



Ontario College of  
Social Workers and  
Social Service Workers

Ordre des travailleurs  
sociaux et des techniciens  
en travail social de l'Ontario

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**DISCIPLINE COMMITTEE OF THE  
ONTARIO COLLEGE OF SOCIAL WORKERS AND SOCIAL SERVICE WORKERS**

Indexed as: Ontario College of Social Workers and Social Service Workers v Kline, 2019  
ONCSWSSW 3

Decision date: 20190326

**BETWEEN:**

THE ONTARIO COLLEGE OF SOCIAL WORKERS  
AND SOCIAL SERVICE WORKERS

- and -

JESSICA KLINE

PANEL: Sophia Ruddock Chair, Public Member  
Rita Silverthorn Professional Member  
Charlene Crews Professional Member

Appearances: Jill Dougherty and Jordan Stone, counsel for the College  
Danny Kastner and Danielle Stampley, counsel for the Member  
Andrea Gonsalves, Independent Legal Counsel to the Panel

Heard: September 19, 2018

**DECISION, REASONS FOR DECISION AND ORDER**

**Overview**

[1] This motion arises in the context of a Notice of Hearing dated July 17, 2017, which the Ontario College of Social Workers and Social Service Workers (the “**College**”) issued in respect of allegations of professional misconduct against Jessica Kline (the “**Member**” or “**Ms. Kline**”).

[2] The Member brought a motion, dated March 29, 2018, for an order quashing the Notice of Hearing on the basis that the Discipline Committee lacks jurisdiction because the alleged events on which the misconduct allegations are based took place before the Member applied for and obtained a certificate of registration with the College. The College argues that the Discipline Committee has jurisdiction to proceed with the hearing.

[3] Following a preliminary procedural motion that was argued on May 8, 2018, this panel of the Discipline Committee (the “**Panel**”) directed that a motion date be set, in advance of the hearing on the merits, for legal argument on the following two issues: (a) whether the College has jurisdiction to discipline a Member for conduct that occurs prior to their membership, and (b) if so, what is the test for the types of pre-membership conduct that fall within the College’s jurisdiction. The Panel further directed that, depending on its determination of those issues, the issue of whether the Member’s case meets the applicable test will be decided after the evidence is heard at the hearing on the merits.

[4] In advance of the oral argument on this motion, the parties filed written submissions and briefs of authorities. The parties consented to the Panel reviewing those materials in advance of the hearing.

### **The Allegations in the Notice of Hearing**

[5] At this stage of the proceeding, the Panel is not called upon to determine, and has not formed any views about, the merits of the case. The allegations set out in the Notice of Hearing remain only allegations. However, the allegations contained in the Notice of Hearing provide relevant context for the issues to be determined by the Panel in this procedural motion. For that reason, it is useful to reproduce those allegations in these reasons for decision.

[6] The allegations in the Notice of Hearing read as follows.

...TAKE NOTICE that you are alleged to be guilty of professional misconduct within the meaning of section 26(2) of the [*Social Work and Social Service Work Act, 1998*, SO 1998, c 31 (the “**Act**”) ] in that you are alleged to have engaged in conduct that contravenes the Act, Ontario Regulation 384/00 (the “**Professional Misconduct Regulation**”), Schedule “A” to By-law No. 66 of the Ontario College of Social Workers and Social Service Workers, being the Ontario College of Social Workers and Social Service Workers Code of Ethics (the “**Code of Ethics**”), and Schedule “B” to By-law No. 66 of the Ontario College of Social Workers and Social Service Workers, being the Ontario College of Social Workers and Social Service Workers Standards of Practice Handbook (the “**Handbook**”).<sup>1</sup>

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<sup>1</sup> By-law 24, as amended by By-law Nos. 32 and 48 and revoked effective July 1, 2008 by By-law 66, continues to apply to conduct which occurred prior to July 1, 2008.

**I. The following are particulars of the said allegations:**

1. Now, and since on or about July 9, 2013, you have been a registered social work member of the Ontario College of Social Workers and Social Service Workers (the “College”).
2. Now and at all times relevant to the allegations, you were employed as a social worker at a Family and Children’s Services Agency (the “CAS”).
3. In or about 1983, Ms. X (the “Complainant”) had a son whom she gave up for adoption at birth, by means of a closed adoption that was handled by the CAS. After that adoption, until in or about December of 2012, there was no contact between the Complainant and her son and neither had any information concerning the other’s whereabouts or identity.
4. In or about 2012, without the knowledge or consent of the Complainant or the CAS and without any legal authorization to do so, you:
  - (a) accessed the CAS’s file(s) concerning the closed adoption of the Complainant’s son, “X.X.”,
  - (b) identified “X.X.” ’s biological parents, and/ or
  - (c) copied the file(s) and provided the file(s) and/ or information from the file(s) to “X.X.”, with whom you had a personal relationship.
5. In or about December of 2012, you and “X.X.” contacted the Complainant’s parents and, subsequently, the Complainant, by using information from the CAS file(s) to identify and locate them. That contact was initiated without the Complainant’s consent and had a negative impact on her emotionally and in her personal and employment relationships.
6. The Complainant is a police officer. After learning of her identity, “X.X.” repeatedly told members of the police force where the Complainant is employed that he is her son, in an attempt to extricate himself from various legal issues, and subsequently made allegations of improper conduct against the Complainant to her employer.
7. In or about March of 2013, the Complainant reported the above information to the CAS, which conducted an investigation as a result of that complaint. The CAS’s investigation confirmed that you had improperly accessed the adoption file relating to “X.X.” Upon being confronted by the CAS with the results of the investigation, you were allowed to resign from your employment there.

8. Subsequently, on or about June 9, 2013, you became a social work member of the College. The above circumstances, which reflect on your suitability to practise as a Registered Social Worker, were not disclosed to or known to the College when you were granted a certificate of registration.

**II. It is alleged that by reason of engaging in some or all of the conduct outlined above, you are guilty of professional misconduct as set out in section 26(2)(a) and (c) of the Act, in that you violated:**

1. **Section 2.29 of the Professional Misconduct Regulation** by contravening a federal, provincial or territorial law or a municipal by-law (namely, the *Vital Statistics Act*, R.S.O. 1990, c. V.4, the *Child and Family Services Act*, R.S.O. 1990, c. C.11, and/or the Adoption Information Disclosure Regulation (O. Reg. 464/07)), the contravention of which is relevant to your suitability to practise, in that you improperly accessed and released information to “X.X.” relating to a closed adoption; and/or
2. **Section 2.36 of the Professional Misconduct Regulation** by engaging in conduct or performing an act relevant to the practice of the profession that, having regard to all circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.

[7] The Member accepted that for the purposes of this motion the Panel can assume the allegations to be true.

**The Parties’ Submissions**

[8] The parties’ submissions focused on the interpretation of s. 26(2) of the Act, which provides as follows:

26. (2) The Discipline Committee may find a member of the College guilty of professional misconduct if, after a hearing, the Committee believes that the member has engaged in conduct that,

- (a) contravenes this Act, the regulations or the by-laws;
- (b) contravenes an order of the Discipline Committee, the Complaints Committee, the Council or the Registrar; or
- (c) is defined as being professional misconduct in the regulations.

[9] The parties agreed that this Panel must apply the modern principle of statutory interpretation, namely that “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27).

[10] The Member argued that on a proper construction, s. 26(2) does not give the Discipline Committee power to find a member guilty of professional misconduct for conduct in which the member engaged before becoming a member. The College argued the opposite. Both parties relied on the text, context and purpose of the Act, and case law, to support their respective interpretations. A more detailed summary of their submissions follows.

### a) The Member

#### *Issue 1 – Jurisdiction*

[11] Counsel for the Member argued that the College does not have jurisdiction to discipline a member for conduct that occurs prior to their membership. In his submission, that result flows from two decisions of the Divisional Court, which he submitted are binding on this Committee and determinative of the issue: *College of Nurses of Ontario v. Dumchin*, 2016 ONSC 626 (“**Dumchin**”) and *Association of Professional Engineers of Ontario v. Leung*, 2018 ONSC 4527 (“**Leung**”). Counsel argued that these two decisions require this Panel to conclude that the College has no jurisdiction to discipline a member for pre-membership conduct.

[12] Although the cases involve different regulatory bodies (the College of Nurses (“**CNO**”) and the Association of Professional Engineers (“**APEO**”), respectively), counsel argued that the decisions are determinative of the questions before this Committee for the following reasons:

- a. for all relevant purposes, the statutes at issue in *Dumchin* and *Leung* are comparable to the *Social Work and Social Service Work Act*;
- b. the discipline committee of each of those regulatory bodies has the same function as the Discipline Committee of this College; and
- c. the public interest concerns in this case and in those cases are identical.

[13] Counsel submitted that the Divisional Court in *Leung* decided the very issue in this case in favour of the Member’s position, by reaching the unambiguous conclusion that APEO’s discipline committee did not have jurisdiction over a licensee’s pre-registration conduct. Counsel submitted that there was no reason why the Discipline Committee of this College would have a broader or greater jurisdiction than that of the CNO or the APEO. The Member’s submissions on why *Dumchin* is determinative of this motion are set out below.

[14] Citing *Leung* in support, the Member’s counsel submitted that before the Discipline Committee can exercise any power, that power must be authorized by the Act. In considering whether the Act authorizes the use of the College’s discipline powers in respect of pre-membership conduct, counsel contrasted the wording used in the Discipline Committee section of the Act (Part III) with the wording used in the Registration section (Part II) and in the College’s Registration Regulation, O Reg 383/00.

[15] The Member argues that the Act addresses the question of pre-membership conduct in the Registration section, through the membership application process that a person must follow to become a member of the College. Paragraph 18(3)(a) of the Act, which falls within Part II dealing with Registration, expressly speaks to “*the past conduct or actions of the applicant*” (emphasis added) as grounds on which the Registrar may refuse to issue a certificate of

registration. Similar wording appears in s. 5(2)3 of the Registration Regulation which refers to the “The applicant’s past and present conduct” in setting out the requirements for registration. Counsel submitted that this language makes it explicit that the College can consider past and present conduct of applicants before admitting them to membership.

[16] In contrast, Part III concerning Discipline does not refer to past conduct, pre-membership conduct or other any similar concept. Counsel argued that s. 26(2) limits the Discipline Committee’s jurisdiction to “conduct” by a “member” – that is, when the member *is a member of the College*. The Member says that interpretation is supported by s. 13(3) which provides that former members remain subject to the College’s disciplinary jurisdiction only for conduct that occurred when they “held a certificate of registration”.

[17] The Member relies on the presumption of consistent expression, which was explained by the Supreme Court of Canada in *Agraira v. Canada*, 2013 SCC 26, at para 81, as follows:

[A]ccording to the presumption of consistent expression, when different terms are used in a single piece of legislation, they must be understood to have different meanings. If Parliament has chosen to use different terms, it must have done so intentionally in order to indicate different meanings.

It was her Counsel’s submission that, applying the presumption of consistent expression, it is significant that the Act uses the word “applicants” in the context of registration, and the word “members” in the discipline context. It is also meaningful that the provisions concerning registration use the terms “past conduct” and “past and present conduct” whereas the provisions concerning discipline do not. Counsel argued that where the Legislature intended the College to consider past conduct it said so explicitly, and there is no reference to “past conduct”, “pre-membership conduct” or any other similar expression used in reference to the Discipline Committee’s jurisdiction. It was Counsel’s submission that this is an indication that the Legislature intended to limit the Discipline Committee’s jurisdiction to conduct in which a member engaged while they were a member, and not extend it to conduct that occurred in their pre-membership past.

[18] Counsel submitted that the College may consider and regulate pre-membership conduct in only two ways: 1) at the point of registration, when s. 5(2) of the Registration Regulation authorizes the Registrar to reject an application if the applicant’s “past conduct” suggests the applicant is unsuitable for membership in the College, and 2) in cases of application fraud where it is discovered after registration is granted that the member had not complied with their disclosure obligations during the application process. Counsel argued that application fraud is not purely a pre-membership issue, since the misconduct is ongoing and continues into the membership period.

[19] The Member’s counsel addressed the 2003 decision *Ontario College of Social Workers and Social Service Workers v. Ackermann*, in which this Discipline Committee decided it could discipline a former member for conduct that occurred before she was a member. Counsel submitted that *Ackermann* was wrongly decided and this Panel should decline to follow it for two main reasons: 1) the reasoning in *Ackermann* has been rejected by the Divisional Court in *Leung and Dumchin*, and the Committee is legally bound by decisions of the courts, and not by

past Committee decisions; 2) *Ackermann* is a fundamentally unreliable precedent because the Committee received only one-sided submissions and no counterpoint, since the member was unrepresented. He further submitted that the panel in *Ackermann* made a critical error in its failure to consider Part II and Part III of the Act and the differences between those parts as set out above.

[20] Counsel submitted further that the Committee in *Ackermann* made a fundamental error in its analysis of s. 13(3) of the Act. That section permits the Committee to discipline a former member for conduct “referable to any time during which the person held a certificate of registration under this Act”. Relying on *Dumchin*, the Member’s counsel argued that s. 13(3) gives the Discipline Committee jurisdiction over a former member, but only “provided that the alleged conduct occurred *while* the person was a member” (*Dumchin*, para 24). Thus, in *Ackermann* the Discipline Committee erred when it accepted that “referable to any time during which the person held a certificate of registration” includes conduct that occurred before the person held a certificate of registration. According to the Member’s argument, it would be incongruent and lead to an unacceptable “two tier” discipline system if (as the College argues) a *current* member could be disciplined for conduct that occurred pre-membership, while a *former* member cannot.

[21] Counsel for the Member submitted that the College can capture all pre-membership conduct that might be of concern through a proper exercise of its powers through the registration process. If the College fails to do so at the registration stage, it cannot claim powers at the discipline stage that it does not have, in order to address pre-membership conduct of concern.

[22] As set out below, the College argued that the presumption against the retrospective application of legislation does not apply to public protection legislation like the Act. In response to that argument, counsel for the Member accepts that the presumption does not apply to public protection legislation. However, he explained that it is the Member’s submission that the issue underlying the presumption against retrospective application— that is, when can a “new penalty apply to old conduct”? – does not arise in this case because it is clear that there is no legislative authority in the Act for the College to reach back into a member’s past in discipline matters.

### *Issue 2 – The Test*

[23] The second issue in this motion arises only if the Panel finds the College has jurisdiction over the Member’s pre-registration conduct. On that second question – what is the test for the types of pre-membership conduct that fall within the College’s jurisdiction? – counsel for the Member challenged the two options that had been suggested by the College in previous submissions. The two options referred to were: whether the member’s pre-membership conduct is of such a nature that: 1) if known at the time of her application for registration, it would have prevented the member from being admitted to the College; or 2) it calls into question her current suitability to practise the profession.

[24] With respect to the first test, “if known at the time of registration”, Counsel for the Member disputed the assertions by the College that this test has been applied by other Discipline Committees and is supported by the B.C. Supreme Court’s decision in *Stolen v. College of Teachers (British Columbia)* (1993), 2 BCLR (3d) 44, 1994 CarswellBC 71 (“*Stolen*”). At paragraph 23 of *Stolen* the Court specifically rejects that test, determining that the test does not

apply to “pre-membership conduct”, though it might apply to the “conduct of a member”. Counsel argued that this conclusion was good reasoning. It is also just, in that it applies a different test regarding pre-membership conduct to members who having already been registered with the College, have built their careers, and made critical life decisions in reliance on their registration, as opposed to applicants who have not done so.

[25] With respect to the second test, “suitability to practise the profession”, Counsel for the Member submitted that this test is already used by regulators to consider member misconduct committed outside of the professional context. Counsel submitted that the test is useful when applied to member misconduct as opposed to pre-membership conduct. However, attempting to judge a member’s current character based on pre-membership behaviour is unreliable.

[26] While no alternative test was put forward by the Member, her counsel submitted that whatever the test, it should focus on the member’s current conduct and professionalism as a *member*, rather than drawing theoretical inferences about the member’s character from pre-membership events.

## **b) The College**

### *Issue 1 – Jurisdiction*

[27] College counsel submitted that the Act confers on the College jurisdiction to discipline members for pre-registration conduct. The College’s mandate is to ensure protection of the public and it has jurisdiction to consider pre-membership conduct that is so serious it calls into questions the member’s suitability to practise, and if known to the Registrar at the time of registration, would have prevented the member from being admitted to the College.

[28] College counsel argued that the application process is, in itself, pre-registration conduct for which a member is held accountable. A member who obtains registration through a misrepresentation (by commission or omission) continues that misconduct by maintaining a status (membership) that was obtained through fraud and dishonesty, reflecting a lack of honesty, integrity and suitability. College counsel noted also that s. 5(2) of the Registration Regulation allows the Registrar to refuse an application for registration if there are reasonable grounds to believe that the applicant’s past actions or conduct would afford grounds to believe that the applicant would not perform their duties as a social worker in accordance with the law, including but not limited to the Act, the regulations and the by-laws of the College. The College referred to *Haramic v. College of Registered Psychotherapists and Registered Mental Health Therapists of Ontario (Registrar)*, 2017 ONSC 5668 (Div Ct) as establishing that it is appropriate for a discipline committee to consider a member’s failure to disclose prior complaints and inappropriate relationships with clients in a registration application.

[29] Counsel for the College argued that, in interpreting the Act, this Discipline Committee must be guided by the Act’s purpose and s. 3(1), which provides that “In carrying out its objects, the College’s primary duty is to serve and protect public interest.” College counsel submitted that the provisions of the Act, when considered contextually and in conjunction with the purpose of the Act, support an interpretation that grants the College jurisdiction, in appropriate circumstances, to discipline current members based on their pre-membership conduct. Although the law recognizes a presumption against the retrospective application of legislation, that presumption does not apply to public protection legislation like the Act, where a statutory

disqualification or restriction exists to protect the public. This has been recognized by numerous courts of appeal, by the Discipline Committee of this College, and by other colleges. To support the College's public protection mandate, it is critical that the Discipline Committee not be prevented from looking at pre-registration conduct that calls into question a member's suitability to practise, where the public interest is at stake. College counsel referenced *Ackermann and Psychologist "Y" v. Nova Scotia (Board of Examiners in Psychology)*, 2005 NSCA 116, in support of its position that the presumption against retrospectivity does not apply when interpreting public protection legislation such as the Act.

[30] The College relied on *Ackermann*, arguing that it was correctly decided and that the Panel should follow its reasoning. In *Ackermann*, the Discipline Committee determined that it had jurisdiction to discipline a member for pre-membership conduct, primarily on the basis of the public protection exception to the presumption against retrospectivity. Counsel submitted that, contrary to the submission of the Member, the reasoning in *Ackermann* has not been rejected by the Divisional Court. Counsel submitted that the public protection exception to retrospectivity, which was the primary consideration in *Ackermann*, was not considered in the *Leung* or *Dumchin* Divisional Court decisions. As such it can not be said that the reasoning in *Ackermann* has been rejected by the Court.

[31] College counsel argued that the Supreme Court of Canada, as well as other courts, have held that professional discipline legislation should be interpreted using "a broad and purposive approach" and should receive a large and liberal interpretation that best ensures that such legislation protects the public interest. The *Legislation Act, 2006*, SO 2006, c 21, Sched F, s. 64(1), addresses the interpretation of legislation and mandates that all legislation be given a broad interpretation "to best ensure the attainment of its objects". While s. 13(3) applies only to former members of the College whose certificates of registration have been revoked or cancelled and therefore do not raise ongoing public protection concerns, this does not limit the College's jurisdiction over *current* members. The Legislature made a deliberate choice not to impose limitations in s. 26(2) with respect to current members, specifically using the word "conduct" without limiting it to the past or the present. Any other interpretation of the *Act* would prevent the College from protecting the public, specifically vulnerable clients, from individuals who are unfit to practise the profession. The College relied on the statement in *Stolen* that "membership does not give rise to immunity nor provide a shield to all past conduct" (para. 51).

### *Issue 2 – The Test*

[32] Counsel for the College submitted that the test for jurisdiction over the pre-membership conduct of a member is whether the conduct suggests that the member is currently unsuitable to practise the profession as a member of the College. This test is alternatively articulated as whether the pre-membership conduct is of such a nature that, if known to the College when the member applied for registration, it would have prevented the member from being admitted to the College. Jurisdiction also extends to pre-membership conduct where the conduct at issue is a misrepresentation in a member's application for registration.

[33] College counsel argued that the test for jurisdiction based on current unsuitability is clear and has been recognized by various courts and discipline committees (for example, *Ackermann*, *Ho v. Alberta Association of Architects*, 2015 ABCA 68, *College of Early Childhood Educators v. Mallais*, 2013 ONCECE 7, and *Keppel v. Assn of Professional Engineers, Geologists &*

*Geophysicists (Northwest Territories)* (1996), 41 Admin LR (2d) 303, 1996 CarswellNWT 54, and *Stolen*). College counsel referred to *Psychologist "Y"* in which Justice Cromwell, then of the Nova Scotia Court of Appeal, stated that “conduct before and at the time of admission to a profession may be found to constitute professional misconduct in the present on the basis that the conduct is of a continuing nature or *evidences an ongoing unsuitability to practise*” (para. 34, emphasis added). Counsel argued that this articulation of the test for jurisdiction is consistent with the public protection exception to the presumption against retrospective application of legislation. It was counsel's submission that the basis of the public protection exception to retrospectivity is that an individual’s past conduct calls into question their integrity, such that a person poses a risk into the future and ought to be disqualified or restricted from a statutory privilege. In this respect, the College asserted that its proposed test is fully consistent with the test for the public protection exception, which has been set forth by the Supreme Court of Canada.

### **Advice of Independent Legal Counsel**

[34] Given the nature of this motion, which involves questions of law, at the conclusion of oral argument the Panel sought advice in writing from its independent legal counsel. That advice was shared with the parties, and they each provided the Panel with written comments on the advice.

[35] Independent Legal Counsel (“**ILC**”) advised that as a tribunal created by legislation (namely, the Act), the Discipline Committee has only those powers conferred on it by the Act. Accordingly, to decide whether the Discipline Committee has the power (or jurisdiction) to discipline a member for conduct that occurred prior to their membership, the Panel must interpret the Act and reach a conclusion on whether the Act gives that power to the Discipline Committee.

### *Interpreting the Statute*

[36] In interpreting the Act, ILC advised that the Panel is to use the approach often referred to as the “modern principle of statutory interpretation”, as agreed upon by the parties. This approach requires the Committee to interpret the words of the Act in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. The Panel must look at the main provision of the Act dealing with the powers of the Discipline Committee, s. 26(2), as well as at other relevant provisions of the Act, and to consider the Act’s purpose, before arriving at a conclusion on the proper interpretation of s. 26(2).

[37] ILC stated that s. 26(2) defines and limits the Discipline Committee’s powers in three ways, which she referred to as three types of jurisdictions: personal, temporal and conduct. Personal jurisdiction refers to the persons in respect of whom a finding may be made: the individual must be “a member of the College” (or, by operation of s. 13(3), a former member). Temporal jurisdiction refers to the applicable time period: the individual “has engaged”, which denotes actions in the past. Conduct jurisdiction refers to the types of conduct: that which (a) contravenes the Act, the regulations or the by-laws; (b) contravenes an order of the Discipline Committee, the Complaints Committee, the Council or the Registrar; or (c) is defined as being professional misconduct in the regulations.

[38] It was ILC’s opinion that s. 26(2) is unclear on its face and is capable of two reasonable interpretations, each of which has been put forward by the Member and the College as follows:

- a. that the word “member” in “**the member** has engaged in conduct...” limits the Discipline Committee’s temporal jurisdiction to the time period after registration, as put forward by the Member, and
- b. that the word “member” in “**the member** has engaged in conduct” limits the Discipline Committee’s *personal jurisdiction* – that is, the Discipline Committee may discipline a “member” only – but it does not narrow the *temporal jurisdiction* of what follows, i.e. “has engaged in conduct...”, as put forward by the College.

[39] ILC stated that the argument made by both the Member and the College that if the Legislature intended the meaning advanced by the *other* side, it could have used words to make that clear, may be true, but the argument works both ways and does not assist either party. That is, the Legislature could have inserted words that made more clear its intention either to give the Discipline Committee power to discipline for conduct engaged in before a person was a member *or* not to give the Discipline Committee that power. ILC advised that in choosing between the two reasonable interpretations, and consistent with the modern approach to statutory interpretation, the Panel must look beyond the plain wording of the section, to the context in which those words appear, the scheme of the Act, the purpose of the legislation, and the intention of the legislature, as well as consideration of the relevant case law.

#### *Reliance on Case Law*

[40] It was ILC’s advice that while the Panel is required to follow court decisions that interpret the Act and the Discipline Committee’s powers, no court has interpreted s. 26(2) of the Act and therefore there are no such “binding” decision that *require* the Committee to arrive at a particular interpretation of s. 26(2). ILC stated that if we conclude that there are no binding cases, our analysis of and conclusion on the Discipline Committee’s jurisdiction should still be informed and guided by the cases, some of which may be more persuasive than others in helping us decide how s. 26(2) should be interpreted. Counsel listed several factors that might affect how persuasive a case may be, including: whether it is a court or tribunal; the level of court; the province or jurisdiction; the similarity of the legislation at issue in the case to the Act; and how old or recent the case is.

[41] It was ILC’s opinion that contrary to the submission of counsel for the Member, neither *Leung* nor *Dumchin* is binding on the Panel or determinative of the issues in this motion. ILC opined that while both decisions are from the Divisional Court (which hears appeals from decisions and orders of this Discipline Committee), neither case involved the interpretation of s. 26(2) of the Act or engaged the specific set of factual issues involved in this case. *Leung* involved different legislation, the *Professionals Engineers Act*, RSO 1990, c P.28, and the pre-licensure conduct at issue in that case, unauthorized practise, is a provincial offence under that legislature. It was ILC’s opinion that, nevertheless, *Leung* should be considered persuasive given the similarities between the Act and the *Professional Engineers Act*.

[42] With respect to *Dumchin*, it was ILC’s opinion that although it concerned very similar legislation (the *Regulated Health Professions Act*, 1991, SO 1991, c 18), the case did not raise or decide the issue before us, namely whether a discipline committee has the power to discipline a

member for pre-registration conduct. Paragraph 24 of *Dumchin* – which the Member relies on to argue that the Divisional Court pronounced that the discipline committee’s jurisdiction is limited to alleged conduct that occurred while the person was a member – does not clearly support that proposition. Rather, ILC advised that, as was noted by the College, the Court continued after para. 24 to discuss continuing disciplinary jurisdiction over former members under the *Regulated Health Professions Act*. It was ILC’s opinion that the better reading of para. 24 is that the statement in that paragraph “provided that the alleged conduct occurred while the person was a member” refers only to *former members*. ILC further opined that there are aspects of the *Dumchin* decision (including what the Court did actually decide) that support the College’s position that the College’s discipline powers should be interpreted broadly to promote the public protection and public interest purposes of the legislation (referencing, for example, paras. 30, 33, 39 and 42 of the decision, and the Court’s conclusion that all of the orders in s. 51(2) of the *Code* are available in respect of former members).

[43] With respect to *Ackermann*, ILC stated that this case considered the very issue in dispute before us: whether the Discipline Committee has the power to make findings of professional misconduct against a member based on conduct that took place before they were a member. ILC advised that although the underlying facts are different from the facts in this case, it was her opinion that those differences are not material to the analysis of the jurisdiction issue except potentially the fact that in *Ackermann* the member had resigned her certificate of resignation by the time of the discipline hearing and therefore she was a former member.

[44] ILC advised that despite the commonalties it shares with the case before us, *Ackermann* is not a complete answer to the jurisdiction issue before us for several reasons: 1) this Panel is not bound by decisions of other panels of the Discipline Committee; and 2) it was not a contested hearing and the panel’s reasons for decision suggest that the jurisdiction issue was not fully argued, giving it less weight. ILC advised the Panel to carefully reflect on the reasons in *Ackermann* and also consider whether those reasons are affected by the more recent court decisions to which the parties referred.

[45] It was ILC’s opinion that of the cases referred to by the parties on the issue of the professional discipline jurisdiction, only *Leung* and *Ackermann* are highly persuasive for our analysis. ILC opined that the other cases relate to different statutes, do not decide the issue we must decide, are from different provinces, and/or are distinguishable on their facts.

#### *The Act’s Scheme, Purpose and Legislative Intent*

[46] It was ILC’s opinion that the scheme of the Act does not clearly favour one party’s position over the other. ILC advised the Panel to look at other sections of the Act to assist in our understanding of the meaning of s. 26(2), rather than considering just the words of that section.

[47] It was ILC’s opinion, as stated above, that words could have been added to s. 26(2) to make either side’s position clearer, and the absence of an explicit mention of “past conduct” in s. 26(2) is no more useful to the interpretation of that section than the absence of the words “referable to any time during which the person held a certificate of registration...”. Similarly, ILC opined that the fact that s. 26(2) refers to a “member” rather than an “applicant” appears of little significance to this issue. It was ILC’s opinion that the presence of the word “member” in s. 26(2) limits the Discipline Committee’s jurisdiction to those who are members (or, by virtue of s.

13(3), former members); but the fact that other provisions in the Act refer to “applicants” while s. 26(2) refers only to a “member”, does not support the argument that the Discipline Committee has no jurisdiction over pre-registration conduct. ILC opined that s. 26(2) refers to “the member” because the College’s discipline process can be initiated only in respect of those who hold a certificate of registration; the discipline process cannot be used in respect of an “applicant”.

[48] Regarding the effect of the College’s registration regime on the interpretation of s. 26(2), ILC stated that the registration provisions can reasonably be read to suggest that the College’s discipline powers in s. 26(2) do not reach back to pre-registration conduct, as reflected in the Divisional Court’s reasons in *Leung*. However, ILC noted that interpreting discipline jurisdiction in that way in *Leung* did not create a gap since a person who engaged in unauthorized practice before obtaining a licence from the APEO would be subject to prosecution under s. 40 of the *Professional Engineers Act* and potential civil liability.

[49] It was ILC’s opinion that the fact that the registration regime can consider and address pre-registration conduct does not exclude the interpretation advanced by the College as a reasonable interpretation of s. 26(2). The registration regime and the disciplinary regime serve different purposes and, as the College argues, there can never be a guarantee that all preregistration conduct of concern will be revealed in the registration process, no matter how carefully the College exercises its powers in that process. ILC opined that the registration provisions under the Act can co-exist harmoniously with an interpretation of s. 26(2) that gives the Discipline Committee jurisdiction over pre-registration conduct – particularly if the test for jurisdiction is the same or similar to the registration requirements.

[50] ILC advised that the Member’s argument about the unfairness of jeopardizing a member’s certificate of registration which was truthfully obtained, based on past conduct that is later discovered, can be considered but cannot be a reason to depart from what the Panel believes is the correct interpretation of the Act. The Panel’s task is only to interpret and apply the legislation as it is written, not to determine the fairness or wisdom of it. ILC advised further that, as the College argues, this potential unfairness could be addressed or mitigated by setting an appropriate test or threshold for pre-registration conduct to attract disciplinary consequences.

[51] ILC advised the Panel to consider the Member’s argument that a “two tier” disciplinary system arises from the College’s interpretation of s. 26(2). The Member argued that if s. 26(2) is interpreted to include jurisdiction over a member’s pre-membership conduct, a member could frustrate the discipline process by resigning and the College would have no continuing jurisdiction because the conduct is pre-registration conduct and not “referable to” the period when the person held a certificate of registration. ILC provided three comments for our consideration in response to this argument, as follows:

- a. It might not be a significant concern if one accepts the College’s argument that jurisdiction over pre-registration conduct is appropriate to protect the public and there are no public protection concerns if the member resigns.
- b. There may be an argument that a discipline proceeding initiated against a current member in respect of pre-registration conduct that reflects on the member’s current suitability to practise is “referable to” the period when that person held a certificate of registration, such that the College would have continuing

jurisdiction under s. 13(3) even if the person resigned membership in the College – *i.e.* there is not necessary a “two tiered” system.

- c. If the correct interpretation of s. 26(2) leads to a “two-tiered” disciplinary system, that might be a feature of the Act that has to be accepted unless it is amended.

[52] ILC advised that the modern approach to statutory interpretation requires the Committee to consider the purpose of the Act and legislative intent when deciding what s. 26(2) means. ILC stated that according to s. 3(1) of the Act, “the College’s primary duty is to serve and protect the public interest”, and this duty applies when the College is carrying out its statutory objects such as its disciplinary process. ILC was in agreement with the College that the Act “must be given a broad and purposive interpretation in keeping with the College’s duty to act in the public interest. Interpretations that lead to absurd results and/or undermine the College’s ability to carry out its duties are inconsistent with this legislative intent and are to be avoided” (see *Dumchin*, para 33). ILC further agreed with the College that the more narrow test in *Leung*, reciting “the principle that penal legislation is to be strictly construed”, is outdated. It was ILC’s opinion that the more recent and more authoritative case law, like *Dumchin*, favours a broad and purposive interpretation of the Act.

[53] ILC opined that although there are two reasonable interpretations of the words in s. 26(2) as advanced by the Parties, the broad and purposive interpretation that the Panel is required to give to the Act favours a conclusion that under s. 26(2) the College has jurisdiction to make findings of professional misconduct based on conduct a member engaged in before registration. It was ILC’s opinion that having regard to the relevant principles of statutory interpretation and the case law, the College’s position represents the better interpretation of s. 26(2), the context in which it is situated in the legislation, and the purpose for which the Panel could infer it was adopted.

#### *Retrospectivity*

[54] ILC commented on the issue of retrospectivity raised by the College. ILC advised that retrospectivity comes up in this case because disciplining a member for pre-registration conduct makes past conduct that was not professional misconduct at the time (because the person was not a member), misconduct in the present or future when the individual is a member of the College.

[55] ILC stated that while there is a general presumption against retrospectivity in the interpretation of legislation, the College has provided cases establishing that the presumption does not apply to public protection legislation. ILC advised that if we agree with the College that the Committee has jurisdiction, then the exception would apply because the Act is public protection legislation. On the other hand, if we agree with the Member that the Discipline Committee does not have jurisdiction, then the issue of retrospectivity does not arise. ILC opined that in either case the presumption against retrospectivity should not affect the Panel’s analysis.

#### *Issue 2 – The Test*

[56] ILC advised that if we decide in question 1 that the Discipline Committee has jurisdiction over pre-membership conduct then we must determine what kind of pre-membership conduct attracts that jurisdiction. ILC stated that determining a test presents some interpretive challenges

to the Panel because the Act does not distinguish clearly between pre-registration conduct that is and is not subject to the Discipline Committee's jurisdiction.

[57] ILC summarized the position of the College that not all pre-membership conduct should be subject to this jurisdiction. As noted above, the College's position is that it will have jurisdiction over the pre-membership conduct of a member where the conduct calls into question the member's current suitability to practise the profession of social work or, put differently, where the pre-membership conduct is of such a nature that, if known to the College when the member applied for registration, it would have prevented the member from being admitted to the College. The Discipline Committee would also have jurisdiction over conduct that amounts to a misrepresentation in the application for membership.

[58] It was ILC's opinion that the test proposed by the College is reasonable in that: i) it would apply only to more serious conduct, and ii) it is consistent with the public interest and public protection purposes of the Act and the public protection exception to the retrospective application of legislation. ILC further stated that it was the same threshold that the Discipline Committee applied in *Ackermann*.

[59] ILC opined that the Member's argument that past conduct is not a reliable indicator of current suitability to practise might be true. It was ILC's opinion however, that if the Panel accepted that as the test, this concern could be addressed by the member advancing arguments as to why their pre-membership conduct does not indicate their current unsuitability to practise.

[60] It was ILC's opinion that the most significant challenge with the College's argument is that it does not plainly arise from the words and scheme of the Act. ILC referred to the three bases listed in paragraphs (a) to (c) of s. 26(2) for the Discipline Committee to make a finding of professional misconduct against a member: if the member "has engaged in conduct" that (a) contravenes the Act, the regulations or the by-laws; (b) contravenes an order of the Discipline Committee, the Complaints Committee, the Council or the Registrar; or (c) is defined as being professional misconduct in the regulations.

[61] ILC opined that while paragraph (b) of Subsection 26(2) is unlikely to apply to a person before they are registered, paragraphs (a) and (c) could apply to non-members. Paragraph (a) of s. 26(2) could apply if a non-member uses the protected titles or engages in practice that is restricted to members of the College. Paragraph (c) of s. 26(2) could apply if a non-member engages in certain of the 36 acts as defined as professional misconduct in the Professional Misconduct Regulation.

[62] It was ILC's opinion that while some of the 36 acts defined in the Professional Misconduct Regulation would likely be limited to acts committed during the period of membership; others could apply to pre-registration conduct including those set out in the Notice of Hearing in this case, namely s. 2.29.ii (contravening a law relevant to the member's suitability to practise) and s. 2.36 (engaging in conduct or performing an act relevant to the practice of the profession that would reasonably be regarded by members as disgraceful, dishonourable or unprofessional). ILC opined that these two sections of the Professional Misconduct Regulation, interpreted broadly and purposively, can be read as supporting the test for pre-registration conduct asserted by the College.

*Member's Comments on ILC Advice*

[63] Counsel for the Member submitted that while much of ILC's advice is consistent with the Member's position, they disagree with ILC's ultimate conclusion that both the Member and the College have offered reasonable interpretations and that the College's interpretation is preferred. Counsel for Member filed a supplementary brief of authorities in its response.

[64] The Member disagreed with ILC that the registration screening process could fail because there was no way to guarantee that all pre-registration conduct of concern will be revealed in the registration process, as argued by the College. It was the Member's submission that public protection is fully addressed through the College's registration regime, and suggesting a potential failure is overstated and unrealistic. Counsel submitted that the only way that the registration process could fail is if the applicant concealed required information, and in that case the College is already empowered to revoke their registration for such a misrepresentation.

[65] Counsel for the Member submitted that while *Leung* does not formally bind the Committee, given it deals with the precise question before the Committee and an almost identical statutory scheme, *Leung* effectively determines the question before the Panel. Counsel submitted that where the Court has decided a particular statutory interpretation is clear and correct, the rule of law requires that an administrative body accept that interpretation. Counsel referred to two cases in support of this principle: *McLean v. British Columbia*, 2013 SCC 67, and *Pong Marketing and Promotions Inc. v. Ontario Media Development Corporation*, 2018 ONCA 555.

[66] Counsel for the Member referred to the Federal Court of Appeal decision in *Qin v. Canada (Citizenship and Immigration)*, 2013 FCA 263 as supporting the proposition that where the Court has determined that one interpretation is "correct", the range of reasonable outcomes will be so limited that only one possible, acceptable interpretation exists. Counsel submitted that that is what the Court found to be the case in *Leung* and that is what the Panel should also find in this case.

[67] Counsel for the Member agreed with the comments from ILC with respect to *Ackermann*, however it was their submission that ILC did not go far enough in identifying flaws in that decision. Counsel for the Member submitted that *Ackermann* is wrongly decided for the following three additional reasons, in addition to those put forward by ILC:

- a. The panel's decision in *Ackermann* hinges on a misreading of s. 13(3) of the Act. Subsection 13(3) gives the Committee continuing disciplinary jurisdiction over former members for conduct that occurred during the period of registration, however, the panel erroneously concluded that s. 13(3) allowed them to discipline a former member for conduct that occurred pre-registration.
- b. *Ackermann* involves no analysis of (or even reference to) s. 26(2) of the Act, which is the provision at issue in the present case.
- c. The cases on which the panel relied in *Ackermann* are precisely those cases that ILC has advised us "relate to different statutes, do not decide the issue, are from different provinces, and/or are distinguishable on their facts."

[68] Counsel for the Member disagreed with ILC’s suggestion that comparing the language and purposes of other parts of the Act does not provide adequate guidance in interpreting s. 26(2) of the Act. Counsel for the Member submitted that careful comparison of different parts of the Act gives us an unambiguous answer about this Committee’s jurisdiction. When the Act authorizes the College to consider pre-registration conduct, it uses the language “past conduct” or “past and present conduct”.

[69] Counsel reiterated his previous submissions comparing the Discipline and Registration provisions in the Act and regulations, and noted that there is no reference to “past conduct” in the Discipline provisions, in contrast to the Registration provisions. Counsel submitted that the necessary inference from the discipline provisions referring only to “conduct and actions of the members” is that the College is only entitled to discipline a member for their conduct as a member, not for conduct from their pre-registration past.

[70] Counsel for the Member disagreed with ILC’s opinion that s. 26(2) is worded in past tense when it uses the phrase “the member has engaged”, so in effect it “refers to a member’s past conduct”. Counsel for the Member submits that using the past tense in s. 26(2) does not reflect a legislative choice about pre-registration conduct, rather it is the only tense that makes grammatical sense. Once a complaint is referred to the Discipline Committee, it necessarily relates to conduct that has occurred in the past.

[71] Counsel for the Member disagreed with ILC’s opinion that the parties’ competing arguments about s. 13(3) “do not favour one position over the other”. Counsel submitted that the College’s argument about s. 13(3) would have force if there were no other explanation for why the two provisions are worded differently. It was the Member’s submission that there is a plausible alternative explanation for why s. 13(3) includes the phrase “referable to...” while s. 26(2) does not: because s. 13(3) deals with former members, the provision has to clarify that post-registration conduct is not disciplinable, whereas s. 26(2) concerns only current members, so there is no need to address post-registration conduct.

[72] Counsel for the Member submitted that accepting the College’s position would be a failure of governance with the absurd result of allowing members to be registered honestly, and then later end their careers over pre-registration conduct that was never asked about at registration. Counsel disagreed with ILC’s characterization of this issue as only one of “fairness”, arguing that it was also about effective and coherent governance. It was counsel’s submission that if one statutory interpretation, from a range of possible interpretations, would lead to absurd or unjust governance of the membership, then it does not fit within the scheme of the Act or the responsibility of effective self-regulation.

#### *College’s Comments on ILC Advice*

[73] Counsel for the College expressed agreement with the ILC’s advice, referring to it as “well-reasoned, correct, and persuasive.” The College stated, however, that they had a number of minor comments in relation to ILC’s advice. A summary of some of the more fundamental comments are as follows:

- a. *Leung* should not be considered persuasive because the legal conclusion reached by the court is inextricably linked to the facts of that case, and cannot be extrapolated outside of that factual context. The question in *Leung* was whether

the Discipline Committee of the APEO had jurisdiction over a specific corporation (not a member) that had provided engineering services without a certificate of authorization, and the decision should not be taken beyond these facts. In addition, the case considered arguments on the attempt to assert jurisdiction over any and all pre-membership conduct, not limited jurisdiction regarding suitability to practise that is being argued in the case before us.

- b. The College disagreed with ILC's advice that, aside from *Leung* and *Ackermann*, the other cases provided by the parties "on professional discipline jurisdiction" are not highly persuasive. The College noted a clarification that ILC's comments on this appear to be limited to cases specifically addressing the issue of jurisdiction over pre-membership conduct, and are not directed towards all cases provided to the Panel (such as cases dealing with principles of statutory interpretation). The College submits that some of the other cases that they presented should be considered persuasive, in that the majority are from courts of appeal and all address the issue to be decided on this motion.
- c. On the issue of retrospectivity, the College generally agreed with ILC's advice but disagrees somewhat with her advice as to how the issue of retrospectivity applies to this motion. The College submits that the issue of retrospectivity is a factor that the Panel should consider in reaching an interpretation of the Act, not something that is considered after an interpretation has already been reached. In short, retrospectivity is part of the process in determining the meaning of s. 26(2).

### **Panel's Decision on the Motion**

[74] After deliberating, the Panel has answered the two questions on this motion as follows:

- a. Does the College have jurisdiction to discipline a member for conduct that occurred prior to their membership? The Panel answers **yes** to this question.
- b. If the answer to question (a) is yes, what is the test for the types of pre-membership conduct that fall within the College's jurisdiction? The Panel has determined that the test for the types of pre-membership conduct that fall within the College's jurisdiction is: **conduct which calls into question the member's current suitability to practise as a member of the College.**

[75] Accordingly, the motion is dismissed and the parties are directed to proceed to schedule the hearing on the merits

### **Reasons for Decision**

#### *Issue 1 – Jurisdiction*

[76] The Panel applied the "modern principle of statutory interpretation", as set out in *Rizzo & Rizzo Shoes Ltd.*, in its determination of this issue. That approach was agreed upon by the parties, and we accept that it is the approach that must govern our determination.

[77] Having considered the scheme of the Act, the purpose of the legislation, and the intention of the legislature, the Panel concluded that of the two interpretations of s. 26(2) advanced by the parties, the College's interpretation is correct.

[78] In looking at the main provision of the Act dealing with the powers of the Discipline Committee, s. 26(2), the Panel finds this section is unclear on its face and is capable of two reasonable interpretations, each of which has been put forward by the Member and the College as summarized above. That is, the provision is equally capable on its face of encompassing or excluding the power to discipline a member for pre-registration conduct. Unlike the provisions of the Act dealing with the registration process, where it is clear that pre-membership conduct can be considered, s. 26(2) is ambiguous. In our view, the operative words "the member has engaged" could be read as being limited to conduct in which the member engaged *while a member*, or as reaching back to capture pre-membership conduct as well. The fact that "past conduct" is not explicitly mentioned in s. 26(2) is no more useful to the interpretation of that section than the absence of the words "referable to any time during which the person held a certificate of registration". Similarly, we do not consider the use of "member" rather than "applicant" in s. 26(2) to be a clear indicator of legislative intent to exclude jurisdiction over pre-registration conduct. The word "member" ensures that the College's discipline process cannot be initiated against someone who is not registered with the College (subject to s. 13(3)) but is not a complete answer to the question we must decide in this case.

[79] In helping us determine which interpretation of s. 26(2) is to be favoured, the Panel looked beyond the plain wording of the section to the context in which those words appear, the scheme of the Act, the purpose of the legislation, and the intention of the legislature as is required by the modern approach to statutory interpretation. We also considered the relevant case law to which we were referred by the parties.

[80] Regarding the context and scheme of the Act, the parties' submissions focussed on the registration regime in the Act and on s. 13(3) of the Act dealing with continuing jurisdiction over former members. The registration regime allows the College to refuse a member's application for registration on the basis of conduct that occurred prior to registration (see s. 18(3)(a) of the Act), and s. 5(2)3ii of the *Registration Regulation* makes it a "registration requirement" that the applicant's past and present conduct afford reasonable grounds for the belief that the applicant "will practise social work or social service work, as the case may be, with decency, integrity and honesty and in accordance with the law, including but not limited to the Act, the regulations and the by-laws". The fact that pre-membership conduct can be addressed through the registration process (if known or disclosed at the time), does not preclude it being addressed elsewhere in the legislation and, specifically, through the discipline process. The registration provisions under the Act can co-exist harmoniously with an interpretation of s. 26(2) that gives the Discipline Committee jurisdiction over pre-registration conduct.

[81] As for s. 13(3) and the situation of former members, the Panel considered the Member's argument that a "two-tier" discipline system could result from the College's interpretation of s. 26(2), whereby a current member could be disciplined for conduct that occurred pre-membership while a former member cannot. The Panel notes that such a result would not be inconsistent with the public protection purpose of the Act because unlike current members, former members are not permitted to practise so there is no need to inquire into their suitability to do so.

[82] In our view, an interpretation of s. 26(2) that encompasses jurisdiction over pre-registration conduct is consistent with the purpose of the legislation and the intention of the legislature. The primary purpose of the Act is the protection of the public, as stated in s. 3(1): “*In carrying out its objects, the College's primary duty is to serve and protect the public interest*” (emphasis added). The objects of the College include investigating and dealing with issues of discipline and professional misconduct (Act, s. 3(2)8). The Panel agrees with the College that jurisdiction over pre-membership conduct is necessary to ensure the College is able to fulfill its duty to serve and protect the public interest.

[83] The Member argues that it is unrealistic to suggest that the registration screening process could fail to reveal pre-registration conduct of concern, or that it could fail in a way that would leave the College without recourse. We disagree. In our view, that could be a real consequence of the Member’s interpretation of the legislation. The Panel agrees with the College that the registration process cannot guarantee that all problematic pre-membership conduct will be revealed. The Member referred to the expanded disclosure obligations that are now imposed on registration applicants. As noted by the College, those expanded disclosure obligations have existed only since January 2018. If the Member’s position were accepted, anyone registered before that date who failed to disclose problematic pre-registration conduct in their application for membership (not because of misrepresentation but because the application form did not specifically require it) would be immunized from any action being taken by the College, even if that pre-registration conduct indicated that the member presents a current risk to the public. The Panel agrees with the College that such an interpretation is contrary to the public protection purpose of the Act and should be rejected, as it could allow unsuitable individuals to continue to practise the profession. In our view, it could not have been the intention of the Legislature to prevent the College from ever exercising discipline jurisdiction over a member, no matter how serious the member’s pre-registration conduct, simply because that conduct was not revealed at the time of registration. The Panel agrees with the College that this would be an absurd result. As articulated in *Dumchin*, at paragraph 33, interpretations of the Act that lead to absurd results and/or undermine the College’s ability to carry out its duties should be avoided.

[84] Given the public protection purpose of the Act, the Panel finds that the presumption against retrospectivity does not apply to the Act, whether it is considered in our determination of the meaning of s. 26(2) (as argued by the College), or after our determination of the meaning of that provision (as suggested by counsel for the Member and ILC).

[85] In arriving at the view that s. 26(2) of the Act, properly interpreted, allows the College to exercise disciplinary jurisdiction over a member in respect of pre-registration conduct, we have considered the case law relied on by the parties.

[86] Of the cases presented to the Panel on the issue of professional discipline jurisdiction over pre-membership conduct, none are binding on the Panel in its interpretation of s. 26(2) specifically – a fact that was not challenged by the parties. Of the cases presented, the Panel considered only *Leung* and *Ackermann* to be persuasive (though to varying degrees). The Panel does not consider the other cases to be persuasive because they relate to different statutes, do not decide the issue that we are required to decide, are from other provinces, and/or are distinguishable on their facts.

[87] The Panel read *Leung* carefully and found it be of limited persuasive value because it does not deal with the interpretation of s. 26(2) of the Act, the limited test for jurisdiction over pre-membership conduct of suitability to practise, or the specific factual issues that are raised in this case. In addition, although there are similarities between the *Professional Engineers Act* and the Act, the *Professional Engineers Act* provides (at s. 40) that the conduct in issue in *Leung* (unauthorized practice) is a provincial offence that can be prosecuted under the *Provincial Offences Act*, RSO 1990, c P.33, an option that is not available under the Act in respect of the misconduct alleged in this case. The Panel considered the other Divisional Court decision to which we were referred, *Dumchin*, but did not find it to be highly persuasive because it did not consider or decide the issue of jurisdiction over pre-membership conduct. *Dumchin* dealt with whether a discipline committee can make certain orders (such as revocation or suspension) against an individual who no longer holds an active certificate of registration. Furthermore, aspects of the decision can be used to support both the Member's and the College's position. For example, the Member relies on paragraph 24 of *Dumchin*, in arguing that the Divisional Court limited disciplinary jurisdiction to conduct that "occurred while the person was a member" while the College relied on paragraphs 39 and 42 to argue the contrary. The Panel did find several passages from the decision to be helpful – specifically paragraph 30 which discusses the legislative goal of public protection in professional regulation statutes, and paragraph 33 which discusses the need for a broad and purposive interpretation of such legislation, "in keeping with the College's duty to act in the public interest." Ultimately, the Panel agrees with the submission of the College that paragraph 24 of *Dumchin* refers to a discipline committee's jurisdiction to make findings of professional misconduct in respect of former members – provided that the alleged conduct occurred while the person was a member – and does not limit jurisdiction over current members in the same way.

[88] The Panel was persuaded by *Ackermann*, which considered the same pre-registration discipline jurisdiction issue that arises in this case. We accept that *Ackermann* is not a complete answer to the question before us. The decision is not binding on us and has less weight because it was an uncontested hearing and the panel's reasons for decision suggest that the jurisdiction issue was not fully argued. However, this Panel carefully reviewed and considered the reasoning in *Ackermann* and found it to be helpful, particularly in its reference to the public protection purpose of the Act in support of the conclusion that the Discipline Committee had jurisdiction to deal with Ms. Ackermann's pre-membership conduct where the conduct reflects on her suitability to practise.

[89] The panel in *Ackermann* considered the purpose of the Act to protect the public interest and noted that s.3(1) of the Act "*specifically provides that in carrying out its objects, the College's primary duty is to serve and protect the public interest*" (page 13, emphasis added). The presumption against retrospectivity was therefore negated because of this clear public protection intention. The panel in *Ackermann* accepted the advice of ILC that the Discipline Committee has "jurisdiction to deal with matters that occur prior to Ms. Ackermann becoming a member, given that the alleged conduct reflects on her suitability to perform her professional duties" (page 13). We agree.

[90] In conclusion, we find that on a proper construction of s. 26(2) of the Act, taking into account the scheme of the Act, the purpose of the legislation, and the intention of the legislature, the College has jurisdiction to discipline a member for conduct that occurred prior to their membership.

*Issue 2 – Test*

[91] The Panel agrees with the test proposed by the College that the Discipline Committee will have jurisdiction over the pre-membership conduct of a member where such conduct indicates that the member is currently unsuitable to practise the profession as a member of the College. In our view, that test, based on suitability, reflects the correct interpretation of the Act and the Professional Misconduct Regulation. The Panel finds the test to be appropriate for the following reasons.

- a. It is consistent with the public protection purposes of the Act, as it focuses the inquiry on the member’s *current* suitability to practise.
- b. It meets the test for the public protection exception to the presumption against retrospectivity.
- c. It is the same threshold that the Discipline Committee applied in *Ackermann*.
- d. It is consistent with sections of the Professional Misconduct Regulation that have been alleged against the Member, namely s. 2.29.ii (contravening a law relevant to the member’s suitability to practise) and s. 2.36 (engaging in conduct or performing an act relevant to the practice of the profession that would reasonably be regarded by members as disgraceful, dishonourable or unprofessional) and that are likely to be most relevant to any member’s pre-registration conduct.
- e. It can address some of the potential unfairness to a member arising from being subject to discipline for pre-membership conduct, as a member could only be disciplined for conduct serious enough to demonstrate their current unsuitability to be a member of the College. It will be open to the member in any given case to argue that the pre-membership conduct at issue does not reflect on their current suitability to practise.

[92] The broad and purposive interpretation that must be given to the Act leads the Panel to conclude that the Discipline Committee has jurisdiction over the pre-registration conduct of a member, where that conduct calls into question their suitability to practise.

I, Sophia Ruddock, sign this Decision as Chairperson of the panel and on behalf of the panel members listed below.

Date: \_\_\_\_\_

Signed: \_\_\_\_\_

Sophia Ruddock, Chair  
Rita Silverthorn  
Charlene Crews