasons of the Investigation Committee could have been more fulsome. However, there is no requirement that reasons be perfect, or even near-perfect. Reasons will be adequate if, upon review, one can understand why the decision was made, and determine whether the outcome falls within the scope of reasonable outcomes (**Newfoundland Nurses**). In my view, the reasons offered by the Investigation Committee were such that one can understand how the outcome was reached – the evidence was not sufficient to establish that Dr. Y's contact with Patient X's breast, was sexually motivated. Having come to that conclusion, dismissing the complaint was clearly within the range of reasonable outcomes available to the Investigation Committee.

[75] As a final matter, Justice Hood considered whether the Investigation Committee's reasons were inadequate because they failed to address the "PTSD issue". She reviewed the complaint made by Patient X to the College, and the additional materials submitted to the Investigation Committee. In concluding the lack of reference to Patient X's PTSD in the reasons was not problematic, Justice Hood said:

> [81] … Patient X only referred to PTSD in the context of the effect that Dr. Y's alleged misconduct had on her. Her words were: "I suffer PTSD . . ." and "he triggered things in my life . . .". She did not allege that Dr. Y misconducted himself with regard to her PTSD. She cannot complain now that it was unreasonable for the Investigation Committee not to explain why it found no fault in that regard. It is true that she later said that Dr. Y knew about her PTSD, but at no point did she allege that this was a reason that he was incompetent.
>
> [82] Further, the only matter that she raised to support her claim that Dr. Y knew about her PTSD was the consultation report about the visit that he prepared on May 11, 2009. In that letter, Dr. Y said that Patient X told him what medication she was taking, and he noted that one of the drugs was "for depression/anxiety". In Dr. Y's second response, he noted that depression and anxiety are not the same as PTSD. Nowhere in his May 11, 2009 report, the referral letter from her family doctor, or the remainder of his file is there any

> indication that Patient X had PTSD. As a result, the Committee was left with only Patient X's own statement that he knew she had PTSD. Judging by the minutes of the meeting, she did not repeat that allegation when she was interviewed.
>
> [83] Given that, I do not think the Committee was required to address the PTSD issue. The reasons are therefore sufficient without those comments.

[76] In her formal initial complaint to the College, Patient X clearly states that she felt Dr. Y did two things wrong. He inappropriately touched her breast, and secondly, he made racially inappropriate comments relating to her lung capacity. Although she said Dr. Y's negligence worsened her mental health, her PTSD in particular, Patient X does not suggest in her complaint that Dr. Y should have treated her differently because of the state of her mental health.

[77] The issue of Patient X's PTSD and Dr. Y's knowledge of it, appears to pick up steam as a result of the doctor's response to the complaint. He wrote:

> I cannot recall whether the RN or RT accompanied me for this examination. Routinely they would not, but if there were any concerns expressed by the patient, the referring physician, or the clinic staff, or if I had concerns based on my conversations with the patient, they certainly would have been present. The patient states she has PTSD. If I had been aware of this the RN or RT would have been present during the examination.

[78] In her subsequent reply, Patient X insists Dr. Y did know of the PTSD diagnosis. In her letter filed with the College on November 3, 2011, she responds:

> . . .Also, stated in the October 19th, 2011 response by Dr.[Y] a substantially lengthy conversation took place regarding my medical history. He also states in this same response that he could not recall if an RN or RT accompanied him for the examination. He then states that if he knew that I suffered from PTSD he would have had an RN or RT present during the examination. There was no one male or female present at anytime during my examination. . . .

She does not suggest that Dr. Y's failure to have someone present was a reason why she thought he was deserving of discipline by the College.

[79] In the minutes of the July 24, 2012 interview with Patient X, the Investigation Committee noted that she had been diagnosed with PTSD prior to seeing Dr. Y. It was also noted, along with other things, that Dr. Y "did not offer to have a chaperone present for the examination". Those two references do not

however, appear to be connected. There is no indication that Patient X was asserting that because she suffered from PTSD, Dr. Y failed to meet the appropriate standard of conduct by failing to have a chaperone present. That is certainly not part of her formal complaint.

[80] After carefully reviewing the record, I am satisfied that the complaint before the Investigation Committee did not assert that Dr. Y was guilty of professional misconduct because he failed to properly take into consideration her PTSD diagnosis, or other aspects of her mental health. In my view, the references made by Patient X to her mental health were intended to convey the seriousness of the impact of Dr. Y's alleged misconduct – the inappropriate touching and racial insensitivity, on her already fragile condition. It is not fatal to the Investigation Committee's decision, that it did not address a complaint which was not before it.

[81] I would dismiss the appeal relating to the sufficiency of the Investigation Committee's reasons.

Costs

[82] At the appeal hearing, the College requested costs should the appeal be dismissed. It was submitted that Patient X's appeal was a misplaced attempt to address issues which were not properly before the Court, resulting in a costly legal proceeding. It was submitted that a modest award of costs was warranted.

[83] Patient X argued she should not be subject to a cost award if her appeal was unsuccessful, as she was not at fault for anything that had happened, in fact, she was the victim.

[84] Costs were not awarded in the court below against Patient X in recognition of her financial circumstances. The lack of a costs award there however, does not preclude an award, if warranted, on appeal. Nor does the fact that Patient X is a self-represented litigant, rule out the possibility of a costs award against her, if warranted.

[85] I am of the view that an award of costs is appropriate. Although the issues she attempted to raise are certainly important to her, and some also have a broader societal importance, most of what Patient X attempted to raise in this Court simply did not belong in front of us. Patient X was of the mistaken view that she could somehow turn a complaint to the College about a doctor, and the subsequent

review of the resulting disciplinary decision, into a claim at the Court of Appeal for monetary damages for assault, breach of privacy and other complaints. Notwithstanding the seriousness of the allegations made by Patient X, matters simply do not work that way.

[86] Patient X clearly misunderstands the role of this Court. She came before us looking for an outcome which is impossible for us to give. In pursuing that outcome, she caused unnecessary expense to the other parties. Self-represented litigants, even those with an arguable issue to be considered, must realize that there may be financial consequences to bringing a matter which is found to be without merit.

[87] In light of the circumstances, the College submits a "token" award of costs be considered. I am of the view that an award of costs in the amount of $500.00 payable by Patient X to the College is warranted. Dr. Y made no request for costs. As such, I would not order any.

Conclusion

[88] I would dismiss the appeal and order costs payable by Patient X to the College in the amount of $500.00.

Bourgeois, J.A.

Concurred in:

Bryson, J.A.

Van den Eynden, J.A.