

Medical Profession Legislation for the Northwest Territories

A Discussion Paper

**Prepared for the Department of Health and Social Services,
Government of the Northwest Territories**

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The recommendations and view within the Discussion paper are not necessarily that of the HSS or the Steering Committee, but have been prepared by Field LLP and are intended for the purpose of stimulating discussion and eliciting feedback.

I. INTRODUCTION

The *Medical Profession Act*, R.S.N.W.T. 1988, c. M-9, [the *MPA*] was enacted in its current form in 1983 as the *Medical Profession Ordinance*, O.N.W.T. 1983(1), c. 10, in force on Royal Assent on March 9, 1983. There has been a medical profession statute in the NWT since at least 1885.

There have been minor amendments to the Act since 1983. In 1984, the registration provisions for the Medical Register were altered slightly. In 1985, amendments were made reflecting the fact that the Government of the NWT had become a true legislative assembly. In 1991, the *MPA* was amended to include the President's ability to appoint an investigator after receiving a complaint. Finally, in 2002, there were a number of amendments with respect to the appointment of alternative members to the Medical Registration Committee.

There have also been minor housekeeping amendments to the statute in 1995, 1997, 1998 and 2006, amendments to recognize reorganizations in government departments in 1995 and 1998, and consequential amendments made as a result of the enactment of the *Midwifery Profession Act* in 2003. In the early 1990s, the responsibility for the *MPA* transferred from the now-disbanded Department of Safety and Public Services to the Department of Health and Social Services. At that time, a major initiative arose to consider amendments to the *MPA* to establish a self-funding and completely self-regulating independent "college" structure. These proposals were shelved in 1995, due in part to the recognition of the Medical Association and its members that to sustain such a structure would require great financial and time commitments from a very small group of resident physicians, (approximately 50 at that time).

Although some may presume by virtue of the lack of a college structure that the medical profession is not independent in the NWT, the reality is that the regime under the *MPA* represents a hybrid regulatory and licensing model not seen elsewhere in Canada, but seemingly well-suited to the unique circumstances of the NWT. For instance:

- The Medical Registration Committee is largely composed of physicians nominated by the NWT Medical Association. While the HSS's Registrar performs the administrative tasks of issuing the licenses and maintains the financial and other records to support the Committee's activities, it has minimal involvement in the actual work of the Committee.
- The discipline functions are undertaken independently of the HSS by a panel of physicians. The Board of Inquiry retains independent legal counsel that also supports the College of Physicians and Surgeons of Alberta. Again, while the HSS does not involve itself in the investigations or hearings, it supports these functions administratively and financially. In reality, there are only a few complaints received each year.

- This hybrid structure has resulted in NWT licence costs are among the lowest in Canada. The Medical Registration Committee can turn around a complete licence application in just a matter of days, which compares favourably to the potential 6-8 weeks at some large southern colleges. The Medical Registration Committee reviewed 174 applications in 2006. 121 of these were for a medical license. On April 1, 2007, there were 326 physicians licensed in the NWT.

Some physicians may be interested in pursuing the establishment of a regulatory college structure. It should be recognized, however, that the number of resident physicians in the NWT remains at the mid-1990 levels, approximately 50 physicians. As a result, Field LLP has not reviewed the cost and time factors involved in establishing a regulatory college, but instead presented options to strengthen the existing regulatory model by supporting and protecting independent decision-making by physician peers.

The Department of Health and Social Services, [HSS], of the Government of the Northwest Territories, [NWT] has recognized that the *MPA* requires updating to reflect the current legal and social environment of the medical profession in the NWT and elsewhere.

The discussion paper is intended to elicit feedback and commentary and to propose recommendations on certain issues.

II. METHODOLOGY

The *MPA* amendment project was initiated by the HSS as a result of comments made or concerns raised by various stakeholders. The steps that have been taken to date include:

- Field LLP met with the Steering Committee and they identified individuals or groups to interview as part of the initial scoping exercise.
- Field LLP conducted interviews with the identified individuals to ascertain their opinions and experiences with such areas as the registration and disciplinary processes of the *MPA*, among other issues.
- Field LLP reviewed other NWT professional legislation to identify how other professional bodies in the NWT have dealt with the relevant issues.
- Field LLP reviewed medical professional legislation from other jurisdictions to identify how other medical professional bodies have dealt with the relevant issues.
- Field LLP produced a detailed outline of the Discussion Paper to facilitate feedback from the HSS.
- Field LLP prepared this discussion paper, which will be circulated for feedback and consideration by the HSS and the Steering Committee as well as other stakeholders in the process.

FUTURE STEPS

- HSS and the Steering Committee and Field LLP will consider the feedback with respect to the Discussion Paper.
- Field LLP will assist the HSS to prepare a legislative proposal and drafting instructions, based on the decisions that result from the above steps.

III. CONSULTATION PROCESS

After meeting with members of the Steering Committee, Field LLP's Project Team met with stakeholders and other individuals identified as having particular knowledge or expertise in relation to the medical profession. The purpose of the consultations was to obtain feedback and direction regarding the limitations associated with the current legislation, areas that should be addressed in the amendments, and issues for consideration. The organizations and individuals who were consulted are listed below:

- Jeanette Hall, Registrar
- Dr. John Morse, former Medical Director of Stanton Territorial Health Authority
- Dr. Martin Atkinson, President of the Board of Inquiry
- Craig Boyer, legal counsel, Board of Inquiry
- Dr. Trevor Theman, Registrar, and Dr. Bryan Ward, Deputy Registrar, College of Physicians and Surgeons of Alberta
- The Canadian Medical Protective Association
- **Steering Committee**
 - Dr. John Morse
 - Dr. Don Giovanetto
 - Dr. Bing Guthrie
 - Dr. Chuck MacNeil
- **NWT Medical Registration Committee**
 - Jeannette Hall (Registrar)
 - Nicole Chatel, (physician)
 - Theresa Hansen, (physician)
 - Theresa Farrell, (physician),
 - Pat Winter, (layperson),
 - Jean Gagnon, (Department of Health and Social Services representative)

IV. THE CURRENT *MEDICAL PROFESSION ACT* AND REGULATIONS

A. The Act and Regulations

The *MPA* is comprised of six basic parts: Interpretation; Registration and Licensing; Discipline and Removal; Practice of Medicine; Offences and Punishment; and Regulations.

The Interpretation section, s. 1, is relatively brief, and defines fifteen terms, including “chairperson”, “medical practitioner”, “licence”, “permit”, and “practise medicine”.

Registration and Licensing

The provisions addressing Registration and Licensing, ss. 2-18, establishes the Medical Registration Committee, its composition, and its duty to review and decide on

applications for licensing and registration. To practise medicine in the NWT, a medical practitioner must be registered by, and hold a licence or permit from, the Medical Registration Committee.

The Minister is required to keep three separate registers, the Medical Register, the Education Register, and the Temporary Register. There is no express requirement or power to designate a Registrar, although there are references to a Registrar further in the Act.

The Medical Register is divided into two parts, Part One (for general or family practitioners), and Part Two, (for specialists in a branch of medicine).

The qualifications for registration in Part One of the Medical Register is the production of evidence satisfactory to the Medical Registration Committee that:

- a) they are registered or eligible as a medical professional in a province;
- b) they hold a Licentiate of the Medical Council of Canada;
- c) they have undertaken an internship, residency or other training or experience acceptable to the Medical Registration Committee for Part One registration;
- d) they are the person referred to in the evidence produced;
- e) they are of good character; and
- f) they have not been struck from the register of any college of physicians and surgeons, or suspended for disciplinary reasons from the privileges of a medical practitioner by any college of physicians and surgeons, or by any medical council or similar body in Canada or elsewhere.

The qualifications for registration in Part Two of the Medical Register is the production of evidence satisfactory to the Medical Registration Committee that:

- a) they have complied with the requirements of (a)(b)(d)(e) and (f) for Part One registration above;
- b) have undertaken an internship, residency; or other training or experience acceptable to the Medical Registration Committee for Part Two registration; and
- c) they are certified or eligible to be certified as a specialist in a province.

Furthermore, for both Part One and Part Two registration, the *Medical Profession Regulations* imparts an additional requirement upon applicants that have not received any portion of their medical training in English or at a Canadian institution to provide evidence that they are sufficiently competent and fluent in oral and written English to meet their professional obligations.

The *MPA* contains two exceptions to these qualifications. First, the Minister has the power to direct that the Registrar register an applicant in Part One of the Medical Register who does not have a LMCC if the applicant satisfies all other appropriate requirements for registration. Such registration is subject to any terms and conditions imposed by the Minister, and is registration for the purposes of the Act.

Second, for Part Two registration, the Minister can direct the Registrar to register, for a one-year period, an applicant who is not a fellow or certificated specialist of the Royal College of Physicians and Surgeons of Canada if the applicant is eligible for registration in Part One, the training and experience of the applicant in a post-graduate specialty program is acceptable to the Medical Registration Committee, and if the Medical

Registration Committee believes that there are exceptional circumstances that warrant the registration and recommends registration to the Minister. Such registration is also subject to any terms and conditions imposed by the Minister, and is registration for the purposes of the Act

Accordingly, foreign-trained physicians, [FTPs], or International Medical Graduates, [IMGs], can be registered in the Medical Register if they are registered or are eligible to be registered as a medical practitioner in a province.

Registration in the Medical Register can be denied or withdrawn if a person has been convicted of an offence under the *MPA* or an indictable offence under the *Criminal Code*, (unless, in the Minister's opinion, the permit should be granted, given the nature of the offence or the circumstances under which it was committed). There is no requirement, however, for a Criminal Record Check on application.

The Education Register is for medical students, (undergraduate students at a medical school) and medical residents, (a graduate of a medical school seeking a position as an intern, resident or post-graduate training). These provisions define when and where a medical student can provide medical services, and when and where a medical resident can be appointed as an intern, resident, or engaged in post-graduate training.

The Temporary Register and Permit provisions establish the Temporary Register for those issued a temporary permit. The Minister issues these permits after recommendation by the Medical Registration Committee, upon payment of the prescribed fee, and on such terms and conditions specified by the Minister. It also provides that temporary permits are not to be issued if a person has been convicted of any offence under the *MPA* or the *Criminal Code*, (unless, in the Minister's opinion, the permit should be granted, given the nature of the offence or the circumstances under which it was committed).

There is a right of appeal to the Minister, in writing, within 30 days of any decision of the Medical Registration Committee, and the Minister's decision is final.

Discipline and Removal

The sections of the *MPA* dealing with Discipline and Removal, ss. 19-42, provide the mechanism for handling complaints made against medical practitioners. First, it defines "improper conduct" for the purposes of the *MPA*, and establishes a Board of Inquiry, consisting of President, (who must be a medical practitioner), and not less than two and no more than four other persons.

When a complaint from any person is received, the President must review it and either dismiss it, or refer it to a Board of Inquiry, unless the President is of the opinion that he or she should not or cannot adequately review the complaint. On such occasions, the President is to appoint an investigator to act in the President's place, and must refer the complaint to them. After reviewing the complaint, the investigator must report to the President in writing, with a recommendation to either dismiss the complaint or refer it to the Board of Inquiry. The President is not bound to that recommendation, but, after reviewing the report, must either dismiss the complaint or refer it to the Board of Inquiry. In any event, the *MPA* provides that whenever the President dismisses a complaint, the complainant can still insist that the President refer it to the Board of Inquiry. (In such instances, the Minister can require the complainant to pay \$1,000 for security for costs, to

be used only if the complaint is found frivolous or vexatious to defray the costs of the medical practitioner).

The Board of Inquiry then holds a hearing to inquire into the complaint. The Board of Inquiry can, on concluding its investigation, dismiss the complaint or, if it finds the person guilty of improper conduct, can order that a person be reprimanded and fined, their registration suspended or cancelled, (and their names struck from the Register for the appropriate time), or the imposition of terms or conditions upon their licence or permit as a condition of it being continued. There is an appeal to the Supreme Court from an order of the Board of Inquiry. There are also provisions for reinstatement and/or removal of suspensions upon application in specified circumstances.

Practice of Medicine

The Practice of Medicine provisions, ss. 43-47, provide that a person who does not hold a licence or permit under the *MPA* is not entitled to be paid for providing medical services, or for materials, appliances provided while rendering said services, establishes a right of recovery for reasonable charges for medical services for those persons holding a licence or permit under the *MPA*, and prohibits medical practitioners against practising medicine if their licence or permit has been suspended or cancelled. It also provides that medical practitioners who associate themselves in the practice of medicine with medical practitioners whose licence or permit has been suspended or who are not qualified to practise medicine are guilty of an offence punishable on summary conviction.

Offences and Punishment

The Offences and Punishment provisions, ss. 48-50, establish that it is an offence for anyone other than a person who holds a licence or permit under the *MPA* to practise medicine, to advertise or hold themselves out to be a medical practitioner, or to use the title “Doctor”, Surgeon” or “Physician”. (There are exceptions to the latter restriction for dentists, veterinary surgeons and other people who are entitled by reason of a degree to use the title “Doctor”).

Prosecution is by way of summary conviction. These provisions also set the possible punishments for such offences, the limitation period for prosecutions under the *MPA*, and the burden of proof, (on the accused medical practitioner).

Power to enact Regulations

Finally, the last portion of the *MPA* provides the Commissioner the authority pursuant to the *MPA* to make Regulations. There is only one Regulation that has been enacted pursuant to the *MPA*, the *Medical Profession Regulations*, R.R.N.W.T. 1990, c. M-5.

Medical Profession Regulations

The *Medical Profession Regulations* provide for additional evidence and requirements for applications for Part One and Part Two of the Medical Register, (including the requirement for both oral and written fluency in English), establishes three types of temporary permits, (the medical practice permit, the limited practice permit and the medical research permit), and the requirements and manner of application for those temporary permits, and finally, establishes the fees that are to be charged for registrations, licenses, permits, reinstatement, the amount of security for costs that a

Board of Inquiry can impose on a complainant pursuant to s. 25 of the *MPA*, and fees for certificates of standing.

Finally, there are currently no provisions allowing or restricting medical practitioners from forming professional corporations, [PCs].

The *MPA* can be viewed at www.justice.gov.nt.ca/PDF/ACTS/Medical_Profession.pdf

The *Medical Profession Regulations* can be accessed at www.justice.gov.nt.ca/PDF/REGS/MEDICAL_PROF/Medical_Profess.pdf.

B. Judicial Consideration of the *MPA*

Viswalingam v. Fort Smith Health Centre, 1993 CarswellNWT 57 (NWTCA)

The plaintiff in this case was a doctor with privileges to practice medicine at the defendant health centre. A survey team made a report that identified concerns with the plaintiff's performance of his duties at the centre and recommended that he submit to various assessments. Thereafter, a public administrator, appointed to administer the centre following the resignation of the health centre's board, requested that the plaintiff either submit to the recommended assessments or have his privileges to practice medicine revoked. The plaintiff would not comply, and his privileges were suspended.

The administrator then issued a notice of hearing under the health centre's bylaws to inquire into the plaintiff's fitness. In addition, the Minister appointed a Board of Inquiry pursuant to the *MPA* to investigate the allegations made against the plaintiff in the survey team's report.

The plaintiff commenced an action in which he sought a declaration that the report was invalid. In support of this action he also applied for interlocutory injunctions to restrain the administrator from proceeding with the inquiry under the health centre's bylaws and to restrain the Board of Inquiry from proceeding with its investigation. The applications were allowed and the health centre's board, the administrator, and the Board of Inquiry appealed to the Court of Appeal.

The appeal was allowed, and the plaintiff's applications were dismissed. Essentially, the court determined that as the proceedings against the Board of Inquiry were based on an alleged lack of jurisdiction, the plaintiff should have proceeded by way of an application for prerogative relief, not an interlocutory injunction. Further, it was held that the lower court should not have added the Board of Inquiry as a party to the action.

Bargen v. Northwest Territories (Minister of Health and Social Services), 2004 CarswellNWT 5 (NWTSC)

The applicant in this case was a medical practitioner who was licensed to practice medicine in the NWT in November of 2003. On February 5, 2004, the Minister suspended his licence pending an investigation under the *MPA* into allegations of

improper conduct. He applied to the Court to set aside the interim suspension of his licence. The Court ultimately held that there was no merit in the request to set aside the Minister's temporary suspension.

The court described the power granted to the Minister under the *MPA* to order interim suspensions as a broad discretionary power. And, since the *MPA* did not include specific factors or considerations to guide the Minister in exercising this discretion, presumably he was only constrained by the purposes and objects of the *MPA*, and could take into consideration such factors as the protection of the public, the public interest in the integrity of the profession, the nature of the allegation and the apparent strength of the evidence supporting the allegation.

The doctor also argued that the procedural steps leading to the Minister's decision were unfair to him, alleging that he was not provided with reasons for the suspension and that he was not given a copy of the complaint to the President. Although the Court found on the evidence that these arguments were not valid in this case, it does highlight the fact that the *MPA* does not include a provision requiring a copy of a complaint to be provided to the medical practitioner, which could raise an argument of unfairness or a breach of natural justice.

As there was no appeal granted from the Minister's decision, the court found that the Legislature expressed its intention to defer to the Minister's discretion.

V. LEGISLATIVE REVIEW

Field LLP's Project Team conducted a review of legislation relevant to the issues that were the impetus for the amendments, as well as other issues identified throughout the consultation process. The legislation reviewed by the Project Team included newer professional legislation from the NWT and legislation governing the medical profession in selected Canadian provinces.

Although more extensive summaries of the NWT legislation have been prepared, and are available if requested, they have not been attached as a comprehensive summary of the legislation is set out below, taking into account these issues.

1. Other Professional Legislation from the NWT

The Project Team reviewed the following professional legislation from the NWT:

1. *Architects Act*, S.N.W.T. 2001, c. 10, [*Architects Act*];
2. *Dental Profession Act*, R.S.N.W.T. 1988, c. 33, [*Dental Profession Act*];
3. *Engineering and Geoscience Professions Act*, Bill 6, (received Royal Assent on November 2, 2006 - not yet in force), [*Engineering and Geoscience Professions Act*];
4. *Midwifery Profession Act*, S.N.W.T. 2003, c. 21, [*Midwifery Profession Act*];
5. *Nursing Profession Act*, S.N.W.T. 2003, c. 15, [*Nursing Profession Act*];
6. *Pharmacy Act*, S.N.W.T. 2006, c. 24, [*Pharmacy Act*];

The legislation governing professions in the NWT demonstrates a wide range of legislative approaches to the relevant issues, as outlined below.

A. **Discipline Issues**

The Project Team has reviewed the other NWT professional legislation with respect to the issues identified with respect to the *MPA*'s discipline procedures.

(i) ***Definition of "Improper Conduct"***

Must the Conduct be Disgraceful or Dishonourable to be Misconduct?

In the *MPA*, it is arguable that the definition of "improper conduct" in s. 20(d), "engages or has engaged in conduct that is inimical to the best interests of the public or medical profession", means that there must be disgraceful or dishonest conduct before the Board of Inquiry can remove or suspend the member.

The *Dental Profession Act*, the *Engineering and Geoscience Professions Act*, the *Pharmacy Act*, the *Midwifery Profession Act* and the *Nursing Profession Act* have included within the definition of improper conduct, (or a equivalent phrase), "conduct that is detrimental to the best interests of the public or harms or tends to harm the integrity of the profession", instead of "engages or has engaged in conduct that is inimical to the best interests of the public or the medical profession" in order to ensure that a member can be removed for incompetence or neglect without any disgraceful or dishonest conduct.

Breach of Settlement Agreement included in Unprofessional Conduct?

The *Pharmacy Act* has also included those situations where a medical practitioner has "failed or refused to comply with a settlement agreement approved" under its ADR process.

Provision of medical services while disabled, including addiction or illness

The *Midwifery Profession Act* and the *Nursing Profession Act* include situations where they have provided services when their capacity to provide those services was impaired by a disability or a condition, including addiction or illness.

Criminal Conduct included in the definition?

Whereas the *MPA* includes in criminal conduct (without conviction) in its definition of improper conduct, the *Dental Profession Act*, the *Engineering and Geoscience Professions Act*, and the *Architects Act* do not refer to criminal conduct at all in the definitions of unprofessional or improper conduct. The *Pharmacy Act*, the *Nursing Profession Act* and the *Midwifery Profession Act* refer to convictions for an offence of a nature that could affect his or her practice only, (not criminal conduct *per se*).

(ii) ***Ability to Initiate Complaint Process***

Except for the *Dental Profession Act*, all of the statutes allow for a process to initiate investigations into the conduct of a member without the requirement of a formal complaint.

(iii) ***Notice to Member upon receipt of complaint***

The *MPA* does not expressly provide that physicians will receive a copy of a complaint, and neither does the *Pharmacy Act*, the *Architects Act*, or the *Dental*

Profession Act, (although for the latter two statutes, there are express provisions requiring notice to be given to members before an investigation is commenced).

The *Nursing Profession Act*, the *Midwifery Profession Act* and the *Engineering and Geoscience Professions Act* all provide for notice to the member upon receipt of a complaint.

(iv) Continuing Jurisdiction

All of the other NWT professional statutes allow complaints to be filed about former registered members in a variety of ways.

The *Pharmacy Act* defines “pharmacist” within the Discipline provisions to include former members whose licence or temporary permit expired within two years before a complaint is made.

In the *Engineering and Geosciences Professions Act*, the *Nursing Profession Act* and the *Midwifery Profession Act*, complaints can be made about former registered members if they are filed within two years after the day on which the member ceases to be registered.

In the *Dental Profession Act*, a complaint can be made against a person whose registration or licence has been cancelled or suspended under the Act, and may be dealt with within 5 years following that cancellation or suspension.

Finally, in the *Architects Act*, a complaint can be made against a person whose registration or licence or permit has been revoked or suspended within one year of the revocation or suspension.

(v) Overlapping Functions

Most of the other professional statutes in the NWT provide for a clear separation of their investigative and adjudicative processes.

For instance, the *Pharmacy Act* provides for a Complaints Officer who is responsible to review and inquire into complaints. The Complaints Officer can dismiss complaints, encourage resolution by communication, refer complaints to an alternative dispute process, or appoint a person to investigate the complaint. Ultimately, after consideration of the investigation report, the Complaints Officer can refer a complaint to a Board of Inquiry, a completely separate entity, to conduct a hearing.

This procedure is very similar to that found in the *Midwifery Profession Act* and the *Nursing Profession Act*.

In the *Architects Act*, the Council of the Northwest Territories Association of Architects establishes a Complaints Review Committee. Members on that Committee cannot also be members of Council. When complaints are referred to the Complaints Review Committee, they must designate an investigator who conducts a preliminary investigation, and reports back to the Complaints Review Committee. On receipt of that report, the Committee must either direct no further action, or direct that Council hold a hearing.

(vi) *Interim Suspensions and other Powers*

All of the statutes except for the *Architects Act* and the *Engineering and Geosciences Professions Act* allow for interim suspensions of some kind and duration to be ordered against members whose conduct is being investigated.

The *Pharmacy Act* empowers the Complaints Officer to order an interim suspension where it determines that it is necessary to protect public health or safety, and can also impose any limitations, terms or conditions on a licence or temporary permit. The suspension or imposition of terms or conditions can be appealed to the Supreme Court.

In the *Nursing Profession Act* and the *Midwifery Profession Act*, interim suspensions can be ordered, or limitations, terms or conditions can be imposed on their entitlement to practice, where it is determined that it is necessary to protect public health or safety. The suspensions are effective until the complaint is settled, dismissed or a decision rendered. The suspension or imposition of terms or conditions can be appealed to the Supreme Court.

In the *Dental Profession Act*, the Minister can suspend a person's licence or registration, or both, pending the hearing of a complaint. This suspension cannot exceed 8 weeks unless extended by a maximum of 4 weeks by a Board of Inquiry.

(vii) *Alternative Dispute Resolution*

Five of the other professional statutes include alternative dispute mechanisms within their discipline procedures; the *Architects Act*, the *Engineering and Geoscience Professions Act*, the *Midwifery Profession Act*, the *Nursing Profession Act* and the *Pharmacy Act*.

Not surprisingly, these statutes are more recent legislation. The *Dental Profession Act*, however, was enacted in 1988, prior to ADR becoming the 'mainstream' concept it is today.

(viii) *Dismissal of a Complaint if Insufficient Evidence*

All of the statutes provide the power to dismiss a complaint, (or direct that no further action be taken) prior to a full disciplinary hearing, but only the *Midwifery Profession Act*, the *Nursing Profession Act*, and the *Pharmacy Act* allow for dismissals where there is insufficient evidence of unprofessional conduct.

(ix) *Can the Complainant compel a full hearing?*

In the *MPA*, as noted earlier, if the President dismisses a complaint because, in his or her opinion, the conduct in question does not amount to improper conduct, the complainant is entitled, pursuant to s. 25(3), to require the President to refer the complaint to the Board of Inquiry in any event.

This is not a common entitlement to give a complainant. Only one other statute has similar provisions, the *Dental Profession Act* in ss. 43(2) and (3).

Notably, the newer legislation, including the *Architects Act*, the *Engineering and Geoscience Professions Act*, the *Midwifery Profession Act*, the *Pharmacy Act*, and the *Nursing Profession Act* do not provide this entitlement to a complainant.

The *Architects Act* provides an appeal to the Supreme Court to a complainant if it is ordered that no further action should be taken on their complaint.

(x) *Adjudicative Body's Processes*

Accused member cannot refuse to be examined

All of the other statutes clearly provide that a member whose conduct is the subject of a disciplinary hearing is a compellable witness, and cannot refused to be examined under oath.

Evidence by Telephone or Audiovisual Methods

The *Pharmacy Act*, the *Midwifery Profession Act*, and the *Nursing Profession Act* all provide an express power to a Board of Inquiry to allow for the receipt of evidence by telephone or audiovisual methods.

Testimony of non-resident Witness

Additionally, all of the statutes provide an ability to apply *ex parte* to a judge of the Supreme Court to make an order appointing an examiner or direct the issuing of a commission for the obtaining of the evidence of a non-resident witness.

Is the Complainant a Party?

None of the other NWT statutes provide an ability to a complainant to call, examine or cross-examine parties.

Notice and Service

The *Architects Act*, the *Pharmacy Act*, the *Midwifery Profession Act* and the *Nursing Profession Act* all contain provisions deeming good service if the registered member is given notice by registered mail to the address given on the last registration application or renewal form, and, in the *Architects Act*, this notice can also be delivered by e-mail to the e-mail address provided on the register or roll.

Reasons

Other than the *Engineering and Geoscience Professions Act*, the other Acts contain express provisions requiring written reasons that state the findings made by the adjudicative body and the reason why the findings and order were made.

Appeal does not Act as a Stay

Both the *Architects Act* and the *Dental Profession Act* confirm that an appeal of a hearing decision does not operate as a stay of the finding or order.

(xi) *Medical Examinations*

The other professional statutes examined from the NWT do not provide a power to require a member to take a medical examination within the disciplinary process.

(xii) Powers on Conclusion of Investigation or Hearing

Most of the other professional statutes include the ability to impose a wider range of sanctions than that in the *MPA*, such as requirements to take a particular course of study, see s. 47(2) of the *Nursing Profession Act*, s. 32(2) of the *Midwifery Profession Act*, and s. 40(2) of the *Pharmacy Act* of the NWT.

In addition, those three statutes also contain an overarching power, referred to as a “basket clause,” which permits the Board of Inquiry to “make any further or other order that it considers appropriate”.

Only the *Pharmacy Act* makes it clear that its Board of Inquiry can “do one or more of the following”, with respect to the variety of orders it can direct. This makes it clear that the various orders provided for can be used together; a reprimand and a fine, a reprimand and a suspension, for instance

(xiii) Costs of the Hearing

All of the statutes provide the power to recoup some or all of the costs of the hearing from a practitioner, and some also allow for fines, or both.

(xiv) Who Makes the Decisions on Reinstatement?

In the current *MPA*, medical practitioners who wish to have their licence or permit reinstated after cancellation or suspension apply to the Minister, (or to a judge if the order of cancellation or suspension has been appealed to a judge), who then makes the decision as to reinstatement. This is the same in the *Dental Profession Act*, (also enacted in 1988).

In the *Midwifery Profession Act* and the *Nursing Profession Act*, the Registrar can reinstate a member who has been suspended pursuant to the disciplinary process.

In the *Architects Act*, Council has the power to approve the registration of a member whose registration, licence or permit has been revoked, although it cannot approve such a registration if the member has not complied with specified conditions.

In the *Pharmacy Act*, a member can apply for a new licence after a specified period or upon fulfillment of any requirements ordered by the Board of Inquiry.

Finally, in the *Engineering and Geosciences Professions Act*, if the Board of Inquiry has suspended a practitioner’s registration for a specified period, Council can re-register that member upon application once that period has concluded. Council can also reinstate a practitioner whose licence has been terminated, but only if that member has complied with conditions of reinstatement ordered by the Board of Inquiry.

B. Registration Issues

The Project Team has reviewed the same NWT professional legislation with respect to the registration procedural issues identified in the *MPA*.

(i) *Foreign Trained Physicians and International Medical Graduates*

None of the other statutes contain provisions that expressly consider or allow international medical graduates.

(ii) *Ministerial Involvement in the Registration Process*

None of the other professional statutes examined have the extensive Ministerial involvement in the registration process as contained in the *MPA*.

(iii) *Appeals from Refusals to Register*

Only the *Dental Profession Act* contains an appeal from a refusal to register to the Minister like that contained in the *MPA*.

In the *Engineering and Geosciences Professions Act*, an appeal from a refusal to register is to the Council of the Northwest Territories Association of Professional Engineers and Geoscientists, and then to the Supreme Court.

The *Architects Act*, and the *Midwifery Profession Act* both contain an appeal for refusals of registration to the Supreme Court. The *Nursing Profession Act* has an internal appeal process, and then an appeal to the Supreme Court

There is no ability in the *Pharmacy Act* to appeal refusals of registration.

(iv) *Professional Corporations, [PCs]*

Only two other professional statutes in the NWT allow for the establishment of PCs, the *Architects Act*, and the *Dental Profession Act*.

Section 29 of the *Architects Act* addresses the formation of a “firm” which requires a permit in order to practice in the area of architecture. This section also states that if the “firm” is a corporation, a permit will not be issued unless certain requirements are met. For example, it must be registered pursuant to the NWT *Business Corporations Act* and the function of the corporation must be to engage in the practice of architecture.

Section 25-35 of the *Dental Profession Act* provide for the ability of dentists to register a PC that meets the rules and requirements as set out in those sections.

(v) *Criminal Reference Checks*

The other NWT professional regulatory statutes do not expressly require criminal record checks for registration or licensing in the statute itself, although some have a ‘good character’ requirement like that contained in the *MPA*.

(vi) *Education Register*

The other professional regulatory statutes from the NWT are not relevant to the issues identified with respect to the *MPA*’s education register, i.e. that it does not reflect the distinction in experience and training between medical student and medical residents,

especially with reference to prescribing drugs or signing any documents that require the signature of a duly qualified medical practitioner.

(vii) *Other Registration Issues*

Registration procured through False or Fraudulent Representation

The *Architects Act* provides that a person who willfully procures registration, a licence or permit through false or fraudulent representation (and every person who knowingly aids or assists that person) is guilty of an offence and liable on summary conviction to a fine not exceeding \$5,000.

Who makes decisions on Renewals of Registration?

In the *Pharmacy Act*, the *Midwifery Profession Act*, and the *Nursing Profession Act*, the Registrar makes decisions on applications for simple renewals made before the expiry of a certificate of registration.

In the *Engineering and Geoscience Professions Act*, Council makes decisions on applications for simple renewals made before the expiry of a certificate of registration.

In the *Dental Profession Act*, renewal upon application to the Registration Committee is provided for upon payment of the fee unless the person's licence or registration has been cancelled, suspended or expired.

In the *Architects Act*, if a member's registration in the NWT has been discontinued for more than 5 years, Council can require that person to pass examinations or courses of study or obtain experience before being registered.

C. Unauthorized Practice and Injunctions

The *Architects Act*, the *Engineering and Geosciences Professions Act* and the *Pharmacy Act* provide the ability to apply to the Supreme Court for an injunction enjoining a person from contravening the unauthorized practice provisions to prevent further unauthorized practice.

D. Telehealth

No other professional legislation in the NWT that we reviewed referred expressly to practicing by telehealth or the requirement of those practitioners to register in the NWT.

2. Medical Profession Legislation from Other Canadian Jurisdictions

The Project Team also reviewed medical profession legislation from the following Canadian jurisdictions: Alberta, Ontario, Newfoundland & Labrador, Nova Scotia and the Yukon.

1. Alberta: *Medical Profession Act*, R.S.A. 2000, c. M-11 and *Health Professions Act*, R.S.A. 2000, c. H-7, [the *HPA*];
2. Ontario: *Medicine Act, 1991*, S.O. 1991, c. 30 and Schedule 2 of the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18, the Health Professions Procedural Code, (to be amended by Bill 171, which received Royal Assent on June 4, 2007);
3. Newfoundland & Labrador: *Medical Act*, S.N.L. 2005, c. M-4.01;

4. Nova Scotia: *Medical Act*, S.N.S. 1995-96, c. 10 and the *Medical Professional Corporations Act*, S.N.S. 1995-96, c. 11;
5. Yukon: *Medical Profession Act*, R.S.Y. 2002, c. 149;

Although more extensive summaries of the legislation have been prepared, and are available if requested, they have not been attached, as a comprehensive summary of the legislation is set out below taking into account the relevant issues.

The Project Team has reviewed the professional legislation with respect to the relevant issues as discussed above. The nature of the legislation varies significantly from jurisdiction to jurisdiction. However, some of the key similarities and differences amongst the various legislative enactments are noted below.

In these five jurisdictions, medicine is a self-regulating profession, and the legislation is administered by a Council or a College that is statutorily mandated to oversee and implement the governing legislation.

In the majority of provinces, there is essentially one Act that governs medical practitioners. In Alberta, the statute currently in force is the *Medical Profession Act*, R.S.A. 2000, c. M-11, however, it is expected that the *Health Professions Act*, R.S.A. 2000, c. H-7, [the *HPA*] will soon apply to physicians, which will result in the *Medical Profession Act* being repealed. Therefore, for the purpose of this Discussion Paper, we have focused our attention on the provisions in the *HPA*.

In Ontario, there are two statutes applicable to medical practitioners, the *Medicine Act*, 1991, S.O. 1991, c. 30 and the *Regulated Health Professions Act*, 1991, S.O. 1991, c. 18, which includes in Schedule 2 the Health Professions Procedural Code, [the *HPPC*].

Notable provisions contained in the legislation reviewed include the following:

A. Discipline Issues

(i) *Definition of “Improper Conduct”*

Must the Conduct be Disgraceful or Dishonourable to be Misconduct?

In the *MPA*, it is arguable that the definition of “improper conduct” in s. 20(d), “engages or has engaged in conduct that is inimical to the best interests of the public or medical profession”, means that there must be disgraceful or dishonest conduct before the Board can remove or suspend the member.

- Alberta: s. 1(1)(pp) of *HPA* specifically provides that conduct does not have to be disgraceful or dishonourable to be unprofessional conduct;
- In Ontario, while professional misconduct is defined to include conduct that is disgraceful, dishonourable or unprofessional, it is clear that the acts of professional misconduct listed there and in the *HPPC* are not mutually exclusive, that is, a member can be removed for conduct that is not disgraceful or dishonourable.

Breach of Settlement Agreement included in Unprofessional Conduct?

- In Alberta, a failure or refusal to comply with an approved settlement agreement through ADR is included in the definition of unprofessional conduct.

Provision of medical services while disabled, including addiction or illness

- In all of the other jurisdictions except Newfoundland & Labrador, it can be implied or express that practising medicine while incapacitated or disabled, including addiction or illness, constitutes unprofessional conduct.

Criminal Conduct included in the definition?

- Criminal conduct is only included in the definition of unprofessional conduct in Ontario and Nova Scotia, and only upon a conviction or contravention of a law if relevant to the member's suitability to practice.

(ii) Ability to Initiate Complaint Process

In every other jurisdiction there is an ability given to an entity in the disciplinary scheme to either initiate a complaint, or treat information as a complaint.

(iii) Notice to Member upon receipt of complaint

Only Ontario expressly provides that an accused registered member should receive notice of a complaint within 14 days of its receipt. In the Yukon, Newfoundland & Labrador, and Nova Scotia, there are express provisions for notice later in the disciplinary process, (prior to or after an investigation into the complaint).

(iv) Continuing Jurisdiction

Only the Yukon does not expressly give jurisdiction over former registered members. Newfoundland & Labrador expressly ensures jurisdiction over former registered members. The statutes in Alberta, Nova Scotia and Ontario, however, make it clear that the disciplinary process is applicable to both former registered members and those members that choose to resign during an investigation or hearing into their conduct.

(Currently in Ontario, the *HPPC* provides that a person whose certificate or registration is revoked or who resigns as a member continues to be subject to the jurisdiction of the College for professional misconduct proceedings referable to the time when the person was a member. Bill 171 will amend that to include those members whose registration expires as well.)

(v) Overlapping Functions

None of the other jurisdictions allow for overlapping investigative and adjudicative functions. In Alberta, the *HPA* specifically provides a "bias prevention" provision in s. 71, providing that "any person that has investigated, reviewed or made a decision on a complaint or matters relating to a complaint may not subsequently sit as a member of council, tribunal or committee while it is holding a hearing or a review with respect to that complaint".

(vi) Interim Suspensions and other Powers

All of the other jurisdictions provide for interim suspension powers to some degree.

(vii) *Alternative Dispute Resolution*

Alberta, Nova Scotia and Newfoundland & Labrador's legislation contain alternative dispute resolution processes. The Yukon does not. Bill 171, given Royal Assent on June 4, 2007, will amend the HPPC to permit the use of ADR with respect to a complaint in Ontario.

(viii) *Dismissal of a Complaint if Insufficient Evidence*

Alberta and the Yukon both include provisions allowing a body to dismiss a complaint solely because there is insufficient evidence to substantiate a complaint. In Nova Scotia, an Investigation Committee can simply "dismiss a complaint". Accordingly, it is arguable that a complaint could be dismissed for insufficient evidence.

(ix) *Can the Complainant compel a full hearing?*

None of the other statutes allow a complainant to compel a full hearing upon dismissal. (In Ontario, a complainant has a right to make written submissions within 30 days after receiving a notice from the Investigation Panel that it intends to take no action with respect to the complaint, but if the panel remains satisfied that it was frivolous, moot, vexatious, made in bad faith or otherwise, an abuse of process, the panel will not take action.)

(x) *Adjudicative Body's Processes*

- The legislation in the Yukon, Nova Scotia and Alberta provides the various entities charged with hearing disciplinary matters with the ability to continue in the absence of an accused practitioner on proof of proper service.
- Nova Scotia and Alberta expressly allow an investigative or hearing body to investigate new matters that come to its attention during the investigation or hearing.
- All of the other statutes clearly provide that a member whose conduct is the subject of a disciplinary hearing is a compellable witness, and cannot refuse to be examined under oath.
- No other statute expressly allows evidence to be admitted by telephone or audiovisual method.
- Only Alberta expressly allows the ability for evidence from a non-resident to be gathered by a commission upon an application to court.
- None of the statutes expressly allow the complainant to call evidence, examine or cross-examine other witnesses, (although in Ontario, the hearing panel has the power to grant that ability to a complainant, and in the Yukon, the complainant has the power to present argument).
- All the statutes contain a provision deeming good service to the investigated member to be by registered mail to the member's address as set forth in the applicable register.

- All but the Yukon have a requirement for the hearing body to produce written reasons of its decision.
- In all Acts, an appeal of a discipline decision does not act as a stay, (although there are varying ways that a stay can be granted upon application).

(xi) *Medical Examinations*

All of the statutes allow an entity to order a registered member to undergo physical or mental examinations. In Alberta, a failure or refusal to comply is defined as “unprofessional conduct”. In Nova Scotia and Newfoundland & Labrador, the hearing committee can suspend a member if they refuse to comply.

In Ontario, a hearing panel charged with determining if a member is incapacitated can order a physical or mental examination, and, can make an order directing the Registrar to suspend the member’s certificate until he or she submits to that examination.

In the Yukon, while the Council can require a member to undergo any examinations it considers appropriate, there is no express power to suspend or penalize a member if they do not submit or comply with that order.

(xii) *Powers on Conclusion of Investigation or Hearing*

Alberta’s *HPA* has the clearest provisions with respect to the adjudicative body’s powers to “make one or more of the following orders” and “any order that the hearing tribunal considers appropriate for the protection of the public”.

In the Yukon, it is not clear that the adjudicative body can award one or more of the various remedies available, and there is no “basket clause” available to the body to make any order appropriate.

In Ontario, it is clear that the adjudicative body can award “one or more of the various orders”, but it does not have the power to make any order that it considers appropriate.

In Newfoundland & Labrador, the adjudication tribunal can expressly order one or more of the enumerated remedies, and has to power to “impose other requirements that are just and reasonable in the circumstances”

It is arguable that the Nova Scotia adjudicative body can order one or more of the different remedies, and it can definitely order “such other disposition as it considers appropriate be imposed”.

(xiii) *Costs of the Hearing*

All of the statutes except for the Yukon’s *Medical Profession Act* provide the ability to recoup all or part of the costs of the hearing. The Yukon’s *Medical Profession Act* does allow a fine of not more than \$10,000 to be imposed on a member.

In Alberta, the hearing tribunal can order the investigated physician it has found guilty of unprofessional conduct to pay all or part of the expenses, costs of and fees related to the investigation or hearing or both, including expert fees, traveling

expenses, witness fees, etc., and a maximum fine of \$10,000 per finding of unprofessional conduct, to a maximum of \$50,000.

Nova Scotia provides that costs can be ordered against a medical practitioner, which can include expenses incurred by the College, the Council, the investigation committee and the hearing committee, honoraria paid to members of the investigation committee or hearing committee, and solicitor and client costs and disbursements of the College relating to investigation and hearing of the complaint.

In Newfoundland & Labrador, the adjudication panel can order costs or a part of the costs incurred by the college in the investigation and the hearing, and impose a fine not to exceed \$10,000.

In Ontario, a panel can order the College to pay all or part of a registered member's legal costs where it finds the commencement of proceedings was unwarranted, and can also order the member who the panel finds has committed an act of professional misconduct or finds to be incompetent, to pay the College's legal costs and expenses, the costs and expenses incurred in the investigation, and incurred in conducting the hearing, (s. 53 & 53.1 of the *HPPC*).

(xiv) *Reinstatement*

All of the medical profession statutes contain reinstatement provisions after a member has been suspended through the disciplinary process. None of them, however, give that power to the Minister.

B. Registration Issues

(i) *Foreign Trained Physicians and International Medical Graduates*

Alberta, British Columbia, Manitoba, Ontario, Quebec, Nova Scotia, and Newfoundland & Labrador all have some kind of IMG Assessment programs for IMGs. Only Ontario has an assessment program for IMG Specialists. Ontario also has the only alternate route to specialist licensure, which is registration through practice assessment.

Saskatchewan had a Pilot Project Licensure Program for IMGs, but has put that on hold with the hope of restoring the program at some future time.

New Brunswick, Prince Edward Island and the Yukon have no IMG Assessment programs for medical graduates and GPs, for medical specialists, or alternate routes to specialist licensure.

A document entitled *Department of Health and Social Services, Policy and Legislation Division's International Medical Graduates - Assessment and Licensure Across Canada*, August 6, 2004, Revised June 2007, detailing the information as outlined above (and more), is available upon request.

(ii) *Ministerial Involvement in the Registration Process*

In some jurisdictions, such as Alberta, Newfoundland & Labrador and Ontario, there is really no Ministerial involvement in the registration process. In Nova Scotia and the Yukon, there is some, but very little compared to that outlined in the NWT *MPA*.

(iii) Appeals from Decisions of Refusal to Register

All jurisdictions save the Yukon provide an appeal from a refusal to register an applicant: in Newfoundland & Labrador, it is an appeal to the trial division; in Alberta, to a review panel; in Ontario, to the Health Professions Appeal & Review Board; and in Nova Scotia to Council for some applicants.

(iv) Professional Corporations

Physicians in the Yukon, Alberta, Nova Scotia, Newfoundland & Labrador and Ontario all have the ability to form professional corporations. Nova Scotia has these provisions in a separate statute. While Newfoundland & Labrador's *Medical Act* includes a provision for PCs within the Act, there is also further regulation in the *Medical Board Regulations*, C.N.L.R. 1113/96 with respect to registration in the corporate register, corporate records, corporate name, etc. for PCs.

(v) Criminal Record Checks

No other medical profession legislation expressly requires criminal record checks for registration or licensing in the statute itself, although the Yukon *Medical Profession Act* has as a requirement for registration and for re-registration where a person has left the Yukon and practiced elsewhere, that the person must produce evidence that the person is not subject to criminal charges pending in Canada.

(vi) Education Register

Medical Students and post-graduate trainees in all jurisdictions save Ontario are registered in the same register, although with distinct requirements). In Ontario, only postgraduate trainees are registered, not medical students. In Alberta, the legislation provides for a divided Educational Register for the two categories, but registration for both categories are administered through the University of Alberta and University of Calgary.

Only Newfoundland & Labrador's legislation provides for a distinction in duties and responsibilities reflecting the difference in education and training between medical students and postgraduate trainees. In its *Medical Board Regulations*, there is an ability for some postgraduate trainees to acquire provisional prescribing licences and provisional family practice training licences granting those postgraduate trainees more independence in those areas reflecting their increased experience and training.

Both the Colleges of Physicians and Surgeons in Nova Scotia and Newfoundland & Labrador also have separate policies with respect to Supervision of Undergraduate Medical Students and Postgraduate Trainees.

(vii) Other Registration Issues

Registration procured through False or Fraudulent Representation

In Yukon's *Medical Profession Act*, the Yukon Medical Council has the power to strike the name of any person from a register where registration of that person has been, in the opinion of the council, obtained by fraud, misrepresentation, or error.

In Nova Scotia and Ontario, such conduct is identified as an offence.

C. Unauthorized Practice and Injunctions

In both Nova Scotia and Alberta, there is an ability to apply for an injunction enjoining a person from contravening the unauthorized practice provisions to prevent further unauthorized practice. In the Yukon and Newfoundland & Labrador, unauthorized practice is an offence, but there is no specific provision allowing an application for an injunction. In Ontario, the College can apply to Court for an order directing a person to comply with the Act or its regulations.

D. Telehealth

In Alberta, “telemedicine” is defined in the *Medical Profession By-laws*, Alta. Reg. 129/1991, as meaning the provision of a medical service or opinion to a patient in Alberta by a physician located outside Alberta, based on information about the patient transmitted to the physician by electronic or other means. Those who are providing medical services or opinions via this method are to be registered in part 6 of the Special Register.

See www.cpsns.ns.ca/publications/telemedicine_guidelines.htm for a copy of the College of Physicians and Surgeons of Nova Scotia Guideline for the Provision of Telemedicine Services, which provides that if the College receives a complaint regarding telemedicine services provided to a Nova Scotia resident by a physician licensed in another Canadian or foreign jurisdiction, it may forward the complaint to the appropriate medical licensing authority in that jurisdiction. The College specifically excludes doctor-to-doctor consultations from the guidelines.

Ontario also has a policy at www.cpsso.on.ca/Policies/telemedicine.htm, which states that where a physician outside of Ontario that is not registered with the College of Physicians and Surgeons of Ontario provides telemedicine services to a resident of Ontario, the patient is to be properly informed that any potential complaint would need to be considered in the other jurisdiction.

While telemedicine is being used in Newfoundland & Labrador and the Yukon region, there appears to be no legislation or policy that addresses how registration or discipline procedures are affected if a physician from outside the jurisdiction provides these services.

VI. ISSUES FOR DISCUSSION

In this part, Field LLP's Project Team has outlined the issues identified and to be considered as amendments to the *MPA*.

In some instances, the Project Team has provided a recommendation regarding how the issue identified may be resolved. In other cases, the Project Team has determined that further consultation is required before making a recommendation.

A. Discipline Issues

(i) Definition of "Improper Conduct"

Question: Is the current definition of "improper conduct" sufficient?

Subsection 20(d) of the *MPA* provides:

A person registered under this Act is guilty of improper conduct if the person ...engages or has engaged in conduct that is inimical to the best interest of the public or the medical profession.

The drafter of the legislation will need to consider if it is desirable to modernize the language of the definition of "improper conduct". Whatever definition is used, we recommend that the scope of "improper conduct" in the new legislation remain the same as the current legislation.

Criminal Conduct included in the definition?

The *MPA* includes criminal conduct (without conviction) in its definition of improper conduct, it is questionable whether this is reasonable. None of the other NWT statutes or medical profession statutes reviewed include criminal proceedings without conviction in their definitions. Those statutes that refer to criminal conduct at all require a conviction if it is relevant to the member's suitability to practice. (See the *Pharmacy Act*, *Nursing Profession Act* and the *Midwifery Profession Act*, and *Ontario* and *Nova Scotia*).

We recommend the deletion of the reference to criminal conduct in s. 20(a), while retaining the provision in section 20(c) that conviction of a criminal offence is considered improper conduct.

Provision of medical services while disabled, including addiction or illness

The *Midwifery Profession Act* and the *Nursing Profession Act* include situations where they have provided services when their capacity to provide those services was impaired by a disability or a condition, including an addiction or illness. Section 2(j) of Nova Scotia's *Medical Act* includes "incompetence arising out of physical or mental incapacity" in its definition of disciplinary matter. This could be added to the definition, and is brought forward for discussion purposes.

Breach of Settlement Agreement included in Unprofessional Conduct?

Also, if an ADR process is added to the *MPA*'s disciplinary process with the capabilities of a binding settlement agreement being reached and approved, we recommend that the "improper conduct" provision should include those situations

where a medical practitioner has “failed or refused to comply with a settlement agreement approved” under that provision, see s. 21(2)(h) of the *Pharmacy Act*.

(ii) *Ability to Initiate Complaint Process*

Question: Should the President be authorized to initiate an investigation in the absence of a complaint?

What happens if the President becomes aware that a medical practitioner may be engaging in improper conduct, or conduct breaching the *MPA*, but has not received a formal complaint?

There can be instances where, although an investigation may be warranted, for privacy or other personal reasons, a person may not want to make a formal written complaint against a medical practitioner.

There is presently no ability for the President or any other entity, for that matter, to conduct an investigation in the absence of a formal complaint, even if information has been received that a medical practitioner may be engaging in improper conduct or conduct breaching the *MPA*.

Without that express power, a Board of Inquiry cannot proceed to investigate a complaint without the receipt of a formal complaint. In *Barsoum v. Northwest Territories (Pharmacy Act, Board of Inquiry)*, [1988] N.W.T.J. No. 139 (S.C.)(QL), the Supreme Court found that a Board of Inquiry did not have jurisdiction because it did not receive a formal complaint, and there was no express power in the *Pharmacy Act* at that time to investigate without a formal complaint.

All of the NWT professional statutes reviewed, except for the *Dental Profession Act*, contain a mechanism to initiate investigations in to the conduct of a member without the requirement of a formal complaint. With respect to the medical profession legislation reviewed from other jurisdictions, all contained an ability for some entity to either initiate a complaint, or treat information as a complaint.

We recommend that, in the absence of a formal complaint, when the President or another entity (Complaints Officer, etc.) has reasonable grounds to believe that a medical practitioner may be engaging in improper conduct, or conduct in breach of the *MPA*, the official be given the power to treat that information as a complaint.

Alternatively, if a Complaints Officer is designated, the *MPA* can be amended to give the Complaints Officer the ability to file a complaint to the President in the absence of a complaint.

(iii) *Notice to Member upon receipt of complaint*

Question: Does the accused medical practitioner receive a copy of a complaint?

The *MPA* does not expressly provide that medical practitioner will receive a copy of a complaint made about them. Without that express requirement, it is possible that a medical practitioner may not realize that a complaint has been made, and an investigation could be engaged before he or she ever receives notice.

For certain complaints, if a medical practitioner is notified of a complaint early enough, it is possible that it might be resolved quickly and informally, without the need to go through an expensive and time consuming investigation and hearing process.

While few of the statutes reviewed contain an express requirement for notice, (only the *Nursing Profession Act*, the *Midwifery Profession Act* and the *Engineering and Geoscience Professions Act*, and Bill 171 will add a notice requirement to Ontario's *HPPC*), we recommend that a similar requirement be added to the *MPA* to ensure fairness and a degree of comfort to medical practitioners that they will be kept reasonably informed throughout any disciplinary process.

The Complaints Director should be required to provide a medical practitioner with a copy of the complaint or reasonable particulars of the complaint.

(iv) *Continuing Jurisdiction*

Question: Would the President or Board of Inquiry be able to discipline a person who was no longer registered at the time a complaint was received, or a member who resigned after a complaint was received?

Currently, under s. 24 of the *MPA*, it is arguable that the President and Board of Inquiry would not have jurisdiction over a complaint against a medical practitioner who was no longer registered, or could lose jurisdiction if the medical practitioner resigned in the midst of an investigation.

All of the NWT professional statutes that the Project Team reviewed allowed complaints to be filed against former registered members in a variety of ways.

For instance, section 21(1) of the *Pharmacy Act* defined "pharmacist" within the Discipline provisions to include former members whose licence or temporary permit expired within two years before a complaint is made.

In the *Engineering and Geosciences Professions Act*, the *Nursing Profession Act* and the *Midwifery Profession Act*, complaints can be made about former registered members if they are filed within two years after the day on which the member ceases to be registered.

With respect to the extra-jurisdictional medical professional legislation, only the Yukon does not expressly give jurisdiction over former registered members.

Section 54(2) of Alberta's *HPA* makes it clear that a complaint is not affected by the person about whom the complaint is made ceasing to be a regulated member before the proceedings with respect to the complaint are completed.

We recommend a provision be added expressly allowing complaints to be filed respecting the conduct of a registered medical practitioner who is no longer registered to be dealt with in disciplinary proceedings if the complaint is filed within two years after the day on which the registered medical practitioner ceased to be registered, and the conduct complained of occurred while they were registered.

We also recommend a provision expressly providing jurisdiction to the President and Board of Inquiry over medical practitioners who resign their registration during an investigation or hearing, similar to s. 54(2) of Alberta's *HPA*.

(v) ***Overlapping Functions***

Question: Should the President of a Board of Inquiry have the ability to both investigate and adjudicate a complaint?

The *MPA* permits the President to be responsible for the initial investigation of a complaint and also serve as a member of a Board of Inquiry that ultimately adjudicates at the hearing. In other words, the *MPA* clearly contemplates that the President can act in both an investigative and adjudicative capacity, although the President can appoint an investigator if he or she feels they should not or cannot adequately review the complaint. In practice, however, the President currently oversees investigations but does not participate in the adjudication phase due to concerns about these overlapping functions.

According to *Barsoum v. Northwest Territories (Pharmacy Act, Board of Inquiry)*, [1988] N.W.T.J. No. 139 (S.C.)(QL), a case considering similar 'dual role' disciplinary provisions, (albeit in the pharmacy context), the overlapping of functions can be contrary to the principles of natural justice.

The *Pharmacy Act* provides clear delineation between the investigative and adjudicative roles. There is a Complaints Officer who is responsible to review and inquire into complaints. The Complaints Officer can dismiss complaints, encourage resolution by communication, refer complaints to an alternative dispute process, or appoint a person to investigate the complaint. Ultimately, after consideration of the investigation report, the Complaints Officer may refer a complaint to a Board of Inquiry, a completely separate entity, to conduct a hearing.

This procedure is very similar to that found in the *Midwifery Profession Act* and the *Nursing Profession Act*.

None of the other jurisdictions allow for overlapping investigative and adjudicate functions. In Alberta, the *HPA* specifically provides a "bias prevention" provision in s. 71.

We recommend that the *MPA* provide for a Complaints Officer in order to separate the investigative and adjudicative process.

(vi) *Interim Suspensions and other Powers*

Question: Should the President have the power to impose an interim suspension of and/or terms and conditions on a licence or permit?

Currently, the Minister can issue a suspension pending an investigation into improper conduct. The interim suspension cannot exceed a period of six weeks, [s. 42].

Should the President exercise that power instead?

As investigations into improper conduct, (or criminal prosecutions) can take much longer than 6 weeks, we recommend that there should be no express time period for an interim suspension.

Should an interim suspension power also include the power to impose it pending the outcome of criminal proceedings being taken against the member by way of indictment?

All of the other NWT statutes except for the *Architects Act* and the *Engineering and Geosciences Professions Act* allow for interim suspensions of some kind and duration to be ordered against members whose conduct is being investigated.

The *Pharmacy Act* empowers the Complaints Officer to order an interim suspension where it determines that it is necessary to protect public health or safety, and can also impose any limitations, terms or conditions on their licence or temporary permit. The suspension or imposition of terms or conditions can be appealed to the Supreme Court.

In the *Nursing Profession Act* and the *Midwifery Profession Act*, interim suspensions can be ordered, or limitations terms or conditions can be imposed on their entitlement to practice, where it is determined that it is necessary to protect public health or safety. These suspensions are effective until the complaint is settled, dismissed or a decision rendered. The suspension or imposition of terms or conditions can be appealed to the Supreme Court.

In the *Dental Profession Act*, the Minister can suspend a person's licence or registration, or both, pending the hearing of a complaint. This suspension cannot exceed 8 weeks unless extended by a maximum of 4 weeks by a Board of Inquiry.

All of the other jurisdictions provide for interim suspension powers to some degree.

It should be recognized that that the power to issue these types of suspensions are only used in the most serious of cases, when the public is potentially at risk and where the evidence is strong. Additionally, with the inclusion of an appeal process to the Court and the power to alternatively impose limitations, terms or conditions upon a licence or permit, it also includes checks and balances on the use of that power.

We recommend that the *MPA* should provide, notwithstanding anything contained in the Act, that the President may issue an interim suspension or may impose limitations, terms or conditions on a medical practitioners licence or permit pending the completion of an investigation, Board of Inquiry hearing, and pending the outcome of criminal proceedings being taken against the member by way of

indictment: see ss. 27(1)(a) & (b) of the *Pharmacy Act* and s. 65(1) of the Alberta *HPA*.

Also, the President should have the power to revoke the interim suspension where he or she feels it is appropriate; see s. 36(4) of the *Nursing Profession Act* and s. 21(4) of the *Midwifery Profession Act*.

Should this amendment be made, an appeal process to the Courts will also be required to review the use of this power, see ss. 27(3) & (4) of the *Pharmacy Act*, and 65(2) of the Alberta *HPA*.

(vii) ***Alternative Dispute Resolution***

Question: Should an alternative dispute resolution process, such as mediation, be incorporated in the *MPA* to settle disputes prior to a hearing?

Currently in the *MPA* there are no provisions for ADR prior to a full Board of Inquiry hearing.

Five of the other professional statutes in the NWT include ADR mechanisms within their discipline procedures, the *Architects Act*, the *Engineering and Geoscience Professions Act*, the *Midwifery Profession Act*, the *Nursing Profession Act* and the *Pharmacy Act*.

Not surprisingly, these statutes are all more recent legislation. Conversely, the *Dental Profession Act* was enacted in 1988, which is prior to ADR becoming a ‘mainstream’ concept.

Alberta, Nova Scotia and Newfoundland & Labrador’s legislation contain ADR processes. The Yukon does not. In Ontario, Bill 171, given Royal Assent on June 4, 2007, will amend the *HPPC* to permit the use of ADR with respect to a complaint.

In the *Nursing Profession Act*, the Chairperson of the Professional Conduct Committee can refer the complaint to an ADR process (prescribed by the bylaws) at any time after a complaint is filed, but before a hearing is complete, if the complainant and the nurse agree, and if the Chairperson believes that it is appropriate in the circumstances, [s. 37]. Also see s. 22 of the *Midwifery Profession Act*.

In s. 28 of the *Pharmacy Act*, the Complaints Officer can also refer a complaint to an ADR process at any time after a complaint is filed, but before a hearing has commenced, if the complainant and the respondent agree, if the complainant and respondent agree to comply with the procedures that apply to the ADR process, and if the Chairperson believes that it is appropriate in the circumstances.

ADR processes have also been incorporated into legislation such as Alberta’s *HPA*, and have been extremely helpful in resolving suitable complaints in an expeditious manner.

We recommend that the *MPA* should include an ability to resolve complaints by way of an ADR process, similar to that employed in s. 28 of the *Pharmacy Act*.

In addition, an undertaking process is also used by the College of Physicians and Surgeons of Alberta [the CPSA] for some complaints. Essentially, the Complaints Director of the CPSA is able to resolve some complaints without a formal mediation

or complaint/hearing process, through an undertaking with the medical practitioner to do or not do certain things. This has proven to be an efficient and cost-effective resolution process for those complaints that do not really require either mediation or an investigation/hearing.

We also recommend an undertaking process similar to that used by the CPSA be made available as an option for the Complaints Director under the *MPA*.

(viii) *Dismissal of a Complaint if Insufficient Evidence*

Question: Could the President dismiss a complaint if there was insufficient Evidence?

Currently, it is arguable that the President could not dismiss a complaint if there was insufficient or no evidence, but only where he or she is of the opinion that the conduct in question does not amount to improper conduct, [ss. 25(1.1)(a)(i) & (1.4)(a)].

Within the NWT statutes considered, all of the statutes provide the power to dismiss a complaint, (or direct that no further action be taken) prior to a full disciplinary hearing, but only the *Midwifery Profession Act*, the *Nursing Profession Act*, and the *Pharmacy Act* allow for dismissals where there is insufficient evidence of unprofessional conduct.

Alberta and the Yukon both include provisions allowing a body to dismiss a complaint solely for insufficient evidence to substantiate the complaint. In Nova Scotia, an Investigation Committee can simply “dismiss a complaint”, so it is arguable that a complaint could be dismissed for insufficient evidence.

We recommend that the President be given the ability in ss. 25(1.1) and (1.4) to dismiss a complaint if there is insufficient or no evidence to support a finding of improper conduct.

(ix) *Can the Complainant compel a full hearing?*

Currently, if the President has determined after an investigation that a complaint should be dismissed, a complainant can compel the President to refer the complaint to a Board of Inquiry, [s. 25(3)].

None of the other medical profession statutes considered allow a complainant to compel a full hearing upon dismissal. (In Ontario, a complainant has a right to make written submissions within 30 days after receiving a notice from the Investigation Panel that it intends to take no actions with respect to the complaint, but if the panel remains satisfied that it was frivolous, moot, vexatious, made in bad faith or otherwise, an abuse of process, the panel will not take action).

Within the NWT statutes reviewed, only the *Dental Profession Act* in ss. 43(2) and (3) contains a similar provision. Notably, the newer legislation, including the *Architects Act*, the *Engineering and Geoscience Professions Act*, the *Midwifery Profession Act*, the *Pharmacy Act*, and the *Nursing Profession Act* do not provide this entitlement to a complainant.

The *Architects Act* provides an appeal to the Supreme Court to complainant on the dismissal of their complaint.

We recommend that the provision giving the complainant the power to compel a full hearing should be removed.

An ability to appeal the dismissal of a complaint after an investigation to the Supreme Court can be provided, similar to that in s. 43(2) of the *Architects Act*, or alternatively, a review of the dismissal of a complaint by another administrative entity can be provided, such as in s. 68 of the Alberta *HPA*.

Note that, currently, the *MPA* gives the Minister the authority to request a prescribed sum as security for the cost of the investigation where the complainant has forced a Board of Inquiry hearing pursuant to s. 25(3). We recommend that this authority to order security for costs be removed if the power to force a Board of Inquiry hearing is removed.

(x) ***Board of Inquiry's Processes***

Question: Are a Board of Inquiry's Processes Adequate?

Medical Practitioner cannot refuse to be examined

Although s. 29 provides that an accused medical practitioner is a compellable witness, it is not clear that he is a "witness" in s. 30, in that he or she cannot refused to be examined under oath. We recommend that this be made clear. See s. 49(1)(2) of the *Architects Act* and s. 46(2) of the *Nursing Profession Act*.

Receipt of Evidence by Other Methods

As noted, s. 37(2) of the *Pharmacy Act*, (as well as the *Midwifery Profession Act* and the *Nursing Profession Act*), provides an express power to a Board of Inquiry to allow for the receipt of evidence by telephone or audiovisual methods.

We recommend that s. 28 of the *MPA* should be amended to ensure that the Board of Inquiry has the ability to receive evidence by audiovisual methods, or, if all parties agree, by telephone.

Testimony of non-resident

Like all other NWT statutes reviewed, for the purpose of obtaining the testimony of a witness who is outside the NWT, the Board and the medical practitioner should have the ability to apply *ex parte* to a judge of the Supreme Court for an order appointing an examiner for the obtaining of the evidence of the witness; see s. 38(5) of the *Pharmacy Act*.

New Matters

Some jurisdictions such as Nova Scotia and Alberta expressly allow the investigative or hearing body to investigate new matters that come to its attention during the investigation or hearing.

We recommend that the Complaints Officer and Board of Inquiry be given this power.

Ability to proceed with Hearing

The medical profession legislation in the Yukon, Nova Scotia and Alberta provide the various bodies charged with hearing disciplinary matters the ability to continue in the absence of an accused practitioner on proof of proper service

We recommend that the Board of Inquiry be given the ability to proceed with a hearing in the absence of an accused medical practitioner on proof of service of the notice of the hearing, see s. 35(9) of the *Pharmacy Act*, s. 46 of the *Architects Act*, and s. 43(6) of the *Nursing Profession Act*.

Complainant should not be a Party

Section 34 should be amended to remove the ability of a complainant to call, examine or cross-examine parties. This power is not seen in any other statutes reviewed.

Natural Justice

Section 36 provides that a Board of Inquiry shall conduct its proceedings in accordance with the rules of natural justice. Is this necessary given that there is already a requirement that hearings be conducted in a procedurally fair manner? We suggest all that is needed is a provision stating, “Subject to this Act, a Board of Inquiry may establish rules of procedure respecting the conduct of hearings”; see s. 45(5) of the *Architects Act*.

Deemed Service

We recommend that the *MPA* include a provision deeming good service if the medical practitioner is given notice by registered mail to the address or e-mail address given on the last registration application or renewal form. See s. 57(2)(c) of the *Architects Act* and s. 44(2)&(4) of the *Pharmacy Act*.

Reasons

There should there be an express provision requiring written reasons that state the finding made by the Board and the reason why the findings and order were made; see s. 51(2) of the *Architects Act*.

Appeal does not act as a stay

There is currently a provision to appeal the Board’s decisions to the Supreme Court in s. 40. We recommend adding a express provision outlining that an appeal to the Supreme Court does not operate as a stay of the finding or order of the Board, but that the Supreme Court can order a stay, in whole or in part, on the terms it considers reasonable until the appeal is decided; see s. 55 of the *Architects Act*.

(xi) Medical Examinations

Question: What would happen if a medical practitioner refused to undergo a medical examination requested by a Board of Inquiry under s. 27?

In an investigation, while a Board of Inquiry can require a medical practitioner to undergo a medical examination, (s. 27), there is no provision which considers what the Board could do if the medical practitioner refused to do so.

The other professional statutes examined from the NWT do not provide the power to require a member to undergo a medical examination as part of the disciplinary process.

All of the other medical profession statutes allow an entity to order a registered member to undergo physical or mental examinations. In Alberta, a failure or refusal to comply is defined as “unprofessional conduct”. In Nova Scotia and Newfoundland & Labrador, the hearing committee can suspend a member if they refuse to comply.

In Ontario, a hearing panel charged with determining if a member is incapacitated can order a physical or mental examination, and, can make an order directing the Registrar to suspend the member’s certificate until he or she submits to that examination.

In the Yukon, while the Council can require a member to undergo any examination it considers appropriate, there is no express power to suspend or penalize a member if they do not submit or comply with that order.

We recommend that a Board of Inquiry be given the power to suspend a medical practitioner if he or she refuses to comply with an order to undergo a medical examination.

(xii) Powers on Conclusion of Investigation or Hearing

Question: Are a Board of Inquiry’s Powers on the Conclusion of its Investigation broad enough?

Currently, if a Board of Inquiry determines that a medical practitioner is guilty of improper conduct or has contravened the *MPA*, its powers in s. 38(1) include a reprimand and a fine, cancellation or suspension of the medical practitioner’s licence or permit, or the attachment of any conditions or terms to a licence or permit including limitations on the practice of medicine or a requirement for treatment in an alcohol or drug program.

The wording of that provision could be interpreted to be mutually exclusive, in that the Board could order a reprimand and fine, but could not also order the attachment of terms and conditions to the medical practitioner’s licence.

It should be made clear that “On concluding the hearing, the Board of Inquiry may “make one or more of the following orders”.

We also recommend that a Board of Inquiry’s powers should include the ability to impose a wider range of sanctions, such as a requirement to take a particular course of study, (see s. 47(2) of the *Nursing Profession Act*, s. 32(2) of the *Midwifery Profession Act*, and s. 40(2) of the *Pharmacy Act*), as well as a “basket clause” to “make any further or other order that it considers appropriate”.

(xiii) *Costs of the Hearing*

Question: Should a Board of Inquiry have the power to order that a medical practitioner found guilty of improper conduct pay costs of the hearing?

Currently, pursuant to s. 38(2) of the *MPA*, a Board of Inquiry can only order costs calculated in accordance with tariff of the Rules of the Supreme Court, which would generally yield costs that are approximately only 20% of the actual costs of a hearing.

All of the NWT professional statutes that were reviewed provide a power to recoup some or all of the costs of the hearing from a practitioner, and some also allow for fines, or both. For example, s. 40(3) of the *Pharmacy Act*, provides that the Inquiry Panel may order the respondent to pay (a) all or part of the costs of the hearing, (b) a fine not exceeding \$5,000; or (c) both costs and a fine.

All of the medical profession statutes except for the *Yukon Medical Profession Act* provide the ability to recoup all or part of the costs of the hearing. Again, other than the Yukon, the other jurisdictions have Colleges that are self-funded, justifying this power to recoup all of the costs of an investigation and /or hearing. The *Yukon Medical Profession Act* does allow for a fine of not more than \$10,000 to be imposed on a member due to unprofessional conduct, but this power is discretionary.

We recommend that the Board of Inquiry should retain the discretionary power to award costs calculated in accordance with the tariff of the Rules of the Supreme Court and/or a fine not exceeding \$5,000. (xiv) ***Who Makes the Decisions on Reinstatement?***

Question: Should the Minister make the decision on reinstatement of a medical practitioner after cancellation or suspension?

Currently in the *MPA*, applications for the reinstatement of a medical practitioner's licence or permit after cancellation or suspension are to the Minister, (or to a judge if the order of cancellation or suspension had been appealed to a judge), who then makes the decision as to reinstatement.

Should this role belong to the Minister, or would it be better to have this as part of the President, Medical Registration Committee's, or other entity's, responsibilities?

In the other NWT professional statutes, only the *Dental Profession Act* includes this same requirement to apply to the Minister for reinstatement. For instance, in the *Midwifery Profession Act* and the *Nursing Profession Act*, the Registrar can reinstate a member who has been suspended pursuant to the disciplinary process.

All of the medical profession statutes contain reinstatement provisions after a member has been suspended through the disciplinary process. None of them, however, give that power to the Minister.

There is no need for the Minister's involvement in reinstatement decisions. We recommend that it would be more desirable to have this power as part of another entities' responsibilities, such as the President, Medical Registration Committee, or another entity such as the Courts. The choice of which body should be responsible is an issue to be considered by the stakeholders, Steering Committee and HSS.

B. Registration Issues

(i) *Foreign Trained Physicians and International Medical Graduates*

Question: Is the current registration process for IMGs satisfactory?

Currently, to be registered in the NWT, applicants must be registered or be eligible for registration in a province, (although there is some flexibility given to the Minister in ss. 9(3) & (4) of the MPA to except other requirements for registration in Part One and Part Two of the Medical Register). This shifts the assessment process of IMGs from the NWT to the provinces, which, it is recognized, generally have greater capacity to conduct such assessments. However, it is recognized that there are recruitment challenges facing employers of medical practitioners in the NWT. Some of those consulted are of the view that it would be beneficial if the requirement for provincial registration was removed.

Some of the issues associated with licencing IMGs who are not licenced or are not eligible to be licenced in a province include:

- Assessment of Credentials - this assessment needs to include an evaluation of an IMGs' academic institution in addition to the individual's performance at that institution. These assessments have to be undertaken independently, are expensive, and often require significant expertise from medical school faculty members who have experience in this area.
- Assessment of the Individual - for instance, with respect to the requirement for "good character", criminal record checks may be impossible to obtain and reference letters from colleagues may be difficult to evaluate. With candidates that have lived in Canada for many years but have not been able to obtain a licence in other jurisdictions, there is also a potential problem of the length of time out of practice.
- Many candidates need additional university courses or medical residency programs to meet Canadian standards of practice. Access to these programs is expensive and may be difficult for the GNWT to provide.
- Strict supervision is a restrictive licence condition that could apply in the NWT to an IMG, but that condition is difficult to impose in clinics as they are largely staffed by locum physicians on short-term stints.
- The Medical Registration Committee has expressed its view that its members do not have the time or the expertise to take on these additional assessment functions.
- This kind of initiative would be costly.

One option could be to amend the *MPA* to permit registration through practice assessments, (without the need for the individual to be registered or eligible to be registered in a province). However, this function would not rest with the Medical Registration Committee. Instead, the *MPA* could be amended to provide the following, with much of the details of the process to be included in regulations.

- The Minister would appoint a qualified Review Officer, (likely a faculty member of a Medical School), who could:
 - Arrange for an independent assessment;
 - Identify any licence restrictions required;
- The Registrar could licence, only upon recommendation of the Review Officer;
- The licence could be revoked, upon recommendation of the Review Officer;
- The licence could be renewed, upon recommendation of the Review Officer;
- The intake of candidates for this licence could be controlled, requiring an annual intake date and limiting the number of candidates selected for assessment, and an even smaller number to be licenced.

This item is brought forward for the purpose of consultation and discussion. Would the benefits of additional flexibility for registering IMGs be worth the additional costs and complexity?

(ii) Ministerial Involvement in the Registration Process

Question: Is the degree of involvement of the Minister in the administrative processes of the registration scheme better suited to another entity?

Currently, the *MPA* provides for the extensive involvement of the Minister in the administrative processes within the registration scheme:

- s. 5: appoints the Medical Registration Committee;
- s. 7: causes to be kept three registers;
- s. 9(3): register without LMCC;
- s. 9(4): register as specialist a person who is not a Fellow or certificated specialist;
- s. 10(3): renew a registration (on recommendation of Medical Registration Committee);
- s. 10(4): remove the name of a registered person from the Medical Register who has been convicted of an offence under the *MPA* or an indictable offence under the *Criminal Code*;
- s. 10(5): assess the criminal record of a registered person to determine if conviction as above should not disqualify a person from being or remaining registered in the Medical Register;
- s. 11(2): discretion to strike a person from the Medical Register who fails to comply with a request of the Medical Registration Committee to submit certificates of standing, etc., from another jurisdiction in those instances where a registered person ceases to be a resident of the NWT for a period of a year or more;
- s. 14(1): discretion to allow undergraduate student who is registered in the Education Register to provide medical services in a hospital, office or other premises;
- s. 16(1): issue a temporary permit to a member of a visiting force;

- s. 17(1): issue a temporary permit to practise medicine;
- s. 17(2): discretion to assess the criminal record of a person to determine if conviction of an offence under the *MPA* or any offence in the *Criminal Code* should not disqualify a person from being or remaining registered in the Temporary Register;
- s. 19(1): direct the Registrar to remove names of persons from a register who fail to comply with provisions of the *MPA* respecting licence or permit fees;

No other NWT professional statute or medical profession statute reviewed had such extensive Ministerial involvement in the registration process. We recommend that the Minister not be so involved with administrative matters.

Should the Medical Registration Committee or a different entity be given these tasks?

(iii) Appeals from Decisions of Medical Registration Committee

Question: Should appeals of decisions of the Medical Registration Committee go to the Minister or another body?

Currently, s. 18 of the *MPA* provides that appeals of any decision of the Medical Registration Committee go to the Minister.

In s. 10 of the *Midwifery Profession Act* and s. 20 of the *Architects Act*, a person who is refused registration can appeal that refusal to the Supreme Court.

With respect to the medical profession statutes reviewed, all jurisdictions save the Yukon provide an appeal from a refusal to register an applicant: in Newfoundland & Labrador, it is an appeal to the trial division; in Alberta, to a review panel; in Ontario, to the Health Professions Appeal & Review Board; and in Nova Scotia to Council for some applicants.

Is an appeal to the Minister the best solution? If not the Minister, who would consider the appeal? Should it be the Courts?

We recommend that the *MPA* should be amended to provide that appeals of decisions of the Medical Registration Committee should go to the Courts.

(iv) Professional Corporations

Question: What are the advantages and disadvantages of PCs in the regulated medical profession?

A PC is an individual or group of individuals, all of whom are required by law to be licensed in their profession or to obtain other legal authorization, incorporated for the purpose of rendering the same professional service to the public. There are only two primary requirements for PCs set out in this definition. First, the individuals who are establishing a PC must be licensed in their profession or at the very least must obtain some form of legal authorization to practice. Secondly, these individuals are being incorporated for one purpose: to render their professional services to the public. On an informal level, this definition establishes the basic “necessaries” required to create a statutory regime where professional incorporation is permitted.

Professional incorporation was discouraged in many jurisdictions initially as a matter of policy, that a professional should not, through incorporation, be able to shift the

risk of loss arising from professional negligence from the practitioner onto the innocent patient. This concern can be eliminated through the use of statutory provisions that expressly provide that professional liability is not limited through professional incorporation. Continuing professional liability of the shareholders of a PC responds to the concern that patients of the incorporated professional should not suffer as a result of other business considerations that may have prompted the use of a PC. A balance can be reached between protection of the patient and the desire of a medical practitioner to enjoy the tax and other benefits that incorporation may provide.

PCs may be desirable for the following reasons:

1. The PC can offer tax advantages for a medical practitioner;
2. PCs allow insulation for the medical practitioner shareholder against trade and other creditors of the PC.

Trade and other creditors of the PC do not receive the same protected treatment as patients.

There are some disadvantages to professional incorporation:

1. There are generally ownership restrictions where only members of the profession can be shareholders of the PC.

Across many of the Canadian jurisdictions, one or more members of the same profession must legally and beneficially own all issued and outstanding shares of the PC, directly or indirectly. Thus, income-splitting tax opportunities within a family are severely limited. However, this trend is changing. By way of example, under the Nova Scotia *Medical Professional Corporations Act* any person may own, beneficially or legally, shares of a PC. The only restriction in Nova Scotia is that one or more physicians legally and beneficially own a majority of the issued shares of the PC. Further, in Ontario since the 2005 provincial budget, doctors and dentists who practice using a PC have been allowed to add family members as non-voting shareholders in the corporation.

2. PCs generally have a less stable business life due to the dependence on its members.

One example, which highlights this disadvantage, is if the medical practitioner shareholder passes away or becomes disqualified from the practice, the PC will either dissolve or be required to undergo major restructuring.

Generally, the ability of independent medical practitioners to incorporate PCs can be very beneficial to them.

Question: Should medical practitioners in the NWT be permitted to establish Professional Corporations?

PCs are permitted for medical practitioners in many different jurisdictions across Canada. In Alberta the *HPA* allows regulated members of the College of Physicians and Surgeons of Alberta, the Alberta Dental Association and College, The College of

Chiropractors of Alberta, and the Alberta College of Optometrists to establish PCs for their practice.

In Ontario, the legislation that permits PCs for medical practitioners is the *Regulated Health Professions Act*. This statute provides that one or more members of the same health profession may establish a health profession corporation for the purpose of practicing their health profession. The definition of “health profession” encompasses a great number of professions, including chiropractors, medical physicians, and optometrists.

In Nova Scotia the legislation that permits PCs for medical practitioners is the *Medical Professional Corporations Act*. This statute permits physicians who practice in the areas of: medicine, surgery, obstetrics, pathology, radiology, and other specialties to establish PCs.

In all three of the aforementioned jurisdictions the legislation governing corporations and their establishment respectively permits PCs. For example, in Alberta, under the *Business Corporations Act*, PCs are to be issued certificates of incorporation in the event that they have properly set out their articles of incorporation, received approval of the articles from their governing body within 2 years of attempting to incorporate, and have included the words “Professional Corporation” as the last words in the corporate name.

In the NWT, the *Business Corporations Act* does not mention PCs, let alone specifically permit or forbid their incorporation.

Indeed, there is other legislation in the NWT that currently addresses the establishment of PCs for other professions. For example, dentists can establish a PC under the *Dental Profession Act*. In this particular statute, a “professional corporation” is defined as “a corporation that is registered and licensed under this Act to practise dentistry”. The sections of the *Dental Profession Act* that permit the establishment of PCs are sections 25-34. These sections include everything from eligibility requirements to the liability of shareholders.

The majority of medical practitioners in the NWT are contracted employees of a governmental organization, and accordingly, the benefits of establishing a PC may not be as evident. There are some medical practitioners, however, who work on an independent contractor basis with governmental organizations. Those individuals may benefit from the tax and other advantages PCs provide.

Would allowing medical practitioners the option of establishing PCs require significant restructuring of the current registration system to allow for registration of such entities?

We recommend that the *MPA* include the ability for medical practitioners to establish PCs, similar to the opportunity available for dentists in the NWT under the *Dental Profession Act*.

Question: Should the rules and requirements for Professional Corporations be set out in the *MPA*, its regulations, or elsewhere?

In other jurisdictions, such as Alberta, the legislation governing PCs is contained within the more general statute that deals with health professions: the *HPA*. In Ontario, the provisions pertaining to PC's are contained within the *Regulated Health Professions Act*; an overarching statute governing all aspects of regulated health professions in Ontario. In the Yukon, the *Medical Profession Act* deals with PCs, their rules and requirements.

Unlike the aforementioned jurisdictions, in Nova Scotia the provisions governing PCs are contained in a separate statute called the *Medical Professional Corporations Act*. This particular statute only deals with the rules and requirements for physicians to establish PCs in Nova Scotia.

In addition, currently in the NWT, dentists are permitted to establish PCs as a result of provisions contained in the *Dental Profession Act*.

Generally, the only compelling reason to have the rules and requirements of PCs set out in a regulation would be to ensure that they could be easily changed. Consider that once the provisions allowing medical practitioners to establish PCs have been set out in a statute, any changes that need to be made can be done through policies designed and implemented by the Medical Registration Committee or other appointed bodies.

We recommend that the rules and requirements for PCs be contained within the *MPA* and its regulations.

Question: Should there be any subsidiary limitations placed on Professional Corporations established under the *MPA*?

Consistent with the rationale for making medical practitioners personally liable for acts or omissions, several subsidiary rules are imposed on the PC in many Canadian jurisdictions, including Alberta, Ontario, and Nova Scotia. For example, in all three jurisdictions there is a requirement that the corporation's name include the words "Professional Corporation" or the French language equivalent.

Consideration should be given to whether shareholders of medical practitioner PCs in the NWT should be restricted to members of the same profession. This restriction would result in the severe limitation of income-splitting opportunities within families of medical practitioners. Further, this subsidiary limitation is being re-considered in many Canadian jurisdictions such as British Columbia, Ontario, and Nova Scotia.

Consideration should also be given to name restrictions of the PC, such that a PC must include the words "Professional Corporation" or the French language equivalent as part of its corporate name. Depending on the current database infrastructure for registration of medical practitioners in the NWT consider having a restriction in the name format for registration included in the Act i.e. medical practitioner's last name to come before the words "Professional Corporation".

A further consideration is whether a PC under the *MPA* should be restricted from carrying on any business other than the practice of the profession and any ancillary activities.

Ultimately, the appropriate limitations on PCs in the *MPA* should be discussed further with the HSS and other stakeholders.

(v) ***Criminal Record Checks***

Question: Should a criminal record check be a requirement in the *MPA*?

The *MPA* does not currently prohibit the Medical Registration Committee from requiring a criminal record check on registration or renewal, although this is not currently being done as a matter of practice.

A person wishing to be registered in Part One or Part Two of the Medical Register needs to provide satisfactory evidence to the Medical Registration Committee that he or she is of good character. A criminal record check could form part of the requirement for “satisfactory evidence” of good character.

In practice, however, the documentation required to prove ‘good character’ consists of a Letter of Standing from jurisdictions where the candidate was previously or is currently licensed and three (3) letters of reference. Applicants are asked if they have a criminal record and are asked about their disciplinary history. The Medical Registration Committee does not require a criminal record check.

None of the other NWT professional statutes reviewed require a criminal record check to provide evidence of good character. No other medical profession legislation expressly requires criminal record checks for registration or licensing in the statute itself, although ss. 14(1)(e) and s. 21 of the *Yukon Medical Profession Act* has a requirement for registration and for re-registration where a person has left the Yukon and practiced elsewhere, that the person must produce evidence that the person is not subject to criminal charges pending in Canada.

We recommend that if a requirement for a criminal record check upon application for registration is desired, such a requirement does not need to be included in the *MPA*, but dealt with in the policies of the Medical Registration Committee, or by the employers themselves.

(vi) ***Education Register (Medical Students v. Medical Residents)***

Question: Does the current Education Register reflect the true capabilities and qualifications of Medical Residents?

Medical students are undergraduate students at a medical school, and includes those who may be in their first to fourth year of medical school. Medical residents are graduates of a medical school, with an MD designation, who carry their own liability insurance. Currently, both medical students and medical residents in the NWT are both registered in the Education Register.

One concern is that the current *MPA* does not reflect the actual distinction in experience and training between medical students and medical residents, especially

with respect to prescribing drugs or signing documents that require the signature of a duly qualified medical practitioner, [see s. 14(8) of the *MPA*.]

In the other jurisdictions, usually both medical students and medical residents were registered within a single “education register”. None of the legislation clearly distinguished their roles to any great extent, although Newfoundland & Labrador’s *Medical Board Regulations* give qualifying medical residents an ability to acquire provisional prescribing licences and provisional family practice training licenses. Also, the Colleges of Physicians and Surgeons in both Nova Scotia and Newfoundland & Labrador have policies outlining the differences in these roles with respect to required supervision.

Should the respective roles of medical students and medical residents be clearly distinguished to allow greater latitude to medical residents to practise according to their qualifications and training? If so, how?

If so, should these respective responsibilities be best set out within the *MPA* or in a separate policy or other document, such as Education Register regulations or policies?

This analysis is raised for further discussion and deliberation purposes.

(vii) Other Registration Issues

Question: Should the grandfathering provision in the Medical Profession Regulations be changed?

Pursuant to s. 1.1 of the *Medical Profession Regulations*, an applicant for Part One of the Medical Register who was registered or was eligible to be registered in Part One of the Medical Register or was registered or was eligible to be registered as a medical practitioner in a province as of November 14, 1999 is exempt from the requirement of post-graduate training in medicine in s. 1(1)(a) of the *Medical Profession Regulations*.

Should the grandfathering provision be amended to delete the 1999 cut-off completely? That date simply refers to when the regulations were last changed.

Question: Should there be an ability to cancel a licence or permit if it is obtained by misrepresentation or fraud?

There is no express provision in the *MPA* providing the power to cancel a medical practitioner’s licence or permit if it is found that it was obtained by misrepresentation or fraud.

In section 20(1)(a) of Yukon’s *Medical Profession Act*, the Yukon Medical Council has the power to strike the name of any person from a register where registration of that person has been, in the opinion of the council, obtained by fraud or misrepresentation.

Alternatively, s. 62 of the *Architects Act* provides that a person who willfully procures registration, a licence or permit through false or fraudulent representation (and every person who knowingly aids or assists that person) is guilty of an offence and liable on summary conviction to a fine not exceeding \$5,000. (Similar provisions are contained in Nova Scotia and Ontario).

We recommend that the *MPA* should provide the ability to strike the name of any person from a register where their registration has been obtained by fraud or misrepresentation.

Who should have this ability, the Medical Registration Committee, the President, or an ad hoc committee set up to hear appeals of decisions of the Medical Registration Committee?

Question: Should there be a provision for the Registrar to issue subsequent permits or licences to applicants whose previous permit or licence is current, or has expired for not longer than 6 months (or whatever time period is decided on)?

Currently, except for the annual renewals of licences, all requests for another licence or permit have to go to the Medical Registration Committee, whether or not a new application has to be submitted.

In s. 11(2) of the *Midwifery Profession Act*, applications for the renewals made before the expiry of a certificate of registration go to the Registrar, who can renew the certificate if he or she is satisfied that the registered midwife is eligible under s. 11(3).

In s. 11(5) of the *Midwifery Profession Act*, if a person has been removed from the Midwifery Register due to a failure to renew his or her certificate, the Registrar may reinstate the person's registration if an application is made within 60 days of removal and upon payment of the prescribed fees.

Renewals of registration in other medical profession legislation are usually done by the Registrar.

This issue and analysis is brought forth for the purpose of discussion and deliberation to determine if there is truly a need for the Medical Registration Committee to oversee all renewals. Should annual renewals be dealt with by the Registrar?

C. Unauthorized Practice and Injunctions

Question: Should there be a provision in the *MPA* to issue an injunction against persons found to be contravening the Act?

The *MPA* currently has no provision for an injunction to be issued against a person found contravening the unauthorized practice provisions to prevent further unauthorized practice.

In s. 12 of the *Architects Act*, if a person other than an authorized practitioner practises or offers to practise architecture, or if a person employs someone to practise architecture who is not an authorized practitioner, or where a person uses the name "architect" improperly, the Association may apply to a judge of the Supreme Court for an injunction restraining that person from further contraventions of the Act.

A similar authority is granted in the *Engineering and Geoscience Professions Act* and the *Pharmacy Act* in the NWT, as well as in the medical profession legislation in Nova Scotia and Alberta.

We recommend that the *MPA* should include this capability. The power to issue an injunction should be as against anyone practicing medicine without being registered in the NWT.

A decision must be made as to which entity should have the authority to make the application for an injunction to the Supreme Court. Should the applicant be the Medical Registration Committee, the President, a Board of Inquiry, or the Minister?

D. Telehealth

Question: Should a provision be added requiring medical practitioners who practise medicine in the NWT by Telehealth to be registered in the NWT?

Telehealth or telemedicine is employed around the country, including the Northwest Territories. However, other than Alberta, there are no requirements for physicians from other jurisdictions practicing by telehealth to register in the province in which their telehealth patients are resident.

In Alberta, as noted earlier, section 4(1)(f) of the *Medical Profession By-Laws* specifically requires those who are providing medical services or opinions via this method are to be registered in part 6 of the Special Register.

If a similar requirement is added in the *MPA*, it would be important to distinguish situations where a medical practitioner in the NWT consults with a physician in another jurisdiction without that physician requiring a licence in the NWT, as outlined in s. 46(a) of the *MPA*.

In other jurisdictions, including Nova Scotia and Ontario, while there is no legislated requirement for registration, the respective Colleges have passed policies or guidelines outlining that complaints about telemedicine services provided to a Nova Scotia or Ontario resident by a physician licensed in another Canadian or foreign jurisdiction would have to be dealt with by the appropriate medical licensing authority in that jurisdiction. The Nova Scotia College's policy specifically excludes doctor-to-doctor consultations.

This information is provided to the stakeholders for information purposes for further discussion and deliberation. However, evidenced by the lack of legislation in this area, registration of telehealth providers is a complex area which is still evolving, and thus, we recommend not legislating in this area until a clear trend develops.

E. Miscellaneous, Definitions and Other Housekeeping Issues

Question: Is the Protection from Liability Clause in s. 23 Adequate?

Currently, s. 23 of the *MPA* provides that “no action shall be brought” against the President, the Board, etc. for acts done in good faith. However, it is arguable that this would not protect those individuals from potential liabilities from other administrative proceedings.

We recommend that s. 23 should be amended to ensure that the protection from liability is from any “action or proceeding”.

Miscellaneous

Section 26:

Section 26 begins with “On receiving a complaint under section 24...”. However, a Board of Inquiry does not receive the complaint under s. 24, but only when it is referred to them pursuant to ss. 25(1.1)(a)(ii), 25(1.4)(a)(b) or 25(3).

We recommend amending section 26 to read “On receiving a complaint under ss. 25(1.1)(a)(ii), 25(1.4)(a)(b) or 25(3).

Board of Inquiry “Hearing”?

It is not clear that a Board of Inquiry holds a “hearing”: it is called a “hearing” in s. 26(1) and (2), a “meeting” in s. 26(3)(b), and an “investigation”, (ss. 27, 38).

We recommend that all references to the Board of Inquiry process to be called a “hearing” in those provisions.

Definition of “practise Medicine”

The current definition of “practise medicine” means “to offer or undertake by any means or method to diagnose, treat, operate or prescribe for any human disease, pain, injury, disability or physical condition or to hold oneself out as being able to diagnose, treat, operate or prescribe for any human disease, pain, injury, disability or physical condition”. Is this satisfactory?

Convictions under the Criminal Code

Pursuant to s. 10(4) and 10(5) of the *MPA*, a person convicted of an indictable offence under the *Criminal Code* is to be refused registration, (or disqualified from registration if they are already registered), in the Medical Register unless the Minister believes they should not be refused, given the nature of the offence or the circumstances under which it was committed.

However, for the Temporary Register, s. 17(2) provides that registration is to be refused if a person is convicted of any offence under the *Criminal Code* is to be refused registration.

To our knowledge, there does not appear to be any reason for the distinction in criminal offences between the Medical and Temporary Register.

Furthermore, there is no similar provision denying registration or disqualification in the event of criminal convictions for the Education Register.

We recommend consistency in both the types of offences, and for all Registers.

Registrar

Finally, while the Minister is mandated to keep three registers, and there is reference to a Registrar, there is no express power given to the Minister to appoint a Registrar.

See ss. 6 and 7 of the *Midwifery Profession Act*, which requires the Minister to appoint a Registrar. The Registrar is mandated to maintain the Registers.

We recommend that a clause should be added providing that the Minister must appoint a Registrar and that the Registrar is to maintain the Registers and carry out the other duties as provided in the *MPA*.

VII. SUMMARY OF QUESTIONS AND RECOMMENDATIONS

1. Is the current definition of “improper conduct” sufficient?

The drafter of the legislation will need to consider if it is desirable to modernize the language of the definition of “improper conduct”. Whatever definition is used, we recommend that the scope of “improper conduct” in the new legislation remain the same as the current legislation.

We recommend the deletion of the reference to criminal conduct in s. 20(a), while retaining the provision in section 20(c) that conviction of a criminal offence is considered improper conduct.

We recommend that the “improper conduct” provision should include those situations where a medical practitioner has “failed or refused to comply with a settlement agreement approved” under that provision, see s. 21(2)(h) of the *Pharmacy Act*

2. Should the President be authorized to initiate an investigation in the absence of a complaint?

We recommend, in the absence of a formal complaint, in circumstances where the President or another entity (Complaints Officer, etc.) has reasonable grounds to believe that a medical practitioner may be engaging in improper conduct, or conduct in breach of the *MPA*, that such person be given the power to treat that information as a complaint.

Alternatively, if a Complaints Officer is designated, the *MPA* can be amended to give the Complaints Officer the ability to file a complaint to the President.

3. Does the accused medical practitioner receive a copy of a complaint?

We recommend that a requirement for notice to a medical practitioner be added to the *MPA* to ensure fairness and a degree of certainty to medical practitioners that they will be kept informed throughout the disciplinary process. The Complaints Director should be required to provide a medical practitioner with a copy of the complaint or reasonable particulars of the complaint.

4. Would the President or Board of Inquiry be able to discipline a person who was no longer registered at the time a complaint was received, or a member who resigned after a complaint was received?

We recommend a provision be added expressly allowing complaints to be filed respecting the conduct of a registered medical practitioner who is no longer registered to be dealt with in disciplinary proceedings if the complaint is filed within two years after the day on which the registered medical practitioner ceased to be registered, and the conduct complained of occurred while they were registered.

We also recommend a provision expressly providing jurisdiction to the President and Board of Inquiry over medical practitioners who resign their registration during an investigation or hearing, similar to s. 54(2) of Alberta’s *HPA*.

5. Should the President of a Board of Inquiry have the ability to both investigate and adjudicate a complaint?

We recommend that the *MPA* provide for a Complaints Officer in order to separate the investigative and adjudicative processes.

6. Should the President have the power to impose an interim suspension of and/or terms and conditions on a licence or permit?

We recommend that the *MPA* should provide, notwithstanding anything contained in the Act, that the President may issue an interim suspension or may impose limitations, terms or conditions on a medical practitioners licence or permit pending the completion of an investigation, Board of Inquiry hearing, and pending the outcome of criminal proceedings being taken against the member by way of indictment: see ss. 27(1)(a) & (b) of the *Pharmacy Act* and s. 65(1) of the *Alberta HPA*.

Also, the President should have the power to revoke the interim suspension where he or she feels it is appropriate.

Should this power be added, an appeal process to the Courts will be required to review the use of this power.

7. Should an alternative dispute resolution process, such as mediation, be incorporated in the *MPA* to settle disputes prior to a hearing?

We recommend that the *MPA* should include an ability to resolve complaints by way of an ADR process, similar to that employed in s. 28 of the *Pharmacy Act*.

We also recommend an undertaking process similar to that used by the CPSA be made available as an option for the Complaints Director under the *MPA*.

8. Could the President dismiss a complaint if there was insufficient Evidence?

We recommend that the President be given the ability in ss. 25(1.1) and (1.4) to dismiss a complaint if there is insufficient or no evidence to support a finding of improper conduct.

We recommend that the provision giving the complainant the power to compel a full hearing should be removed.

An ability to appeal the dismissal of a complaint after an investigation to the Supreme Court can be provided.

We recommend that the authority to order security for costs should be removed if the power to force a Board of Inquiry hearing is removed.

9. Are a Board of Inquiry's Processes Adequate?

Medical Practitioner cannot refuse to be examined

Although s. 29 provides that an accused medical practitioner is a compellable witness, it is not clear that he is a "witness" in s. 30, in that he or she cannot refuse to be examined under oath. We recommend that this be made clear. See s. 49(1)(2) of the *Architects Act* and s. 46(2) of the *Nursing Profession Act*.

Receipt of Evidence by Other Methods

We recommend that s. 28 of the *MPA* should be amended to ensure that the Board of Inquiry has the ability to receive evidence by audiovisual methods, or, if all parties agree, by telephone.

Testimony of non-resident

Like all other NWT statutes reviewed, for the purpose of obtaining the testimony of a witness who is outside the NWT, the Board and the medical practitioner should have the ability to apply *ex parte* to a judge of the Supreme Court to order appointing an examiner for the obtaining of the evidence of the witness; see s. 38(5) of the *Pharmacy Act*.

New Matters

We recommend that the Complaints Officer and/or Board of Inquiry be given the power to investigate and/or hear new matters that come to its attention during the investigation or hearing.

Ability to proceed with Hearing

We recommend that the Board of Inquiry be given the ability to proceed with a hearing in the absence of an accused medical practitioner on proof of service of the notice of the hearing, see s. 35(9) of the *Pharmacy Act*, s. 46 of the *Architects Act*, and s. 43(6) of the *Nursing Profession Act*.

Complainant should not be a Party

Section 34 should be amended to remove the ability of a complainant to give evidence and to call, examine or cross-examine parties. This power is not seen in any other statutes reviewed.

Natural Justice

Section 36 provides that a Board of Inquiry shall conduct its proceedings in accordance with the rules of natural justice. Is this necessary given that there is already a requirement that hearings be conducted in a procedurally fair manner? We suggest all that is needed is a provision stating, "Subject to this Act, a Board of Inquiry may establish rules of procedure respecting the conduct of hearings"; see s. 45(5) of the *Architects Act*.

Deemed Service

We recommend that the *MPA* include a provision deeming good service if the medical practitioner is given notice by registered mail to the address or e-mail address given on the last registration application or renewal form. See s. 57(2)(c) of the *Architects Act* and s. 44(2)&(4) of the *Pharmacy Act*.

Reasons

There should be an express provision requiring written reasons that state the finding made by the Board and the reason why the findings and order were made; see s. 51(2) of the *Architects Act*.

Appeal does not act as a stay

There is currently a provision to appeal the Board's decisions to the Supreme Court in s. 40. We recommend adding an express provision outlining that an appeal to the Supreme Court does not operate as a stay of the finding or order of the Board, but the Supreme Court can order a stay, in whole or in part, on the terms it considers reasonable until the appeal is decided; see s. 55 of the *Architects Act*.

10. What would happen if a medical practitioner refused to undergo a medical examination requested by a Board of Inquiry under s. 27?

We recommend that a Board of Inquiry be given the power to suspend a medical practitioner if he or she refuses to comply with an order to undergo a medical examination.

11. Are a Board of Inquiry's Powers on the Conclusion of its Investigation broad enough?

The wording of that provision could be interpreted to be mutually exclusive, in that the Board could order a reprimand and fine, but could not also order the attachment of terms and conditions to the medical practitioner's licence.

It should be made clear that "On concluding its hearing, the Board of Inquiry may "make one or more of the following orders".

We also recommend that a Board of Inquiry's powers should include the ability to impose a wider range of sanctions, such as a requirement to take a particular course as well as a "basket clause" to "make any further or other order that it considers appropriate".

12. Should a Board of Inquiry have the power to order that a medical practitioner found guilty of improper conduct pay costs of the hearing?

We recommend that the Board of Inquiry should retain the discretionary power to award costs calculated in accordance with the tariff of the Rules of the Supreme Court and/or a fine not exceeding \$5,000.

13. Should the Minister make the decision on reinstatement of a medical practitioner after cancellation or suspension?

We recommend that it would be more desirable to have this power as part of another entities' responsibilities, such as the President, Medical Registration Committee, or

another entity such as the Courts. The choice of which body should be responsible is an issue to be considered by the Steering Committee and HSS.

14. Is the current registration process for IMGs satisfactory?

This item is brought forward for the purpose of consultation and discussion. Would the benefits arising from additional flexibility for registering IMGs be worth the additional costs and complexity?

15. Is the degree of involvement of the Minister in the administrative processes of the registration scheme better suited to another entity?

We recommend that the Minister not be so involved with administrative matters.

Should the Medical Registration Committee or a different entity be given these tasks?

16. Should appeals of decisions of the Medical Registration Committee go to the Minister or another body?

We recommend that the *MPA* should be amended to provide that appeals of decisions of the Medical Registration Committee should go to the Courts.

17. What are the advantages and disadvantages of PCs in the regulated medical profession?

The ability of independent medical practitioners to establish and use PCs can be very beneficial.

18. Should medical practitioners in the NWT be permitted to establish Professional Corporations?

We recommend that the *MPA* include the ability for medical practitioners to establish PCs, similar to the opportunity available for dentists in the NWT under the *Dental Profession Act*.

19. If so, should the rules and requirements for PCs be set out in the *MPA*, its regulations, or elsewhere?

We recommend that the rules and requirements for PCs be contained within the *MPA* and its regulations, as already done in many of the jurisdictions across Canada including Alberta and the Yukon.

20. Should there be any subsidiary limitations placed on Professional Corporations established under the *MPA*?

Ultimately, the appropriate limitations should be discussed further with the HSS and other stakeholders as a matter of policy.

21. Should a criminal record check be a requirement in the *MPA*?

We recommend that if a requirement for a criminal record check upon application for registration is desired, such a requirement does not need to be included in the *MPA*, but dealt with in the policies of the Medical Registration Committee, or by the employers themselves.

22. Does the current Education Register reflect the true capabilities and qualifications of Medical Residents?

This analysis is raised for further discussion and deliberation purposes.

23. Should the grandfathering provision in the Medical Profession Regulations be changed?

This issue is brought forth for the purpose of discussion and deliberation.

24. Should there be an ability to cancel a licence or permit if it is obtained by misrepresentation or fraud?

We recommend that the *MPA* should provide the ability to strike the name of any person from a register where their registration has been obtained by fraud or misrepresentation.

Who should have this ability, the Medical Registration Committee, the President, or an ad hoc committee set up to hear appeals of decisions of the Medical Registration Committee?

25. Should there be a provision for the Registrar to issue subsequent permits or licences to applicants whose previous permit or licence is current, or has expired for not longer than 6 months (or whatever time period is decided on)?

This issue and analysis is brought forth for the purpose of discussion and deliberation to determine if there is truly a need for the Medical Registration Committee to oversee all renewals. Should annual renewals be dealt with through the Registrar?

26. Should there be a provision in the *MPA* to issue an injunction against persons found contravening the Act?

We recommend that the *MPA* should include this capability. The power to issue an injunction should be as against anyone practicing medicine without being registered in the NWT.

Should the applicant be the Medical Registration Committee, the President, a Board of Inquiry, or the Minister? This should be discussed.

27. Should a provision be added requiring medical practitioners who practise medicine in the NWT by Telehealth to be registered in the NWT?

This issue and analysis is brought up for the purposes of discussion and deliberation. However, evidenced by the lack of legislation in this area, registration of telehealth providers is a complex area which is still evolving, and thus, we recommend not legislating in this area until a clear trend develops.

28. Is the Protection from Liability Clause in s. 23 Adequate?

We recommend that s. 23 should be amended to ensure that the protection from liability is from any “action or proceeding”.

29. Section 26

Section 26 begins with “On receiving a complaint under section 24...”. However, a Board of Inquiry does not receive the complaint under s. 24, but only when it is referred to them pursuant to ss. 25(1.1)(a)(ii), 25(1.4)(a)(b) or 25(3).

We recommend amending section 26 to read “On receiving a complaint under ss. 25(1.1)(a)(ii), 25(1.4)(a)(b) or 25(3).

30. Board of Inquiry “Hearing”?

It is not clear that a Board of Inquiry holds a “hearing”: it is called a “hearing” in s. 26(1) and (2), a “meeting” in s. 26(3)(b), and an “investigation”, (ss. 27, 38).

We recommend that all references to the Board of Inquiry process to be called a “hearing” in those provisions.

31. Convictions under the *Criminal Code*

Pursuant to s. 10(4) and 10(5) of the *MPA*, a person convicted of an indictable offence under the *Criminal Code* is to be refused registration, (or disqualified from registration if they are already registered), in the Medical Register unless the Minister believes they should not be refused, given the nature of the offence or the circumstances under which it was committed.

However, for the Temporary Register, s. 17(2) provides that registration is to be refused if a person is convicted of any offence under the *Criminal Code* is to be refused registration.

To our knowledge, there does not appear to be any reason for the distinction in criminal offences between the Medical and Temporary Register.

Furthermore, there is no similar provision denying registration or disqualification in the event of criminal convictions for the Education Register.

We recommend consistency in both the types of offences, and for all Registers.

32. Registrar

We recommend that a clause should be added providing that the Minister must appoint a Registrar and that the Registrar is to maintain the Registers and carry out the other duties as provided in the *MPA*.

VIII. COMMENTS ON DISCUSSION PAPER

We invite individuals and organizations to provide comments on the Discussion Paper. Do you agree with the recommendations summarized above? What other comments do you have with respect to the questions posed and the issues considered? Are there other issues that should be addressed that were not?

NEXT STEPS

It is the intention of the HSS to conduct consultations sessions with respect to this Discussion Paper for discussion and feedback with members of the NWT Medical Association in the fall of 2007.

For details on the consultation sessions, and to forward any written responses to this paper by **October 15, 2007** please contact the following:

Gay Kennedy, Director
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Health and Social Services, HSS
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The web-sites for the Department of Health and Social Services will include further information on the consultation process and time-frames for providing written responses to this paper.

IX. CONCLUSION

Overall, with the amendments as recommended, the current *MPA* can be updated to reflect the current legal, medical and social environment of the medical profession in the NWT.