NOVA SCOTIA COURT OF APPEAL

Citation: Creager v. Nova Scotia (Provincial Dental Board), 2005 NSCA 9

Date: 20050201
Docket: CA 216913
Registry: Halifax

Between:

Dr. Clive Creager

Appellant

v.

Provincial Dental Board

Respondent

Judge(s): Saunders, Freeman, Fichaud, JJ.A.

Appeal Heard: December 6, 2004, in Halifax, Nova Scotia

Held: Appeal partially allowed and matter remitted to the Discipline Committee for an opportunity to reconsider the costs and state written reasons, per reasons for judgment of Fichaud, J.A.; Freeman and Saunders, JJ.A. concurring.

Counsel: Alan Stern, Q.C. and Cheryl Hodder, for the appellant
Michael Wood, Q.C. and Jennifer Ross, for the respondent

Reasons for judgment:

[1] Dr. Creager is a dentist. The Discipline Committee of the Provincial Dental Board of Nova Scotia upheld charges of unprofessional conduct against Dr. Creager for his treatment of temporo-mandibular disorders suffered by six of his patients. Dr. Creager says that the Discipline Committee erred in law by failing to articulate and apply an appropriate standard of care, by upholding the charge that he breached the *Code of Ethics* and by ordering him to pay $90,000 costs.

1. Background

[2] A significant portion of Dr. Creager's practice involved treatment of temporo-mandibular disorders. Dr. Creager's treatment included the use of an anterior repositioning appliance ("ARA"). The ARA would lower the jaw and bring it forward. The goal was to relieve pressure on the temporo-mandibular joint and to correct the position of the disc in the joint.

[3] Initially the treatment would relieve some of the pain. When the ARA was discontinued, the patients found that their back teeth would not meet, leaving the teeth with posterior open bite, the patients had difficulty chewing and the pain would return. Several patients sought treatment from other specialists to resolve these complications.

[4] Three of Dr. Creager's patients filed letters of complaint with the Registrar of the Dental Board. There were five letters of complaint from specialists who had taken over the care of Dr. Creager's former patients.

[5] The Registrar of the Dental Board served Dr. Creager with a Notice of Charge dated August 19, 2002. This document charged that Dr. Creager "committed offences contrary to s. 3 of the Discipline Regulations made under the *Dental Act*", namely "unprofessional conduct as defined in ss. 4(1)(c) and (d) of the Discipline Regulations." The Notice of Charge gave the following particulars of this "unprofessional conduct":

> a. You have failed to diagnose and treat the following patients over the approximate time periods indicated [omitting names of patients] with a standard of skill, knowledge or judgment which is reasonable in the practice of dentistry in Nova Scotia.
>
> b. You have engaged in conduct that is detrimental to the best interest of the above-named patients by

i. providing appliance therapy that was inappropriate under the circumstances

ii. failing to discuss with the patient treatment recommendations including benefits, prognosis and risks, reasonable alternatives and associated costs in order to allow the patient to make an informed choice.

c. You have breached Articles 1 and 8 of Part A of the *Code of Ethics* as a result of the above-named treatment provided to the named patients.

d. The complaints relate to the diagnosis and treatment of the above-named patients with respect to the symptoms and complaints of pain associated with the Temporo-Mandibular Joints.

The time periods specified for each patient in the notice of charge ranged from March, 2000 to April, 2002.

[6] The Discipline Committee conducted a hearing over 12 days in January, April, May and July, 2003. The Committee heard testimony from Dr. Creager's patients, Dr. Creager, and experts called by the Board and by Dr. Creager. This was a quasi-judicial proceeding. Dr. Creager was represented throughout by counsel. Witnesses were cross-examined.

[7] The Discipline Committee released its decision on November 10, 2003. The Committee ruled that Dr. Creager had committed unprofessional conduct (1) in his treatment of six patients, (2) by failing to adequately inform those patients of the prognosis, risks and alternatives to Dr. Creager's course of treatment and (3) for four patients, by breaching the *Code of Ethics*. Later I will discuss the Committee's detailed reasons.

[8] The Discipline Committee reconvened on January 9, 2004 to hear representations on sanctions. On February 6, 2004 the Committee released its sanctions decision. This directed that: until successful completion of a remedial training program Dr. Creager abstain from temporo-mandibular treatment; for one year Dr. Creager have all orthodontic treatment plans approved by an orthodontic specialist; his practice be monitored for one year following the completion of the remedial program; he be reprimanded; the practice restrictions be published and reported; and Dr. Creager pay $90,000 in costs.

[9] Dr. Creager appeals to this court under s. 38(1) of the *Dental Act* S.N.S. 1992, Chapter 3.

2. Issues

[10] Dr. Creager's factum lists five issues. The first three involve whether the Discipline Committee erred in law in its articulation and application of the standard of care, the breach of which constitutes unprofessional conduct. I will discuss these three points together as the first issue.

[11] The second issue is whether the Discipline Committee erred in law by finding a breach of the *Code of Ethics*.

[12] The third issue is whether the Discipline Committee erred in law with the costs award.

3. Standard of Review

[13] Section 38(1) of the *Dental Act* permits an appeal only on a "point of law".

[14] Appeals from decisions of courts on points of law are reviewed for correctness. An error of law which is extractable from a mixed question of fact and law similarly is subject to the correctness standard. Factual matters, including inferences, and mixed questions of fact and law with no extractable error of law are reviewed for palpable and overriding error. *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, at paras. 8, 10, 19-25, 31-36. If this were an appeal from a court, then all appealable issues described by s. 38(1), points of law, would be reviewed for correctness.

[15] Judicial review of an administrative tribunal's decision involves different standards of review than those stated by *Housen* for an appeal from a court's decision. Under the pragmatic and functional approach, the court analyses the cumulative effect of four contextual factors: the presence, absence or wording of a privative clause or statutory appeal; the comparative expertise of the tribunal and court on the appealed issue; the purpose of the governing legislation; and the nature of the question, fact, law or mixed. From this, the court selects a standard of review of correctness, reasonableness, or patent unreasonableness. The functional and practical approach applies even when there is a statutory right of appeal: *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, at paras. 17, 21-25, 33; *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, at para. 21. The approach applies even to pure issues of law, for which the standard of review need not be correctness. The existence of the statutory right of appeal and whether the issue is one of law, are merely factors weighed with the others in the process to select the standard of review: *Ryan* at paras. 21, 41, 42; *Dr. Q* at paras. 17, 21-26, 28-30, 33-34.

[16] The *Dental Act* contains no privative clause. The statutory right of appeal, limited to questions of law, is narrower than the scope of appeal permitted by the statute in *Ryan* (see *Ryan* para. 28). This factor is not determinative of the standard of review for the appealable issues of law. Rather, it means the factual issues are not appealable at all because of s. 38(1) of the *Dental Act*. For the issues of law which are appealable, the more critical factors to determine the standard of review are the expertise of the tribunal, purpose of the legislation and nature of the question.

[17] The tribunal is composed of dentists, who have more expertise than do members of this court on matters related to standards of professional conduct. The purpose of the legislation is to direct professional self-regulation by dentists in the interests of the public. The Supreme Court of Canada and this court have ruled that the application of a standard of care by a professional discipline tribunal should be reviewed based on a standard of reasonableness: *Dr. Q* at paras. 36-39; *Ryan*, at para. 42; *Nova Scotia Barristers' Society v. Solicitor "Y"*, 2004 NSCA 75 at paras. 11-14; *Nolan v. Association of Land Surveyors (Nova Scotia)*, 2003 NSCA 145 at para. 7. My review of the expertise and statutory purpose factors would largely reproduce the comments of the Supreme Court of Canada and this court which led to the selection of the reasonableness standard of review in those cases.

[18] In Dr. Creager's case, there are issues involving the interpretation of legislation respecting the contents of the Notice of Charge, the authority of the Committee to consider an issue not mentioned in the Notice of Charge, and the validity of delegated legislation relating to costs. These are legal matters for which the court has greater expertise than does the Discipline Committee.

[19] Different issues may attract different standards of review. Legal issues at the core of the tribunal's area of expertise, which is incorporated by the statutory purpose, should receive deference. This, despite that the Committee's function includes statutory interpretation, such as the meaning of "professional misconduct". Other legal issues outside the tribunal's core of expertise usually are reviewed on a correctness standard. *Barrie Public Utilities v. Canadian Cable Television Association*, [2003] 1 S.C.R. 476, at paras. 12-16, 18; *Voice Construction*, at paras. 19, 21; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at para. 28; *Toronto (City) v. C.U.P.E. Local 79*, [2003] 3 S.C.R. 77 at para. 14; *Alberta Union of Professional Employees v. Lethbridge Community*

College, [2004] 1 S.C.R. 727 at paras. 15, 19-20; *Ryan*, at paras. 41-42; *Dr. Q.* at paras. 28, 34.

[20] After considering the four contextual factors of the functional and practical approach, in my view, the standard of review should be as follows:

(a) For matters related to the selection, articulation and application of the standard of care for unprofessional conduct, the standard of review should be reasonableness as in *Ryan* and *Dr. Q*. This would apply to the First Issue which is discussed below.

(b) For matters related to the quantum of costs, I would apply the reasonableness standard of review. I discuss my reasons in more detail below under the Third Issue (paras. 88-96).

(c) The Second Issue includes consideration of whether the legislation permitted the Discipline Committee to consider a *per se* breach of the *Code of Ethics,* given the wording of the Notice of Charge (paras. 69-76). This is a legal matter outside the Committee's core of expertise to which I would apply the correctness standard of review.

(d) The Third Issue includes consideration of whether regulations prescribing components of awardable costs are *ultra vires* the enabling provision in the *Dental Act* (paras. 83-87). This also is a legal issue outside the tribunal's core of expertise, and I would apply the correctness standard.

[21] In *Ryan* Justice Iacobucci for the Court described the function of the reviewing court under a standard of reasonableness and how that function differs from review for correctness:

> 55 A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere (see *Southam*, at para. 56). This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling (see *Southam*, at para. 79).

> 56 This does not mean that every element of the reasoning given must independently pass a test for reasonableness. The question is rather whether the reasons, taken as a whole, are tenable as support for the decision. At all times, a court applying a standard of reasonableness must assess the basic adequacy of a reasoned decision remembering that the issue under review does not compel one specific result. Moreover, a reviewing court should not seize on one or more mistakes or elements of the decision which do not affect the decision as a whole.

[22] Similarly, in *Dr. Q*, Chief Justice McLachlin for the Court stated:

> 39 Balancing these factors, I am satisfied that the appropriate standard of review is reasonableness *simpliciter*. The reviewing judge should have asked herself whether the Committee's assessment of credibility and application of the standard of proof to the evidence was unreasonable, in the sense of not being supported by any reasons that can bear somewhat probing examination (see *Ryan, supra*, at para. 46).
>
> . . .
>
> 41 . . . Yet when the standard of review is reasonableness, the reviewing judge's role is not to posit alternate interpretations of the evidence; rather, it is to determine whether <u>the Committee's</u> interpretation is unreasonable. . . . With respect, when applying a standard of reasonableness *simpliciter*, the reviewing judge's view of the evidence is beside the point; rather, the reviewing judge should have asked whether the Committee's conclusion on this point had some basis in the evidence (see *Ryan, supra*). . . . [Supreme Court's emphasis]

[23] This appeal also involves two issues of procedural fairness. First, as discussed under the Second Issue, is whether a Committee may convict Dr. Creager for two separate charges based on the same conduct and the same legal standard (paras. 77-79). Second, as discussed under the Third Issue, is whether the Committee offended procedural fairness by failing to give written reasons to explain its substantial costs award (paras. 98-109).

[24] Issues of procedural fairness do not involve any deferential standard of review: *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, at para. 74 per Arbour, J.; *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, at paras. 100-103 per Binnie, J. for the majority and at para. 5, per Bastarache, J. dissenting. As stated by Justice Binnie in *C.U.P.E*, at para. 102:

> The content of procedural fairness goes to the manner in which the Minister went about making his decision, whereas the standard of review is applied to the end product of his deliberations.

This point is also clear from *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. Justice L'Heureux-Dubé (paras. 55-62) considered "substantive" aspects of the tribunal's decision based on the standard of review determined from the functional and practical approach but (para. 43) considered procedural fairness without analyzing the standard of review.

[25] Procedural fairness analysis may involve a review of the statutory intent and the tribunal's functions assigned by that statute: eg. *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884 at paras. 21-31; *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, [2003] 2 S.C.R. 624 at paras. 31-32. But, once the court has determined that a requirement of procedural fairness applies, the court decides whether there was a violation without deference.

[26] I will not apply any standard of review or deference to the analysis of the two issues of procedural fairness in this case: (1) whether there can be multiple convictions as discussed in the Second Issue and (2) whether the Committee should have given reasons for its costs award as discussed in the Third Issue.

[27] I will apply the above formulations of the standards of review, subject to the restriction in s. 38(1) of the *Dental Act* that the appeal is limited to points of law.

4. First Issue - Charges (a) and (b) - Standard of Care for Professional Misconduct

[28] Dr. Creager's factum states the first three issues as whether the Discipline Committee erred in law by ruling: that Dr. Creager did not treat his patients "with a standard of skill, knowledge or judgment which is reasonable in the practice of dentistry"; that Dr. Creager's use of ARA therapy "was inappropriate under the circumstances"; and that Dr. Creager "failed to provide sufficient, suitable and timely information as to treatment details and costs to allow the above-mentioned six patients to make an informed consent." These rulings refer to charges (a), (b)(i) and (b)(ii), respectively, from the Notice of Charge (quoted above para. 5).

[29] Dr. Creager's arguments involve an assessment of the standard of care applied by the Discipline Committee in its ruling that Dr. Creager committed unprofessional conduct.

[30] The application of a standard of care is a mixed question of law and fact. The definition of the standard is a question of law. The determination of whether the evidence establishes a breach of, or compliance with, that definition is a question of fact: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at paras. 36 - 38; *Galaske v. O'Donnell*, [1994] 1 S.C.R. 670, at pp. 690-1; *Ingles v. Tutkaluk Construction Ltd.*, [2000] 1 S.C.R. 298, at para. 42; *St-Jean v. Mercier*, [2002] 1 S.C.R. 491, at para. 49; *Housen* at paras. 31-33, 36-37.

[31] As this appeal is limited to points of law, I will focus primarily on the Discipline Committee's definition of the standard.

[32] The Committee heard testimony from experts as to the appropriate standards for planning a course of treatment, undertaking the treatment and informing the patients to enable an informed consent. The Committee's sources for the selection of a standard included a substantial body of expert evidence. So even the Committee's definition of a standard is based on evidence, which invokes curial deference: *St. Jean v. Mercier* at para. 49.

[33] Casey, *The Regulation of Professions in Canada* (Carswell), pp. 15-5 to 15-6 summarizes the scope of deference:

> Courts are reluctant to review a discipline tribunal's finding as to what constitutes professional misconduct and as to the appropriate penalty for professional misconduct. The rationale for this judicial deference is based both on the concept of self governance of the professions and on the belief that members of a profession are by reason of their special knowledge, training and skill in the best position to judge the conduct of one of their peers ...
>
> The authorities are legion that the findings of a disciplinary tribunal with respect to professional misconduct and as to the appropriate sentence, should be given great weight and should not be lightly interfered with by the Courts.

This passage cites many authorities, which for brevity I will not repeat here, supporting the principle of curial deference to the Committee's determination of what constitutes professional misconduct.

[34] To hurdle the barrier of deference and isolate appealable points of law, Dr. Creager addressed particular points of legal principle in the Committee's articulation and application of the standard of care. These submissions attempt to extract errors of law from the mixed factual and legal application of the standard of care. I will discuss these submissions in turn.

(a) Two Schools of Thought

[35] Dr. Creager's first submission was:

> Dr. Creager says that the evidence in this case was unequivocal in establishing that there are differing schools of thought as to the treatment of temporomandibular disorders. Dr. Creager's treatment was in accordance with one such school of thought, while the evidence tendered by the prosecution's witnesses followed a differing approach.
>
> Dr. Creager says that the competing bodies of expert evidence presented at the hearing demonstrated that Dr. Creager's choice of treatment in relation to the patients concerned amounted to a professional judgment which was within the standard of care.

[36] There is authority that a course of treatment supported by a responsible and competent body of professional opinion does not become professional misconduct merely because there is a differing body of professional opinion. A discipline proceeding is not a laboratory for prioritizing competing but responsible methods of treatment: *Brett v. Ontario (Board of Directors of Physical Therapy)* (1991), 48 O.A.C. 24 (Gen. Div.) at paras. 34 - 38, affirmed 104 D.L.R. (4th) 421 (O.C.A); *Hallam v. College of Physicians and Surgeons (Ontario)*, 61 O.A.C. 143 (Div. Ct.) at p. 153; *Thompson v. Chiropractors' Association of Saskatchewan* (1996), 145 Sask. R. 35 (Q.B.) at paras. 45-46; *Krop v. College of Physicians and Surgeons (Ontario)*, (2002) 156 O.A.C. 77 (Div. Ct.) at para. 27; *Aronov v. College of Physicians and Surgeons, (Ontario)* 2002 Carswell Ont. 5117 (Div. Ct.) at para. 44. This is consistent with the approach to the tortious standard of care: *ter Neuzen v. Korn,* [1995] 3 S.C.R. 674 at paras. 38-40. In *ter Neuzen*, at para. 41, Justice Sopinka noted, as an exception, that where the practice is "fraught with obvious risks" the practice, though common, may still breach the standard of care.

[37] Dr. Creager's submission is inapplicable here. The Discipline Committee did not choose between competing theories. The Committee's decision stated:

> In addition to the patients' testimony, we heard evidence from expert witnesses for both sides. It became clear very quickly that there would be two distinct philosophies about TMJ/TMD treatment to consider.

. . .

> After hearing all the expert witnesses, our Committee felt that it had recognized their differences. We do not think the disposition of these charges depends upon an acceptance or rejection of these differing philosophies of treatment. The decision we render is based on the way in which particular patients were treated.

The Committee's decision then summarized, for each patient, its findings and conclusions on the deficiencies in Dr. Creager's treatment. I will review the Committee's comments in the next section.

(b) Articulation of a Standard

[38] Dr. Creager then submits that the Discipline Committee's decision failed to articulate the standard of care for each patient before ruling that Dr. Creager had committed unprofessional conduct.

[39] As noted in *Ryan* and *Dr. Q.*, to apply the reasonableness standard of review, it is necessary to "assess the basic adequacy of a reasoned decision remembering that the issue under review does not compel one specific result" and to determine "whether the reasons, taken as a whole, are tenable as support for the decision." The question is whether the decision is not "supported by any reasons that can bear somewhat probing examination." If the Committee's decision, taken as a whole and subjected to somewhat probing examination, did not articulate any standard of care, then I agree that an essential element of a tenable reasoned decision would be missing.

[40] Dr. Creager states that the Committee's decision omits the essential articulation of a standard of care.

[41] I will review the Committee's comments for each patient, substituting initials for names in the quoted passages. In my view, the Committee's decision, taken as a whole, does articulate a sufficient standard of care for each charge which was upheld by the Committee.

[42] The Committee's decision began with comments applicable to all the patients:

> The problems surfaced when it came time to discontinue the use of the A.R.A., either gradually or abruptly. All the patients found that their back teeth did not meet on closure attempts, they could not chew, and their pain returned. Several patients expressed shock and concern about this in their testimony. It was clear the patients had not been adequately informed in advance that posterior open bite was very likely to occur after extended use of the A.R.A.
>
> In their turn, five of the patients thus treated sought advice and treatment elsewhere by various specialists for extra and expensive "bail-out" procedures. In a number of these cases, the attending specialists were moved to complain to the Registrar regarding Dr. Creager's treatments.

[43] With respect to the first patient, J.R., the Committee stated:

> ... After 9 months and monthly adjustments, the patient still had pain. At this point Dr. Creager decided to start orthodontic treatment - without having previously alerted [J.R.]. She was very upset and wanted information on other options. ...

> It's clear that Dr. Creager's treatment of [J.R.] has been substandard in planning orthodontics while the patient was still in pain, a move that contradicts Dr. D. Brown's testimony that orthodontics should not be embarked upon while the patient is in pain. "That's malpractice."
>
> It's also clear that [J.R.] had <u>not</u> [Committee's emphasis] been informed of posterior open bite occurrence, or that orthodontics or orthognathic surgery would be required under Dr. Creager's treatment plan.

[44] The Committee considered the second patient, S.C.:

> Fall of 2001 - Dr. Creager ready for braces on [S.C.]. A.R.A. discontinued. Parents taken aback at [S.C.'s] increasing pain and inability to chew due to posterior open bite. By now, Dr. Creager had taken a growing boy's jaw position from a Class I normal jaw position, to one that had no stable occlusion and a repositioned jaw. Again, a more conservative approach, as per Dr. ElGeneidy, would have prevented this. The parents transferred their son to an orthodontist and Dr. Creager informed them that he would not longer see their son for TMJ treatment. The [family] were very upset at not having been advised of the open bite problems produced by the A.R.A. and that it could have produced the need for orthodontics.

[45] For the third patient, C.I., the Committee stated:

> Dr. Creager removed Dr. Bourque's lower retainers and placed A.R.A. - no information re: outlook. She was not told she would have to wear it for life.
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> . . .
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> If Dr. Creager proceeded with the removal of Dr. Bourque's retainers without consultation, it would be highly unethical, bordering on incompetence.
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> . . .
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> His mistreatment with A.R.A., given with virtually no information to permit informed consent. "appliance to be worn for life." The A.R.A. made her jaw function worse, with the posterior open bite, and her pain was "excruciating".

[46] For the fourth and fifth patients, D.V. and C.S., the Committee stated:

> The management of orthodontic/surgical treatment was too complex for Dr. Creager's training and experience. When the military oral surgeon realized Dr. Creager was gearing up to start orthodontic treatment for both these patients, one

of them still in pain [C.S.], they were referred to a certified orthodontist and are under his care now. ...

Our Committee's concern here is the <u>intent</u> [Committee'*s* emphasis] of Dr. Creager to involve himself in complex orthodontic treatment for which he was not qualified, particularly regarding [C.S.] who did require surgery.

In addition, neither patient was timely informed that the A.R.A. treatment would produce posterior open bite.

[47] For the sixth patient, T.D., the Committee stated:

November 2000 - discontinued A.R.A. wearing, leading to increased pain.

December 2000 - 3 weeks without the A.R.A.- trouble eating and more pain. She had not been informed about posterior open-bite. By his own testimony, Dr. Creager acknowledged that the use of a maxillary appliance (Riconator) would have been helpful.

February 2001 - Braces applied to upper and lower teeth with the patient still in pain, contrary to good practice according to testimony given by Dr. Creager's own experts. ...

... Dr. Morrison felt that the ARA had caused posterior intrusion and anterior extrusion, leaving a residual malocclusion. Dr. Morrisson recommended Dr. Hannigan to [T.D.].

[T.D.] is still under Dr. Creager's care and says she has no complaint about his treatment.

Notwithstanding [T.D.'s] continuing support of Dr. Creager, the testimony reveals the same approach to treatment: ARA with no maxillary appliance to control posterior open bite (Riconator not used). No warning of loss of posterior occlusal contact and the pain that ensues in the time between appliances cessation and orthodontics. Again, Dr. Creager opted to move orthodontics and build up before the pain had been reduced.

[48] After reviewing the six individual cases, the Committee commented on Dr. Creager's standard of care for his patients:

The Committee felt that many of Dr. Creager's problems began after his "mentor" Dr. ElGeneidy moved away leaving Dr. Creager to develop his own standard of care. He acknowledged in his own testimony that he was a "work in progress". His exclusive use of the ARA modality was to be followed by orthodontics (done

> by him). His limited communications to the patients regarding the course, length, and detail of potential treatment requirements were inadequate as effective informed consent. Our Committee finds that Dr. Creager did not fully understand the use and consequences of ARA therapy, indicating an inadequate standard of skill and knowledge applied to these patients. As regards these patients, they unfortunately, represented a huge learning curve for him.

[49] In these passages, the Committee's key conclusions were:

1. Dr. Creager's use of the ARA resulted in posterior open bite. This caused inability of the teeth to meet on closure, loss of ability to chew, and return of pain. In technical terms, Dr. Creager's ARA treatment caused posterior intrusion and anterior extrusion, leaving a residual malocclusion.

2. Dr. Creager failed to oppose the ARA with a maxillary bite plane appliance which would have alleviated some of the difficulties.

3. These outcomes required the patients to seek "bailout" procedures from other specialists.

4. Dr. Creager removed the retainers from another dentist without consultation.

5. Dr. Creager proposed to begin orthodontic treatment, performed by him, while the patients were still in pain.

6. Dr. Creager proposed to undertake complex orthodontic treatment for which he was unqualified by training and experience.

7. Dr. Creager failed to adequately notify his patients in advance of the risks involved with his proposed course of treatment.

8. This course of treatment occurred after Dr. Creager's mentor, Dr. ElGeneidy moved away, leaving Dr. Creager on his own. Dr. Creager acknowledged he was a "work in progress". The result was that his patients "represented a huge learning curve for him."

[50] In *Voice Construction* at para. 31, Justice Major for the majority, citing *Ryan* stated:

> It is not necessary for every element of the Tribunal's reasoning to pass the reasonableness test. The question is whether the reasons as a whole support the decision.

To the same effect: *Ryan* para. 56.

[51] This point has relevance here. Each component of the Discipline Committee's reasoning, isolated per patient, may not attain syllogistic perfection. But the decision as a whole expresses the view that Dr. Creager's conduct, listed in the preceding paragraphs, failed to meet the appropriate standard of professional conduct. The Committee's decision recites facts which support its findings that Dr. Creager failed to satisfy one or more particulars of that standard for each patient.

[52] The charge was professional misconduct contrary to Discipline Regulations 4(1)(c) and (d). These Regulations define "professional misconduct" as (1) failure to diagnose and treat a patient with a standard "that is reasonable in the practice of dentistry in Nova Scotia", and (2) conduct "detrimental to the best interests" of a patient. It was open to the Discipline Committee to decide that the items listed in the preceding paragraphs were unreasonable in the practice of dentistry in Nova Scotia and were detrimental to the best interests of those patients. The Committee's decision articulates a standard of care and provides tenable support for its conclusions, the test under the standard of review.

(c) Subjective Standard of Care

[53] Dr. Creager then submits that, insofar as the Committee articulated a standard of care, the members of the Committee derived this standard from their personal backgrounds, rather than from objective sources. Dr. Creager refers to *Huerto v. College of Physicians and Surgeons* (1994), 117 D.L.R. (4th) 129 (S.Q.B.) at pp. 136-40, affirmed (1996), 133 D.L.R. (4th) 100 (S.C.A.) at p. 107, and *Bennet v. Registered Psychiatric Nurses' Association (Manitoba)*, [2003] 10 W.W.R. 472 (M.C.A.) at paras. 15-16. The disciplinary tribunal may not invent a subjective standard from the panellists' personal backgrounds. Tribunal members are expected to use their expertise to assess evidence, including expert evidence. But the standard must derive from objective legal or evidentiary sources.

[54] In my view, the Disciplinary Committee did not violate this principle. The Committee's standard of care derived from objective sources. Regulations

4(1)(c) and (d), under which Dr. Creager was charged, prescribe "a standard of skill, knowledge or judgment that is reasonable in the practice of dentistry in Nova Scotia" and proscribe "conduct that is detrimental to the best interests of one or more patients." The Committee applied those standards. These standards accord with traditional definitions of the required level of professional competence: *Re R.E. Groves and Council of the College of Dental Surgeons of British Columbia*, (1976), 63 D.L.R. (3d) 744 (B.C.C.A.), at 748, leave to appeal denied (1976), 63 D.L.R. (3d) 744 (note) (S.C.C.); *ter Neuzen v. Korn* at para. 33.

[55] The Committee's decision referred to testimony of experts to support particular subordinate standards cited by the Committee. The Committee's decision stated:

> ... The Board experts thought that the A.R.A. should be closely monitored and opposed by maxillary "Bite Plane" appliances to control the extrusion/intrusion of molars. Not to include this control is "tantamount to incompetence" (Dr. Simmons).

The Committee noted that planning orthodontics while a patient was still in pain was "malpractice" according to the testimony of Dr. D. Brown. The Committee's decision noted that application of braces while the patient was still in pain was "contrary to good practice according to testimony given by Dr. Creager's own experts."

[56] The witnesses who testified on behalf of the Dental Board included specialists who had examined these patients, their models and x-rays, or had treated these patients in "bail out" procedures after the patients left Dr. Creager. The expert witnesses who testified on behalf of Dr. Creager had not examined the patients.

[57] The components of the Committee's standard of care were objectively based in principle and evidence. They were not random singularities created from the Committee members' personal backgrounds.

(d) Failure to Inform

[58] Respecting the charge that Dr. Creager failed to inform his patients in advance of the risks involved with ARA therapy, Dr. Creager makes two points.

[59] First, he says that the symptoms noted by the patients are "an anticipated part of the anterior repositioning therapy", and therefore are "not a material

risk". The therapy would continue to resolve these difficulties "through one or more treatment modalities" and the symptoms were "merely a step along the way."

[60] It was open to the Committee to rule that the standards of professional conduct required by Regulations 4(1)(c) and (d) included timely notice of the material risks so the patients could provide an informed consent. This is similar to the test judicially adopted in the civil tort context: *Reibl v. Hughes*, [1980] 2 S.C.R. 880 (S.C.C.), at pp. 884-5; *Malette v. Shulman* (1990), 72 O.R. (2d) 417 (O.C.A.), at pp. 423-4; *Seney v. Crooks* (1998), 223 A.R. 145 (A.C.A.), at paras. 53 - 56.

[61] The risks involved here included residual malocclusion, resumption of pain (in one case "excruciating"), inability to bite and chew, and requirements for orthodontics or surgery or other "bail out" procedures. These are material. It is no solace to the patient that the material risk may be a "step along the way" to the "bail out" procedure. The Committee was entitled to determine that the standard required the dentist to inform the patient of these risks.

[62] Second , Dr. Creager says that he did inform his patients in advance of the risks, and that the Committee erred by ruling otherwise. This is a question of fact. Issues of fact are not appealable under s. 38(1). There is substantial evidence to support the Committee's finding that Dr. Creager failed to pre-inform his patients. There is no palpable and overriding error and no error of law. Neither does the Committee's analysis on this subject offend the reasonableness standard of review.

[63] I would dismiss the grounds of appeal respecting the articulation and application of the standard of care and the failure of Dr. Creager to sufficiently inform his clients in advance.

5. Second Issue - Charge (c) - Code of Ethics

[64] Dr. Creager challenges the Discipline Committee's rulings of responsibility for charge (c) from the Notice of Charge, that he breached the *Code of Ethics.*

[65] The Notice of Charge stated:

> TAKE NOTICE THAT as a result of complaints received by the Registrar of the Provincial Dental Board of Nova Scotia, and following investigation of the complaints and on instruction of the Complaints Committee, the Discipline Committee of the Provincial Dental Board of Nova Scotia will hold a hearing ... to inquire into complaints that you have committed offences *contrary to s. 3 of the*

Discipline Regulations made under the *Dental Act*, the *particulars of which are as follows*:

> 1. You have engaged in *unprofessional conduct* as defined in Sections *4(1)(c) and (d)* of the Discipline Regulations of the Provincial Dental Board in that:
>
> . . .
>
> (c) You have *breached Articles 1 and 8 of Part A of the Code of Ethics* as a result of the above-noted treatment provided to the named patient.

[emphasis added]

[66] The *Code of Ethics*, Part A, Articles 1 and 8 state:

> **Article 1: Service**
>
> As a primary health care provider, a dentist's first responsibility is to the patient. As such, the competent and timely delivery of quality care within the bounds of clinical circumstances presented by the patient, shall be the most important aspect of that responsibility.
>
> **Article 8 - Choice of Treatment**
>
> A dentist must discuss with the patient treatment recommendations including benefits, prognosis and risks, reasonable alternatives and associated costs to allow the patient to make an informed choice.
>
> A dentist shall inform the patient if the proposed oral health care involves treatment techniques or products which are not in general recognized or accepted by the dental profession.

[67] The Notice of Charge, charge (c), describes the breach of the *Code of Ethics* as a particular of "unprofessional conduct" contrary to Regulations 4(1)(c) and (d). The Discipline Committee ruled that, for four patients, Dr. Creager committed that offence.

[68] I will consider Dr. Creager's challenge to this ruling from two perspectives: (1) Was the Committee empowered to consider whether a breach of the *Code of Ethics* was an offence *per se*? (2) If not, was the Committee entitled to decide that breaching the *Code of Ethics* was an offence of "unprofessional conduct"?

(a) Breach of Code of Ethics as a *per se* Offence

[69] Regulation 3 of the Discipline Regulations under the *Dental Act* states:

> Offences
>
> 3 The offences under these regulations include
>
> (a) unprofessional conduct;
>
> (b) infamous conduct;
>
> (c) breach of, or failure to observe, the Advertising Standards**;**
>
> (d) breach of, or failure to observe the *Code of Ethics*.

[70] Breach of the *Code of Ethics* in Regulation 3(d) is a *per se* offence separate from the offence of unprofessional conduct in Regulation 3(a).The Notice of Charge gave Dr. Creager notice only of charges of "unprofessional conduct". This refers to Regulation 3(a) not to Regulation 3(d).

[71] Regulations 4(1)(c) and (d) state:

> "Unprofessional conduct" by a dentist is defined to include any of the following:
>
> . . .
>
> (c) failure to diagnose and treat one or more patients with a standard of skill, knowledge or judgment that is reasonable in the practice of dentistry in Nova Scotia;
>
> (d) Conduct that is detrimental to the best interests of one or more patients.

Neither Regulation refers to the *Code of Ethics*.

[72] In my view, the Committee had no power to rule that Dr. Creager committed an offence by breaching the *Code of Ethics per se*.

[73] Regulation 16(1)(a) of the Discipline Regulations states:

> A notice of charge for a hearing before the Discipline Committee shall be in writing and shall contain the following:

(a) a statement of the charge or charges, including the provision or provisions of the Act or regulations under which the licensee is charged.

[74] The Notice of Charge did not contain written notice to Dr. Creager of the provision of the *Act* or Regulations which creates a *per se* offence for breaching the *Code of Ethics*. By prefacing all the charges, including the breach of the *Code of Ethics* in charge (c), as "unprofessional conduct", the Notice of Charge referred to Regulation 3(a), not Regulation 3(d).

[75] A disciplinary tribunal acting under statute must strictly comply with the conditions precedent for its jurisdiction. In *Harris v. Law Society (Alberta)*, [1936] 1 D.L.R. 401 (S.C.C.), at 402, Chief Justice Duff stated:

> The rule of law is correctly stated, I think, in *Craies' Statute Law* at p. 355, in this sentence: '... when a statute confers jurisdiction upon a tribunal of limited authority and statutory origin, the conditions and qualifications annexed to the grant must be strictly complied with'.

Similarly, in *Cameron v. Law Society (British Columbia)* (1991), 81 D.L.R. (4th) 484 at 492, the British Columbia Court of Appeal stated:

> Disciplinary proceedings expose a member of society to a range of punishments which include suspension of the right to practice and even disbarment. In addition, irrespective of their outcome, the very nature of the proceedings can have a devastating effect on a member's reputation, the single most valuable asset which any professional can possess. With the potential for such consequences in mind, I am of the view that the Chambers judge was right when he applied the principle described in the authorities to which he referred, and gave a strict construction to Rule 466(1)(b)(ii).

The Chambers justice in *Cameron* agreed with the following principle from *Maxwell on The Interpretation of Statutes*:

> Similarly, statutes dealing with jurisdiction and procedure are, if they relate to the infliction of penalties, strictly construed: compliance with procedural provisions will be stringently exacted from those proceeding against the person liable to be penalised, and if there is any ambiguity or doubt it will, as usual, be resolved in his favour. This is so, even though it may enable him to escape upon a technicality.

Casey, *The Regulation of Professions in Canada* (Carswell), pp. 6-1 through 6-5 cites many additional authorities to support these principles.

[76] The particulars in the Notice of Charge were limited to “professional misconduct”, meaning Regulations 3(a), 4(1)(c) and (d) which do not create a *per se* offence from a breach of the *Code of Ethics*. The Discipline Committee did not have the power to rule that Dr. Creager committed an offence *per se* by breaching the *Code of Ethics*.

(b) Breach of Code of Ethics as a Particular of “Unprofessional Conduct”

[77] The conduct which breaches the *Code of Ethics* might also constitute “unprofessional conduct” under Regulations 3(a), 4(1)(c) and 4(1)(d). I make no comment whether that is so in Dr. Creager’s case. I will assume, subject to the multiplicity issue discussed below, that the Committee was entitled to decide that Dr. Creager breached the *Code of Ethics* and that this was “unprofessional conduct”. Such an offence would convict Dr. Creager for the same acts and omissions, subject to the same legal standard of “unprofessional conduct”, which led to Dr. Creager’s convictions under charges (a) and (b) in the Notice of Charge (above para. 5). Charge (c) would duplicate the charges for which Dr. Creager already was held responsible. At the hearing of this appeal, counsel for the Board acknowledged that the charges under the *Code of Ethics*, in that sense, were largely superfluous.

[78] An individual should not be held responsible for duplicated charges resulting from the same conduct. This principle, rooted in criminal law, also applies, as an element of procedural fairness, to the quasi-criminal process of professional discipline. I agree with the following passage stated by the Alberta Court of Appeal in *C. (K.) v. College of Physical Therapists (Alberta)* (1999), 12 W.W.R. 339, at paras. 63 - 64:

> Multiple convictions for the same conduct are prohibited. In a criminal context, a verdict of guilty on two counts, with the same or substantially the same elements making up the offences charged in both counts, results in the application of the rule against multiple convictions: *R. v. Kienapple*, [1975] 1 S.C.R. 729 (S.C.C.) at 751. The relevant inquiry is whether the same cause, matter or delict, rather than the same offence, is the foundation for both charges: *Kienapple* at 750. The rule does not bar several convictions if they are in respect of different factual events. The rule against multiple convictions applies when the counts arise from the same transaction: *R. v. Prince*, [1986] 2 S.C.R. 480 (S.C.C.) at 490. Therefore in order for the rule to apply there must be both legal nexus, that is no additional or distinguishing elements in the second offence, and a factual nexus, that is the same act must ground each of the charges. The rule against multiple convictions

> applies to allegations of professional misconduct made against members of a self regulated profession: *Richmond v. College of Optometrists (Ontario)* (1995), 25 O.R. (3d) 448 (Ont. Div. Ct.), at 460; *Carruthers v. College of Nurses (Ontario)* (1996), 31 O.R. (3d) 377 (Ont. Div. Ct.) at 398.
>
> In each case the applicability of the rule depends upon the facts. Here there is both a sufficient factual and legal nexus to warrant its application. The allegations in counts I. and II. arise out of the same conduct or transaction and the same factual circumstances, the letters to the Minister and the refusal to cooperate with M. on July 30, 1997. Both charges incorporate the professional misconduct language of ss. 37(1)(a) and (c); both charges involve identical legal elements. It is impossible to conclude that the charges relate to distinct delicts, causes or matters which properly sustain separate findings of guilty. While count II. is slightly more detailed than count I. a finding of guilty under II. necessarily results in a finding of guilty under count I.. The rule against multiple convictions applies and one set of convictions must be quashed. I will permit the more particular convictions to override the general and will quash the convictions for failure to accept the registrar's authority and failure to cooperate with the investigator under count I.

[79] Neither the Discipline Committee's decision, nor the Board in its submissions on this appeal, identified a single element under charge (c), not already canvassed by charges (a) and (b), for which Dr. Creager was found guilty. The Committee's decision barely discussed the *Code of Ethics*, and its convictions under charge (c) trailed in the slipstream of the convictions under charges (a) and (b). In my view, conviction of charge (c) violates the ban against duplicative convictions.

(c) Summary

[80] The Discipline Committee erred in law by determining that Dr. Creager offended the *Code of Ethics* under charge (c) from the Notice of Charge.

6. Third Issue - Costs

[81] The Discipline Committee's decision on sanctions ordered Dr. Creager to pay $90,000 in costs. The decision's only discussion of costs is:

> Dr. Creager shall pay $90,000 towards the costs of the hearing by way of thirty-six equal monthly instalments to begin June 1, 2004.

Nowhere does the Committee explain how it arrived at this number.

[82] In the hearing which preceded the decision on sanctions, the Registrar of the Dental Board testified that the full costs incurred for the hearing were $167,019.79. This included the legal accounts of the solicitor for the Board, the legal accounts of the solicitor for the Discipline Committee, disbursements, the *per diem* charges of the panel members, and an estimate of those costs for the sanctions hearing itself.

(a) Statutory Authority

[83] Dr. Creager submits that the costs award of $90,000 is, in substance, an award of solicitor-client costs and that this is unauthorized by the *Dental Act*. Dr. Creager says that the awardable costs would include an amount for the Board's own counsel calculated on a party-party scale similar to that used in the Nova Scotia Supreme Court, but would exclude *per diem* fees for the panel, recorder fees and facility costs, and any amounts paid to counsel for the panel. Dr. Creager submits that, insofar as the Discipline Regulations authorize a broader costs award, the Regulations are *ultra vires*.

[84] Dr. Creager relies on the decision of the British Columbia Court of Appeal in *Roberts v. College of Dental Surgeons (B.C.)* (1999), 171 D.L.R. (4th) 104. The British Columbia *Dental Act* authorized rules respecting costs in a disciplinary proceeding:

> ... including the assessment of some or all of the costs against some or all of the parties to the hearing and the collection of costs.

Justice Goldie (para. 30) stated that "costs" may mean either a solicitor's recovery from his own client or the recovery toward fees and expenses between two parties to legal proceedings. Justice Goldie stated that the costs contemplated by the *Act* were party-and-party costs. He reasoned:

> [32] In this Province the word taxation has been replaced by assessment. Whatever the name, the processes in both the classifications described in the above quotation are administered by a judicial officer. That officer's discretion is exercised according to evidence and by reference to a published schedule or tariff or to principles, either statutory or stated in the relevant authorities. In the end, both processes are subject to review by the courts. Throughout these processes the maxim "nemo debet esse judex in propria sua causa" - no man can be judged in his own cause - is carefully observed.

Justice Goldie stated that, under the Supreme Court *Rule*, solicitor-and-client costs were taxable only where the conduct of the party was reprehensible. Otherwise, the disciplinary costs were the amount taxed according to the party-and-party scale of the Supreme Court *Rule*.

[85] The scope of costs awardable by the Discipline Committee here depends on the wording of the Nova Scotia *Dental Act*. Section 33(2)(c)(v) of the *Act* permits the Dental Board to make regulations prescribing sanctions which "may include ... requiring that a person pay all or part of the costs of the disciplinary proceeding." The Nova Scotia *Dental Act*, s. 33 does not contain the word "assessment" which in *Roberts* Justice Goldie equated to "taxation" and which, therefore, imported the British Columbia's party-and-party's taxable scale from the Supreme Court *Rules*. Nothing in Nova Scotia's *Dental Act* indicates an intent that the Dental Board's power to enact regulations covering "all or part" of the costs must incorporate a party-and-party scale. In *Beaini v. APENS,* 2004 NSCA 122, at para. 15, this court interpreted the statutory power to award costs "in light of the broad mandate granted to the Council in section 17 to discipline those governed by the *Act*". *Beaini* involved the *Engineering Profession Act* RSNS 1989 c. 148. The costs power under the *Dental Act* is entitled to a similar purposive interpretation, and is not restricted by artificial importation of a party-and-party scale designed for courtroom litigation.

[86] Regulation 29(1)(i) of the Discipline Regulations, enacted under s. 33 of the *Dental Act*, states:

> 29 (1) The sanctions that may be imposed by the Discipline Committee in a decision resulting from a hearing are:
>
> ...
>
> (i) payment by the licensee of all or part of the costs of the disciplinary proceeding, including
>
> (i) per day fees for members of the Discipline Committee,
>
> (ii) counsel fees,
>
> (iii) reporter fees,

(iv) facility charges, and other charges associated with the hearing.

[87] The charges listed in Regulation 29(l) are authorized by the words "all or part of the costs of the disciplinary proceeding" in s. 33(2) of the *Act*. The Regulations are *intra vires*. I would dismiss Dr. Creager's submission that, based on *Roberts*, the regulations are *ultra vires* the enabling legislation.

(b) Reasonableness Standard of Review

[88] Justice Goldie's rationale was stated in para. 32 from *Roberts*, quoted above: the disciplinary arm of a self-regulating professional authority should not be the final arbiter, without principled review, in its own cause respecting costs. To nourish this rationale it is unnecessary to reproduce a notional litigation scale and taxation procedure. The rationale may be addressed by the reasonableness standard of review.

[89] That was the approach favoured by the Saskatchewan Court of Appeal in *Brand v. College of Physicians and Surgeons (Saskatchewan)* (1990), 77 D.L.R. (4th) 449, *per* Vancise, J.A., *Barik v. College of Physicians and Surgeons (Saskatchewan)* (1992), 100 Sask. R. 27, and *Lambert v. College of Physicians and Surgeons (Saskatchewan)* (1992), 100 Sask. R. 203.

[90] In *Brand*, the discipline committee found that the physician was guilty of unprofessional conduct. He was ordered to pay $12,177.13 costs for a hearing of under three days. Justice Vancise stated:

> [24] The awarding of compensation is discretionary and must be exercised judicially. The reasonableness of the assessment or awarding of compensation to the investigating body is, therefore, subject to judicial review. The right of appeal and the right to examine the reasonableness of the exercise of that discretion is expressly wide when the consequences that someone is or can be deprived of his rights, in this case, his right to practice medicine. See *Barrette v. The Queen*, [1977] 2 S.C.R. 121 at 125. The standard of review is whether the assessment is reasonable, and not whether there has been clear error.
>
> [25] In my opinion, the awarding of compensation in the amount of $12,177.13 for a hearing which lasted a portion of three days (a great portion of which was taken up in connection with an offence which was not proven) is unreasonable.

[91] In *Barik* the disciplinary committee suspended a physician from practice and ordered the physician to pay costs of the disciplinary investigation and hearing. The College consented to a taxation. The costs were taxed on a solicitor-and-client basis at $15,088.15. The statute authorized the council to

order payment of "the costs of and incidental to the investigation, including fees payable to solicitors, counsel and witnesses or any part of those costs." Justice Vancise (para. 5) adopted the passage quoted above from *Brand*, then stated:

> [6] ... The appellant submits that such interpretation should be re-examined and that the words "costs of and incidental to the investigation" should not be interpreted to permit the College to recover all solicitor-and-client costs incurred by it. It contends that "costs incidental" means costs which are incurred only at the formal charge stage and not at the preliminary inquiry stage. In my opinion, those submissions are not tenable.
>
> . . .
>
> [11] In summary, the College is entitled to order a physician to pay the costs incurred by it for the investigation and hearing. That statutory power must, as we noted in *Brand*, be exercised reasonably and any such assessment costs is subject to judicial review on the basis of whether it is reasonable.
>
> [12] As noted above, the College consented to the taxing of costs by the taxing master. We commend the College for its approach and recommend that it follow the same procedure if and when taxation is requested in the future.

[92] In *Lambert*, on appeal from another finding of professional misconduct by a physician, the Saskatchewan Court of Appeal stated:

> [7] The final matter is a question of penalty and more specifically the award of costs. The chambers judge, after analyzing them, concluded them to be reasonable and in the circumstances, no error in his analysis having been shown, we are not prepared to interfere. We merely point out that counsel for the appellant noted that in *Barik v. College of Physicians and Surgeons*, (unreported, 31 January 1992, Sask.) this Court had commented that the large component normally constituted by the fees of the College's lawyer should be subject to taxation. Counsel for the appellant indicated that he was likely to make the request after this appeal in the event that he were not successful, and this Court urges upon the College what it said in *Barik*, that the taxation of these bills by the physician is appropriate. The College which is in the solicitor/client relationship and able to ask for taxation, if it has no responsibility for the bill, is unlikely to do so. The physician, not having a solicitor/client relationship should have some recourse to assure that the bill is in all respects reasonable, once he has been ordered to pay it. We further comment that while the Chambers judge found here that the costs had not reached an excessive level, it is possible that in absolute terms the costs might, in an individual case or as a matter of routine practice of

the College, become so excessive and exorbitant that they do deny to the doctor a fair chance to dispute any suggestions of professional misconduct..

[93] In my view, the proper approach is this. The costs award is subject to the same reasonableness standard of review as is the rest of the substantive disciplinary decision. I have referred earlier to the formulation stated by the Supreme Court of Canada in *Ryan* and *Dr. Q*. This is a principled and objective review which addresses the concern expressed by Justice Goldie in *Roberts*. I agree with the Saskatchewan Court of Appeal's approach in *Barik* and *Lambert*. Nothing in the *Dental Act* allows Dr. Creager to tax a legal account included in the costs award. But the Dental Board may, if it wishes, have its own legal accounts taxed. If the Discipline Committee decides to include a legal account in its costs award, then the existence or absence of verification by taxation would be a relevant factor to the court's subsequent application of the reasonableness standard of review on appeal.

[94] At this point, it is necessary to recall that s. 38(1) of the *Dental Act* limits this appeal to points of law. My comments on the reasonableness standard do not suggest that this court may review the reasonableness of factual findings or inferences related to the costs award. The Saskatchewan Court of Appeal, in the decisions discussed above, was limited to considering points of law under the *Medical Profession Act*, 1981, SS 1980-81, c. M-10.1, s. 66: see *Brand*, para. 78. An appeal court may vary a costs decision of a trial judge for error of principle: *Hamilton v. Open Window Bakery Ltd.*, [2004] 1 S.C.R. 303, at para. 27. The legal principles which govern awards of costs, applied consistently with the reasonableness standard of review or the rules of procedural fairness, may be evaluated in an appeal which considers points of law under s. 38(1) of the *Dental Act*.

[95] I agree with the comments of the Saskatchewan Court of Appeal. The reasonableness standard of review permits consideration of whether the quantum of costs would be so excessive as to deny the accused person a fair opportunity to dispute the allegations of professional misconduct.

[96] The reasonableness standard might also involve consideration of whether the costs award is so exorbitant that it would effectively bar the complainant from practice, contrary to the Committee's express dispositive sanction. Such a result, depending on the Committee's reasons, may or may not constitute an error of law. I mention this because, after restricting Dr. Creager's ability to practice, the Committee ordered Dr. Creager to pay $90,000 costs by thirty-six equal monthly instalments to begin June 1, 2004. Dr. Bonang, Registrar of the Dental Board, testified at the sanctions hearing:

Q. This isn't in your recommendations, Dr. Bonang, but have you turned your mind to what your recommendation would be should any of those cost instalments not be paid? Is it simply a question of debt collection between the Board and Dr. Creager or would there be any other result that flows from non-payment?

A. If this were an applied sanction, failure to comply, clearly, would negate the ability for Dr. Creager to begin practice again, it would seem to me.

The other sanctions will severely restrict Dr. Creager's ability to earn income. If during this period he cannot afford $90,000 from after tax income then, according to the Registrar, Dr. Creager should be unable to practice at all. This would change the Committee's finite suspension to an effective indefinite suspension, a disposition not expressly countenanced by the Committee's sanctions decision.

[97] I cannot say how these principles apply to the Committee's costs award here. Neither can I say what effect, if any, Creager's conviction for breaching the *Code of Ethics* (which I would set aside) had on the Committee's award of costs. That is because the Committee gave no reasons for its costs award. This leads to the topic of sufficiency of reasons.

(c) Sufficiency of Reasons

[98] Section 38(3) of the *Dental Act* states that the record for an appeal from a decision of the Discipline Committee shall include “the decision of the Committee.” The *Act* contemplates a written decision.

[99] Regulation 28(1) of the Discipline Regulations under the *Dental Act* states that the Discipline Committee:

> shall file its written decision with the Registrar, including
>
> (a) its findings of fact;
>
> (b) its conclusions respecting the disposition of the charge or charges; and
>
> (c) any sanctions imposed.

The Regulation does not expressly require written reasons for the sanctions. But the Regulation’s particulars are stated to be inclusive, not comprehensive.

[100] The traditional common law position was that reasons, though desirable, were not required for administrative decisions: *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684, at pp. 705 - 6; *Supermarchés Jean Labrecque Inc. v. Flamand*, [1987] 2 S.C.R. 219, at p. 233; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 37.

[101] In *Baker*, the Supreme Court reformulated the principle. Justice L’Heureux-Dubé, for the full Court on this point, reviewed the factors which determined the nature and extent of the duty of fairness (paras. 23 - 28). This included the following passage:

> 25 A third factor in determining the nature and extent of the duty of fairness owed is the importance of the decision to the individual or individuals affected. The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated. This was expressed, for example, by Dickson J. (as he then was) in *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105, at p. 1113:
>
> > A high standard of justice is required when the right to continue in one's profession or employment is at stake. . . . A disciplinary

> suspension can have grave and permanent consequences upon a professional career.

Justice L'Heureux-Dubé concluded that:

> 43 In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required. ...

[102] As discussed earlier under the standard of review analysis, an evaluation of procedural fairness does not involve a deferential standard of review.

[103] The costs award is of "important significance" to Dr. Creager. He was required to pay $90,000 by monthly deadlines when, for much of the period, the practice restrictions will severely restrict his ability to earn income. According to the testimony of the Registrar of the Dental Board, if Dr. Creager misses a payment, he should not be permitted to practice.

[104] As noted by Justice L'Heureux-Dubé in *Baker* at para. 43, when there is a statutory right of appeal, the duty of fairness implies a responsibility to provide written reasons. Otherwise, the right of appeal is pointless. To the same effect: *R.D.R. Construction Ltd. v. Rent Review Commission* (1982), 55 N.S.R. (2d) 71 (A.D.) at paras. 18, 23 - 24.

[105] The same principle inheres in the reasonableness standard of review. In *Ryan* Justice Iacobucci stated:

> The question is rather whether the reasons, taken as a whole, are tenable as support for the decision. At all times, a court applying a standard of reasonableness must assess the basic adequacy of a reasoned decision remembering that the issue under review does not compel one specific result.

Chief Justice McLachlin in *Dr. Q* again stated that the reviewing court is to determine whether the conclusions of the lower tribunal are "supported by any reasons that can bear somewhat probing examination." Without written reasons from the tribunal, the reviewing court does not have the tools to perform this function.

[106] In *R. v. Sheppard*, [2002] 1 S.C.R. 869, Justice Binnie for the Court (para. 33) stated that deficiency of reasons is not a free-standing right of appeal and

the "appellant must show not only that there is a deficiency in the reasons, but that this deficiency has occasioned prejudice to the exercise of his or her legal right to the appeal in a criminal case". To the same effect: *R. v. Chittick*, 2004 NSCA 135 at para. 32. I am aware that in *Sheppard* (para. 19) Justice Binnie directed his comments to criminal not administrative appeals. But, in my view, under *Baker* a similar principle applies to an appeal from a conviction in a quasi-criminal disciplinary proceeding. In Dr. Creager's case, the absence of reasons prevents the appeal court from effectively executing the reasonableness standard of review.

[107] I do not suggest that every minor costs award by an administrative tribunal requires written reasons. This is not a minor award. According to the Registrar's testimony, before Dr. Creager's case, the highest costs award by a disciplinary committee under the Nova Scotia *Dental Act* was $35,000. This hearing was lengthier than the usual disciplinary hearing. Whether that justifies the $90,000 award is for the Disciplinary Committee to decide with written reasons. Only then would a reviewing court be in position to assess the reasonableness of the award. I make no comment on the appropriate *quantum* of costs.

[108] In my view, the Discipline Committee erred in law by failing to state any reasons for its costs award of $90,000.

[109] In *Hatfield v. Nova Scotia Barristers' Society* (1978), 30 N.S.R. (2d) 386 (A.D.), at paras. 23 and 59, in the absence of a reasoned basis for a costs award by a disciplinary tribunal, the Appeal Division disallowed the award. In my view, that result is too extreme. I would allow the appeal from the costs award, but remit the matter to the Discipline Committee for an opportunity to reconsider the costs and state written reasons for its conclusion. This is consistent with the remedy for breach of procedural fairness ordered in *Congregation des Témoins de Jehovah de St. Jérôme-La Fontaine v. Lafontaine (Village)*, [2004] 2 S.C.R. 650 at para 31.

7. Summary:

[110] I would allow the appeal from the ruling of the Discipline Committee that Dr. Creager breached the *Code of Ethics* under charge (c) of the Notice of Charge, but would dismiss the appeal from the findings of responsibility for the other charges. I would allow the appeal from the costs award, on the basis that the Committee failed to give written reasons, and would remit the issue of costs to the Discipline Committee. Costs are remitted both to give the Committee an opportunity to provide written reasons and for

reconsideration should the Committee choose to do so in light of the comments in this Decision.

[111] As success was divided on this appeal, the parties should bear their own costs of the appeal.

Fichaud, J.A.

Concurred in:

Freeman, J.A.

Saunders, J.A.