

COPY

PROVINCE OF NOVA SCOTIA  
COUNTY OF HALIFAX

**IN THE MATTER OF:** *The Medical Act*, R.S.N.S. 1995-96, c. 10

- and -

**IN THE MATTER OF:** A Complaint against Dr. David Russell, Medical  
Practitioner of Mount Uniacke, Nova Scotia

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**DECISION**

**re Conditions for Reinstatement of License and Payment of Costs  
of the Hearing Committee of the College of Physicians and Surgeons of Nova Scotia  
Pursuant to ss. 66 and 67 of the Medical Act, R.S.N.S. 1995-96, c. 10**

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**Members  
of the Hearing Committee:**

Mr. Michael J. Wood, Q.C., Chair  
Dr. Dawn Ross  
Mr. Harold Bezanson  
Dr. Ethel Cooper-Rosen

**Counsel:**

Marjorie A. Hickey, Q.C.  
Counsel for the College of Physicians and  
Surgeons of Nova Scotia

Daniel M. Campbell, Q.C.  
Cox Hanson  
Counsel for Dr. David Russell

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**re Conditions for Reinstatement of License and Payment of Costs**  
**of the Hearing Committee of the College of Physicians and Surgeons of Nova Scotia**  
**Pursuant to ss. 66 and 67 of the Medical Act, R.S.N.S. 1995-96, c. 10**

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**BACKGROUND**

On November 24, 2005, a meeting of the Hearing Committee of the College of Physicians and Surgeons of Nova Scotia ("CPSNS") approved a Settlement Agreement between CPSNS and Dr. David Russell pursuant to s. 57 of the *Medical Act* ("the Settlement Agreement").

By Amended Notice of Hearing dated April 5, 2006, CPSNS notified Dr. Russell that a hearing was to be held alleging that he had breached the terms of the Settlement Agreement by:

1. Testing positive for the presence of marijuana in urine samples taken from him prior to April 26, 2006 on two or more occasions contrary to paragraph 25(b) of the Settlement Agreement;
2. Failing to be available for contact between 8:00 a.m. and 9:00 a.m. seven days per week during the time the random testing was in place contrary to paragraph 25(g) of the Settlement Agreement; and/or
3. Failing to attend for requested urine tests on March 22, March 24, and/or March 27, 2006 contrary to paragraph 25(g) of the Settlement Agreement.

On April 26, 2006, the Hearing Committee of CPSNS held a Hearing pursuant to s. 66 of the *Medical Act* with respect to the charges set out in the Amended Notice of Hearing dated April 5, 2006. At that time the Committee received evidence and submissions from both CPSNS and Dr. Russell. During that Hearing the parties acknowledged that they did not have available any evidence as to the nature and extent of any conditions which

should be prescribed by the Committee in the event that it determined that a suspension of license was appropriate.

By written Decision dated May 5, 2006, the Hearing Committee found Dr. Russell guilty of the first charge set out in the Amended Notice of Hearing but not guilty with respect to the other two allegations. The Committee determined that breach of the Settlement Agreement by Dr. Russell constituted professional misconduct and that Dr. Russell was guilty of a disciplinary matter within the meaning of s. 66 of the *Medical Act*. The Committee issued an immediate suspension of Dr. Russell's license to practice medicine pursuant to s. 66(2)(e)(i)(B)(ii).

In its Decision dated May 5, 2006, the Hearing Committee retained jurisdiction over this matter for purposes of receiving evidence and submissions from both parties as to what conditions might be appropriate before reinstatement of Dr. Russell's license. The Hearing for this purpose was convened on June 16, 2006. At the commencement of that Hearing both counsel confirmed the purpose was to receive evidence and submissions on the conditions which would apply to the reinstatement of Dr. Russell's medical license.

## **EVIDENCE**

CPSNS called as a witness Dr. Kenneth Cooper who was accepted by the hearing committee as an expert witness with a specialization in psychiatry and qualified to give opinion evidence with respect to psychiatry and addiction medicine.

Dr. Cooper testified that he carried out an assessment of Dr. Russell in October 2005 at which time he reached a diagnosis of substance dependence using the criteria set out in DSM IV. He testified that substance dependence is a condition that is permanent and a patient is never "cured". They are either in remission or relapse. He further testified that in his opinion a person must have some type of external control in order to be successful and maintain themselves in remission.

According to Dr. Cooper, the success of any particular treatment program will vary with each patient and it is difficult to predict what treatment will result in any given patient achieving the level of control that will allow them to remain in remission. In some circumstances, it takes a number of different treatment programs before the patient reaches the point where "the light goes on" and they understand how to manage their illness. The likelihood of a patient achieving success increases with the number of times they participate in treatment programs.

Dr. Cooper has experience with physicians suffering from substance dependence and testified that they are particularly difficult cases. The problem which physicians face is having to make the transition from being in charge to acknowledging that they are a patient in need. For these reasons, treatment programs specifically designed for physicians are more likely to be successful.

Dr. Cooper has not seen Dr. Russell since carrying out his assessment in October 2005, however, he was provided with a copy of the decision of the Hearing Committee dated May 5, 2006 and based upon this formed the clinical impression that Dr. Russell had suffered a relapse in his substance dependence. He differentiated between a clinical impression and a diagnosis on the basis that he would not reach a diagnosis without examining the patient. Dr. Cooper did testify that he was 99.5% as certain in his clinical impression as he would be with a diagnosis. In other words, he was very confident in his opinion that Dr. Russell had suffered a relapse.

With respect to the treatment program which would most likely be successful with Dr. Russell, Dr. Cooper gave his opinion that it needed to be an in-patient treatment program specifically designed for physicians in order to have the greatest chance of success. He is familiar with the program offered by Homewood and would recommend this because of his knowledge of that particular facility. However, he did acknowledge that there are other programs that would be suitable.

Dr. Cooper understood that Dr. Russell had gone to the Homewood facility and was not prepared to accept the 12-step program which was based on an element of spirituality.

Dr. Cooper agreed that this can pose problems for some people and in such cases other programs might be more suitable.

Dr. Cooper also recommended a period of six to twelve months of clean drug testing prior to reinstatement of Dr. Russell's license. He testified the first three months is the most likely time for a violation if a patient is in relapse and the longer the period of clean test results the greater the likelihood of successful remission. The incremental increase in success between six months of clean testing and twelve months of clean testing is not statistically significant according to Dr. Cooper.

Dr. Russell's counsel called Dr. Risk Kronfli as an expert witness. The Hearing Committee accepted that Dr. Kronfli was a psychiatrist qualified to give opinion evidence on substance abuse and dependence. He has extensive experience in forensic psychiatry as well as management and design of treatment programs for individuals in custody in provincial institutions.

Dr. Kronfli has been Dr. Russell's treating psychiatrist for two years and agrees with Dr. Cooper's diagnosis that he is substance dependent. He also agrees that substance dependency is a lifelong condition and a patient is either in relapse or remission.

Dr. Kronfli does not believe that Dr. Russell was in relapse in the spring of 2006 based upon his interpretation of the criteria in DSM IV, however, that determination is not material to his opinion as to what the Hearing Committee should set as conditions for reinstatement of Dr. Russell's license.

Dr. Kronfli differentiates between measures that are necessary in order to protect the public safety and those which might be appropriate for treatment of the individual patient. On issues of public safety, he testified that measures should be put in place to ensure that the physician is not in relapse and that this can be accomplished through appropriate drug-testing procedures.

According to Dr. Kronfli's evidence, one month of clean test results will be sufficient to determine if Dr. Russell is in relapse. He recommends providing a period of three years of ongoing testing with immediate suspension for failure. If there is a failure and suspension, Dr. Kronfli testified that as soon as Dr. Russell has another period of one month of clean test results his license should be reinstated.

In cross-examination, Dr. Kronfli recognized there was some potential for harm to patients with Dr. Russell being suspended periodically as a result of failed drug tests but he felt this was unlikely because it would be increasingly difficult for Dr. Russell to carry on practice through multiple suspensions.

Aside from the issue of public safety, Dr. Kronfli also testified as Dr. Russell's treating psychiatrist. In his opinion an in-patient program is not necessary or advisable primarily because Dr. Russell does not accept that he is substance dependent. In such circumstances, forcing Dr. Russell to participate in an in-patient treatment program will likely not be successful. Up to this point, Dr. Russell has not indicated that he has a desire to stop the use of marijuana and doesn't recognize that he has a problem with substance dependence.

In Dr. Kronfli's opinion, treatment needs to be customized for each patient. In Dr. Russell's case, there is a therapeutic team consisting of himself, Dr. Russell's family doctor, and a psychologist and that continuing with this team represents the best therapeutic treatment process for Dr. Russell.

The final evidence which was submitted to the Hearing was an Affidavit of Costs setting out the costs listed by CPSNS with respect to this matter. According to the Affidavit, the costs are as follows:

- |   |             |
|---|-------------|
| 1. Legal fees including disbursements and HST from<br>November 2005 to May 31, 2006 | \$17,938.13 |
| 2. Hearing Panel Honoraria (including estimates for June 12                         | 18,425.13   |

Teleconference and June 16<sup>th</sup> Hearing)

3.	Witness Fees (including estimate for June 16 <sup>th</sup> Hearing)	5,714.50
4.	Room and Court Reporter Costs (including estimate for June 16 <sup>th</sup> Hearing)	<u>2,545.51</u>
	<b>Total:</b>	<b><u>\$44,623.27</u></b>

In addition, the Affidavit indicates that of the \$25,000 in costs that Dr. Russell had agreed to pay pursuant to the terms of the Settlement Agreement, the sum of \$20,312.50 remains outstanding. The Settlement Agreement also required Dr. Russell to pay the costs of random urine testing and there remains outstanding for those costs a total of \$2,196.50.

### **SUBMISSIONS**

Counsel for CPSNS made the submission that in light of the evidence of Dr. Kronfli suggesting that Dr. Russell did not acknowledge that he was substance dependent or had a problem with the use of marijuana, the Hearing Committee should revoke his license pursuant to s. 66(2)(e)(i)(A) in place of the suspension ordered in the May 5, 2006 decision. In the event that the Hearing Committee does not accept this submission and proceeds to consider requirements to be met in order to lift Dr. Russell's license suspension, counsel for CPSNS provided a detailed list of conditions at the Hearing. At the request of the Hearing Committee, counsel prepared a letter setting out these conditions dated July 14, 2006 which is attached as Schedule "A" to this decision.

In addition to the imposition of the conditions on reinstatement, CPSNS sought recovery of costs as outlined in the Affidavit of Costs.

Counsel for Dr. Russell disagreed that a revocation of license was appropriate and submitted that the Hearing Committee did not have jurisdiction to make such an order since they had already determined that a suspension was the appropriate sanction.

With respect to the conditions on reinstatement counsel for Dr. Russell advised that the only issue with the recommendations of CPSNS was the length of time of clean drug testing prior to reinstatement and whether Dr. Russell should be required to participate in an in-patient treatment program. With respect to payment of costs, counsel for Dr. Russell indicated the Committee should set an amount that is reasonable in all the circumstances and does not form a barrier to Dr. Russell's return to practice should all other requirements be met.

## **DISPOSITION**

The Hearing Committee is not prepared to order revocation of Dr. Russell's license to practice medicine. The Committee had previously decided to issue a suspension and receive evidence with respect to the conditions to be imposed on reinstatement. Having already decided on the essential disposition, the Committee did not have jurisdiction to reverse that conclusion. The suspension was not an interim decision but rather was a final determination of the appropriate sanction with a further hearing to consider applicable conditions for reinstatement.

With respect to the conditions to be imposed for reinstatement of Dr. Russell's license, the only issues raised by Dr. Russell's counsel are the length of testing to be in place prior to reinstatement and whether to require in-patient treatment.

With respect to the period for clean drug testing, the Hearing Committee relies on the evidence of Dr. Cooper (which was essentially confirmed by Dr. Kronfli) that successful remission is likely to be achieved if the patient is able to abstain from drugs for a period of six months. As a result the Hearing Committee accepts this as an appropriate period of clean drug testing prior to reinstatement.

With respect to whether to require in-patient treatment as a condition of reinstatement, counsel for CPSNS indicated that the primary concern of the College is protection of the public and promoting confidence in the ability of the College to regulate the profession. She also indicated that CPSNS is concerned about ensuring physicians who require



remedial help are able to obtain it. This concern is somewhat less significant and should not override the protection of the public and maintenance of confidence in the self-regulation process. Counsel for Dr. Russell essentially agreed with this description of the mandate of CPSNS.

In the present case, the Hearing Committee was concerned that Dr. Russell appeared to have made little progress in his current treatment regime as evidenced by his denial of a substance dependence problem. Dr. Cooper testified there is significant value in an in-patient treatment program and that repeated treatment increases the likelihood of a patient being able to manage and control their substance dependence. The Hearing Committee accepts this evidence and for this reason agrees with the submission of CPSNS that a period of in-patient treatment should be required as a condition of reinstatement.

There might be some concern with a Hearing Committee who was primarily responsible for discipline issues determining an appropriate treatment program for a patient rather than leaving those decisions to the patient and his medical advisors. In response to such concerns, the Committee notes that it is ultimately up to Dr. Russell to determine the method of treatment which he wishes to follow. However, if he wants to regain the privilege of practicing medicine he must comply with the requirements set by this Committee. These requirements are designed to ensure, as much as possible, that Dr. Russell will not return to practice until he has demonstrated that the risk to the public and his patients is adequately controlled.

As a result, the Hearing Committee accepts that conditions outlined in paragraphs numbered 1 through 11 in the letter from counsel for CPSNS dated July 14, 2006 attached as Schedule "A" to this Decision, and imposes these conditions on the reinstatement of Dr. Russell's license.

## **COSTS**

The costs as outlined in the Affidavit of Costs filed by CPSNS are significant. This Committee is responsible for determining whether the burden of those costs should be

borne by Dr. Russell or the profession generally (through CPSNS), or whether there is some balance whereby the burden is allocated between those parties.

In the present case, Dr. Russell is primarily responsible for the costs and their magnitude due to the positive drug tests which gave rise to this proceeding. The length and expense of the proceeding was somewhat increased by Dr. Russell's denial of drug use which the Committee had previously found not to be credible.

The Committee is also mindful of the submissions of counsel for Dr. Russell that any requirement to pay costs should not establish an impossible barrier to Dr. Russell's return to practice if he is otherwise able to comply with this Committee's conditions. There are also costs which Dr. Russell will incur in completing the conditions which have been imposed and those costs are not reflected in the Affidavit of Costs which has been filed.

After considering the above factors as well as submissions of counsel, the Committee has determined that the portion of costs associated with this hearing to be paid by Dr. Russell should be reduced from \$44,623.27 to \$30,000. This is in addition to the amounts already owing by Dr. Russell pursuant to the provisions of the Settlement Agreement being the sums of \$20,313.50 and \$2,196.50 noted above.

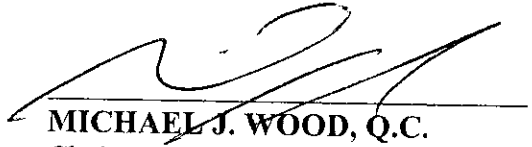
As a further condition of reinstatement of Dr. Russell's license, this Committee requires that any balance owing to CPSNS pursuant to the terms of the Settlement Agreement be paid. In the event that any portion of the costs of \$30,000 remains unpaid at the time of reinstatement of Dr. Russell's license, it is a condition of his reinstatement that he agree to pay that amount in equal monthly instalments over a period of 36 months following his reinstatement.

#### **FURTHER RETENTION OF JURISDICTION**

Counsel for CPSNS has requested this Committee retain jurisdiction over this matter until "satisfaction of all terms of its order". The Committee is not prepared to retain a general supervisory jurisdiction over every aspect of the conditions which may be applicable to

the lifting of the suspension on Dr. Russell's license. It is, however, prepared to retain jurisdiction with respect to this matter but only for purposes of determining whether a particular condition has been met.

Dated at Halifax, Nova Scotia, this 21<sup>st</sup> day of July, 2006.



**MICHAEL J. WOOD, Q.C.**

Chair, Hearing Committee of College of  
Physicians and Surgeons of Nova Scotia  
on behalf of Committee Members:  
Dr. Dawn Ross, Mr. Harold Bezanson,  
and Dr. Ethel Cooper-Rosen

Our File: AH-1144  
July 14, 2006

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**BY HAND**

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Dear Mr. Chair and Committee Members:

**Re: College of Physicians and Surgeons of Nova Scotia – Dr. David Russell**

Further to the reconvening of the Hearing on Friday, June 16, 2006, I am setting out below the College's proposed terms for the lifting of the suspension of Dr. Russell's licence. The proposed disposition of the College, as an alternative to our submissions on revocation which were given on June 16, 2006, are as follows:

1. The suspension of Dr. Russell's licence to practice would continue until compliance with the remaining conditions outlined below;
2. Prior to the lifting of the suspension of his licence Dr. Russell shall complete an inpatient physician focused assessment and treatment program. The specific program to be taken by Dr. Russell shall be approved by the College. Dr. Russell shall comply with the treatment recommendations arising from this program and in the event of any dispute as to whether Dr. Russell has complied with the treatment recommendations, the Hearing Committee of the College shall retain jurisdiction in the matter to resolve any questions arising concerning compliance with the program;
3. Subject to paragraph 9, Dr. Russell shall abstain from all cannabinoids, opioids, benzodiazepines, barbiturates, cocaine and all other illicit mood-altering substances, and all prescription or non-prescription medications (the "Prohibited Substances") except as specifically prescribed by his family physician, treating psychiatrist, family dentist, specialist dentist, or any other physician as may be approved by the College. Dr. Russell shall provide information to any of the health professionals named in the foregoing sentence to advise them of his Settlement Agreement with the College and the subsequent decisions of this

Hearing Committee. Dr. Russell shall further be ordered not to self-prescribe any medication, and not to prescribe any medication to any family members.

4. Dr. Russell shall recommence a program of random body fluid monitoring for the detection of the Prohibited Substances for a period of at least six (6) months prior to his application for the lifting of the suspension of his licence. Dr. Russell must maintain negative readings for such testing for this minimum six (6) month period before he is eligible to seek the lifting of the suspension of his licence to practice.
5. During the six (6) month period outlined in paragraph 4 no more than fifteen (15) samples are to be taken. These samples are to be drawn on a random basis by East Coast Mobile, or such other entity approved by the College (referred to herein as "the testing agency"), with the expense to be borne by Dr. Russell. Dr. Russell shall provide the cost for fifteen (15) tests to the College in advance of the recommencement of the random urine testing. A failure to attend for the request for random testing without an excuse approved by the College will be deemed to be a positive result. Dr. Russell agrees to be available to be contacted by the testing agency between 8:00 a.m. and 9:00 a.m. seven (7) days per week during the time the random testing is in place. Copies of the test results are to be sent by the testing agency to the Investigation Department of the College, which shall then forward copies of the results to Dr. Russell.
6. The random body fluid testing for detection of the Prohibited Substances shall continue for a period of five (5) years following the lifting of the suspension of Dr. Russell's licence. During that period, Dr. Russell agrees to be bound by the terms of the random body fluid monitoring outlined in the previous paragraph, with the sole exception being that the number of tests shall be reduced to no more than fifteen (15) tests for every twelve (12) month period. In the event of any positive result from the random body fluid monitoring test, or any other violation of the terms of this Settlement Agreement, Dr. Russell's licence to practice medicine shall be immediately suspended, and the matter shall be referred to a Hearing Committee of the College for determination with respect to further disposition.
7. At the time he applies for the lifting of his suspension, Dr. Russell shall provide the College with a copy of a current assessment from his treating psychiatrist, or such other psychiatrist as may be approved by the College. In addition, should the College require it, Dr. Russell shall attend for an independent examination by a psychiatrist selected by the College. In the event the psychiatric reports are favorable and Dr. Russell meets the other conditions imposed by the Hearing Committee such that his licence shall be reinstated, Dr. Russell shall, following the lifting of his suspension, continue to be seen by a psychiatrist for a period of five (5) years. His treating psychiatrist shall provide the College with quarterly reports on Dr. Russell's progress during the first twelve (12) month period following the lifting of the suspension of his licence, and thereafter semi-annual reports continuing until the five (5) years have lapsed. The reports from the psychiatrist shall document Dr. Russell's ongoing compliance with recommended

treatment, and shall continue regular review of Dr. Russell's alcohol consumption and gambling. The College shall provide copies of all decisions of the Hearing Committees and Settlement Agreements to any of the psychiatrists who are providing reports in accordance with this paragraph.

8. Dr. Russell shall be required to have regular visits with his family physician and such psychologists as may be recommended by his psychiatrist. The College shall provide a copy of the Settlement Agreement dated November 18, 2005 together with all other decisions of the Hearing Committee to his psychologist(s) and his family physician, and Dr. Russell hereby consents to, and requests his psychologist(s) and family physician to provide reports to his psychiatrist documenting compliance with any recommended treatment, and outlining his participation in such treatment since the date of the last report. The reports from the family physician and psychologist(s) shall be provided to the psychiatrist in sufficient time for the psychiatrist to incorporate reference to these reports in his quarterly and then semi-annual reports to the College, as outlined above in paragraph 8.
9. In the event Dr. Russell becomes an inpatient in a health facility, use of benzodiazepines or opioids may be done only under close supervision while remaining in the facility. If required in the opinion of Dr. Russell's treating physician while an inpatient, only SSRI's should be used to treat anxiety and depression, and sleep aids shall be confined to trazodone or amitriptyline or such other medication (excluding Zopiclone) as may be prescribed by the treating physician. Such treating physician shall be provided with a full copy of the Settlement Agreement dated November 18, 2005 together with copies of the other decisions herein of the Hearing Committee. Dr. Russell shall immediately advise the College following his discharge from an inpatient facility with respect to the use of any benzodiazepines or opioids while in such facility.
10. The prohibition against Dr. Russell prescribing controlled substances to any person that was imposed pursuant to the Settlement Agreement dated November 15, 2005 shall be continued. In addition, the condition that Dr. Russell shall not accept the practice of having patients return unused medication to him shall continue following the lifting of the suspension. A sign to the effect that he cannot prescribe controlled substances and cannot accept the return of unused medication shall be posted within the office in which Dr. Russell is practicing.
11. In the event Dr. Russell satisfies all the requirements for the lifting of the suspension of his licence, he shall return to work gradually, starting with half days. He shall continue working half days for the first four (4) weeks following the reinstatement of his licence and thereafter he shall abide by the opinion of his psychiatrist with respect to the timing of the gradual return to work on a full-time basis.

In addition to the above terms of the lifting of the suspension of Dr. Russell's licence, the College requests that the Hearing Committee retain jurisdiction over this matter until satisfaction

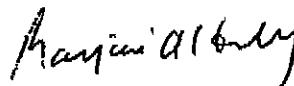
of all terms of its order. In the event there are insufficient numbers of members of the Hearing Committee available to constitute a quorum at the time an issue may arise, the College may appoint other members to a Hearing Committee in order to constitute a quorum to deal with the new matter arising from the interpretation or implementation of the Hearing Committee's decision.

Finally, as noted in our oral submissions, the College seeks solicitor/client costs from Dr. Russell for the reasons we articulated during our oral submissions.

Thank you for your attention to this matter.

Yours very truly,

McINNES COOPER



Marjorie A. Hickey

MAH/hjb  
cc: Dan Campbell  
Dr. Cameron Little

(#908800)