NOVA SCOTIA COURT OF APPEAL

Citation: *Psychologist "Y" v. Nova Scotia (Board of Examiners in Psychology)* , 2005 NSCA 116

Date: 20050902
Docket: CA 239448
Registry: Halifax

Between:

Psychologist "Y"

Appellant

v.

Nova Scotia Board of Examiners in Psychology

Respondent

Restriction on publication: **pursuant to ss. 41(2)(b) and 41(3) of the Psychologists Act.**

Judges:	Cromwell, Oland and Hamilton, JJ.A.
Appeal Heard:	June 16, 2005, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Cromwell, J.A.; Oland and Hamilton, JJ.A. concurring.
Counsel:	Warren Zimmer, for the appellant Alan J. Stern, Q.C., for the respondent

Reasons for judgment:

I. INTRODUCTION:

[1] The Nova Scotia Board of Examiners in Psychology alleges that the appellant, a registered psychologist, committed acts of professional misconduct. It claims that he had a sexual relationship with a former client and that this was contrary to professional ethics and standards. However, that relationship is alleged to have occurred before the appellant became a registered psychologist and before the current legislation and *Code of Professional Ethics* governing the profession came into force. For these reasons, the appellant claims that the Board has no jurisdiction to pursue these old charges. He applied to Coughlan, J. in the Supreme Court for an order in the nature of prohibition to stop the Board of Examiners in Psychology from proceeding, but the judge dismissed the application. The matter now comes to us on appeal.

[2] An order of prohibition is a drastic remedy and generally should be used only in clear cases. In my view, the judge was right to refuse it here. While the appellant raises serious legal questions relating to what disciplinary standards and sanctions, if any, apply to the alleged misconduct, the answers to these questions are far from clear and, in arriving at the answers, the statutory tribunal may well be entitled to a measure of deference from a reviewing court. Both considerations support the judge's refusal to close down the proceedings before the tribunal at this stage. I would dismiss the appeal.

II. THE COMPLAINT AND THE APPELLANT'S POSITION:

[3] The complaint against the appellant covers the time between the spring of 1992 and September of 1993. At that time, he was not , as he is now, a registered psychologist, but a registered candidate. The basis of the complaint is that the appellant had a sexual relationship with a former client, tried to avoid responsibility for it and made misrepresentations to the Board in connection with his applications for registration. The amended complaint, which has been forwarded to a hearing committee for determination, now reads:

> The complaint of the Nova Scotia Board of Examiners in Psychology, filed pursuant to the *Psychologists Act*, S.N.S. 2000, c. 32, against [Psychologist "Y"], a Registered Psychologist, of Halifax, in the

> County of Halifax, Province of Nova Scotia, hereby charges [Psychologist "Y"] with professional misconduct, in that:
>
> 1. He, while a Registered Candidate in private practice provided counselling services to [G.B.] from 1988 until late 1991, and had further contact with Ms. [B.] in the spring of 1992 and, shortly thereafter, entered into a social relationship with Ms [B.] which included intimate sexual relations with her, contrary to Principle II.3 and Principle III.23 of a *Canadian Code of Ethics for Psychologists* and Principle 8.4 of the Standards of Professional Conduct (in effect during 1988 to 2002).
> 2. He, while a Registered Candidate, as his intimate relationship with Ms. [B.] was ending in 1992, cautioned Ms. [B.] not to tell anyone about their romantic relationship thereby trying to avoid accepting responsibility for his actions, contrary to Principle II.3 of a *Canadian Code of Ethics for Psychologists* (in effect during 1988 to 2002).
> 3. He, a Registered Candidate, in an Application for Registration under the *Psychologists Act* signed by him on November 6, 1990, attested that he reviewed the Code of Ethics and attested that he was adhering to the Code of Ethics and that he would continue to do so. In 1992, when he knew such attestation was false, he continued to misrepresent to the Nova Scotia Board of Examiners that he was adhering to the *Code of Ethics* contrary to Principle III.1 and the Preamble which deals with Responsibility of the Individual Psychologist Article 1 of the *Canadian Code of Ethics for Psychologists* and Principle 1.1 of the Standards of Professional Conduct (in effect during 1988 to 2002).
> 4. He, upon applying for and securing the status of Registered Psychologist on September 23, 1993, failed to advise the Board of Examiners about his failure to adhere to the *Code of Ethics* in 1992 contrary to Principle III.1 and the Preamble which deals with Responsibility of the Individual Psychologist Article 1 of the *Canadian Code of Ethics for Psychologists* and Principle 1.1 of the Standards of Professional Conduct (in effect during 1988 to 2002).

[4] The appellant's position is that the Board has no jurisdiction to proceed with this complaint for two main reasons.

[5] The first is that the hearing committee cannot proceed with charges under the current legislation in relation to conduct that is alleged to have occurred before that legislation was in force. At the time of the alleged misconduct, a predecessor statute was in force . It did not set out any disciplinary process in relation to registered candidates, the status that the appellant had at that time. In other words, at that time, the appellant could not have been charged with professional misconduct. In addition, no penalties, apart from removal from the register, could have been imposed on him. The appellant says, therefore, that he is being charged under provisions relating to professional misconduct and being exposed to penalties that were not in place at the time of the alleged misconduct. The appellant's second main contention is that the *Code of Ethics* in force at that time, unlike the current *Code*, did not provide that it was unethical to have sexual relations with a former client.

[6] In short, the appellant says that the complaint exposes him to a disciplinary process and to penalties that were not in place at the time of the alleged misconduct and that, in any event, the conduct was not contrary to the *Code of Ethics* then in force. It follows, he submits, that the Board has no jurisdiction to proceed with the complaint.

III. THE JUDGE'S DECISION:

[7] Coughlan, J. dismissed the appellant's application for prohibition. He held that the Board had jurisdiction because it has authority to discipline a registered psychologist and, at the time the complaint was made in March of 2003, the appellant was a registered psychologist. The judge held, however, that the appellant should be judged by the ethical and professional standards in force at the time the misconduct is alleged to have occurred.

IV. ISSUES:

[8] The issue on appeal may be expressed as a single question: Do either of the two main legal contentions advanced by the appellant show that the hearing committee has no jurisdiction to proceed and should be prohibited from doing so?

V. ANALYSIS:

1. The regulatory framework:

[9] Before turning specifically to the issue on appeal, I must explain the distinction between a registered candidate and a registered psychologist, outline briefly the discipline regime and *Code of Ethics* in place at the time of the alleged misconduct and finally refer to the current regime under which the complaint was issued.

[10] There are two relevant statutes: the **Psychologists Act**, S.N.S. 1980, c. 14, which appeared in the Revised Statutes as R.S.N.S. 1989, c. 368 (the "old **Act**"; section number references will be to the R.S.N.S. 1989) and the **Psychologists Act,** S.N.S. 2000, c. 32 (the "new **Act**"). Under both the old and the new **Acts**, the Board of Examiners in Psychology is to maintain two registers, a Register of Psychologists and a Register of Candidates. In brief, higher educational requirements and greater practical experience are required to be entered on the Register of Psychologists (new **Act**, s. 14(1); old **Act**, ss. 13 and 14). The appellant was a registered candidate under the old **Act** at the time of the alleged acts of professional misconduct. He is now a registered psychologist under the new **Act**.

[11] Under the old **Act**, the framework for professional conduct in relation to registered candidates was different than it was for registered psychologists. In addition, that framework under the old **Act** for candidates was different than the regime put in place for candidates under the new **Act**. I must go into a little more detail on these points.

[12] Under the old **Act**, the Board of Examiners was given authority to discipline registered psychologists (s. 15) and to make regulations concerning discipline, conduct and a code of ethics: s. 10(1)(g), (i) and (j). However, there was no similar express power to discipline or make regulations concerning the discipline, conduct or a code of ethics in relation to registered candidates. The authority over candidates was to fix conditions, limitations and restrictions relating to registration and , in the event of non-compliance, to remove them from the register: s. 15. This is the basis of the appellant's first main point : at the time of the alleged misconduct, a candidate such as himself could not have been charged with professional misconduct and that no sanctions, apart from removal from the register of candidates, could have been imposed on him.

[13] The next point relates to the *Code of Ethics*. Under its regulation-making power in the old **Act**, the Board adopted the *1986 Code of Ethics* of the Canadian Psychological Association ("*1986 Code*"). Principle II of that *Code*, entitled "Responsible Caring", in para. 23, provided that "In adhering to the Principle of Responsible Caring, psychologists would: ... (23) Be acutely aware of the power relationship in therapy and, therefore, not encourage or engage in sexual intimacy with therapy clients." The *Code* defined "client" as "... a person ... receiving service from a psychologist"(emphasis added). The complaint now made against the appellant, however, relates to alleged sexual intimacy with a former client, not a person who was receiving services from him at the time. So the appellant's second main point is that even if the *Code* applied to him, it did not prohibit what he is alleged to have done with a former client.

[14] The complaint against the appellant was filed under the new **Act**. It came into force in June of 2002 and repealed the old **Act**. Without going into unnecessary detail, the new **Act** establishes a disciplinary process that applies to both registered psychologists and candidates. Complaints are to be investigated by an investigation committee and referred to a hearing committee. The hearing committee is to determine whether the registered psychologist or registered candidate is guilty of charges relating to a discipline matter and, if so, may cancel or suspend the registered psychologist's registration, remove the name from the Register of Candidates and impose various other sanctions. The psychologist has a right of appeal from the findings of a hearing committee to this Court on any point of law.

[15] We are advised that the Board has adopted the 3rd edition of the *Canadian Code of Ethics for Psychologists* (2000). Principle II, "Responsible Caring" in para. II.27 provides that: "In adhering to the Principle of Responsible Caring, psychologists would: ... II.27 Be acutely aware of the power relationship in therapy and, therefore, not encourage or engage in sexual intimacy with therapy clients, neither during therapy, nor for that period of time following therapy during which the power relationship reasonably could be expected to influence the client's personal decision making" (emphasis added). This revised principle explicitly extends the prohibition of sexual relations to former, as well as present, clients so long as the former therapeutic relationship could reasonably be expected to influence the client's personal decision making.

[16] In summary, under the new **Act**, unlike the old one, the disciplinary regime, code of ethics and an array of disciplinary sanctions apply to persons on both the psychologists and candidates registers. The new version of the *Code*, unlike the old one, expressly addresses sexual relations with former clients.

[17] I should note the transitional provisions in the new **Act** and the **Interpretation Act**, R.S.N.S. 1989, c. 235, as they have a bearing on the issues raised on appeal. Their effect appears to be that conduct is to be judged according to the standards in place at the time it was committed, but may be dealt with under the new procedures.

[18] Section 51 of the new **Act** provides that a complaint made pursuant to the former **Act** shall continue to be proceeded with in accordance with the new Act "... as nearly as circumstances permit." Section 52 deals with matters pending before the Board at the time of the coming into force of the new **Act**. Section 53 repeals the former **Act**, thereby engaging some provisions of the **Interpretation Act**. Section 23(1)(c), (e) and (2), 23 (3) (c) and (d) of that **Act** provide:

> **23** **(1)** Where an enactment is repealed, the repeal does not
> ...
> (c) affect a right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment;
> ...
> (e) affect an investigation, legal proceeding or remedy concerning any right, privilege, obligation, liability, penalty, forfeiture or punishment acquired or incurred under the enactment.
> **(3)** Where an enactment is repealed and other provisions are substituted for it,
> ...
> (c) every proceeding taken under the enactment shall be taken up and continued under and in conformity with the provisions so substituted, as far as consistently may be;
> (d) in the recovery or enforcement of penalties and forfeitures incurred and in the enforcement of rights, existing or accruing under the enactment or in a proceeding in relation to matters that have happened before the repeal, the procedure

> established by the substituted provisions shall be followed as far as it can be adapted thereto; ...

[19] With respect to the transition from the old **Act** to the new, two things are not in dispute. First, there is no dispute that the Board of Examiners has jurisdiction to receive and review a complaint relating to someone who, like the appellant, is currently a registered psychologist, whatever the time frame to which the complaint may relate. (There is, of course, a dispute about whether the Board had the authority to refer this complaint, as it has done, to a hearing committee to proceed with a hearing on the merits.) Second, it is common ground between the parties that, as the Chambers judge held, the standards to be applied to the appellant for assessing his conduct must be the standards that were in place at the time he acted. The complaint has been amended to try to make clear that this is the intent.

2. The remedy of prohibition:

[20] In my view, the outcome of this appeal turns mainly on the nature of the remedy the appellant sought, an order of prohibition.

[21] Prohibition is a drastic remedy. It is to be used only when a tribunal has no authority to undertake (or to continue with) the matter before it. Unless a lack of jurisdiction or a denial of natural justice is clear on the record, prohibition is also a discretionary remedy. As Sara Blake says in her text, *Administrative Law in Canada*, 3rd ed. (Butterworths, 2001) at 200, it may be refused if the existence of jurisdiction is debatable or turns on findings of fact that have yet to be made. "It must be clear and beyond doubt," she writes, "that the tribunal lacks authority to proceed." Or as 11 Halsbury's Laws of England (3rd ed., 1955) p. 115 puts it, prohibition cannot be claimed as of right unless the defect of jurisdiction is clear. (See also **R. v. Ashby**, [1934] O.R. 421 (C.A.); **Re Lilly and Gairdner** (1973), 2 O.R. (2d) 74 (Div. Ct.).) Prohibition is not a substitute for an appeal: **R. v. Jones** (1974), 2 O.R. (2d) 741 (C.A.) application for leave to appeal dismissed (1974), 2 O.R. (2d) 741n (S.C.C.).

[22] There can be no hard and fast rule as to when a tribunal should be closed down by prohibition rather than left to decide the legal points, subject to judicial review or appeal: **Bell v. Ontario (Human Rights Commission)**, [1971] S.C.R. 756 at 772, at pp. 772-780. In **Bell**, the Court quoted with approval the following

from Lord Goddard, C.J. in **R. v. Tottenham and District Rent Tribunal, Ex p. Northfield (Highgate) Ltd.**, [1957] 1 Q.B. 103 (C.A.):

> ... I think it would be impossible and not at all desirable to lay down any definite rule as to when a person is to go to the tribunal or come here for prohibition where the objection is that the tribunal has no jurisdiction. Where one gets a perfectly simple, short and neat question of law as we have in the present case, it seems to me that it is quite convenient, and certainly within the power of the applicants, to come here for prohibition. ...

[23] David J. Mullan, in his text *Administrative Law*, 3rd ed. (Carswell, 1996) at para. 539 notes that prohibition is available to prevent the wrongful assumption of jurisdiction, but not to restrain expected or anticipated legal errors that do not go to the tribunal's jurisdiction. He continues:

> **§540** Even in the domains of jurisdictional error and procedural fairness obligations, there is now a strong tendency to allow a statutory decision-maker the opportunity to make a preliminary assessment of the issues. If the decision-maker has the legal capacity to consider a challenge to its jurisdiction or to determine the extent of procedural entitlements, the courts generally refrain from entertaining an application for prohibition until the tribunal either declines to consider the matter or actually deals with it. Until then the application is premature.
>
> (Emphasis added)

[24] These considerations are particularly pertinent here for two reasons. The **Psychologists Act**, in common with many other statutes regulating self-governing professions, sets up a comprehensive statutory scheme for addressing issues of professional discipline and competence. It is generally undesirable – although of course there are exceptions – for the courts to intervene in these matters until there has been a full hearing and determination on the merits: see generally, *Mullan*, *supra*, at paras. 667 - 669. Moreover, a statutory professional disciplinary body may be entitled to deference from a reviewing court on some questions of law or mixed law and fact. For example, we held recently that this was the case in defining the standard of professional conduct for dentists: **Creager v. Provincial Dental Board of Nova Scotia** (2005), 230 N.S.R. (2d) 48; N.S.J. No.32 (Q.L.)(C.A.) at paras. 23 - 34; James T. Casey, *The Regulation of Professions in*

Canada, looseleaf, (Carswell, 2003) at pp. 15 - 5 to 15 - 6. Where some deference may be due to the tribunal on the point in issue, it will generally be better for the court not to intervene by prohibition unless the tribunal's decision to proceed clearly exceeds the bounds of any deference owed to its decisions. Intervening by prohibition other than in very clear cases is to be avoided because it will generally preclude judicial deference and short-circuit the statutory division of labour between the tribunal as a first instance decision-maker and the court as an appellate review body.

[25] In summary, it seems to me that prohibition will generally only be appropriate where it is clearly shown, taking appropriate judicial deference into account, that the tribunal has no authority to continue with the proceeding. In cases in which the tribunal has not clearly exceeded the bounds of any deference which may be due to it on the critical legal question, or in which further fact-finding is necessary or in which the answer to the legal question is not clear, it will generally be better to let the proceeding run its course before the tribunal, subject to appellate review or appeal at its conclusion.

[26] The issue here is whether the two main contentions advanced by the appellant clearly demonstrate that the hearing committee has no authority to address the merits of the complaint. In short, do the legal issues raised by the appellant show that the hearing committee clearly lacks jurisdiction to embark on the hearing? I will consider the appellant's two main contentions in turn.

3. May a registered psychologist be disciplined for conduct engaged in while a registered candidate?

[27] Each of the four paragraphs of the complaint set out particular acts of alleged misconduct. Each relates to the time before the appellant was a registered psychologist. However, it is helpful to distinguish between the first two and the last two, as they raise somewhat different issues in relation to applying the present rules to past misconduct.

[28] The first two alleged acts of misconduct relate solely to a time at which the appellant was a registered candidate. The question with respect to them is simply whether conduct at that time may constitute professional misconduct.

[29] Professional misconduct is not defined in the legislation. There is authority for the view that conduct by professionals which predates their admission into the profession may be the basis of discipline: see, e.g., *Casey*, s. 4.2; **Achong v. College of Physicians and Surgeons (B.C.)** (1997), 36 B.C.L.R. (3d) 314 (C.A.) at paras. 25 - 47; **Keppel v. Association of Professional Engineers, Geologists and Geophysicists of the Northwest Territories** (1996), 138 D.L.R. (4th) 749 (N.W.T.S.C.) at paras. 23 - 32 and cases reviewed therein. Whether and to what extent earlier conduct may constitute professional misconduct on the part of a registered psychologist is, in my view, a legal question which the hearing committee under the new **Act** has jurisdiction to decide subject, of course, to review on appeal. The answer, in my view, is not clear and the question may well be one on which the hearing committee is entitled to some deference from the reviewing court. Without expressing a final view on how either point should ultimately be resolved, they both support the decision of the Chambers judge not to intervene in the tribunal's process by prohibition at this stage.

[30] The question of what sanctions may be imposed seems to me to be interwoven with the previous issue. While, of course, a new penalty cannot be imposed for past misconduct (absent clear legislative intent to authorize it) the situation is arguably different if the past misconduct is treated as evidence of the individual's present unsuitability for the profession. Once again, without expressing a final view, there is not a clear or obvious answer to this issue and the hearing panel in resolving it may be entitled to a measure of deference from the court. Both considerations support the judge's refusal to grant prohibition.

[31] The third and fourth acts of alleged professional misconduct relate to the appellant's applications for registration. There is authority for the view that misrepresentation at the time of application for accreditation is a continuing act of professional misconduct so long as the accreditation continues: see e.g., **Re Harcourt and Association of Professional Engineers of the Province of Ontario** (1931), 39 O.W.N. 462 (Sup. Ct. A.D.); **Re Knox; A Solicitor** (1914), 20 D.L.R. 546 (A.S.C.A.D.). That is essentially what is alleged against the appellant in the third and fourth paragraphs of the complaint. My point is not that **Harcourt** and **Knox** necessarily govern this case. But they show that it is far from clear that the hearing committee has no authority to inquire into the appellant's conduct in relation to his applications for registration. Again, without expressing any final view, this point supports the judge's decision not to intervene by prohibition.

[32] That brings me to the appellant's concern that the Board is trying to apply new rules to old conduct. There is, of course, a principle of statutory interpretation that, absent clear legislative intent to the contrary, an enactment should not be interpreted so as to alter the past effects of a past situation: see, e.g. **Gustavson Drilling (1964) Ltd. v. Canada (Minister of National Revenue)**, [1977] 1 S.C.R. 271; **Re Yat Tung Tse and College of Physicians and Surgeons of Ontario** (1978), 18 O.R. (2d) 546; **R. v. Coles**, [1970] 1 O.R. 570 (C.A.); **Jellis v. Appraisal Institute of Canada**, [1986] A.J. No. 637 (Q.L.)(Q.B.). The appellant relies on this principle. He says that he cannot be pursued under the new regime of professional conduct for matters alleged to have been committed at a time when he was a registered candidate, and therefore, in his submission, not subject to any professional conduct regime or penalties other than removal from the candidates' register.

[33] While I do not doubt the vitality of this legal principle, its application in this case is far from straightforward. There is authority for the proposition, for example, that attaching future consequences to an ongoing situation does not run afoul of the principle against changing the past effects of a past situation: **Brosseau v. Alberta Securities Commission**, [1989] 1 S.C.R. 301; Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th, 2002) at 559 - 563. In the old case of **R. v. Vine** (1875), L.R. 10 Q.B. 195, a provision which denied a licence to sell spirits to a person convicted of a felony was applied to someone who had been convicted before the provision came into effect. The conviction was seen as a proxy for the present and continuing trait of bad character. Thus, the provision did not have the effect of changing either the past effects of a past situation or the future effects of a past situation: see *Sullivan* at pp. 560 - 561.

[34] In the present case, the new **Act** does not define professional misconduct or clearly differentiate for discipline purposes between misconduct and fitness to practice. As noted earlier, conduct before and at the time of admission to a profession may be found to constitute professional misconduct in the present on the basis that the conduct is of a continuing nature or evidences an ongoing unsuitability to practice. The present case seems to me to raise complex factual and legal issues in this regard and it is not appropriate to pre-empt the hearing committee from addressing them, subject of course to appellate review. In short, whatever the result at the end of day, this complaint at this stage is not so clearly

seeking to change the past effects of past events that the hearing committee should be prohibited from undertaking the inquiry on its merits.

[35] It follows, in my view, that the first of the appellant's legal contentions does not clearly show that the hearing committee has no jurisdiction to proceed with the merits. I emphasize that I am not expressing any final view on the questions of whether these allegations may constitute professional misconduct or whether the complaint is improperly seeking to apply the new **Act** to old events. I rest my decision on the point that the answers to these questions are not so clear that it is appropriate to prohibit the hearing committee from addressing them, subject, of course, to the appellate review provided for in the new **Act**.

4. Does the 1986 Code provide any basis for setting the standard of conduct to be expected from a registered candidate?

[36] The appellant's position is that the *1986 Code* cannot be used to assess his conduct because it never applied to him. He says the old **Act** did not authorize the Board to make regulations adopting a Code of Ethics in relation to registered candidates, a status he held during the time addressed by the complaint. Although there was a regulation made which purported to apply the 1986 *Code* and *Standards* to candidates (N.S. Reg 39/88, section 5), the appellant says that it was *ultra vires* the authorizing legislation and, therefore, of no effect. He submits that it is clearly beyond the jurisdiction of the hearing committee to apply the *1986 Code* to him as the amended complaint alleges it should.

[37] I will assume, for the purposes of what follows, that the old **Act** did not permit the Board to make regulations relating to a Code of Ethics for registered candidates. However, it does not necessarily follow that the *1986 Code* and the *Standards* are irrelevant to the issues raised in this complaint or that, even if they are irrelevant, it would follow that the hearing committee clearly lacks jurisdiction to find the alleged conduct to have been improper at the time it was alleged to have been committed.

[38] As noted earlier, the old **Act** expressly permitted the Board to fix "conditions, limitations and restrictions applicable to persons whose names are entered on the Register of Candidates": s. 16(3). The Board's position is that the appellant, in applying for registration as a candidate in 1990, attested to having read and adhered to the *1986 Code* and that he was advised in writing on two

occasions in 1991 that he was obliged to adhere to the *Code* and *Standards*. Therefore, even accepting that the *1986 Code* and *Standards* could not be made to apply to candidates by regulation, it is arguable that they could be made to apply as a "condition, limitation and restriction" which the Board had the right to impose under s. 14(3) of the old **Act**. I conclude that it is far from clear that the *1986 Code* and *Standards* have no application to the appellant's conduct while a registered candidate. There are both factual and legal issues to be confronted.

[39] The appellant also says that having a sexual relationship with a former client did not constitute misconduct because it was not specifically prohibited by the *1986 Code*. However, in my view, that is not clearly the case. The respondent rightly points out that a "charge" of misconduct need not necessarily be based on a written code: *James T. Casey*, *supra* at section 13.3; **Re College of Physicians and Surgeons and Ahmad No. 2** (1973), 44 D.L.R. (3d) 541 (B.C.S.C.); **Morton v. Registered Nurses Association (N.S.)** (1989), 92 N.S.R. (2d) 154 (S.C., T.D.); **Ripley v. Investment Dealers Association** (1991), 108 N.S.R. (2d) 38 (S.C.A.D.), application for leave to appeal dismissed (1992), 113 N.S.R. (2d) 90 n (S.C.C.); **Re Matthews and Board of Directors of Physiotherapy** (1987), 61 O.R. (2d) 475 (C.A.), aff'g 54 O.R. (2d) 375 (Div. Ct.) . Therefore, the fact that the *1986 Code* did not expressly censure sexual relations with a former client does not necessarily or clearly preclude a finding that such conduct was improper at that time: see, e.g. **College of Physicians and Surgeons of Ontario v. Boodoosingh** (1993), 12 O.R. (3d) 707 (C.A.).

[40] In short, whether the appellant's conduct while a registered candidate or during the course of his application to become a registered psychologist constituted a departure from the applicable ethical standards is, in the first instance, a matter for the hearing committee and it is not so plainly beyond the committee's jurisdiction that it ought to be prohibited from proceeding. I emphasize again that in saying this, I am not expressing a final opinion on the question of the application of the 1986 *Code* or of unwritten professional norms to the appellant.

VI. DISPOSITION:

[41] In the result, I agree with the result arrived at by the Chambers judge and would dismiss the appeal with costs fixed at $500 plus disbursements.

Cromwell, J.A.

Concurred in:

Oland, J.A.

Hamilton, J.A.