

Date: 20131203
Docket: 12/37
Citation: *Aylward v. Law Society of Newfoundland and
Labrador*, 2013 NLCA 68

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

BETWEEN:

GORDON AYLWARD

APPELLANT

AND:

LAW SOCIETY OF NEWFOUNDLAND
AND LABRADOR

RESPONDENT

Coram: Welsh, Rowe and Harrington JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (G) 201101G7721
(2012 NLTD(G) 25 and 2012 NLTD(G) 85)

Appeal Heard: September 10, 2013
Judgment Rendered: December 3, 2013

Reasons for Judgment by Harrington J.A.
Concurred in by Welsh J.A.
Concurring Reasons by Rowe J.A.

Counsel for the Appellant: Self Represented
Counsel for the Respondent: Bernard Coffey Q.C.

Harrington J.A.:

INTRODUCTION

[1] Gordon Aylward (Appellant) appeals the rejection of his application for judicial review of a decision of the Complaints Authorization Committee (Committee) of the Law Society of Newfoundland and Labrador (Law Society) to issue a caution to Gerlinde van Driel Q.C. (Ms. van Driel) under the *Law Society Act, 1999*, SNL 1999, c. L-9.1 (*Act*). The Appellant also appeals the decision of the same Justice dismissing his appeal from the Committee's finding that there was no evidentiary basis to support his allegation of collusion against Ms. van Driel resulting in the Committee's decision not to refer the allegation to a disciplinary panel.

[2] For the reasons which follow, I conclude that the Trial Division judge did not err in dismissing the Appellant's judicial review application and appeal.

BACKGROUND

[3] The Appellant has practiced law as a member of the Law Society since 1991. The Appellant and his spouse separated in 2008. Subsequently, the Appellant applied for a divorce and an order for distribution of the matrimonial property. He represented himself and Ms. Aylward retained Ms. van Driel.

[4] The Appellant, his former spouse and Ms. van Driel attended a settlement conference in December 2009 at which Justice Mary Noonan of the Family Division presided. The Appellant alleged that Ms. van Driel acted unprofessionally towards him and the Family Division regarding the scheduling of the conference and further that Ms. van Driel colluded with Justice Noonan during the conference process to deprive him of the value of certain matrimonial and business assets by making erroneous statements regarding the law respecting his wife's entitlement.

[5] The Appellant initially filed a complaint with the Canadian Judicial Council (CJC) regarding the conduct of the settlement conference by Madam Justice Noonan. He forwarded a copy of this complaint to the Law Society and requested that the allegations he made against Ms. van Driel in

his complaint to the CJC be investigated. The Vice-President of the Law Society referred a copy of the Appellant's CJC complaint to the Committee.

[6] Following a review of correspondence received from the Appellant and Ms. van Driel, the Committee determined that there were reasonable grounds to believe that Ms. van Driel had "engaged in conduct deserving of sanction".

[7] The Committee issued to Ms. van Driel a caution which it defined citing the *Shorter Oxford English Dictionary, 1993* as a "word of warning ... an official reprimand regarding a person's future conduct". The Committee elaborated:

The Complaints Authorization Committee is of the opinion that Ms. Van Driel owed a courtesy to Mr. Aylward to immediately advise him of her unavailability on October 28, 2009 subsequent to her call to the Court, and further that Ms. Van Driel owed a courtesy to the Court to bring her unavailability to the Court's attention without the need for prompting by the Court. The Complaints Authorization Committee is of the opinion that Ms. Van Driel's comment: "*There just won't be anyone showing up from Ms. Aylward's side – so how can you have a Settlement Conference*", was inappropriate and unbecoming an officer of the Court.

(Italics in original.)

[8] However, there was no finding of guilt by the Committee either with respect to conduct unbecoming an officer of the court or professional misconduct since the authority to find that a member "is guilty of conduct deserving of sanction" rests solely with an adjudication tribunal comprised of members of the disciplinary panel of the Law Society and since the Committee chose not to refer the complaint to the panel. Regrettably, the Trial Division judge mistakenly referred to a finding by the Committee that Ms. van Driel was "guilty of professional misconduct" at paragraph 72 of his reasons and also in his summary. In fact only an adjudication tribunal comprised of members of the disciplinary panel is authorized to make such a determination (see subsection 50(1)). Where a member is found guilty by an adjudication tribunal following the grant of a hearing to the member, it may, along with other options, reprimand the member. In this case, neither the disciplinary panel nor an adjudication tribunal were engaged with respect to consideration of the Appellant's complaint.

[9] In its initial decision, the Committee did not address the allegations of collusion between Ms. van Driel and Justice Noonan referenced in the letter from the Appellant to the CJC, which focused on alleged erroneous opinions of Ms. van Driel and Justice Noonan during the settlement conference regarding the state of the law in this Province regarding the division of matrimonial property.

[10] Knowledge of the proper context surrounding the action of the Law Society is important since it is the Appellant who is questioning the failure of the Law Society to take further steps, including directing Ms. van Driel to appear at a hearing for examination under oath by the Committee.

First Decision of the Trial Division Judge

[11] There being no statutory right of appeal from a decision of the Committee to issue a letter of caution, the Appellant brought an application for judicial review of that decision.

[12] The Trial Division judge found that the reasonableness standard of review applied to decisions of the Committee. Applying this standard he held that the Committee's opinion was reasonable in its justification and issuance of a letter of caution to Ms. van Driel with respect to the scheduling of a settlement conference presided over by Justice Noonan. However, he found that the Committee had not acted reasonably when it failed to make any reference to the allegation of collusion and referred the matter back to the Committee. Each party was ordered to bear its own costs.

Second Decision of the Trial Division Judge

[13] The Committee subsequently met to consider the Appellant's allegation of collusion. The Committee reached the conclusion that "there is no evidence of an arrangement between Justice Noonan and Ms. van Driel to act in collusion against Aylward". It confirmed its earlier decision to issue a caution to Ms. van Driel with respect to the matters surrounding scheduling of the settlement conference. It directed that "notice of dismissal of the allegation of collusion be provided pursuant to the *Law Society Act, 1999*, subsection 45(2)".

[14] The Appellant appealed the dismissal of his allegation of collusion against Ms. van Driel pursuant to subsection 45(7) of the *Act*. The Trial Division judge held that the standard of review applicable to appeals of decisions of the Committee was the same as that applicable to judicial

review of its decisions, i.e. reasonableness. In rejecting the appeal, the Trial Division judge wrote:

[28] Here the Complaints Authorization Committee knew all of the circumstances Mr. Aylward relied on but would not draw the inference from them that Mr. Aylward makes: “In the event Mr. Aylward is asking the Complaints Authorization Committee to draw an inference that, on the basis of the settlement conference before Madam Justice Noonan, there was collusion between Madam Justice and Ms. Van Driel, the Complaints Authorization Committee is unable to draw such inference” [my underlining]. The Committee also noted that the evidence related only to Ms. Van Driel and it had no evidence of Madam Justice Noonan’s conduct. It is understandably hard to infer that two people acted together to “defraud another or to do or obtain something forbidden by law” – the definition of “collusion” the Committee relied on – when you have evidence about only one of them and even that evidence is vague and inconclusive.

[29] Let me put Mr. Aylward’s claim in context. He alleges that Madam Justice Noonan and Ms. Van Driel deliberately set out to deprive him of some of the value of his matrimonial property and that they orchestrated events, jointly and separately as needed, during the fall of 2009 to achieve that purpose. His claim presupposes that Madam Justice Noonan and Ms. Van Driel met to discuss a date for the settlement conference when Madam Justice Noonan was available and that they agreed Madam Justice Noonan would espouse deliberately false positions on the law of matrimonial property at the settlement conference that would benefit Ms. Aylward and that Ms. Van Driel would adopt and use Madam Justice Noonan’s false statements to press her client’s case for a larger share of the matrimonial property.

[30] Mr. Aylward’s claim also presupposes that Madam Justice Noonan and Ms. Van Driel might benefit from this surreptitious conduct. While it might be argued that Ms. Van Driel would “benefit” from advancing her client’s interests, a specious claim at best, there is no apparent benefit to Madam Justice Noonan from the arrangement. In fact, I asked Mr. Aylward during his submissions how Madam Justice Noonan might benefit from colluding with Ms. Van Driel against him. He offered none and simply said, “I don’t know, judge”.

[31] In short, the circumstantial evidence Mr. Aylward relies on does not support the inference that he asked the Committee to draw from it. The Committee acted reasonably to reject it. I note that the two of three Committee members are lawyers with an abundance of experience. They know the exigencies of practicing law and how scheduling court proceedings, including settlement conferences, can be difficult at times. They also know of the “give-and-take” that occurs in settlement conferences. I am sure they understand that the circumstances Mr. Aylward relies on are susceptible to innocent explanations that are inconsistent with the complicated scenario that he draws from them.

[15] The Appellant was ordered to pay party-and-party costs to the Law Society on column III of the scale of costs. The Appellant now appeals from both decisions.

ISSUES

[16] The Appellant's original factum narrowed the list of issues in the notice of appeal to the following:

- (i) whether the Trial Division Judge erred in determining that the *Act* does not require the Committee to investigate a complaint, in particular, that it was not required to interview Ms. van Driel; and
- (ii) whether the Trial Division judge erred in his conclusion that the Committee acted reasonably in its investigation and decision to dismiss the complaint alleging collusion against Ms. van Driel.

[17] Leave was given, if necessary, to the Appellant to supplement his first ground of appeal with the assertion that the Committee denied him procedural fairness. The Appellant argues that his allegation of misconduct against Ms. van Driel engaged issues of credibility and motive which required the Committee to refer the matter to the disciplinary panel so that the Appellant and Ms. van Driel could be heard before an adjudication tribunal and submits that Ms. van Driel should have been examined orally about the events surrounding the scheduling of the settlement conference.

STANDARD OF REVIEW

(i) Procedural Fairness Issue

[18] On this appeal, the Appellant raises questions relating to whether the Committee breached its duty of procedural fairness by not having interviewed Ms. van Driel about the scheduling of the settlement conference and about her dealings with Justice Noonan with respect to the actual conference. He also asserted the right to be heard at an adjudication tribunal hearing, an issue not raised before the Trial Division judge.

[19] Where a party alleges a breach of the duty of procedural fairness, the Court does not need to engage in an assessment of the appropriate standard of review: *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249 at para. 74. If the tribunal being reviewed failed to accord appropriate procedural safeguards to an interested party, the decision

must be set aside. *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 43. See also *McAdam v. Law Society of Newfoundland and Labrador*, 2010 NLTD 39, 302 Nfld. & P.E.I.R. 284, at para. 11, citing *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 S.C.R. 221 at para. 65.

(ii) Substantive Issue

[20] A reviewing judge must be correct in his or her determination of the applicable standard of review: *Burke v. Newfoundland and Labrador Association of Public and Private Employees*, 2010 NLCA 12, 294 Nfld. & P.E.I.R. 230 at para. 49. Here, the reviewing judge held that the standard of review applicable to the substantive issues on both the judicial review application arising from the caution of Ms. van Driel and the appeal arising from the dismissal of the collusion complaint was reasonableness.

[21] As noted in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, there are two possible standards of review where a Court is reviewing the decision of a tribunal: reasonableness and correctness. In determining which standard should be applied, this Court must first look to existing jurisprudence to see whether the applicable standard has already been satisfactorily established.

(a) Existing Jurisprudence

[22] A number of cases have dealt with the standard of review applicable to an appeal from a decision of the Committee to dismiss a complaint. In *Martin v. Law Society of Newfoundland and Labrador*, 2010 NLTD(G) 186, 302 Nfld. & P.E.I.R. 293, Chief Justice Orsborn held that a reasonableness standard applied to such appeals:

[18] Given the legislated right of appeal, the screening or vetting stage of the process, and the particular expertise of the standing committee as part of the scheme by which the conduct of lawyers is regulated, I am satisfied that the appropriate standard of appellate review of a decision of the Complaints Authorization Committee to dismiss a complaint is reasonableness.

[23] Relying on *Martin*, Chief Justice Orsborn applied a reasonableness standard in *Connolly v. Law Society of Newfoundland and Labrador*, 2011 NLTD(G) 152, 315 Nfld. & P.E.I.R. 281, at para. 23. Similarly in *Tilley v. Law Society of Newfoundland and Labrador*, 2010 NLTD(G) 187, 303 Nfld. & P.E.I.R. 301, Faour J. held that the reasonableness standard applied,

noting that the Committee's main role is deciding whether to refer a complaint and such similar decisions are generally accorded considerable deference.

[24] In general, “applying the *Dunsmuir* principles results in reasonableness remaining the applicable review standard for disciplinary panels”: see *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395 at para. 45. (See also *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247.) The Committee is no exception, as the persuasive analysis in *Martin*, *Connolly*, and *Tilley* shows. I agree with the Trial Division judge that the reasonableness standard applies both to the decision of the Committee to dismiss one allegation and its decision to issue a caution with respect to the second allegation.

ANALYSIS

(i) Procedural Rights

[25] As a preliminary matter, it is necessary to consider whether the Committee should have granted the procedural rights that the Appellant sought. The reviewing Trial Division judge wrote:

[20] When a Complaints Authorization Committee of the Law Society receives an allegation from the vice-president of the Law Society it may ... require the respondent to appear before it (45(1)(d))...

[24] I also note that the *Law Society Act, 1999* is unclear about what happens when a respondent appears before the Committee if required. Would the respondent be examined on oath? If so, by whom? Could the Committee also “require” the complainant to appear? Would the complainant be examined on oath? Mr. Aylward wants to cross-examine Ms. Van Driel on all aspects of his allegation. That would not seem appropriate before the Committee, whose main purpose is to screen allegations to see if they warrant further inquiry.

[26] However, subsection 42(9) clearly provides the Committee with the authority to examine the respondent and the complainant under oath. The subsection states:

The complaints authorization committee, an adjudication tribunal appointed under section 46 and a person appointed by either of them may summon a respondent or other person and require the respondent or other person to give evidence, orally or in writing, upon oath or affirmation, and produce the documents and things that either of them considers necessary for the full investigation and hearing of an

allegation or complaint and shall have the powers, privileges and immunities that are conferred on a commissioner appointed under the *Public Inquiries Act, 2006*.

(Emphasis added.)

[27] Additionally, section 5 of the *Public Inquiries Act, 2006*, SNL 2006, c. P-38.1 which is applicable to proceedings before the Committee by virtue of subsection 42(9) of the *Act* provides:

- (1) A commission shall give those persons who believe they have an interest in the subject of the inquiry an opportunity to apply to participate.
- (2) A commission shall determine whether a person may participate in an inquiry, and how he or she may participate, after considering
 - (a) whether the person's interests may be adversely affected by the findings of the commission;
 - (b) whether the person's participation would further the conduct of the inquiry; and
 - (c) whether the person's participation would contribute to the openness and fairness of the inquiry.

...

Pursuant to that section, therefore, the Committee could allow the Appellant (a person who believes he has an interest in the subject of the inquiry) to apply to participate. The scope of participation could include cross-examination of the respondent if allowed by the Committee.

[28] The Committee could have granted the procedural rights that the Appellant submits he should have had before its decision, principally that the Committee should have held a hearing where there would be an opportunity to question and cross-examine Ms. van Driel. The Appellant argues that at a minimum the Committee acted unreasonably in issuing a caution to Ms. van Driel without interviewing her in person or taking evidence on oath and in dismissing the allegation of collusion without hearing from Ms. van Driel or the Appellant in person.

[29] As noted by Justice L'Heureux-Dubé in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of

each case.” In determining the content, Courts are directed to look at the following non-exhaustive factors: (1) the nature of the decision; (2) the nature of the statutory scheme; (3) the significance of the interests; (4) the legitimate expectations of the person challenging the decision; and (5) the previous procedural choices of the administrative decision maker (*Patient X v. College of Physicians and Surgeons of Nova Scotia*, 2013 NSSC 165, 370 N.S.R. (2d) 345 at para. 16, citing *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 21–28). The ultimate objective of this analysis is to ensure that “administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker” (*Baker*, paragraph 22).

(ii) The Nature of the Statutory Scheme

[30] In looking at the nature of the statutory scheme, a reviewing court should consider such matters as, “the role of the particular decision within the statutory scheme” or “other surrounding indications in the statute that help determine the content of the duty of fairness” and whether there is an appeal procedure available. The absence of an appeal procedure suggests greater procedural protections should be afforded. (See *Baker*, per L’Heureux-Dubé J., at paragraph 24.)

[31] The Appellant suggests that when the Committee dismisses an allegation or decides to counsel or caution a member, the decision is final as far as the complainant is concerned. He notes that there is a right of appeal from a decision to dismiss an allegation, but that because such appeals are subject to the reasonableness standard, they are limited. This, he suggests, points towards more procedural rights being afforded to complainants.

[32] Counsel for the Law Society noted that the Committee’s function must be distinguished from that of the adjudication tribunal established under the *Act*. The Committee, he argues, primarily performs a screening role. This leads to the suggestion that its decisions are not final and also that the legislated structure of the complaints process would be defeated if complainants were granted significant procedural rights at this stage.

[33] I cannot agree that the decision to dismiss an allegation or to counsel or caution a member is not “final.” I find support for this assertion in the judgment of Justice Hood from *Patient X* at paragraph 29, where she noted

that the decision to dismiss the allegation in that case “was as adverse a decision as could be made against [the complainant]”. This reasoning applies here. Similarly, the decision to counsel or caution a member of the Law Society is final in that the matter does not move on to a full hearing and there is no appeal process provided for complainants.

[34] The finality of the decision by itself might point to a higher level of procedural fairness being owed to the complainant. However, I agree with counsel for the Law Society that the function of the Committee would be thwarted if significant procedural rights were granted to the Appellant. This is clear upon an examination of the complaints process established in the *Act*, succinctly described by Orsborn C.J.T.D. in *Martin* in the following manner:

[8] The Complaints Authorization Committee is made up of at least three benchers of the Society (42(1)). The duties and powers of the Complaints Authorization Committee are set out in s. 45:

45. (1) Where an allegation has been submitted to the complaints authorization committee, the committee may exercise one or more of the following powers:

- (a) refer the allegation back to the vice-president for an investigation or alternative dispute resolution in accordance with the rules;
- (b) conduct an investigation itself or appoint a person to conduct an investigation on its behalf;
- (c) conduct a practice review into the member’s practice or the conduct of a professional law corporation of which the member is a voting shareholder; and
- (d) require the respondent to appear before it.

(2) Where the complaints authorization committee is of the opinion that there are no reasonable grounds to believe the respondent has engaged in conduct deserving of sanction, the committee shall dismiss the allegation and give notice in writing of the dismissal to the complainant and the respondent.

(3) Where the complaints authorization committee is of the opinion that there are reasonable grounds to believe that a respondent has engaged in

conduct deserving of sanction, the allegation shall be considered as constituting a complaint, and the committee may

(a) counsel or caution the respondent;

...

[9] If an allegation is dismissed by the Complaints Authorization Committee a complainant may appeal to this court:

45. (7) A complainant whose allegation is dismissed by the complaints authorization committee under subsection (2) may, within 30 days after receiving notice of the dismissal, appeal the dismissal to the Trial Division by filing a notice of appeal with the Registrar of the Supreme Court.

...

[11] If the Complaints Authorization Committee instructs the vice-president “to file the complaint” and “to refer it to the disciplinary panel”, an adjudication tribunal is established from the membership of the disciplinary panel (42(4) and s. 46), and the complaint proceeds to a formal hearing. This hearing is governed by s. 47:

47. (1) Where a complaint has been referred under paragraph 45(3)(b), an adjudication tribunal shall hear the complaint.

(2) The parties to a hearing are the society and the respondent and a party may be represented by his or her counsel at a hearing.

(3) A hearing shall be conducted in public but an adjudication tribunal may exclude the public from a hearing, or from part of it, where it determines that the desirability of protecting a party to the complaint or another person against the consequences of possible disclosure of personal matters outweigh the desirability of holding the hearing in public.

[12] Where an adjudication tribunal holds a hearing, it must decide if the member “is guilty of conduct deserving sanction”. If it so decides, it has available to it a range of remedies, including the imposition of a fine of up to \$10,000, suspension, and disbarment (50(3)). A decision of an adjudication tribunal may be appealed to the Trial Division by either the respondent member or the Law Society.

[13] The benchmark for assessment of a member’s conduct is “conduct deserving of sanction”. This is defined to include:

41.(c) “conduct deserving of sanction” includes:

- (i) professional misconduct,
- (ii) failure to maintain the standards of practice,
- (iii) conduct unbecoming a member of the society, and
- (iv) acting in breach of this Act or the rules including rules of professional ethics or conduct made under paragraph 18(p);

...

[14] The first step in the complaint process is the filing of an allegation with the vice-president. It is only in the event that the allegation reaches the Complaints Authorization Committee and the committee is of the opinion that there are reasonable grounds to sustain the allegation that the allegation is considered to be a complaint and possible remedial action available. At this stage, it is only the dismissal of an allegation that gives rise to a right of appeal.

[15] The legislation establishes the Complaints Authorization Committee as a screening mechanism to assess allegations and to consider the availability of remedial measures short of a full hearing and a possible formal finding of guilt.

[16] The function of the Complaints Authorization Committee is not to make a final determination of guilt, but rather to form an opinion on whether reasonable grounds exist to conclude that the member has engaged in conduct worthy of sanction.

(Emphasis added.)

[35] In context, it is clear that the role of the Committee is to screen allegations to determine if any sanctions or further proceedings are appropriate. As noted by Hood J. in *Patient X*:

[33] ... Where a committee is performing a screening role, as it was in this case, extensive procedural rights could impede the efficiency of the process... It is meant to be a simple, expeditious process to investigate complaints and screen out those where it concludes there is not sufficient evidence to warrant referral to a full hearing.

[34] There is no oral hearing required to dismiss a complaint; thus neither direct nor cross-examination of the physician is even contemplated in the legislation. To read in such procedural rights would essentially convert the investigation stage into an additional hearing stage. That is impractical and undermines the entire structure of the complaints process that the legislature

intended. Overall, therefore, this factor points to a lower level of procedural fairness.

[36] The legislative scheme in this case is very similar to the one considered in *Patient X*. The reasoning there applies equally here.

(iii) The Nature of the Decision

[37] In *Baker*, at paragraph 23, L’Heureux-Dubé J., citing *Knight*, noted that “the closeness of the administrative process to the judicial process should indicate how much of those governing principles should be imported into the realm of administrative decision making”. Thus, the more a decision making process resembles judicial, adjudicative decision making, the greater the procedural rights afforded to participants.

[38] The Appellant argues in his factum that the decision of the Committee is adjudicative which points towards a high degree of procedural fairness. Counsel for the Law Society argues instead that the Committee’s process is inquisitorial and not adjudicative. He notes that a complainant does not put “evidence” before the Committee but instead files an unsworn version of the events underpinning the complaint. He further notes that “[w]hile the person filing the allegation may initiate the process, investigation of the matter falls to the vice-president and [the Committee]”.

[39] I would agree with Counsel for the Law Society that the Committee’s role is more investigative or inquisitorial as opposed to adjudicative. This is clear upon examining the statutory framework, the *Act*. Once the allegation is forwarded to the Committee by the vice-president of the Law Society, the Committee has carriage of the matter. This is not an adversarial process whereby the complainant advances its interests before the Committee. It is the Committee itself that is charged with generating information so that it may determine whether there are reasonable grounds to believe that the member has engaged in conduct that may be deserving of sanction so that further action may be taken if necessary. It primarily performs a screening role.

[40] Courts in this Province have found on a number of occasions that tribunals performing complaint screening roles are non-adjudicative: see *Grant v. Newfoundland and Labrador (Human Rights Commission)*, 2003 NLCA 22, 224 Nfld. & P.E.I.R. 225; *Spurrell v. Newfoundland and Labrador (Human Rights Commission)*, 2003 NLSCTD 28, 222 Nfld. &

P.E.I.R. 290; and *Coady v. Newfoundland and Labrador (Human Rights Commission)*, 2010 NLTD 21, 293 Nfld. & P.E.I.R. 248. Notably, the Human Rights Commission considered in *Grant*, *Spurrell* and *Coady* did not have remedial powers similar to those that are available to the Committee under paragraphs 4(3)(a), (c) and (d). The Nova Scotia Supreme Court has, however, also held that a tribunal similar to the Committee constituted under legislation similar to the *Act* was “inquisitorial” (see *Patient X*, *supra*).

[41] Looking at the statutory provisions and prior cases on this issue, it is clear that the Committee’s role is investigative and not adjudicative. This suggests that fewer procedural rights are engaged.

[42] Counsel for the Law Society argues that the decision “had no grave repercussions for the Appellant” in that it did not jeopardize his right to practice law, his freedom or his continued residence in this country. He notes that the disciplinary process is not concerned with vindicating the interests of the complainant but, rather, the regulation of the legal profession. In his capacity as a litigant before the Family Division, the Appellant had a tangible interest regarding the disposition of matrimonial assets. However, the unbecoming conduct alleged to have been committed by Ms. van Driel related to the scheduling of a non-binding settlement conference process which could not be shown to have any adverse effect on the Appellant, personally or professionally.

[43] I conclude that the objective of a professional discipline process is not the vindication of the complainant’s rights, but the regulation of the profession itself and that the decision of the disciplinary body does not affect the right of the complainant to lodge a criminal complaint or pursue civil proceedings. See *Patient X*, *supra*, at paras. 44-45.

(iv) The Legitimate Expectations of the Person Challenging the Decision

[44] The Appellant submits that he had a legitimate expectation that Ms. van Driel would be questioned, as his allegations raised issues of credibility which could only be resolved through in person interviews or a hearing. Counsel for the Law Society, however, states that the Appellant had no legitimate expectation that he would have the ability to examine or cross-examine Ms. van Driel or that the Committee would require her to appear before it for questioning.

[45] As L’Heureux-Dubé J. noted in *Baker* at paragraph 26, the doctrine of legitimate expectations is based upon the principle that “ ‘circumstances’ affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights”. Here, the Appellant did not point to any promises, policies or regular practices of the Law Society in conducting such hearings. Further to this, he did not point to any substantive promises which might accord him additional procedural rights. There was, therefore, no legitimate expectation that there would be any procedure beyond what was afforded in this case.

(v) The Previous Procedural Choices of the Administrative Decision Maker

[46] In *Baker*, at paragraph 27, L’Heureux-Dubé J. noted that the analysis should “take account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances”. She continued, stating that “while this, of course, is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints”.

[47] The Appellant notes that the Committee had the statutory discretion to direct a further and more extensive investigation. He also notes that it could have referred the matter to a hearing and that this suggests that this factor is “neutral” in determining the procedural rights due to him at the complaint screening stage. This discretion afforded to the Committee, coupled with the fact that the Act prescribes very few procedural rights for complainants before the Committee, indicates that deference is owed to the Committee’s choice of procedures.

[48] As discussed above, the Committee had a broad discretion in the procedure it adopted. While the Committee had the power to order that Ms. van Driel appear before it and could allow the Appellant to question her under oath, this was entirely within its discretion. Such a procedure was not necessary in the Committee’s collective mind, and the Appellant as a complainant could not insist upon it. Considerable deference must therefore be given to the Committee’s exercise of discretion to deal with the complaint

based on the correspondence it received from the Appellant and Ms. van Driel.

[49] The following conclusion may be drawn from the above: the duty of procedural fairness did not require that Ms. van Driel be questioned or that the matter be forwarded on to a hearing with the opportunity to cross-examine her. To read in such procedural rights in favour of the Appellant would distort the legislative scheme and disregard the Committee's choice of procedure in this case.

(vi) Reasonableness of the Committee's Decision to Issue a Caution

[50] The Appellant's request for judicial review of the Committee's decision to issue a caution to Ms. van Driel without a hearing was justifiably rejected by the Trial Division. He properly applied a reasonableness standard of review. The *Act* expressly mandates the Committee's authority to issue a caution with respect to a potential complaint without an oral hearing being conducted. The reviewing judge noted that the record confirmed that the Committee had before it a considerable amount of correspondence from both the Appellant and Ms. van Driel regarding the controversy surrounding the scheduling of the ill-fated settlement conference.

[51] It is worthy of note that neither the Appellant nor Ms. van Driel were given the opportunity to be heard by the Committee during the exercise of its screening function under the *Act*. In the end the focus of the Committee's review was on the nature of the conduct by Ms. van Driel at the Family Division with regard to her availability to attend the conference within the original time frame suggested by the court staff, which included a statement to the effect that if the settlement conference date was not changed there would be no one present "from Ms. Aylward's side".

[52] The Committee in its statutory role was entitled to assess the seriousness of the allegations of "conduct unbecoming" made by the Appellant against Ms. van Driel and to determine the sufficiency of its letter of caution based on the information it garnered from the written submissions it received. The Committee was comprised of two lawyers who are members of the Law Society and a lay benchler. It was capable of making the kind of screening assessment mandated by the *Act* regarding allegations

made by members of the general public or other members of the Law Society regarding the conduct of individual lawyers.

(vii) Reasonableness of the Committee's Decision to Dismiss a Complaint of Collusion

[53] The Trial Division judge found that the Committee's dismissal of the Appellant's complaint about alleged collusion by Ms. van Driel with Justice Noonan regarding the entitlement of the Appellant's former spouse to certain matrimonial property was justified. He noted further that the Appellant had focused his complaint initially against Justice Noonan by submitting a written complaint to the CJC and forwarding a copy to the Law Society. When the complaint was dismissed by the CJC, the Appellant did not take any further steps to focus the Committee on an amended complaint of collusion against Ms. van Driel.

[54] The review of the complaint and the record led to a finding by the Trial Division judge that the dismissal by the Committee was reasonable given the decision of the CJC to dismiss the complaint against Justice Noonan in a detailed set of reasons. He held that the Committee would have had no basis to proceed with a complaint against Ms. van Driel given the lack of evidence against Justice Noonan and the requirement of mutuality of conduct to meet the legal determination of "collusion."

[55] The reviewing judge also found that there was no direct or circumstantial evidence which would support a finding of collusion. At best, one would conclude that even if any erroneous statements of the law regarding matrimonial entitlement were uttered by Ms. van Driel or Justice Noonan, this would have occurred during a non-binding settlement conference in which a legally trained spouse, the Appellant, willingly participated.

COSTS

[56] In the first decision which contained mixed results for the parties, there was an order that each party bear their own costs. The second decision regarding the dismissal of the appeal by the Appellant arising from the finding by the CJC that there was no collusion, resulted in an award of party-and-party costs in favour of the Law Society. I find no error on the part of the Trial Division judge in reaching this decision. In the result, the appeal is

dismissed with costs in this Court on column III of the Scale of Costs, with the costs orders below to remain.

[57] This Court finds that the reviewing judge:

- (i) did not err in finding that a reasonableness standard applied to judicial review of the decision of the Committee to caution Ms. van Driel;
- (ii) did not err in finding that the Appellant was entitled to a right of appeal from the decision of the Committee to dismiss his complaint of collusion based on application of a reasonableness standard;
- (iii) did not err in declining to set aside the Committee's decision to caution Ms. van Driel without conducting a hearing;
- (iv) did not err in dismissing the appeal of the Committee's decision rejecting the allegation of collusion against Ms. van Driel; and
- (v) did not err in his award of party-and-party costs against the Appellant limited to the dismissal of the collusion in the second decision.

[58] In the result the appeal is dismissed. The Law Society shall be entitled to party-and-party costs in this Court to be taxed based on column III of the scale of costs.

M. F. Harrington J.A.

I Concur: _____

B. G. Welsh J.A.

Concurring Reasons by Rowe J.A.

[59] I concur in the reasons and the result as set out by my brother Harrington. I would add a few words in *obiter*.

[60] There were two complaints against Ms. van Driel, one relating to the postponement of the settlement conference, the other a far more serious allegation of “collusion” with a judge of the Family Division. I would underline the distinction between the two complaints:

(1) there was evidence of a want of professional courtesy in the complaint relating to the postponement of the settlement conference, whereas there was a bald allegation of “collusion” with the Family Division judge; and

(2) the postponement of the settlement conference gave rise to a caution from the Law Society, whereas the potential sanction for “collusion” with a judge would be disbarment.

[61] This decision ends four years in which Ms. van Driel’s personal and professional integrity was placed in issue by the allegation of “collusion”. The decisions respecting this allegation by the Law Society, the Trial Division and, now, of this Court should be seen as vindication of Ms. van Driel.

M. H. Rowe J.A.