PROVINCE OF NOVA SCOTIA
HALIFAX REGIONAL
MUNICIPALITY

IN THE MATTER OF: **The College of Physicians and Surgeons of Nova Scotia**

-and-

Dr. Manivasan Moodley

DECISION ON DISPOSITION

Hearing date: April 6, 2021

Date of Decision: May 20, 2021

Hearing Panel:

Ms. Gwen Haliburton
Dr. M. Naeem Khan
Dr. Gisele Marier
Dr. Erin Awalt
Raymond Larkin, Q.C.

Counsel for the College of Physicians and Surgeons of Nova Scotia:

Ms. Marjorie Hickey, Q.C., and Mr. Ryan Baxter

Counsel for Dr. Manivasan Moodley:

Mr. Robin Cook and Mr. Shane Belbin

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I. Introduction

1. It is unethical for medical practitioners in Nova Scotia to exploit their patients for sexual reasons by asking questions or making comments of a sexual nature with no medical relevance. This case illustrates the harm resulting from failing to respect a physician's professional boundaries by sexual interactions with patients and the disciplinary consequences for crossing those boundaries.

2. On November 23, 2020, the Hearing Committee issued its decision that Dr. Moodley had engaged in professional misconduct. Our decision included the following:

> "273. We have concluded that Dr. Moodley engaged in professional misconduct with A.B. by commenting inappropriately on her physical appearance and by initiating a discussion of a personal or sexual nature with her that was not relevant to her medical issues, and that following a physical examination, he asked questions of a sexual nature that were not relevant to her medical issue.
>
> 274. We have also concluded that Dr. Moodley engaged in unprofessional conduct by asking C.D. questions and making comments of a personal and sexual nature that were not relevant to her medical issues and that he violated the boundaries between physician and patient by attending at C.D.'s worksite."

3. Since we issued our decision, we have received extensive written submissions from counsel on the disposition of this matter and held a hearing on April 6, 2021 to receive oral submissions from counsel. This is our decision on the disposition of the disciplinary issues arising from Dr. Moodley's misconduct.

II. History of the Proceeding

4. On August 18, 2017, A.B. made a complaint to the College about the conduct of Dr. Moodley during an appointment at his office on July 13, 2017. On September 20, 2017, C.D. made a complaint to the College about Dr. Moodley's conduct during an office appointment on July 6, 2017. Each of the complaints included claims that Dr. Moodley had made inappropriate comments of a sexual nature while assessing their medical issues during those office appointments.

5. Dr. Moodley vehemently denied the claims made by A.B. and C.D. in their complaints. Furthermore, in his reply to C.D.'s complaint, Dr. Moodley complained that the allegation against him was "coordinated and racially motivated." He has reaffirmed that belief in his evidence at the hearing despite admitting he had no evidence to support it.

6. Following the complaint by A.B., on August 31, 2017, Dr. Moodley voluntarily undertook to have an attendant present for all female encounters. After the complaint from C.D., the Investigation Committee of the College imposed an interim restriction on Dr. Moodley's licence that included the following:

"1) Dr. Moodley is required to have an attendant present for all encounters from beginning to end;

2) the attendant must have an obstructed view of any procedure performed;

3) the attendant will be a regulated healthcare professional, approved by the College;

4) a College sign regarding this requirement is to be placed in all waiting rooms and examination rooms where patients are to be seen;

5) Dr. Moodley is required to avoid contact with his patients outside the clinical setting."

7. The Investigation Committee of the College initially referred allegations to the Hearing Committee in July of 2018. There was a long delay from the referral to a hearing committee and the beginning of the hearing. Counsel for the College and Dr. Moodley discussed hearing dates in the spring of 2019 and eventually agreed on hearing dates of October 24-28, 2019. A hearing panel was constituted early in October 2019.

8. The hearing of the merits did not proceed in October. Pre-hearing issues were raised by Dr. Moodley, followed by two written motions on October 10, 2019. Dr. Moodley and the College agreed that they would address pre-hearing matters on the first day of the hearing scheduled to begin on October 24, 2019. Written submissions and affidavit evidence on the preliminary issues were submitted by the College and by Dr. Moodley.

9. On October 24, 2019, four motions were considered. The College, with the agreement and consent of Dr. Moodley, requested a publication ban on the names of the complainants and any information that could identify them. The Hearing Committee agreed that the publication ban was necessary and imposed the ban. Dr. Moodley requested a temporary partial publication ban on his identity and his country of origin. The College objected to the publication ban sought by D. Moodley. Counsel fully argued this issue with affidavit evidence and cross-examination of Dr. Moodley. The decision was reserved, and the Committee eventually issued a written decision on December 16, 2019, rejecting the proposed publication ban on Dr. Moodley's name and country of origin.

10. The other two motions considered on October 24, 2019, were Dr. Moodley's motions for production documents by the complainants, which, after later amendments, provided as follows:

"Dr. Manivasan Moodley ("Dr. Moodley"), the Respondent in this proceeding, moves for an Order required the Complainant, [A.B.] to produce:

(a) All social media postings of [redacted] within her power, possession, or control from ~~January 1, 2014~~, May 1, 2016, through to the present day, including but not limited to postings on Facebook, Instagram, and Twitter related to Dr. Moodley or [C.D.];
(b) All emails, text messages, or other correspondence, to or from or copied to the office of Dr. Erin MacLellan, including but not limited to Sandra Phillips-MacInnis or Dr. Erin MacLellan, relating to [C.D.] or Dr. Moodley;

(c) All emails, text messages, or other correspondence, to or from or copied to [C.D.] regarding Dr. Moodley; and
(d) All emails, text messages, or other correspondence, relating to [C.D.] and Dr. Moodley."

"Dr. Manivasan Moodley ("Dr. Moodley"), the Respondent in this proceeding, moved for an Order requiring the Complainant, [C.D.], to produce:

(a) All social media postings of [C.D.] within her power, possession, or control from ~~January 1, 2014~~, May 1, 2016, through to the present day, including but not limited to postings on Facebook, Instagram, and twitter;
(b) All emails, text messages, or other correspondence to or from or copied to the office of Dr. Erin MacLellan including but not limited to Sandra Phillips-MacInnis or Dr. Erin MacLellan relating to [A.B.] or Dr. Moodley;
(c) All emails, text messages, or other correspondence, to or from or copied to [A.B.] regarding Dr. Moodley; and
(d) All emails, text messages, or other correspondence, relating to [A.B.] and Dr. Moodley."
[Names of complainants redacted and initials substituted]

11. The purpose of these motions was to obtain evidence to support Dr. Moodley's claim that the complaints were motivated by racism and were coordinated between the complainants.

12. At the hearing on October 24, 2019, there was an initial discussion of these motions. Lawyers representing the complainants were in attendance opposing the motions. The Hearing Committee gave directions and set dates for hearing the motions on December 16 and 17, 2019, and for a hearing of the merits for February 24th-28th, 2020.

13. Extensive affidavit evidence was filed by the College and Dr. Moodley, and briefs were submitted by all counsel addressing the two motions for production.

14. On December 11, 2019, the Hearing Committee was notified that Dr. Moodley had changed legal counsel. A video conference hearing was held on December 16, 2019; the date for the hearing of Dr. Moodley's motions was changed to January 20, 2020. Dr. Moodley's counsel requested a lengthy adjournment of the hearing on the merits. The Hearing Committee refused to grant the adjournment and confirmed the hearing dates of February 24th-28th.

15. On January 8, 2020, Dr. Moodley's new counsel withdrew the two motions for production. The hearing on January 20, 2020, was cancelled. An amended Notice of Hearing was issued on January 22, 2020, which provided as follows:

"1. With respect to patient A.B., on a date in July 2017, Dr. Moodley committed professional misconduct and/or was incompetent by:

(a) commenting inappropriately on the patient's physical appearance;
(b) performing a physical examination of the patient in a sexualized manner, or alternatively in a manner inconsistent with accepted standards;

(c) in the course of the clinical encounter, initiating a discussion of a personal or sexual nature with the patient that was not relevant to the patient's medical issues;
(d) following the physical examination, asking questions of a sexual nature that were not relevant to the patient's medical issues.

2. With respect to patient C.D., on a date in July 2017, Dr. Moodley committed professional misconduct and/or was incompetent by:

(a) prior to informing of her test results, asking questions and making comments of a personal and sexual nature that were not relevant to the patient's medical issues;
(b) unnecessarily requesting an internal examination;
(c) in the course of conducting a pelvic ultrasound, complimenting her on the colour of her underwear;
(d) following the physical examination, asking questions and making comments of a personal or sexual nature that were not relevant to the patient's medical issues, including a suggestion about seeing her at home and advising he knew where she lived;
(e) conducting a pelvic ultrasound in a manner inconsistent with accepted standards;
(f) unnecessarily magnifying the extent of the patient's medical issues.

3. With respect to patient C.D., after the July 2017 clinical encounter, Dr. Moodley committed professional misconduct by violating the boundaries between physician and patient through his attendance at the patient's workplace, where he sought her out."

16. On February 10, 2020, the College filed a motion seeking an order to exclude the public other than the media from the hearing scheduled to begin on February 24, 2020. Dr. Moodley did not support the motion but argued that, if it was granted, it should exclude the media. Affidavit evidence and briefs were filed, and oral submissions were made to the Hearing Committee on February 14, 2020. The Hearing Committee granted the order requested by the College and, with the consent of the parties, written reasons were reserved. Those reasons have been included in the Hearing Committee's decision of November 23, 2020.

17. Of the six pre-hearing motions, two were brought by the College, both of which were accepted by the Hearing Committee (Dr. Moodley did not contest one). Four motions were brought by Dr. Moodley and contested by the College, and all four were rejected.

18. As scheduled, the hearing of the merits began on February 24, 2020, and continued until February 28. Other dates were agreed but were lost because of the COVID-19 pandemic. Two additional days for hearing were held on August 26 and 27, 2020, in which the evidence was completed and oral arguments presented. Counsel filed extensive written briefs. In final argument, the College withdrew the allegations of incompetence and part of the allegation in paragraph 1 (b) of the Notice of Hearing and paragraphs 2 (e) and (f) of the Notice.

19. The Hearing Committee reserved decision and issued its decision on November 23, 2020. The Committee found that Dr. Moodley had committed professional misconduct as alleged in paragraphs 1 (a)(c)(d), paragraphs 2 (a)(c)(d), and paragraph 3 of the Notice of Hearing. In effect, the Hearing Committee did not accept the allegations in paragraphs 1 (b), 2 (b)(e)(f).

20. Essentially, the allegations in the Notice of Hearing relating to the clinical aspects of Dr. Moodley's contact with the complainants were either withdrawn or not accepted by the Hearing Committee. The Committee's findings of misconduct, except for Dr. Moodley attending C.D.'s place of work, all related to inappropriate sexually oriented comments and questions directed to the complainants without any medical reason. These comments are summarized in the decision as follows:

> "With regard to A.B. at paragraph 131:
>
> a. As A.B. walked into Dr. Moodley's office towards the chair where she would be sitting, and, as Dr. Moodley was closing the door to the office, he said to her, "…and what would a young beautiful girl like you be doing here?"
>
> b. [**OMITTED**]
>
> c. Dr. Moodley asked A.B. if she used sex toys.
>
> d. Dr. Moodley asked A.B. about childbirth, her children, and if she was tight and told her that some men like it tight and some men like it loose.
>
> e. Dr. Moodley asked A.B. whether she was sure that she didn't want any more children.
>
> f. In conducting an ultrasound, Dr. Moodley noticed that she had tattoos on her hips and commented on how nice her tattoos were.
>
> g. After conducting the P.A.P. test and returning to Dr. Moodley's office he asked what kind of orgasms she had, clitoral or vaginal, saying you know you have the ability to have a vaginal orgasm and that a woman can be stimulated through her nipples and clitoris."
>
> "With regard to C.D. at paragraph 257:
>
> a. How do you look after yourself sexually while your partner is away;
>
> b. It seemed that C.D. would have a very healthy appetite sexually;
>
> c. Did you use your fingers or sex toys;
>
> d. He would look after me well;
>
> e. He liked that my underwear matched the colour of my lipstick;
>
> f. Asked her about her living arrangements;

g. Would I see you if I came to the [her community] – at your house – I know where you live;

h. Where my bedroom is located in reference to children;

i. If I lived with my father;

j. If engaging in sexual activity would my children hear if I was to scream or make any noises; and

k. I wouldn't need to worry because at the next appointment he would thoroughly look after me and I wouldn't need my partner – it would be our secret. **[Location redacted]**"

21. None of these comments were medically relevant, although, concerning paragraph k, there may have been a misunderstanding about Dr. Moodley's remark that C.D. would not have to worry because he would thoroughly look after her in her next appointment. However, there was no medical reason for him connecting this with not needing her partner and that "it would be our secret."

III. Disposition

22. The College of Physicians and Surgeons of Nova Scotia has very stringent guidelines governing sexual misconduct by a physician with their patients. The standards in place in 2017 prohibited sexual interaction with patients or the exploitation of patients for sexual reasons. The guidelines recognize a power inequality existing in the patient/physician relationship in which the patient is vulnerable. They require medical practitioners to respect professional boundaries in their interaction with their patients. The standards state that "any finding of a sexual boundary violation by a physician within a physician/patient relationship will result in a disciplinary sanction."

23. This is a case where Dr. Moodley did not respect the sexual boundaries required by the standard and asked questions and made comments of a sexual nature, and went to the workplace of one of the complainants for no medical reason. The issues at this stage involve the consequences for Dr. Moodley of our findings of professional misconduct and to what extent Dr. Moodley must pay the investigation and hearing costs that led to those findings.

24. Having found that Dr. Moodley engaged in professional misconduct in his interaction with two of his patients in July 2017, the Hearing Committee has a mandate under the *Medical Act* and Medical Practitioners Regulations to make orders that dispose of this matter. The *Medical Act*, S.N.S. 2011, c 38, includes the following provision:

> "54 (1) Where a hearing committee finds professional misconduct, conduct unbecoming, incompetence or incapacity, the Committee shall dispose of the matter in accordance with the regulations;

25. Section 115 of the Medical Practitioners Regulations provides as follows:

"115 A hearing committee that finds professional misconduct, conduct unbecoming, incompetence or incapacity on the part of a respondent may dispose of the matter in any manner it considers appropriate, including doing one or more of the following, and must include orders for the action in the Committee's disposition of the matter:

(a) revoke the Respondent's registration or licence;

(b) for a respondent who held a temporary licence at the time of the incident giving rise to the complaint, revoke the Respondent's ability to obtain registration or require the Respondent to comply with any conditions or restrictions imposed by the Committee if registration is granted;

(c) authorize the Respondent to resign their registration;

(d) suspend the Respondent's licence for a specified period of time;

(e) suspend the Respondent's ability to obtain a licence for a specified period of time;

(f) suspend the Respondent's licence pending the satisfaction and completion of any conditions a hearing committee orders;

(g) impose any restrictions or conditions, or both, on the Respondent's licence for a specified period of time;

(h) reprimand the Respondent and direct that the reprimand be recorded in the records of the College;

(i) direct the Respondent to pass a particular course of study or satisfy a hearing committee or any other committee established under the Act of the Respondent's general competence to practise or competence in a particular field of practice;

(j) refer the Respondent for a competence assessment as determined by the Registrar, and require the Respondent to pay for any costs associated with the assessment;

(k) direct the Respondent to pay a fine in an amount determined by the hearing committee for findings that involve

(i) practising while not holding a valid licence to practise, or

(ii) professional misconduct or conduct unbecoming the profession;

(l) direct the Respondent to pay any costs arising from compliance with an order under clause (g), (i) or (j);

(m) publish or disclose its findings in accordance with the Act and these regulations."

26. Further, having found misconduct, the Hearing Committee may order the medical practitioner to pay some or all of the costs incurred by the College in investigating and hearing complaints against the practitioner. Section 121 of the Medical Practitioners Regulations provides the Hearing Committee with broad jurisdiction to order costs:

> "121 (1) For the purposes of this Section, "costs" includes all of the following:
>
> (a) Expenses incurred by the College in the investigation of a complaint;
> (b) Expenses incurred by the College for the activities of an investigation committee and a hearing committee;
> (c) Expenses incurred for participation in any competence assessment arising from a decision of an investigation committee or a hearing committee;
> (d) Expenses incurred under subsection 88(4), 99(4) or 110(6);
> (e) The College's solicitor and client costs, including disbursements and H.S.T., relating to the investigation and hearing of a complaint, including those of College counsel and counsel for a hearing committee;
> (f) Fees for retaining a court reporter and preparing transcripts of the proceedings;
> (g) Travel costs and reasonable expenses of any witnesses, including expert witnesses.
>
> (2) Except when awarded costs under this Section, a respondent is responsible for all expenses incurred in their defence.
>
> (3) If a hearing committee finds professional misconduct, conduct unbecoming the profession, incompetence or incapacity on the part of the Respondent, **it may order that the respondent pay costs in whole or in part.**
>
> (4) If a hearing committee considers that a hearing was not necessary, it may order the College to pay some or all of the respondent's legal costs.
>
> (5) The Registrar may suspend the licence of any respondent who fails to pay the costs within the time ordered until payment is made or satisfactory arrangements for payment are made."
> **[Emphasis added]**

27. In this case, the College has requested the Hearing Committee to reprimand Dr. Moodley, to suspend his licence to practice within an appropriate range which the College submits is six to eight months, to require him to complete ethics training before returning to practice following the suspension, and to continue providing a practice monitor during appointments in his office with patients and to post signs approved by the College confirming the requirement of the monitor. The College seeks just under $400000 in costs.

28. Dr. Moodley acknowledges that the disposition of this matter should include a reprimand and completion of ethics training as proposed by the College. He also recognizes that a suspension is appropriate but argues that the appropriate suspension would fall between two

and four months. He does not accept the proposal of a practice monitor made by the College. He disputes the costs order sought by the College.

(a) Applicable Principles

29. Neither the *Medical Act* nor the Medical Practitioners Regulations aim primarily at penalizing or punishing medical practitioners who engage in professional misconduct. In our view, the *Medical Act* and the Medical Practitioners Regulations require dispositions that are remedial, not punitive. The *Act* and the Regulations require a hearing committee to dispose of a matter by adopting orders that promote the public interest. Most often, this will be best accomplished by denouncing the misconduct and imposing conditions or restrictions that provide an assurance of public protection and demonstrate to the public and the medical profession that there are effective means of maintaining the profession's standards.

30. There is a role for including sanctions in a set of dispositions that together reflect the public interest. The purpose of suspending a medical practitioner's licence should be to correct the practitioner who has engaged in professional misconduct and send a message to the profession that certain conduct will not be tolerated. In our opinion, revocation of a licence should only be ordered as a last resort.

31. In the Hearing Committee's decision in *Re Ezema* 2018, CanLII 105365, the Hearing Committee applied this approach in a sexual misconduct case. In paragraphs 13 to 29, we reasoned as follows:

> "4. Protection of the Public
>
> 13. Protection of the public must be paramount in considering the appropriate disposition in this matter. In our opinion, Dr. Ezema's misconduct was serious. We believe that it is important not to minimize or excuse misconduct of a sexual nature between physicians and health workers.
>
> 14. This case illustrates the harm that can result when a physician crosses professional boundaries. Dr. Ezema was persistent in making advances towards Colleague 'A', which she did not invite or reciprocate. To avoid his advances, she had to resort to a strategy of taking a long way around in the halls of the workplace to avoid running into him or isolating herself in her office. It reached the point that she gave up her employment took a job with another employer with a substantial reduction in pay, and only returned to her position after Dr. Ezema moved to another location.
>
> 15. Likewise, it goes without saying that no health worker like Colleague 'C' should be cornered in the file room for an unwanted hug and kiss from a physician.
>
> 16. We regard these incidents as serious, both as to the conduct itself and the harm done to Colleagues 'A' and 'C' as a result.

17. These health workers are members of the public that the College is mandated to protect from professional misconduct. Considering protection of the public only Dr. Ezema's conduct calls for a disposition which makes it clear that his conduct cannot be tolerated."

5. Maintaining the Confidence of the Public in the ability of the College to Regulate the Medical Profession

18. An appropriate disposition of the matter should be one that leaves no doubt that the College takes sexual harassment and assault by physicians seriously. The serious nature of Dr. Ezema's misconduct must be considered in imposing a disposition that will maintain the confidence of the public in the ability of the College to regulate the medical profession. The decision of the College in this matter will be made known to the public. Sexual harassment and assault of hospital workers by physicians is unacceptable, and the decisions of the College should reflect the seriousness of this conduct not only to deter it but to demonstrate to the public that the College has the public interest as its primary consideration."

6. General Deterrence

19. There is no doubt that a disposition of this matter resulting in the revocation of Dr. Ezema's licence to practice would send a strong message to physicians that sexual harassment of hospital staff will not be tolerated in Nova Scotia.

20. Whether revocation is the only disposition that would send that message is not as clear. We have not been presented with evidence that sexual harassment of health workers by physicians is endemic in Nova Scotia. In our opinion, we should not assume that only the most severe disposition will create the desirable level of general deterrence. A reprimand and a significant suspension would also send a strong message that the College will not minimize or excuse this kind of conduct.

7. Specific Deterrence

21. Specific deterrence is an important consideration here. If we concluded that it was unlikely that a suspension would deter Dr. Ezema from repeating acts of professional misconduct, the College's request for revocation of his licence could be the appropriate disposition. If we were convinced that Dr. Ezema was unlikely to repeat his professional misconduct, a disposition other than revocation could be appropriate.

22. In our opinion, Dr. Ezema himself needs to be sent a strong message. His persistent sexual harassment of Colleague 'A' and its repetition, in another form, with Colleague 'C', demonstrates a course of conduct over time that

cannot be regarded as an isolated mistake. In our opinion, there was deliberate repeated breaches of professional sexual boundaries.

23. Dr. Ezema did not admit any of his misconduct. That, of course, was his right but, even at the disposition hearing, his counsel referred to our findings as allegations. Dr. Ezema's persistent denial of his conduct means that we have no evidence that he has developed insight into the impact of his conduct on his workplace colleagues.

…

27. In our view, specific deterrence in the circumstances of this case requires a disposition that causes Dr. Ezema to understand that any future repetition of his misconduct may have the consequence of the revocation of his licence sought by the College in this matter.

8. Potential for the Member's Rehabilitation

28. Given Dr. Ezema's denial of the incidents that the Hearing Committee has found in its hearing on the merits, we really have no evidence of potential for his rehabilitation.

9. Proportionality

29. None of the factors we have considered can be applied to the facts of this case in isolation. An appropriate balance between the disposition principles at play, in this case, must also include consideration of the principle of proportionality. Not every breach of professional sexual boundaries justifies the revocation of a physician's licence. Any sanction imposed in the disposition of this matter must be proportionate to Dr. Ezema's misconduct."

(b) Power Imbalance

32. *Re Ezema* was a case of sexual misconduct involving fellow employees in a hospital. A more nuanced approach is necessary where sexual misconduct involves patients. Unlike the relationship between a physician and his work colleagues and fellow employees, the physician-patient relationship exists for the patient's benefit only. Physicians benefit from the relationship through job satisfaction from helping their patients and from applying science to the health issues presented by a patient, and Medicare ensures that they are compensated. However, a physician who seeks to satisfy their personal needs in the relationship with the patient risks crossing an ethical boundary. When a physician seeks to meet their own sexual needs by asking questions and making comments of a sexual nature with no medical relevance, they have crossed that ethical boundary.

33. Patients seek assessment or treatment from a physician because of the physician's expertise and experience on a health issue. Patients are vulnerable in that relationship. When a person is sick or injured, they are at their most vulnerable. Patients are in a relationship where the physician has far more power than the patient because of their expertise and experience. In

that relationship with its power imbalance, patients trust that the physician is concerned with their needs only.

34. Conduct that in other circumstances might be unobjectionable is entirely unacceptable in the physician-patient relationship. If a physician indulges in their own sexual needs by asking questions and making comments of a sexual nature without any medical relevance, such talk constitutes an abuse of the unequal power in the relationship; the physician's needs have taken precedence over the patient's needs.

35. While this type of conduct is harmful to the patient, it also damages the medical profession's reputation and confidence in the College as a regulator. The trust that patients repose in their physicians will be eroded if the medical profession tolerates or minimizes this kind of abuse of power.

36. In recent years, there has been much attention to examples of powerful men making unwanted sexual advances towards women. Reflecting this awareness and changing social attitudes, the public demands accountability of those in unequal power relationships who abuse the trust reposed in them. In *CPSO v. Peirovy*, 2018 ONCA 420, the Ontario Court of Appeal noted that" …what needs to be done to maintain the public's confidence must constantly be reassessed in light of considerations such as changes in society and the practice of medicine."

37. As a Hearing Committee which has found sexual misconduct with patients by Dr. Moodley, we must ensure a disposition of this matter that holds Dr. Moodley accountable for his misconduct and which maintains the confidence of the public that the medical profession will not tolerate this kind of conduct in light of changing societal attitudes about sexual misconduct by physicians.

(c) Protection of the public

38. The statutory mandate of the College is to protect and serve the public interest. That gives protection of the public the highest priority in the disposition of a case of sexual misconduct.

39. The public interest is also served by fairness in holding physicians accountable who engage in such misconduct. There may indeed be cases where a physician's conduct is so egregious that the protection of the public demands revocation of their licence to practice. However, in our opinion, we should only order revocation of a physician's licence if measures short of revocation will not protect the public or do not make it clear to the physician and the public that sexual misconduct of this sort will not be tolerated.

40. Disposition of a disciplinary matter should recognize that it is in the public interest to correct and rehabilitate physicians who have strayed across acceptable boundaries. For example, Dr. Moodley fills a much-needed role in the delivery of medical services to women in Cape Breton. From the evidence of his colleagues, he does this with a high level of professionalism and skill, working well with colleagues and patients and is much appreciated for his work. In our opinion, if we can order a disposition of this matter that protects the public from future boundary

violations and keeps Dr. Moodley providing needed service to Cape Breton patients, we should do that.

(d) Insight into the nature of sexual boundaries and evidence of character

41. Our most significant challenge in achieving this objective is that we have no evidence that Dr. Moodley accepts responsibility for his conduct or has developed insight into his past behaviour.

42. Counsel for Dr. Moodley cited several decisions that adopt the principle from the criminal law of sentencing that denial of all misconduct and absence of remorse for professional misconduct established by the College should not increase a disciplinary penalty. We agree with this submission. A physician is entitled to a hearing in which the College proves allegations against them on the balance of probabilities. The physician should not be penalized for exercising that right. It is not an aggravating factor in determining the appropriate disposition.

43. However, by denying his misconduct, Dr. Moodley has denied himself a potentially crucial mitigating factor in our assessment of an appropriate disposition that protects the public. The absence of any admission of misconduct and the lack of remorse results in a practical problem for a Hearing Committee in deciding how to protect the public from such misconduct in the future. In this case, there is very little evidence that Dr. Moodley has any insight into the nature of sexual boundaries in the physician-patient relationship. While there is evidence of Dr. Moodley's good character from workplace colleagues and the expert opinion from Dr. Kelln on his likelihood to re-offend, it is difficult to put much weight on that evidence given the absence of any evidence of that insight. This is particularly so given his pursuit of a claim that the complainants colluded against him in their complaints because of his race and his persistence in that belief at the hearing despite having abandoned his motion for production of the complainants' online activities.

44. The College argues that character evidence cannot be given any weight in assessing the appropriate disposition in a case involving sexual comments and questions without a medical reason because conduct of this nature takes place in private one-to-one situations in which the character referees would not be present.

45. In our opinion, the character evidence and the evidence of Dr. Kelln argued by Dr. Moodley are deeply flawed for the purpose of assessing corrective measures. The evidence that he is not the type of person to cross sexual boundaries with patients directly contradicts the findings of the Hearing Committee that he engaged in such misconduct with A.B. and C.D. Likewise, the evidence of Dr. Kelln that "there is absolutely no evidence that Dr. Moodley has any sexual attitude or pattern of behaviour that would place any person at risk" is at odds with facts that the Hearing Committee has found.

46. Given the nature of Dr. Moodley's misconduct, in the absence of any evidence that would permit us to be confident about his recognition of sexual boundaries, we have to rely on appropriate restrictions and corrective measures that protect the public and make it clear to him

that his serious boundary violations cannot be tolerated and, if repeated in the future, would put his licence to practice in jeopardy.

(e) Reprimand, Ethics Training and Monitoring

47. Dr. Moodley accepts that the disposition of this matter should include a reprimand that denounces the misconduct found by the Hearing Committee. Likewise, there is no dispute that Dr. Moodley should be ordered to complete ethics training as a condition for his return to practice after a period of suspension.

48. Dr. Moodley disagrees that he should be ordered to continue to have a practice monitor and a requirement to post a College approved sign following his return to practice. The College proposes to continue the monitoring and signage requirements that the Investigation Committee imposed as an interim restriction on Dr. Moodley's licence.

49. Dr. Moodley argues that, although he plans to continue using a chaperone as part of his practice going forward, there should be no formal requirement for a mandated practice attendant in the future. He says that having a restriction on his licence as proposed by the College would likely have a negative impact on his ability to do locums in other healthcare facilities and his ability to apply for a licence in other jurisdictions. He submits that if the Hearing Committee mandates a monitor, it should not require signage to that effect and that it must be limited to a specified period of time.

50. In our opinion, an ongoing requirement of a practice monitor and related signage is necessary to protect the public because of Dr. Moodley's misconduct in his private office appointments with A.B. and C.D. Protection of the public is our highest priority in the disposition of this matter.

51. The requirement of a monitor by the Hearing Committee in cases of sexual misconduct was upheld by the Nova Scotia Court of Appeal in two previous decisions. In *Dhawan v. College of Physicians and Surgeons of Nova Scotia*, 1998 NSCA 83, the Court noted with approval in paragraph 133 that the appellant did not challenge the condition respecting a female chaperone. In *Fashoranti v. College of Physicians and Surgeons of Nova Scotia* (2015), 356 N.S.R. 350, the Court of Appeal approved the decision of the Hearing Committee that included the order "that Dr. Fashoranti is required to have a chaperone present for any examination of a female patient."

52. We are not convinced that the consequences of an order for monitoring and related signage to Dr. Moodley, which he predicts, outweigh the need to protect future patients of Dr. Moodley. As previously noted above, we have no evidence of Dr. Moodley's insight into his misconduct. The evidence that we do have about his character and the testimony of Dr. Kelln is not consistent with our findings on Dr. Moodley's conduct with A.B. and C.D. In our view, a practice monitor is required. An order for a monitor and related signage, if complied with, is our best assurance that this conduct is not repeated.

53. In our opinion, the signage required in the interim order from Investigation Committee is necessary to assure transparency for Dr. Moodley's patients and assure the public that essential measures have been taken to protect these patients.

54. Dr. Moodley argues that the monitoring order sought by the College is effectively an order for an indefinite restriction on his licence, which goes beyond the authority of the Hearing Committee in Section 115 (1)(g) of the Medical Practitioners Regulations. The College says that the order should remain in effect so long as Dr. Moodley is licenced to practice in Nova Scotia.

55. In our opinion, the period from the date of our order until Dr. Moodley is no longer licenced to practice in Nova Scotia is a specified period of time within the meaning of Section 115(1) (g). Keeping in mind the purposes of the *Medical Act* and the broad general powers of disposition given to the Hearing Committee in the opening words of Section 115, Section 115 (g) should be interpreted broadly to permit a disposition necessary to protect the public tailored to the circumstances of a particular case.

(f) Suspension principles

56. There is no dispute between the College and Dr. Moodley that the findings of misconduct justify an order suspending him from practice for a period of time. The College proposes a suspension in the range of six to eight months; Dr. Moodley proposes a suspension in the range of two to four months.

57. The purpose of a suspension is not to punish Dr. Moodley but to correct his behaviour and assure the public that the medical profession takes this misconduct seriously and does not minimize or excuse the crossing of sexual boundaries in the physician-patient relationship.

58. As summarized in *Re Ezema* above, a suspension must reflect the principles of denunciation of sexual misconduct, deterrence of Dr. Moodley and send a message to the medical profession that severe consequences will result from crossing sexual boundaries. The length of the suspension must be proportionate to the seriousness of the misconduct and the harm caused to the patients involved. The more serious the misconduct, the stronger the correction is necessary to send a message to Dr. Moodley, members of the profession and the public that such conduct will not be tolerated. Sexual misconduct by medical practitioners undermines the reputation of the medical profession and the trust of patients towards their physicians. The length of a suspension after a finding of misconduct for crossing sexual boundaries must reflect the protection of the medical profession's reputation.

(g) Proportionality – Harm done to the complainants

59. Dr. Moodley argues that the Hearing Committee should determine a sanction based on holistic considerations of all the circumstances. We agree. He argues that the assessment of proportionality requires considering the impact of the misconduct on A.B. and C.D. The College argues that we should also consider the impact of the investigation hearing process on the complainants in assessing the effects of Dr. Moodley's misconduct. We agree with Dr. Moodley

that in assessing proportionality, the harm to be considered should relate to the misconduct, not the process of investigation and the burden of testifying at the hearing

60. In assessing the seriousness of Dr. Moodley's misconduct, we need to consider the evidence of the complainants about the impact of his conduct on them. The College provided a victim impact statement from A.B. In her statement, A.B. says that no doctor's appointment would ever be the same after her treatment by Dr. Moodley. She says that she becomes nervous every time she visits a walk-in clinic; her heart rate increases, and she feels very nervous. She indicates how uncomfortable it is to go to a hospital since 2017 and that she avoids that as much as possible. She is fearful of any type of emergency that would require her to go to the hospital.

61. C.D. did not provide a victim impact statement, but her evidence at the hearing testified that she would never forget the feeling of helplessness experienced over the months following her appointment with Dr. Moodley.

62. It must not be forgotten that A.B. and C.D. were referred to Dr. Moodley for gynecological issues. Assessment of those issues involved the most private and intimate parts of their bodies. Gratuitous inquiries about their sex lives and making sexual comments with no medical relevance is especially inconsistent with the boundaries that must be respected in the relationship between a gynecologist and their patients.

63. Counsel for the College submits that “Dr. Moodley betrayed in an egregious way the boundaries that are fundamental to proper and effective professional relationships. By sexualizing his clinical encounters with these patients, and by attempting to see a patient outside the workplace for personal reasons, Dr. Moodley irreparably damaged the core of his treating relationship with them." We agree.

64. Looked at in the context of the evidence as a whole and the testimony of A.B. and C.D. in particular; it is clear that Dr. Moodley's misconduct is very serious. The harm done to A.B. and C.D. is fundamental for determining the length of suspension proportionate to Dr. Moodley's misconduct.

(h) Proportionality—Suspensions for similar conduct

65. Both counsel for the College and Dr. Moodley have argued that the length of the suspension should reflect the range of suspensions for similar conduct imposed by the discipline committees in the medical profession in Nova Scotia and across Canada. In our opinion, looking at such decisions serves two purposes. One is fairness to Dr. Moodley. The length of a suspension, in this case, should be consistent with the decisions of the Hearing Committee in previous cases. The other purpose is to assess whether a particular period of suspension is proportionate to the misconduct found by the Hearing Committee. A disproportionate period of suspension could, in effect, be punishment in disguise. A proportionate suspension consistent with previous decisions is correction, not punishment.

66. An analysis of consistency with the earlier decisions of the Hearing Committee is somewhat limited by the very small number of those cases in the recent past. Both counsel have

cited the decision of the Hearing Committee in *Re Ezema*. In that case, a physician engaged in repeated sexual harassment of a work colleague and cornered a health worker in the file room for an unwanted hug and kiss by the physician. The College sought revocation of the physician's licence, but the Hearing Committee rejected that disposition and reasoned that a suspension of the physician's licence in the range of two to six months was appropriate in sexual boundary cases involving fellow employees. In paragraph 45 of that decision, the Hearing Committee stated as follows:

> "45. In this matter, the evidence of the harm caused to Colleague 'A' and the assault on Colleague 'C', in our opinion, calls for a suspension higher in this range rather than lower. Dr. Ezema's failure to accept responsibility for his conduct leaves doubt about his future compliance with the standards expected of physicians with respect to professional boundaries with workplace colleagues. This, too, calls for a suspension higher in the range. In our view, the appropriate disposition of this matter should include a reprimand and a suspension of 4 months from practice."

67. The sexual misconduct in *Re Ezema* involved improper physical contact, unlike the conduct of Dr. Moodley with A.B. and C.D. However, as noted above, the complainants in *Re Ezema* were workplace colleagues, not patients. The unequal power in those relationships and the vulnerability of those workplace colleagues were nowhere nearly as significant as the unequal power relationship between Dr. Moodley and his patients and their corresponding vulnerability to Dr. Moodley's abuse of that power. In our opinion, Dr. Moodley's violation of sexual boundaries with A.B. and C.D. was more serious than the misconduct in *Re Ezema* despite the absence of physical touching and therefore deserving of a longer suspension.

68. In *Re Fashoranti*, the physician violated physician-patient boundaries by engaging in "an inappropriate examination." The decision on the disposition is not clear as to the nature of the inappropriate examination. However, the Hearing Committee ordered that Dr. Fashoranti provide a chaperone in appointments with female patients suggests there was an element of crossing physician-patient sexual boundaries. The Hearing Committee ordered a suspension of three months. Dr. Moodley's misconduct with A.B. and C.D. was much more serious than the misconduct In *Re Fashoranti.*

69. In *Dhawan v. College of Physicians and Surgeons (Nova Scotia),* the Court of Appeal approved a six-month suspension in circumstances involving improper touching and discussions related to the circumstances of the patients, including their sex life, which were not consistent with the conduct of a physician doing a professional examination. The decision of the Court of Appeal includes the following passages:

> "114. The primary purpose of a disposition made by the Committee under the Act is, without question, the protection of the public.
>
> …
>
> 119. I have reviewed the cases submitted by the appellant. I have reviewed the Committee's reasons for sentencing. In it, the Committee stated that notwithstanding the fact that several of the particulars of complaint were withdrawn or found not

> proven, there were serious findings against the appellant in relation to all five former patients. The Committee rejected the submission that offences were at the low end of the scale of professional misconduct. The appellant, it said, displayed a disregard for his patients and *a lack of appreciation of boundary issues which must be considered by all physicians. Five* female patients placed their trust and confidence in the appellant and were subjected to extremely inappropriate and unacceptable behaviour by him. The Committee expressed a concern that if the type of behaviours revealed remained unchecked, female patients would be reluctant to undergo examinations by male doctors. Patients must be able to have confidence and trust in their physicians."

70. Like the circumstances considered in *Dhawan,* Dr. Moodley's conduct displayed a disregard for his patients and a lack of appreciation of the boundary issues which all physicians must consider. A.B. and C.D. placed their trust and confidence in him and were subjected to extremely inappropriate and unacceptable behaviour by him. Like the Hearing Committee in *Dhawan*, we are concerned that not only A.B and C.D., but that women patients more broadly could be reluctant to undergo intimate examinations in the absence of a strong message to the public that this misconduct will not be tolerated.

71. Unlike the circumstances in *Dhawan*, in this case, there are two patients, not five, and the misconduct does not include improper touching. *Dhawan* was decided in 1998. Public attitudes towards sexual misconduct in physician-patient relationships have evolved since then but the absence of improper touching by Dr. Moodley is significant and suggests a suspension of less than the six-months suspension in *Dhawan.*

72. The College has also cited decisions of the Hearing Committee approving settlement agreements. In our opinion, settlement agreements have limited value because the disposition in a settlement agreement is a negotiated resolution of the complaints under investigation. The College may agree to a suspension because of difficulties in obtaining testimony. The physician may decide to avoid a hearing with an uncertain outcome and the potential of a large costs award.

73. The suspensions in the previous cases assist in assessing the proportionality between Dr. Moodley's misconduct, the harm done to the complainants and the length of a suspension. Consistency with the relevant decisions of the Hearing Committee would require a suspension in this case greater than four months but less than six months, unless there is a reason in this case to deviate from the range of suspensions imposed in the previous decisions of the Committee.

(i) Proportionality – Decisions in similar cases in other provinces

74. Our assessment of proportionality, in this case, is also assisted by considering the decisions of similar bodies in other provinces, taking into account the differences in the legislative schemes of those provinces. These decisions show an evolution in assessing proportionality in sexual misconduct cases over time.

75. In *College of Physicians and Surgeons (Ontario) v. Boodoosingh*, 1990 CarswellOnt 750, the physician engaged in flirtation and words of physical attraction that led to a single act of

intercourse. The Discipline Committee revoked his licence, but the Divisional Court substituted a three-month suspension.

76. In *College of Physicians and Surgeons (Ontario) v. Lambert*, 1992 CarswellOnt 717, the Discipline Committee imposed a six-month suspension for making remarks of a sexual nature that were considered derogatory and unprofessional. The Divisional Court substituted a $20,000 fine.

77. In *College of Physicians and Surgeons (Ontario) v. Gillen*, 1993 CarswellOnt 1836, the Discipline Committee revoked the licence of a physician who had placed his penis in the hand of a partially conscious female patient. The Ontario Court of Appeal upheld a nine-month suspension, which had been substituted by the Divisional Court.

78. In *College of Physicians and Surgeons (Ontario) v. Choptiany*, 2011 ONCBSD 29, the physician made inappropriate sexual comments to different patients and did not maintain appropriate spatial distance with a patient. The Discipline Committee accepted a joint submission for a two-month suspension.

79. *In Re Maharajh*, 2013 ONCPSD 37, the Discipline Committee imposed an eight-month suspension on a physician who had admitted to placing his mouth on a patient's breast or rested his cheek on a patient's breast with 10-12 patients. The Discipline Committee imposed an eight-month suspension.

80. In *Re Owolabi*, a decision of the Newfoundland Adjudication Tribunal in 2016 provided a six-month suspension for a physician who had made sexual comments to two patients, told another that she was attractive, and hugged and kissed another.

81. In *Ontario (College of Physicians and Surgeons of Ontario) v. Dao*, 2018 ONCPSD 56, the Discipline Committee accepted a joint submission which included a three-month suspension for making sexual remarks to a patient, which had comments on her tattoo and references to S&M and to "rub and tug."

82. In *College of Physicians and Surgeons of Ontario v. Peirovy*, 2018, ONCA 420, a Hearing Committee imposed a six-month suspension on a physician who had engaged in physical touching of four patients' breasts while conducting an examination with a stethoscope. The six-month suspension was upheld by the Court of Appeal.

83. In *Ontario (College of Physicians and Surgeons of Ontario) v. Feigel*, 2019, ONCPSD 1, the Discipline Committee accepted the joint submission of a reprimand accompanied by the resignation of a physician for remarks of a sexual nature and inappropriate comments to more than one patient on more than one occasion.

84. In *Ontario (College of Physicians and Surgeons of Ontario) v. Fikry*, 2019, ONCPSD 53, the Discipline Committee accepted a joint submission of a two-month suspension when a physician made comments to a patient admiring her bra.

85. In *Ontario (College of Physicians and Surgeons of Ontario) v. Lee*, 2020, ONCPSD 21, the Hearing Committee accepted a joint submission with no suspension for a physician who had

asked inappropriate and personal questions about a patient's sex life and used sexually explicit and vulgar language with another patient and rubbed his groin against her right hip while administering a trigger point injection. The Discipline Committee had previously revoked Dr. Lee's licence, and that decision was quashed by the Divisional Court. However, after the initial revocation, Dr. Lee was out of practice between November 2017 until March 2020. No additional suspension was ordered by the Discipline Committee, but the Committee commented that Dr. Lee had engaged in several sexual boundary violations with two patients for which the Committee would have considered a suspension of a minimum of 12 months to be proportionate.

86. *In Re Imtiaz*, 2020 CarswellAlta 1808, the Hearing Tribunal of the College of Physicians and Surgeons of Alberta accepted a joint submission of a six-month suspension with two months to be served and four months held in abeyance on the condition that Dr. Imtiaz must demonstrate good character for 12 months following the hearing of the Decision Committee. In effect, the decision accepted a submission of a two-month suspension in a case where Dr. Imtiaz had engaged in inappropriate sexual comments, had failed to give a patient privacy while undressing and dressing, and made sexualized unwanted physical interactions.

87. Both the College and Dr. Moodley have cited "joint submissions" cases in support of their positions on the appropriate range of the period of suspension in this case. Decisions of the Discipline Committee of the Ontario College of Physicians and Surgeons and those in other provinces, which involve a "joint submission," are decided expressly on the principle that the Discipline Committee must accept a joint submission on the proper "penalty" unless that would bring the judicial system into disrepute or was otherwise contrary to the public interest. Some of these cases are, therefore, similar to the Settlement Agreement cases in Nova Scotia and similarly represent a negotiated resolution. However, overall, the cases cited above, including the joint submission cases, are helpful in that they show an overall trend toward longer suspensions in sexual boundary decisions.

88. Several cases cited to us involved both crossing sexual boundaries by making sexual comments and some degree of improper touching, which is absent in this case. None of them involved a suspension greater than six months for sexual boundary violations without any inappropriate touching.

(j) The appropriate suspension

89. In our opinion, given the history of similar cases both in Nova Scotia and in other jurisdictions, an appropriate suspension for Dr. Moodley's misconduct, in this case, is five months. Although there was no improper physical touching by Dr. Moodley, his misconduct was very serious. A five-month suspension is proportionate to the seriousness of his conduct.

90. Dr. Moodley's conduct was not simply a series of casual inappropriate remarks. He asked questions and commented about the sex lives of A.B. and C.D., which had no medical relevance. With A.B., he indicated that he found her attractive by his comments on her beauty and telling her how nice her tattoos were. He made suggestive references to her orgasms. He went further with C.D. by bringing up her living arrangements and asking whether her children would hear her scream during sex. Saying he would look after her while she went for her assessment at a hospital,

he told her that she would not need her partner to attend, "It would be our secret". Dr. Moodley's interest in C.D. was not expressed by words alone. He sought her out in her workplace for no proper reason. These were unwanted sexual advances.

91. All of this took place in the context of the relationship between a male gynecologist and his female patients. Dr. Moodley took advantage of the trust needed in that relationship. The assessment of his patients' conditions required access to the most private aspects of their bodies. He abused the trust that they placed in him.

92. In our opinion, a five-month suspension is proportionate to the serious nature of Dr. Moodley's misconduct. It would embody a strong denunciation of his conduct. A five-month suspension meets the requirement of specific deterrence; it should be clear to Dr. Moodley that any further violations of sexual boundaries will put his licence to practice in jeopardy. It also sends a strong message to other physicians that the College will not tolerate crossing sexual boundaries in the physician-patient relationship and to the public that the medical profession in Nova Scotia will not minimize or excuse sexual misconduct by medical practitioners.

93. The five-month suspension should start at a date agreed between Dr. Moodley and the College. We reserve jurisdiction to determine the start date if Dr. Moodley and the College disagree.

IV. Costs

94. The College seeks an order that Dr. Moodley pay costs of $397,978.35 to be paid over five years in equal monthly amounts after returning to practice from his suspension. This amount represents 64% of the total expenses incurred by the College in the investigation and hearing of this matter other than those incurred dealing with Dr. Moodley's motions for the production of the complainant's communications; the College is seeking to recover 100% of its expenses incurred for those motions.

95. The expenses incurred by the College are as follows:

a) Investigation Committee honoraria and expenses - $2,350.00

b) Transcription Services - $9,768.83

c) Witness Fees and Expenses - $3,059.17

d) Expert Payments - $2,625.99

e) Catering - $2,722.35

f) Security - $936.10

g) Hearing Committee honoraria and expenses - $220,833.08

h) Legal Fees, which include:

    i. Legal fees, disbursements, and HST for the investigation - $3,728.16

ii. Legal fees, disbursements, and HST for College counsel for the motions for production - $43,501.27

iii. Legal expenses for complainants' counsel for the motion for production - $34,647.01

iv. Legal fees, disbursements, and HST of College counsel for the hearing - $185,174.66

v. Legal fees, disbursements, and HST estimated for the hearing on sanctions and costs - $43,536.14

96. The total expenses incurred by the College other than the expenses incurred for the motions for production is $499,734.48. Due to divided success, the College claims $319,830.07, which is 64% of its those expenses. The College's total claim for costs also includes $78,148.28, which is 100% of the expenses incurred by the College for the motions for production.

97. The total costs sought by the College amount to $319,830.07 plus $78,148.28 for a total of $397,978.35.

(a) Mandate of the Hearing Committee to order costs

98. The *Medical Act* and the Medical Practitioners Regulations empower the College to incur the kinds of expenses claimed as costs in this matter and authorize a hearing committee to require a medical practitioner to pay those costs in whole or in part. The applicable provisions of the *Medical Act* are the following:

> "8(3) In addition to any other power conferred by this or any other Act, the Council may do such things as it considers appropriate to advance the objects of the College in accordance with Section 5 and, without limiting the generality of the foregoing, may
>
> (c) engage such agents and employees as it, from time to time, deems expedient;
>
> d) expend the moneys of the College in the advancement of its objects and the interests of the medical profession in such manner as it deems expedient;
>
> …
>
> 57 (1) For the purpose of the execution of their duties under this Act, the College or any committee of the College may retain such legal or other assistance as the College or the committee may think necessary or proper. (2) Where authorized by this Act or the regulations, the costs of such assistance may be included, in whole or in part, as costs ordered by the committee. 2011, c. 38, s. 57.
>
> …
>
> 11 (1) With the approval of the Governor in Council, the Council may make regulations
>
> (k) respecting all matters associated with the professional conduct processes of the College, including settlement agreements;

(l) respecting the powers, authority and processes of the Registrar, an investigator, an investigation committee and a hearing committee relevant to the professional conduct process;"

99. Section 121 of the Medical Practitioners Regulations provides as follows:

"121 (1) For purposes of this Section, "costs" includes all of the following:

(a) expenses incurred by the College in the investigation of a complaint;

(b) expenses incurred by the College for the activities of an investigation committee and a hearing committee;

(c) expenses incurred for participation in any competence assessment arising from a decision of an investigation committee or a hearing committee;

(d) expenses incurred under subsection 88(4), 99(4) or 110(6);

(e) the College's solicitor and client costs, including disbursements and HST, relating to the investigation and hearing of a complaint, including those of College counsel and counsel for a hearing committee;

(f) fees for retaining a court reporter and preparing transcripts of the proceedings;

(g) travel costs and reasonable expenses of any witnesses, including expert witnesses.

(2) Except when awarded costs under this Section, a respondent is responsible for all expenses incurred in their defence.

(3) If a hearing committee finds professional misconduct, conduct unbecoming the profession, incompetence or incapacity on the part of the respondent, it may order that the respondent pay costs in whole or in part.

(4) If a hearing committee considers that a hearing was not necessary, it may order the College to pay some or all of the respondent's legal costs.

(5) The Registrar may suspend the licence of any respondent who fails to pay the costs within the time ordered until payment is made or satisfactory arrangements for payment are made."

100. Section 121 provides an expanded meaning of the "costs" that the Hearing Committee may order. Standing alone, the word "costs" means the costs that a court would order to a successful party in civil litigation. Costs awarded in the courts serve to partially indemnify a successful litigant for the expenses of pursuing or defending a claim. The expanded definition of "costs" in Section 121 "includes" amounts not otherwise covered by the approach to costs in the courts. The definition in Section 121 reflects the statutory scheme of self-governance in the *Medical Act*. In our opinion, the purpose of Section 121 is to relieve the medical practitioners

who fund the College from the expenses incurred in investigating and hearing disciplinary matters when a medical practitioner has engaged in misconduct.

101. In the decision of the Alberta Court of Queen's Bench in *Hoff v. Pharmaceutical Association (Alberta),* 1994 CarswellAlta 81, the Court states at paragraph 29:

> "As a member of the pharmacy profession, the Applicant enjoys many privileges. **One of them is being part of a self-governing profession.** Proceedings like this must be conducted by the Respondent association as part of its public mandate to assure the public competent and ethical pharmacists. **Its costs in doing so may properly be borne by the member whose conduct is at issue and has been found wanting.**" **[Emphasis added]**

102. The purpose of Section 121 must be tempered by the public interest in the right of a medical practitioner to defend their ability to practice medicine in the face of allegations of professional misconduct. Section 121(3) gives discretion to a hearing committee to order costs "in whole or in part." In deciding whether to require a practitioner who has engaged in professional misconduct to bear the costs of investigation and hearing, we have to balance public interest factors with the objective of Section 121 that a medical practitioner who has engaged in professional misconduct should bear the costs of the investigation and hearing instead of other members of the profession.

103. This balancing of the purpose of Section 121 with the public interest factors involved is not easy. We must be careful that a large costs order is not just a form of punishment for a practitioner who has engaged in professional misconduct or results in a "backdoor revocation" of their licence. We do not want to discourage practitioners from defending themselves when accused of wrongdoing. However, a contested hearing like this one is necessarily expensive. It required several days of witnesses, expert witnesses, written briefs, and complex issues, along with several preliminary matters that also require hearings, briefs and involve complex constitutional issues. This may require a substantial costs order.

(b) Principles to determine an appropriate costs order

104. In two previous decisions of the Hearing Committee, the Committee set out the principles applied to decide on an appropriate order of costs. In *Re Osif*, 2008 CanLII, 89674, affirmed 2009 NSCA 28, a decision under the former *Medical Act*, the Hearing Committee took the following approach:

> "83. Some aspects of Section 67 should be noted. The committee may order the member to pay the costs of the College, but it has no authority to order the College to pay the expenses of the member who has been found guilty of charges. The committee is not required to order the physician to pay costs but has the discretion to do so or not to do so. The committee's discretion extends to whether to order costs in whole or in part.
>
> 84. In deciding whether to order Dr. Osif to pay costs and determining whether to order her to pay all of the College's costs or part of them, we are required to exercise

our discretion in accordance with the purpose and objects of the College as set out in subsection 4(3) of the *Medical Act*. Essentially, our discretion on costs should be exercised in such a manner that the public interest will be served and protected.

85. An order for costs under Section 67, in light of subsection 4(3), is not a penalty. To the extent that penalties are required, the Committee has a wide discretion under Section 66, including the power to fine a member in an amount up to $15,000.00. The purpose of an order of costs under Section 67 is to appropriately reimburse the College for its expenses for investigating and proving professional misconduct or professional incompetence. However, Section 67 provides that an order to pay costs is discretionary and specifically provides that an order to pay costs may be a partial reimbursement. The Hearing Committee must therefore consider whether there are any public interest factors that would deprive the College of reimbursement of some or all of its costs.

…

100. We also accept that a large order to pay costs could deter a physician from contesting charges of professional misconduct and professional incompetence and force him or her to accept an otherwise unacceptable settlement agreement as the best alternative to a potential ruinous order to pay costs. In our view, the potential of a cost award should influence a member to make proper admissions and to refrain from making numerous procedural objections lacking merit. However, it should not prevent a physician from defending themselves against charges that the physician does not accept as warranted."

105. The Hearing Committee took the same approach in *Re Ezema* under Section 121 of the Medical Practitioners Regulations where we stated the following:

"50. Having found professional misconduct, the Hearing Committee has discretion whether to order Dr. Ezema to pay costs, in whole, in part or at all. In deciding whether to order Dr. Ezema to pay costs and determining whether to order him to pay all of the College's costs or part of them, we are required to exercise our discretion in accordance with the purpose and objects of the College as set out in Section 5 of the *Medical Act*. Essentially, our discretion on costs should be exercised in such a manner that the public interest will be served and protected.

51. An order for costs under Section 121 of the Medical Practitioner Regulations is not a penalty. The purpose of an order of costs under Section 121 is to appropriately reimburse the College for its expenses for investigation and proving professional misconduct. However, Section 121 provides that an order to pay costs is discretionary and specifically provides that an order to pay costs may be a partial reimbursement. The Hearing Committee must therefore consider whether there are any public interest factors that would deprive the College of reimbursement of some or all of its costs.

52. In this case, we think that the College should be appropriately reimbursed for part of its expenses in proving that Dr. Ezema is guilty of professional misconduct. All of the

costs claimed by the College fall under the definition of "costs" found in Section 121 of the Medical Practitioner Regulations. The greater part of these costs are legal fees and disbursements and the honoraria paid to members of the Investigation Committee and the Hearing Committee. We have reviewed the amounts claimed as set out and documented in Noreen Gaudet's affidavit and find that the amounts of the expenses themselves are reasonable and properly fall within the categories included in "costs" in Section 121.

53. The $169,700 in expenses incurred by the College in this matter is high. This is undoubtedly a significant burden to the College. At the same time, it is unlikely that Dr. Ezema can easily pay these costs. A close analysis of the expenses of investigating and proving the charges that led to a finding of professional misconduct and consideration of public interest factors leads us to conclude that the order to pay costs should require him to pay costs considerably lower than the actual expenses of the College.

54. It is not in the public interest to require Dr. Ezema to reimburse to College for its expenses as to the investigation and hearing of the charge that we have dismissed. We have assessed the degree to which the College was successful in establishing professional misconduct. The College was successful in both the charges related to Colleague 'A' and Colleague 'C' but was not successful in the charge that related to Colleague 'B'."

106. In Re *Osif* and *Re Ezema*, the Hearing Committee accepted that the public interest required that an order of costs reflect the success of the College in proving the allegations in the Notice of Hearing and, therefore, a reduction in the costs order from the actual expenses incurred by the College. The Court of Appeal approved this approach in *Osif* and has approved it more generally in decisions arising under similar legislation; see *Fadelle v. Nova Scotia College of Pharmacists*, 2013 NSCA 26.

107. The Saskatchewan Court of Appeal discussed this approach in *Abrametz v. The Law Society of Saskatchewan*, 2018, SKCA 37 at paragraph 49 where the Court states:

"[49] One final general observation about the "mixed success" factor identified in Hills must be made at the outset. While this principle is generally understood to refer to a result where some, but not all of the charges are proven, how courts and regulatory bodies have applied this principle to appropriately quantify costs has not been uniform across Canada: "There does not appear to be a consistent approach by regulatory bodies in determining how to assess costs where the success has been divided, nor does there appear to be a consistent approach by the courts in suggesting which approach is appropriate" (Professional Regulation at 268). **Some regulatory bodies and courts have applied a strict mathematical calculation** (*Fadelle v Nova Scotia (College of Pharmacists)*, 2013 NSCA 26 [*Fadelle*]; or *Kaburda v British Columbia (College of Dental Surgeons)*, 2002 BCSC 870, [2002] BCTC 870). Another approach has been to determine **what the total costs would have been if the member had only been charged with the particulars ultimately proven** (*Huerto v College of Physicians*

and Surgeons of Saskatchewan, 2004 SKQB 360, 253 Sask R 1 [Huerto]; Hills). Yet another approach has been to **consider a variety of factors (e.g., the relative importance of the charges dismissed compared to those proven) in determining what portion of the costs should be borne by the member** (*K.C. v College of Physical Therapists (Alberta)*, 1999 ABCA 253, [1999] 12 WWR 339 [K.C.])." **[Emphasis added]**

108. In light of these decisions, we will use the following approach:

a) Consider whether the expenses incurred by the College fit within the expanded definition of "costs" in Section 121 of the Medical Practitioners Regulations;
b) Consider the extent to which the College proved the allegations in the Notice of Hearing and did not prove any of the allegations;
c) Reduce the costs awarded by the proportion that the College succeeded in establishing the allegations in the Notice of Hearing;
d) Consider any other public interest factors that call for either an increase or a decrease in those costs.

(c) Expenses incurred for honoraria paid to members of the Investigation Committee and the Hearing Committee

109. Dr. Moodley argues that the Hearing Committee does not have jurisdiction to include reimbursement of the honoraria paid to members of the Investigation Committee and the Hearing Committee in an order for costs. He submits that Section 121 (1) (b), which includes as "costs," "the expenses incurred by the College for the activities of an Investigation Committee and a Hearing Committee" are limited to the out-of-pocket expenses of the committee members such as meals, travel and accommodation. He bases this submission on a reading of Section 121 (1) as a whole and in light of its legislative history.

110. Dr. Moodley relies on Section 121 (1) (f), which provides for "fees for retaining a court reporter and preparing transcripts for the proceeding." He submits that the words "expenses incurred by the College" in Section 121 (1) (b) excludes "fees "and is limited to expenses incurred by the College other than fees.

111. Dr. Moodley also argues that the legislative history of Section 121 clarifies its meaning. The Regulations came into force when the former *Medical Act* was repealed and replaced by the current Act. In the former *Medical Act*, costs were defined as follows:

> "67 (3) Costs of the Council" defined "for the purpose of this Section, "costs of the Council" include
>
> a) Expenses incurred by the College, the Council, the Investigation Committee and the Hearing Committee;
> b) Honoraria paid to members of the Investigation Committee and the Hearing Committee;

c) Solicitor and client costs and disbursements of the College related to the investigation and hearing of the complaint."

112. Honoraria for members of the Investigation Committee and the Hearing Committee were specifically included in the definition of costs in the former Act, but not in 121 of the Medical Practitioners Regulations. Dr. Moodley argues that this shows that the intention of the College Council in enacting Section 121 was to exclude these honoraria. He submits that, in light of this history, at best, Section 121 (1)(b) is ambiguous and that a principle of *contra proferentem* should be applied to the interpretation of "expenses incurred by the College" in Section 121 (1)(b).

113. Dr. Moodley also makes a factual argument that the College does not treat these honoraria as expenses of the committee but refers to expenses of the committee as out-of-pocket expenses.

114. These arguments raise an issue of the proper interpretation of Section 121 (1) (b). The modern approach to statutory interpretation has been set out in several decisions of the Supreme Court of Canada. In *Pharmascience Inc. v. Binet*, the Court applied the following principles of interpretation to a statute, which governed professional regulation of pharmacists at paragraphs 30 and 32, as follows:

> "30. Although the weight to be given to the ordinary meaning of the words varies enormously depending on their context, in the instant case, a textual interpretation supports a comprehensive analysis based on the purpose of the Act. Most often, "ordinary meaning" refers "to the reader's first impression meaning, the understanding that spontaneously emerges when words are read in their immediate context" (R. Sullivan, *Sullivan and Driedger on the Construction Statutes* (4th ed. 2002), at p. 21; *Marche v. Halifax Insurance Co.*, [2005] 1 SCR 47, 2005 SCC 6 (SCC) at para 59). In *Canadian Pacific Air Lines Ltd. V. CALPA*, [1993] 3 SCR 724 (SCC), at p. 735, Gonthier J. spoke of the "natural meaning which appears when the provision is simply read through".
>
> …
>
> 32. Nevertheless, it has to be admitted that textual interpretation has its limits. Before this Court, the parties submitted numerous definitions of the French word "on" taken from dictionaries, grammar books and other encyclopedic sources, and countless examples drawn from statutes in which the legislature used similar or different wordings to indicate the inclusion of all persons or of a specific group of individuals. That is why this Court now considers it important, even when a provision seems clear and conclusive, to nevertheless review the overall context of the provision: *Montreal (Ville) v. 2952-1366 Quebec inc.*, [2005] 3 SCR 141, 2005 SCC 62 (SCC), at para. 10."

115. See also *Rizzo Shoes* [1998] 1 SCR 27 where the Court states at paragraph 21 as follows:

> "21. Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed, 1994) (hereinafter "*Construction of Statutes*"); Pierre

Andre Cote, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87, he states:

> Today there is only one principle or approach; namely, 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."

116. Interpretation of Section 121 (1) (b) requires consideration of the ordinary grammatical meaning of that clause in its entire context, especially the purpose of the *Medical Act* and Medical Practitioners Regulations.

117. Section 121 (1) (b) covers expenses incurred by the College “for the activities of an investigation committee and a hearing committee." For ease of reference, we will refer to these as activities of a hearing committee.

118. The ordinary meaning of Section 121 (1) (b) drives a factual inquiry as to whether the expenses incurred by the College were for the “activities” of a hearing committee. The activities of a hearing committee under the *Medical Act* are to conduct hearings and determine whether there has been professional misconduct or incompetence and, if so, to order an appropriate disposition, including costs.(The activities of the Hearing Committee, in this case, have been to read and consider affidavit evidence and written submissions from the parties in the hearing of the disputed motions, participate in the oral hearings on these motions, decide whether to accept the motions and provide reasons for the decision and on the merits to hear the evidence and oral submissions from the parties, read and consider written submissions, deliberate, decide the merits and provide written reasons for the decision.)

119. In our opinion, the ordinary and grammatical meaning of expenses incurred “for the activities of a hearing committee” in Section 121(1) (b) is not limited to out-of-pocket expenses. It includes expenses incurred for the ‘activities” of the committee.

120. This ordinary meaning of Section 121 (1) (b) is consistent with the purpose of Section 121. As discussed above, the purpose of Section 121 is to reimburse the College for the expenses of investigating and proving professional misconduct. Subject to consideration of the public interest, a medical practitioner who has engaged in professional misconduct should bear the cost of those expenses instead of the members of the College who practice ethically.

121. The scheme of Section 121 is to broadly define “costs” in Section 121(1) (b) and in Section 121(3) to give discretion to the hearing committee to order payment of costs in whole or in part.

122. Section 121 is part of the overall scheme of the *Medical Act* and reflects the purpose of the College to serve and protect the public in the practice of medicine as a self-governing profession paid for by the fees of its members. In our opinion, Section 121 (1) (b) itself should be given a broad interpretation consistent with its purpose and leave consideration of whether those costs should be reduced for reasons of the public interest under Section 121(3). The

purpose of Section 121(1)(b) ,in the context of the rest of Section 121 and the purposes of the *Medical Act* as a whole, is consistent with the ordinary meaning of “activities of a hearing committee” in Section 121 (1)(b).

123. In our opinion, excluding the costs of payment of the Hearing Committee members is inconsistent with the breadth of the words "for the activities of a Hearing Committee" that describes the expenses that should be included as "costs." Interpreting Section 121 (1) (b) as limited to out-of-pocket expenses because Section 121 (1) (f) provides for fees for a different purpose is not consistent with the intention of Section 121 and the overall purposes of the *Act*.

124. Dr. Moodley has argued that Section 121 (1) (b) should be interpreted as excluding the College's expenses in paying members of the Hearing Committee in light of its legislative history. Section 63 (3) of the former Act specifically listed as costs "honoraria paid to members of the Investigation Committee and the Hearing Committee," but Section 121 (1)(b) of the Medical Practitioners Regulations does not. He argues that this shows a legislative intention to exclude honoraria from "costs" under Section 121 (1).

125. Compared to Sections 67 (3), Section 121 (1) is a complete restatement of the definition of “costs” when there has been a finding of professional misconduct. Not only is it a longer list of included elements but the language of the two key paragraphs (Section 121 (1) (b) and Section 121 (1) (h)) is broader than in Section 67 (3) of the former Act. In contrast to Section 67(3) (a), Section 121 (1) (b) includes "expenses incurred by the College for the activities of a Hearing Committee." In light of the purpose of Section 121 and the overall scheme of the *Act*, the ordinary meaning of this phrase captures the expenses incurred by the College for the activities of a hearing committee. The drafter of Section 121 did not need to list honoraria specifically.

126. In our opinion, the difference between Section 67(3) of the Act and Section 121 of the Medical Practitioners Regulations does not limit the meaning of Section 121 (1) (b). It does not limit it to out-of-pocket expenses.

127. Dr. Moodley argues that the legislative history and the expressed inclusion of "fees" in Section 121 (1) (h) demonstrates an ambiguity in Section 121 (1) (b) such that we should apply a principle of *contra proferentum*. He says that the Council of the College drafted Section 121 and can change it if it is too narrowly worded.

128. In our opinion, the principle of *contra proferentem* does not apply to the interpretation of Section 121(1) (b) nor is Section 121 (1) (b) ambiguous.

129. Applying this interpretation of Section 121 (b), we have concluded as a fact that the expenses incurred by the College for the activities of the Hearing Committee include the expenses of paying members of the Hearing Committee a daily or hourly rate as the case may be. The activities of the Hearing Committee were the preparation for the hearing, attending the hearing, deliberation on decision making, and preparing reasons for the decision. We do not regard the evidence of the College’s accounting practices to be particularly relevant, given the evidence of Noreen Gaudet in her affidavit sworn on March 8, 2021, which Dr. Moodley did not dispute. She deposes that the College incurred and paid expenses that included Hearing Committee Honoraria and Expenses.

(d) Remuneration of Chair

130. The Hearing Committee Chair is paid an hourly rate of $325 an hour in contrast to the other members of the Committee who receive a daily rate of $1,500 for a hearing day and $150 an hour for time outside the hearing day. Dr. Moodley argues that there is nothing in the *Medical Act* or Medical Practitioners Regulations that provides a different rate for the Hearing Committee members.

131. In our opinion, there is nothing in Section 121 (1) (b) that excludes the expenses of a different rate paid to the Chair from "costs" recoverable under Section 121. The higher rate of the Chair is connected to the activities of the Hearing Committee covered by Section 121 (1) (b). The majority of the Hearing Committee are physicians who bring their specialized knowledge and expertise to the adjudication of allegations of misconduct. The other two members of the Hearing Committee are public representatives, of which the Chair is one. The Chair is legally trained and experienced in matters of professional regulation.

132. In this matter, three motions depended on the application of the Canadian Charter of Rights and Freedoms. Written reasons had to be prepared. The hearing itself gave rise to legal issues related to the admissibility and weight of evidence. The Hearing Committee's decision is subject to an appeal to the Court of Appeal on questions of law. For the Court to consider whether there are legal errors by the Committee, sufficient reasons are necessary to permit the Court to perform its function. It is reasonable for the College to have a legally trained Chair to work with the other Committee members on these tasks.

133. Section 8 of the *Medical Act* authorizes the College to expend the monies of the College in the advancement of its objects in the interest of the medical professional's matter, as it deems expedient. Section 57 of the Act allows the College to retain such legal or other assistance as the College may think necessary and proper. The costs of such assistance may be included in whole or in part as costs ordered by the committee.

134. In our opinion, in the context of the professional responsibility process in Sections 30-58 of the *Medical Act*, the College is authorized to retain legal assistance as it may think necessary and include the expense of those costs in a costs order. The College is entitled to decide if legal assistance is required for the execution of the duties of the Hearing Committee. The College has done this by appointing a legally trained Chair and Vice-Chair of the Hearing Pool provided in Section 48 of the *Medical Act*. The Chair of the Hearing Pool appoints the Hearing Committee members, and either the legally trained Chair or the Vice-Chair serves as Chair of a hearing panel.

135. Dr. Moodley relies on the decision of the British Columbia Court of Appeal in *Roberts v. College of Dental Surgeons (British Columbia), 1999 BCCA 103* for his submission that the Hearing Committee cannot assess honoraria of hearing panel members at different levels. In *Roberts*, the British Columbia Court of Appeal considered applying a rule governing the payment of costs when a dental surgeon had engaged in unprofessional conduct. In particular, the Court considered Rule 16.22 (g), which provides:

"16.22 Disciplinary order. Where the inquiry panel makes a determination under Article 16.21, it may, by order, do one or more of the following:

…

(g) require that the current or former registrant pay to the College the costs of the investigation or hearing or both within a specified time period, as determined by the inquiry panel which costs may include, without limitation, all out-of-pocket expenses incurred by or on behalf of the College or members the inquiry panel or its advisors, **per diems for inquiry panel members,** and legal expenses as between a solicitor and his own client."
[Emphasis added]

136. In considering the phrase "per diems of inquiry panel members," the Court stated as follows:

"34. When one turns to Article 16.22 of the Rules, one finds a different use of "costs." To illustrate this; I will focus first on the expression "per diems" in Article 16.22(g).

35. This phrase is not defined in *Jowett, supra*. It is in Black's *Law Dictionary*, 6th Ed. (St. Paul, 1990) as:

Per diem … By the day; an allowance or amount of so much per day. For example, state legislators are often given allowance to cover expenses while attending legislature sessions. Generally, as used in connection with compensation, wages or salary, means pay for a day's service.

36. If it means no more than a daily allowance it is superficially equivalent to common provisions in this jurisdiction. A familiar example is the allowance paid jurors: $20 a day, increasing to $30 a day if the trial attendance requires absence from home for more than 10 days.

37. Unlike these and other allowances authorized by statute the "per diem" of the members of the Panel varied according to the panelist's occupation. The daily rates as they emerged from the affidavits filed immediately prior to the July 14 hearing were:

for a dentist panelist, a per diem of $628;

for a certified dental assistant, a per diem of $132;

for a public member, a per diem of $250.

38. We were advised these were justified in the case of dentists, as in their absence their income ceased while their overhead continued.

39. I will assume the College may pay members of a disciplinary panel and may pay for legal services. See paragraph (v) of s-s. 26 (1.1) of the *Act*, set out in paragraph [16] of these reasons. But the differential compensation payments in question here are not, in my view, allowances that come within the meaning of "costs" as that word is understood in this jurisdiction.

> 40. The chambers judge erred in according any recognition in the computation or party and party costs to payment of daily allowances embodying a concept of differential income replacement. Such a scheme is not authorized by the *Act*, and to the extent it is purportedly authorized by the Rules, it is of no force and effect." **[Emphasis added]**

137. In contrast to the language of "per diem" in Rule 16. 22 (g) in *Roberts*, Section 121 (1) (b) provides for "expenses incurred by the College for the activities of an investigation committee and a hearing committee." In the context of Section 8 and Section 57 of the *Medical Act*, Section 121 (1) (b) is not limited like Rule 16.22 which was considered by the British Columbia Court of Appeal in *Roberts*.

138. The payment of a different rate to the Chair of a Hearing Committee is a reasonable measure open to the College in exercising its responsibilities in the professional conduct process in the *Medical Act*. There is nothing in Section 121 of the Medical Practitioners Regulations to limit the recovery of those expenses as costs when a medical practitioner has been found to have engaged in professional misconduct.

(e) Legal costs for the counsel for the complainants

139. Dr. Moodley submits that the expenses incurred by the College in providing for independent counsel for the complainants in respect of his motions for the production of their social media postings, text messages and emails, does not fall within "costs" covered by Section 121 (1).

140. After Dr. Moodley filed these motions on October 10, 2019, the College provided independent counsel for each of the complainants. In paragraph 14 of the affidavit of Noreen Gaudet sworn on March 8, 2021, Ms. Gaudet deposes to the following:

> "14. Because of the nature of the motions, the College authorized independent counsel to be appointed to represent the interests of the two complainants. Gail Rudderham Chernin was initially retained to provide advice to complainant A.B. and later replaced by Nancy Rubin of Stewart McKelvey. David Hutt of Burchells was retained on behalf of complainant CD. In addition, in order to arrange for the execution of affidavits, I am advised by Marjorie Hickey and do verily believe that the firm Sampson McPhee of Sydney was retained for this purpose."

141. Counsel for A.B. and C.D. appeared at the hearing on October 24, 2019. They provided written submissions before the hearing scheduled for December 16, and 17, 2019. This hearing was adjourned when Dr. Moodley changed legal counsel; his new legal counsel withdrew these motions on January 8, 2020.

142. While A.B. and C.D. were not parties to the hearings of this proceeding, the Hearing Committee agreed to their participation in the issues raised by the motions for production. The motions brought by Dr. Moodley proposed the production of documents which was very intrusive and which raised important constitutional issues and policy issues on protecting complainants of

sexual misconduct in the professional conduct process. Although the motions were withdrawn before oral submissions, counsel fully addressed the issues in written submissions, and the Hearing Committee found the contribution of independent counsel valuable in our preparation for the hearing on December 16 and 17, 2019.

143. The College claims $34,664 as expenses incurred to pay the fees, disbursements, and HST of independent counsel. It submits that these expenses are covered by Section 121 (1) (e) of the Medical Practitioners Regulations, which provide:

> "121 (1) For the purposes of this Section, "costs" includes all of the following:
>
> > (e) the College's solicitor and client costs, including disbursements and HST, relating to the investigation and hearing of a complaint, including those of College counsel and counsel for a hearing committee."

144. The College submits that the amounts expended for independent counsel for the complainants were included in "the College's solicitor and client costs" in Section 121(1)(e). Dr. Moodley argues that no provision in Section 121 covers the fees and disbursements for independent representation of the complainants. The College argues that while the complainants were not parties, the College was a party, and it is the entity that incurred the payment for legal fees for counsel for the complainants.

145. This issue turns on the proper interpretation of Section 121 (1) (e). As with the interpretation of Section 121 (1) (b), we have to consider the ordinary and grammatical meaning of Section 121 (1) (e) in its total context, which includes the applicable provisions of the *Medical Act* and the purposes of the *Medical Act*.

146. In Section 121 (1) (e), the words "the College's solicitor and client costs" contrast with the words "those of College counsel" in the same clause. The words "the College's solicitor and client costs" include solicitor and client costs incurred by the College more broadly. The ordinary and grammatical meaning of the words is broad enough to include solicitor and client costs incurred by the College for the hearing other than the costs of College counsel.

147. In context, it is clear the *Medical Act* permits the College to incur these expenses under Section 8 (3) (e) and Section 57 of the *Medical Act*. The College can decide whether funds should be expended for the purpose of the Act, particularly for the execution of the College's duties under the professional responsibility process in the Act. Section 57 (2) provides for the College to "retain such legal and other assistance as the College … may think necessary or proper and to include the costs of such assistance as costs ordered by the committee."

148. These provisions in the *Medical Act* are consistent with a broad interpretation of the words "the College's solicitor and client costs" in Section 121 (1) (e). That means that "the College's solicitor and client costs" are not the same as "College counsel" costs. It is more generally consistent with the overall scheme of Section 121. As we have noted above, the proper approach to Section 121 is to interpret Section 121 (1) broadly. Judgment as to whether an expense covered by Section 121 (1) is appropriate is subject to the committee's discretion to order costs in whole or in part under Section 121 (3).

149. In our opinion, those expenses are covered by "the College's solicitor and client costs" in Section 121 (1) (e). Whether they should be included in whole or in part in a costs order requires broader consideration, which will be considered later in these reasons.

(f) Divided Success

150. In our previous decisions in *Re Osif* and *Re Ezema*, we ordered costs proportionate to the degree that the College succeeded in proving the allegations in the Notice of Hearing. This approach was upheld by the Nova Scotia Court of Appeal in *Osif* and reflected a consistent jurisprudence adopted by the Court of Appeal in assessing the reasonableness of a costs award under similar legislation.

151. In *Hills v. Provincial Dental Board of Nova Scotia,* 2009 NSCA 13, the Court of Appeal concluded that a costs award was reasonable based on "requiring a disciplined member of a professional society to pay costs in proportion to the allegation of expenses between the charges which resulted in convictions and those involving acquittals."

152. In *Hills* at paragraph 65, the Court described the reasoning of the Discipline Committee in calculating costs as follows:

> "65. The total expenses incurred by the respondent with respect to the discipline proceeding were $110,641.09" After reviewing the factors referenced in paragraph 61, the Committee determined that the appellant should pay slightly more than 50 percent of that amount. The allegations in two of the four counts against Dr. Hills were upheld, one charge was dismissed because the Board did not meet the burden of proof, and the fourth charge was dismissed when no evidence was offered."

153. The Nova Scotia Court of Appeal followed this approach in *Fadelle v. Nova Scotia College of Pharmacists,* 2013 NSCA 26, where the Court describes the calculation in paragraph 61:

> "61. The Committee calculated the $100,000 costs order as 65% of the full costs of the proceeding. That percentage represented the 6.5 charges that the Committee found to be proven, out of 10 charges laid by the College. That allocation follows the approach endorsed by this Court in Hills V. Nova Scotia (Provincial Dental Board), paras 65-66."

154. In this matter, the College has proved the allegations in paragraphs 1(a), (c), (d) relating to A.B., paragraphs 2 (a), (c), (d), and paragraph 3 pertaining to C.D. in the Notice of Hearing, but the Hearing Committee did not accept the allegations in paragraphs 1 (b) and 2 (b) (e) (f). Taking the approach of the Court of Appeal in *Fadelle v. Nova Scotia College of Pharmacists*, the College has proven seven of eleven allegations supporting a calculation of 64% of the total expenses incurred by the College other than those resulting in the two motions for production. In our opinion, this provides a good starting point for a costs order, but as in *Re Osif* and *Re Ezema*, a more nuanced approach is required in this case.

155. In our opinion, the unnecessary time and expense involved in addressing the two motions for production brought by Dr. Moodley require separate consideration from the proportionate

allocation of costs relating to proving the allegations in the Notice of Hearing. In context, there were six pre-hearing motions, four of which were brought by Dr. Moodley and rejected by the Hearing Committee, and two brought from the College; one consented to by Dr. Moodley and the other contested. Of these, the two motions for production were the most time-consuming for counsel and the members of the Hearing Committee and therefore expensive. We think it is reasonable to include the expense of the motions other than the two motions for production in the overall calculation of relative success on the merits, but that the costs of the motions for production must be considered separately.

156. In *Jaswal v. Newfoundland (Medical Board),* 1996 CarswellNfld 32 (Newfoundland Trial Division), the Court identified several factors to consider in making a costs award in paragraph 51:

> "It is necessary, therefore, to determine the factors appropriate to the proper exercise of the judicial discretion to make an order for payment or partial payment of expenses. In my view, based on the submissions of counsel, the following is a non-exhaustive list of factors which ought to be considered in a given case before deciding to impose an order for payment of expenses:
>
> 1. The degrees of success, if any, of the physician in resisting any or all of the charges
> 2. The necessity for calling all of the witnesses who gave evidence or for incurring other expenses associated with the hearing
> 3. Whether the persons presenting the case against the doctor could reasonably have anticipated the result based upon what they knew prior to the hearing
> 4. Whether those presenting the case against the doctor could reasonably have anticipated the lack of need for certain witnesses or incurring certain expenses in light of what they knew prior to the hearing
> 5. Whether the doctor cooperated with respect to the investigation and offered to facilitate proof by admissions, etc.
> 6. The financial circumstances of the doctor and the degree to which his financial position has already been affected by other aspects of any penalty that has been imposed."

157. The Jaswal factors in paragraphs 1, 2, 3 and 4 substantially overlap in the circumstances of this case. To a large extent, these factors are subsumed in the mathematical approach taken in *Fadelle v. Nova Scotia College of Pharmacists*. Factors 5 and 6 identify potential mitigating circumstances. In our decisions in t*he Osif* and *Re Ezema*, the Hearing Committee also considered other public interest factors not listed in *Jaswal.*

158. In our opinion, consideration of public interest factors, in this case, should reduce the costs resulting from a purely mathematical application based on *Fadelle v. Nova Scotia College of Pharmacists*. The most significant of those factors is the nature of the allegations that the College did not prove.

159. In final argument, the College withdrew its allegations related to A.B. that Dr. Moodley was incompetent and that he had committed professional misconduct by performing a physical examination in a sexualized manner and instead supported the allegation that he had committed professional misconduct by performing a physical examination of A.B. in a manner inconsistent with the accepted standard. The Hearing Committee did not accept that allegation. Concerning C.D., the College, in final argument, withdrew the allegation that Dr. Moodley was incompetent and that he had conducted a pelvic examination in a manner inconsistent with accepted standards and had unnecessarily magnified the extent of C.D.'s medical condition. We did not accept the allegation that Dr. Moodley unnecessarily requested an internal examination.

160. In effect, the College withdrew serious allegations relating to A.B., i.e. of sexual touching, which would constitute an assault, and of the allegations of the inadequate care of C.D.

161. In *Abrametz v. The Law Society of Saskatchewan,* the Court combined "the strict mathematical calculation" in *Fadelle v. Nova Scotia College of Pharmacists,* with other factors such as "the relative importance of the charges dismissed compared to those proven." In this case, we do not consider that the unproven or withdrawn allegations were more important than the allegations, which had been proven. However, it seems to us that the cumulative impact of all of the allegations may have required consideration of revocation of Dr. Moodley's licence to practice or at least a much longer suspension, if all of the allegations had been established.

162. While we are confident that our disposition measures, in this case, will protect the public, there can be little doubt that a disposition short of revocation would be very challenging if we also found that Dr. Moodley conducted a sexualized examination of A.B. and was incompetent in the appropriate clinical requirements for treating C.D. It would be difficult to fashion conditions or restrictions that would assure the public that Dr. Moodley would practice in a manner that met the expected standards for clinical care. The problem with applying a strict mathematical approach to divided success in calculating costs, in this case, is that it fails to take into account that Dr. Moodley was successful on important issues that likely saved his licence to practice or saved him from a much longer suspension.

163. Taking an arithmetical approach to calculating costs, in this case, does not take into account the qualitative aspect of the allegations in the Notice of Hearing.

164. In our opinion, this aspect of the mixed success, in this case, indicates a reduction in the amount of costs below 64% of the expenses incurred by the College other than those included those resulting in the motions for production.

(g) Legal Fees for the Hearing

165. Dr. Moodley argues that taking into account the relatively complex nature of the allegations that were withdrawn in comparison to the relatively straight forward nature of the allegations that were proved, the costs of hearing "should be considered a wash" and the costs ordered by the Hearing Committee should not include the legal fees for the hearing itself. He proposes that the costs order should include nothing for the legal costs of the hearing instead of the $185,174.66 claimed by the College.

166. The basis for Dr. Moodley's argument is that the withdrawn allegations of incompetence and the other allegations of clinical failings make the *Fadelle v. Nova Scotia College of Pharmacists* mathematical approach inappropriate. Citing *Abrametz v. The Law Society of Saskatchewan*, he argues that the proper process in these circumstances is to calculate what the total costs would have been if Dr. Moodley had been charged only with the particular allegations that have been proven. In his submission, the *Fadelle v. Nova Scotia College of Pharmacists* mathematical approach gets undue weight to the substantive results of the hearing.

167. Although we have concluded that the *Fadelle* mathematical analysis is the starting point in the calculation of costs and that the 64% claimed by the College does not fairly capture the significance of the allegations against Dr. Moodley, which the College did not prove, this method of analysis of mixed success argued by Dr. Moodley is problematic. It requires a difficult and speculative exercise. If the hearing had taken five days instead of seven days, and the preparation time for counsel was reduced proportionately, it would not likely reduce the costs award any more than the *Fadelle v. Nova Scotia College of Pharmacists* mathematical approach that we have accepted with modification.

168. For example, Dr. Moodley argues that using this approach, Dr. Viljoen and Dr. Adam would not have been necessary witnesses, and the hearing could have been completed in five days or less instead of seven days; preparation for the hearing would be similarly limited. While much of Dr. Viljoen's and Dr. Adam's testimony related to the withdrawn issue of sexualized touching during the PAP examination of A.B., their testimony was helpful to the Hearing Committee's understanding of the allegations overall. Both were South African trained obstetricians and gynecologists, whose testimony made it clear that Dr. Moodley's questions and comments of a sexual nature without medical reasons were clearly below professional standards, both in South Africa and Canada.

169. In our opinion, if the *Fadelle* mathematical approach is taken as a starting point for the calculation of costs, and if the amount of costs are adjusted given the importance of the charges that were dismissed, that better captures the mixed contribution of Dr. Viljoen and Dr. Adam's evidence than attempting to determine what the costs would have been if only the proven allegations had been referred to hearing in the first place.

170. Dr. Moodley also argues that simply reducing the costs award based on mixed success is not sufficient because the pursuit of the withdrawn and unproven allegations caused him to incur expenses that should be taken into account and set off against the College's cost claim; resulting in a "wash."

171. Apart from the fact that we have no evidence of his expenses, this approach is inconsistent with our previous decision in *Re Osif*, which was upheld by the Court of Appeal and which we applied in our decision in Re Ezema. It would produce an absurd result that the College would have no valid claim for the legal costs of the hearing, despite having established seven out of eleven of the allegations in the Notice of Hearing.

172. In our opinion, the costs award should include the College's legal expenses for the hearing.

(h) Unnecessary expenses incurred by the College

173. Dr. Moodley argues that the College incurred unnecessary expenses to prove the allegations at which it succeeded. In this respect, we adopt the approach taken in *Jaswal* in paragraph 52:

> 52. In examining the scope of the inquiry and the manner and focus of the investigation, the Court, or the Board, ought to be careful not to apply, with the benefit of hindsight, too high a standard for the imposition of costs. The decision to call witnesses and to take a certain approach is made before the disposition in the case is known. The test is therefore not one of necessity viewed in the light of the resulting decision but one of reasonableness viewed from the perspective of the persons investigating and preparing the case for hearing. Thus, in the context of costs awards in litigation in the Supreme Court, it has been held that the fact that evidence from a witness may not ultimately have to be relied upon or used by the Court in reaching its decision does not in itself disentitle a party to recover costs associated therewith if the engagement of the expert viewed from the perspective of someone preparing for trial was nevertheless reasonable in the circumstances. See, Kolonel v. Kenny (1992), 1992 CanLII 7282 (NL SC), 98 Nfld. & PEIR 1; 311 APR 1 (Nfld. TD). A similar position ought to apply to proceedings before the Board."

174. In our reasons for our decision on the merits, the Hearing Committee did not rely on evidence of corroboration called by the College. It did not rely on evidence on a consistent retelling of the encounters with Dr. Moodley by A.B. and C.D. We based our conclusion mainly on the credibility and reliability of the testimony of A.B. and C.D. However, we do not think that it was unreasonable for the College to prepare for the hearing and call this evidence, which included [redacted], Tarin Wells, and Dr. Angus Gardner.

175. Likewise, in our decision on the merits, the Hearing Committee gave no weight to the character evidence called by Dr. Moodley through Dr. Craig Stone, Dr. Sandra Scherbarth, Angela MacKenzie, and Donna Tatlock, as well as the expert evidence of Dr. Brad Kelln. In our opinion, it was not unreasonable for Dr. Moodley to prepare for the hearing and call these witnesses because he did not remember the appointments with A.B. and CD and relied on his testimony that he would never have done the things that they described. Similarly, at the disposition phase, his character evidence has some limited relevance, and it was not unreasonable for Dr. Moodley to rely on those witnesses and make submissions based on that evidence.

176. To the extent that we do not rely on aspects of the College's evidence and the evidence of Dr. Moodley, that is reflected in the mathematical calculations that produced our starting point of 64% and does not point to an additional reduction in the costs award.

(i) Dr. Moodley's financial circumstances

177. Dr. Moodley argues that the costs award should be reduced, taking into account his financial circumstances and the financial impact of the suspension. Unlike in *Osif,* where we were

provided with affidavit evidence of her financial circumstances, we have no evidence here of Dr. Moodley's financial circumstances. Dr. Moodley's submissions are mostly speculative. He says that as a fee for service physician, there is no doubt that the publicity and requirement of a posted notice of monitoring has had and will have a negative impact on his patient load, and therefore his income. There is no evidence to support this argument. He made a similar argument, which we did not accept when he sought a publication ban on his name and country of origin. In that matter, we had affidavit evidence and oral cross-examination, but there is nothing similar here. Dr. Moodley has been practicing since 2017 with a restriction on his licence requiring a monitor and posting a sign about monitoring. We have not been provided with any evidence that this caused him to lose income.

178. We do recognize that a five-month suspension will directly impact Dr. Moodley's financial circumstances. The question is whether the costs award should be reduced to take into account the likely impact of his ability to pay costs after losing five months' pay along with the ongoing expense of the practice monitor. There is little doubt that a costs award in the vicinity of $400,000 as sought by the College would be difficult for any individual to pay. However, as in our previous decisions in Re *Osif* and *Re Ezema,* we will order monthly installments until the costs award has been paid. We have no evidence that Dr. Moodley would be unable to pay costs on that basis, and we have no reason to believe that his financial circumstances when he returns to practice will not permit him to pay his costs obligations over time.

179. We have concluded that the College's costs claim of 64% of expenses should be reduced because of the importance of the allegations that were withdrawn or not proven by the College. In deciding how much of a reduction is warranted, we should take into account the financial impact of the five-month suspension.

(j) Cooperation and Admissions

180. Admissions can reduce the expense of a hearing from the physician or by cooperation in the investigation and hearing of the matter. In this case, Dr. Moodley denied all of the allegations made in the complaints except that he admitted attending C.D.'s workplace, claiming he went there to buy a product and coincidently asked to speak to her.

181. During the investigation and in the preliminary stage of the hearing, Dr. Moodley aggressively pursued the theory that the complainants had colluded against him because of his race.

182. He did consent to the College's motion for a publication ban of the identities of the complainants and gave some support to the College's motion to exclude the public except the media from the hearing but argued that the whole of the public, including the media, should be excluded. He consented to the introduction of affidavit evidence of Dr. Gracie and Noreen Gaudet.

183. We have addressed the cost of motions for the production of documents by the complainants below. Apart from that, in our opinion, the factor of cooperation and admissions is neutral and points neither to increase nor reduction in the costs order.

(k) Costs Incurred as a Result of Dr. Moodley's Motions for Production

184. The College argues that the costs order by the Hearing Committee should include 100% of the College's solicitor and client costs arising from Dr. Moodley's two motions for the production of the complainant's social media posts, including Facebook, Instagram, and Twitter, and production of all of their communications related to Dr. Moodley and each other.

185. As noted earlier, the total amount of the solicitor and client fees, disbursements, and HST, which is claimed, is $78,148.28, which includes $34,647.01 incurred by the College to pay the fees, expenses, and HST of independent counsel for the complainants and $43,050.27 for the legal fees, disbursements, and HST for College Counsel.

186. We have concluded above that those amounts fall within the definition of "costs" in Section 121 (1) of the Medical Practitioners Regulations and are specifically covered by Section 121 (1) (e).

187. We recognize that solicitor and client costs are only awarded in exceptional circumstances in civil litigation in the courts. While it would be logical to interpret "costs" in the same way as costs are assessed in the courts, Section 121, consistent with the overall scheme of the *Medical Act* and Medical Practitioners Regulations, does not simply provide for an award of "costs" but adopts an expansive meaning of the word "costs" by including amounts that would not ordinarily be awarded as costs in the courts. Section 121 (1)(e) includes "solicitor and client" costs within the definition of "costs," not as exceptional categories of costs, but expressly as included expenses.

188. Under Section 121 (3), the Hearing Committee has the discretion to order Dr. Moodley to pay costs in whole or in part. The College has incurred costs in response to Dr. Moodley's motions for production by the expense of legal fees, disbursements and HST, all of which fall within the scope of Section 121 (1)(e). The issue under Section 121 (3) is whether we should order Dr. Moodley to pay all of the expenses incurred by the College in dealing with the motions for production instead of adopting 64% of those costs as a starting point for our analysis.

189. In our opinion, the motions seeking orders requiring the complainants to produce social media posts and other communications were entirely without merit. They were time-consuming for all counsel involved and for the Hearing Committee, which had to consider seven affidavits filed by Dr. Moodley, six affidavits filed by the College, and briefs filed by Dr. Moodley, the College, and by both counsel for the complainants. We received the final reply brief from Dr. Moodley on December 10, 2019, with oral submissions to be scheduled to be heard on December 16 and 17, 2019, but adjourned at the last minute when Dr. Moodley changed counsel. The motions were dropped in January. The expenses incurred by the College were literally thrown away.

190. In his reply to C.D.'s complaint, Dr. Moodley alleged that C.D. and A.B.'s allegations were "coordinated and racially motivated." He later claimed that A.B. had filed a complaint to gain access to a different (white, female) gynecologist. Dr. Moodley argued in support of the motions that the nature and extent of the complainant's social media posts were the only means by which

he could substantiate the allegations of collusion and that the complaints were racially motivated.

191. Despite the sweeping and intrusive nature of the proposed orders for production and their importance to Dr. Moodley's claims of collusion and racism, he provided no evidence that supported his argument that the social media posts and other communications were likely relevant to this claim.

192. Dr. Moodley provided no direct evidence supporting these claims in seeking the order for production. The only evidence was affidavits from his office assistant, Angela McKenzie, which repeated overheard conversations and gossip unconnected to the complainants and his legal counsel's assistant Elizabeth Wilband, which attached Facebook posts with no apparent relevance to the complaints.

193. The College filed affidavits from the complainants, which made it clear that they did not know each other and had never communicated with each other in any way respecting Dr. Moodley. The affidavits from A.B. and others showed no contact among them to obtain an early appointment for A.B.

194. Despite the absence of any evidence, the motions raised complex constitutional issues regarding the production of non-party records and important policy issues about handling complaints of sexual misconduct by physicians.

195. Affidavit evidence filed by the College showed that the allegations of racism had added to A.B.'s anxiety over the making of her complaint and participation in a public hearing. A.B.'s affidavit indicates that the allegation of racism caused her to consider ending her participation in the College process because of the specific nature of her occupation and professional relationships.

196. C.D.'s affidavit deposed that the production motion caused her to have serious misgivings about continuing her complaint. She described feelings of fearfulness, discomfort, and distress.

197. Noreen Gaudet, the Director of Professional Conduct for the College, provided affidavit evidence about the reluctance of complainants generally to come forward with allegations of sexual misconduct by physicians. She characterized this reluctance as "one of the most significant barriers to the effective investigation of allegations of sexual misconduct." She reported that concern about the exposure of complainant's private lives resulting from making a complaint and participating in a hearing is an issue in their involvement in the complaint process.

198. If a physician has a proper basis for questioning the good faith of a complainant, that could lead to consideration of an order to produce documents. However, it is important to consider the impact of such an order on the process of investigating and hearing complaints. Complainants have nothing to gain from subjecting themselves to investigation and participation as a witness in a hearing. In our opinion, in the absence of any factual basis for seeking such an order, intruding into the private lives of complainants as sought by Dr. Moodley could be used as a tactic to discourage their participation. More broadly, we agree with the College that it is

reasonable to expect that such a tactic would have a chilling effect on other potential complainants bringing forward allegations of sexual misconduct.

199. In our view, motions for production without any merit should be discouraged by costs consequences when the Hearing Committee finds professional misconduct. There is no reason to reduce the costs insofar as they relate to the motions for production in this case. We conclude that Dr. Moodley should pay 100% of the expense of legal fees, disbursements, and HST incurred by the College caused by these motions. The amount of $78,148.20 should be added to the costs award for the other aspects of this matter.

V. Conclusion on Costs

200. In our opinion, the most significant factor in exercising our discretion to order costs in whole or in part is the degree of success of the College in proving the allegations in the Notice of Hearing and the corresponding degree of success of Dr. Moodley in contesting those allegations.

201. In the circumstances of this case, consideration of the other *Jaswal* factors does not significantly change the amount of our costs order based on our approach to divided success in this case. That approach starts with applying a simple mathematical calculation based on the College's success in proving seven out of eleven allegations in the Notice of Hearing. However, the importance of the allegations, which were not proved, points to a lower costs award related to the issues other than the two motions for production.

202. Obviously, with a five-month suspension, a substantial costs award will likely be a financial burden on Dr. Moodley. The College proposes an order for costs just below $400,000. This is a substantial costs award. We have concluded that Dr. Moodley should pay 100% of the expenses for the thrown away costs from his two motions for production. This amounts to $78,149.28. Based on our analysis of divided success and the other factors, including the financial impact on Dr. Moodley, the costs ordered for expenses other than the motions should be reduced to 50% of the expenses incurred by the College in proving seven out of eleven allegations in the Notice of Hearing. The total of 50% of the College's expenses of $499,734.48 plus 100% of the expenses of $78,149.28 resulting from the two motions can be rounded off for a total costs order of $325,000.

203. Our costs order is that Dr. Moodley pays the College $325,000. We recognize that if Dr. Moodley has to pay that amount immediately at the same time as beginning a five-month suspension from practice, the practical impact for him could be the same as a revocation of his licence. That is not our intention, and it is not called for by professional misconduct in this matter.

204. Accordingly, we order that $325,000 in costs be paid in monthly installments of $5,000 starting at the end of the sixth month after he begins the suspension. If Dr. Moodley fails to make a monthly installment or ceases to practice in Nova Scotia, the entire remaining unpaid amount of costs shall become due and payable.

205. While we have no evidence of Dr. Moodley’s financial circumstances, we think that it is likely that monthly installments of $5,000 will be manageable and permit him to continue in practice in Nova Scotia.

VI. Disposition Order

206. For the above reasons, having determined that Dr. Manivasan Moodley has engaged in professional misconduct, the Hearing Committee has determined that the disposition of this matter shall be as follows:

1. The Hearing Committee reprimands Dr. Moodley for having engaged in professional misconduct with A.B. by commenting inappropriately on her physical appearance and by initiating a discussion of a personal or a sexual nature with her that was not relevant to her medical issues, and that following a physical examination, he asked questions of a sexual nature that were not relevant to her medical issues. Further, Dr. Moodley is reprimanded for having engaged in unprofessional conduct by asking C.D. questions and making comments of a personal and sexual nature that were not relevant to her medical issues, and he violated the boundaries between physician and patient by attending at C.D.'s worksite;

2. Dr. Moodley's licence to practice shall be suspended for five months beginning at a date agreed to between him and the College;

3. Dr. Moodley must complete an ethics training program as agreed between himself and the College before his return to practice after his suspension;

4. Dr. Moodley is required to have a practice monitor present from beginning to end during all encounters with patients in his private office or examination room:

   a) The practice monitor must have an unobstructed view of any procedure performed;

   b) The practice monitor must be a regulated healthcare professional, approved by the College;

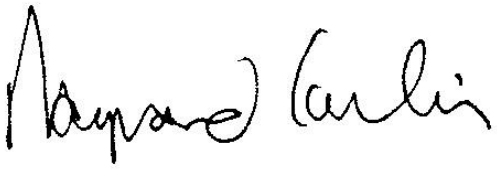
   c) A College sign regarding this requirement is to be placed in all waiting rooms and examination rooms where patients are required to be seen;

5. Dr. Moodley shall pay the College costs in the amount of $325,000 in monthly installments of $5,000 beginning in the sixth month after he starts his suspension. If he fails to make a monthly payment or ceases practice in Nova Scotia, the entire remaining unpaid costs shall be due and payable forthwith.

6. The Hearing Committee reserves jurisdiction to address any issues arising out of the implementation of this decision.

The Committee reserves the right to redact or amend any portions of these reasons that violate the publication ban on the identities of the complainants.

This decision and order made the Hearing Committee this 20th day of May 2021.



Raymond Larkin, Q.C.

Gwen Haliburton

Dr. Gisele Marier

Dr. Erin Awalt

Dr. Naeem Khan

PROVINCE OF NOVA SCOTIA)
HALIFAX REGIONAL)
MUNICIPALITY)

IN THE MATTER OF: **The College of Physicians and Surgeons of Nova Scotia**

-and-

Dr. Manivasan Moodley

DECISION ON MOTION FOR A TEMPORARY PARTIAL PUBLICATION BAN

Hearing Date: **October 24, 2019**

Hearing Panel

Ms. Gwen Haliburton
Dr. M. Naeem Khan
Dr. Gisele Marier
Dr. Erin Awalt
Raymond Larkin, Q.C.

Counsel for Dr. Manivasan Moodley

Mr. Stewart Hayne and Ms. Amy MacGregor
Cox and Palmer

Counsel for The College of Physicians and Surgeons of Nova Scotia

Marjorie Hickey, Q.C.
McInnes Cooper

1. A number of disciplinary matters concerning Dr. Manivasan Moodley have been referred to the Hearing Committee from the Investigation Committee. The hearing has been set for February 24-28, 2020. Pre-hearing matters have been raised by Dr. Moodley including a pre-hearing motion for a temporary partial publication ban on his name and country of origin.

2. In support of this motion, counsel for Dr. Moodley has provided written submissions with case authorities, including a supplementary brief, an affidavit from Dr. Moodley and an affidavit from counsel. The College has also provided written submissions with case authorities and the affidavit of Noreen Gaudet.

3. At the hearing, on October 24, 2019, counsel for the College cross-examined Dr. Moodley on his affidavit and the parties made oral submissions on the motion. The panel indicated that it would reserve decision on the motion and provide a written decision with reasons at a later time.

Statutory Context

4. Complaints and information gathered in the investigation of complaints are confidential. S. 46(1) of the *Medical Act*, SNS 2011 c. 38 provides as follows:

> All complaints received or under investigation, all information gathered in the course of the professional conduct process and all proceedings and decisions of an Investigation Committee and a Hearing Committee that are not open to or available to others in accordance with this *Act* or Regulations must be kept confidential by any persons who possess such information.

5. When a matter has been referred to the Hearing Committee s. 53 of the *Medical Act* provides for a publication ban. S. 53(5) provides as follows:

> With respect to any decision issued by a Hearing Committee, while with respect to any aspect of the Hearing Committee's process pursuant to this Act or the Regulations, the committee may impose a publication ban on such portions of its proceedings or decision as deemed necessary by the committee.

6. Regulations made under the Medical Practitioners Regulation address attendance at hearings and publication bans. S. 109 of the Regulations provides as follows:

> 109 (1) Except as provided in subsections (2) or (3), a **hearing is open to the public.**
>
> (2) At the request of a party, a hearing committee may order that the public, in whole or in part, be excluded from a hearing or any part of it if a hearing committee is satisfied that any of the following apply:
>
> (a) personal, medical, financial or other matters that may be disclosed at the hearing are of such a nature that avoiding public disclosure of those matters in the interest of the public or any person affected outweighs adhering to the principle that hearings should be open to the public;
>
> (b) the safety of any person may be jeopardized by permitting public attendance.
>
> (3) A hearing committee may make an order that the public be excluded from a part of a hearing that deals with a request for an order to exclude the public in whole or in part under subsection (2).
>
> **(4) A hearing committee may make any orders that it considers necessary, including orders prohibiting publication or broadcasting, to prevent the public disclosure of matters disclosed in a hearing, in any decision rendered by a hearing committee, or with respect to any matter under subsection (2) or (3).**
>
> (5) Subject to any order made under this Section, a hearing committee must state at a hearing its reasons for any order made under this Section.
>
> (6) Despite any decision to exclude the public under this Section, a complainant may attend a hearing unless the hearing committee directs otherwise.
>
> [Emphasis added]

7. While everything in the investigative stage is confidential, a hearing is open to the public with very limited exceptions. In exercising its discretion to grant a publication ban prohibiting the public disclosure of matters disclosed in a hearing, the Hearing Committee has to decide whether a publication ban and a specific prohibition is necessary. In deciding

whether a publication ban is necessary the Hearing Committee must be guided by the purpose of the *Medical Act* as stated in s.5 of the *Act* which provides in part:

> **Purpose and duties of College**
> 5 In order to
> (a) serve and protect the public interest in the practice of medicine; and
> (b) subject to clause (a), preserve the integrity of the medical profession and maintain the confidence of the public and the profession in the ability of the College to regulate the practice of medicine, the College shall
>
> ...

8. The Hearing Committee has to consider whether the publication ban will serve the public interest in the practice of medicine and whether it will affect the confidence of the public and the profession and the ability of the College to regulate the practice of medicine.

9. An order from the Hearing Committee to prevent the public disclosure of matters disclosed in a hearing is also a limit on freedom of expression which is a fundamental freedom protected by s.2 of the *Canadian Charter of Rights and Freedoms.*

10. Both parties have cited decisions from the Supreme Court of Canada governing the constitutionality of a publication ban. Both parties have cited *R v Mentuck*, [2001] 3 S.C.R. 442 and *Sierra Club of Canada v Canada (Minister of Finance)* in respect of the constitutionality of a publication ban. In *R v Mentuck* at paragraph 32 the court set out the test for a charter compliant publication ban as follows:

> A publication ban should only be ordered when:
>
> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

11. The court also elaborated on the concept of necessity at paragraph 34 stating as follows:

> I would add some general comments that should be kept in mind in applying the test. The first branch of the test contains several important elements that can be collapsed in the concept of "necessity", but that are worth pausing to enumerate. One required element is that the risk in question be a serious one, or, as Lamer C.J. put it at p.878 in *Dagenais*, a "real and substantial" risk. That is, it must be a risk the reality of which is well-grounded in the evidence. It must also be a risk that poses a serious threat to the proper administration of justice. In other words, it is a serious danger sought to be avoided that is required, not a substantial benefit or advantage to the administration of justice sought to be obtained.

12. In *Sierra Club of Canada* the court applied the same principle in the context of an application for judicial review reciting the test as follows at paragraph 53:

> Applying the rights and interests engaged in this case to the analytical framework of Dagenais and subsequent cases discussed above, the test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:
>
> A confidentiality order under Rule 151 should only be granted when:
>
> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

13. The court elaborated on the idea of "important commercial interest" in paragraph 55 as follows:

> In addition, the phrase "important commercial interest" is in need of some clarification. **In order to qualify as an "important commercial interest", the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality**. For example, a private company could not argue simply that the existence of a particular contract should not be made public

> because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. **Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test.** Or, in the words of Binnie J. in F.N. (Re), [2000] 1 S.C.R. 880, 2000 SCC 35 (CanLII), at para. 10, the open court rule only yields "where the public interest in confidentiality outweighs the public interest in openness"
>
> [Emphasis added]

14. The first element of the legal test used in *Sierra Club* is the test of necessity. It fits comfortably with the provisions of the *Medical Act* and Medical Practitioner Regulations. The second element of the legal test is the requirement of proportionality which requires consideration both of the salutary effects of the publication ban and its deleterious effects.

15. Accordingly, with respect to freedom of expression guaranteed by Section 2 of the Charter, in considering whether to exercise our discretion to order a publication ban in relation to a hearing under the *Medical Act,* we must consider whether a publication ban is necessary in order to prevent a serious risk to the proper administration of the *Medical Act* and whether the benefits of a publication ban in the circumstances of this case outweigh the open court principle.

Facts

16. Dr. Manivasan Moodley is one of five gynecology practitioners serving Cape Breton. He began his practice in Sydney in March 2017. Before that he practiced as an obstetrician and gynecologist in South Africa for 20 years.

17. On August 18, 2017 the College received a complaint from one of Dr. Moodley's patients claiming sexual misconduct in the course of gynecological treatment of the patient. At the request of the College on August 18th, Dr. Moodley undertook on August 21, 2017 not to

see patients without the presence of an attendant and post a sign in his waiting room and in his examination room confirming that undertaking. After meeting with the Investigation Committee on August 29, 2017 Dr. Moodley entered into an amended undertaking on August 31, 2017. This amended undertaking was distributed to the stakeholder bodies, mainly regulatory bodies and the Health Authorities, providing them notice of the undertaking as follows:

1) Dr. Moodley will have an attendant present for a female patient encounters from beginning to end. The attendant will have an unobstructed view of any procedure performed;

2) The attendant will be a regulated health care professional, approved by the college;

3) Dr. Moodley will post a sign in his waiting room and examination rooms advising patients of the attendant requirement

18. On September 11, 2017 CBC News broadcast the content of the notice. In his affidavit in this matter Dr. Moodley described the impact on him from this new story in the following paragraphs:

> 13. This news story has greatly impacted me, my practice, and my family. My children have been teased at school and my practice has been reduced in scope as patients do not wish to see me, given the reputation that has been imposed on me. This has had enormous psychological and emotional impact on me while trying to start a new practice in a new country, with new people, and to meet the requirements of my license to write the Royal College Fellowship exam. I found it extremely difficult to deal with this trauma imposed on me, while being subject to confidentiality obligations imposed by the College. Indeed, I sought medical attention by a psychiatrist, who refused to see me, due to the College complaints. My family doctor is aware. I have had to face this alone. I have however, managed to maintain good practice and my professionalism throughout, passed the Fellowship exams, and have obtained permanent residency status. Through this, I can say that this has been the most difficult period of my time.
>
> 14. I have also seen the stress this has impacted on my wife and three children. Indeed, my first reaction was to quit my position and preserve my family's reputation by moving back to South Africa. I did not take this step as I have elected to stand and defend myself. I provide this as evidence of the impact of the stress

this matter has imparted on me, and the impact it has had on my ability to soundly defend myself.

19. On September 20, 2017 the College received a second complaint from a different patient of Dr. Moodley which also alleged sexual misconduct by him in treating her as a gynecologist. The College responded on September 21, 2017 and imposed the following interim restriction on Dr. Moodley's practice:

    1) Dr. Moodley will have an attendant present for all female patient encounters from beginning to end. The attendant will have an unobstructed view of any procedures performed;

    2) The attendant will be a regulated health care professional, approved by the college;

    3) Dr. Moodley will post a sign in his waiting room and examination rooms advising patients of the attendant requirement;

    4) Dr. Moodley must avoid contact with his patients outside the conical setting.

20. These restrictions were posted both on the College's Physician's Search page and the College's website page entitled "Disciplinary Decisions and Interim Licence Sanctions".

21. In his affidavit, Dr. Moodley states the following at paragraph 15:

    15. I am, by over 20 years, the most senior obstetrician/gynecologist in the department at present. I have clinical and surgical skills which are called upon for second opinions, complications in the OR, and primary surgical assistance. If there is no publication ban, then the same community I am serving, will no longer want me to be involved in their care, which will jeopardize, potentially, their own health and care, due to the public nature of the allegations against me.

22. In cross-examination Dr. Moodley clarified the impact on him from the CBC News report in 2017. He testified that after the news story the number of new patients referred to him declined and his practice never went back to where it was before September 2017 but his office hours were fully booked and he does continue to take new patients.

23. Dr. Moodley is a person of color whose place of origin is South Africa. In cross-examination he indicated his belief that at least one of the complaints against him was racially motivated. Of the five gynecologists in Cape Breton only two are male. The other male gynecologist is also a person of color whose place of origin is Nigeria.

Arguments

24. Dr. Moodley is requesting a temporary partial publication ban which will prohibit publication of his name and his country of origin until a decision on the allegations against him has been reached by the hearing panel. The complaints make serious sexual misconduct allegations against him while engaged in gynecological treatment of patients. He says that publication of his name in conjunction with those "salacious" allegations will have an immediate and irrevocable, harmful impact on his reputation causing irreparable harm to him, his family and his patients. Dr. Moodley's counsel argues that the restrictions placed on his practice by the Investigation Committee are sufficient to protect the public interest without the necessity of publishing Dr. Moodley's name.

25. Dr. Moodley acknowledges the open hearing principle but argues that the panel should balance the open hearing principle of the impact with the publication for him, his practice and the access of patients to patient care in Cape Breton.

26. Dr. Moodley relies strongly on the decision of the British Columbia Court of Appeal in *Dr. Q v College of Physicians,* 1999 BCCA 0053. In that case the British Columbia College found, after a closed hearing, that Dr. Q had engaged in sexual relations with a patient and that that behavior constituted infamous conduct. Dr. Q asked the college to stay the publication of that decision while he pursued an appeal to the courts. Neither the College nor the chambers judge agreed to this request. The chambers judge refused to grant an injunction preventing the College from publishing Dr. Q's name. The British Columbia's Court of Appeal found that this was a case where the applicant for the injunction would suffer irreparable harm if the injunction was refused and the opposing party would suffer

virtually no harm if it was granted. The court found that the public interest was sufficiently met by the protective conditions of practice. The court also found that while the primary goal of confidentiality was to protect complainants, doctors are intended to be protected as well - "There is a public interest in not damaging professional reputations unnecessarily".

27. Dr. Moodley also relied on a decision of the Supreme Court of British Columbia in *Mr. G v. British Columbia College of Teachers*, 2004 BCSC 625. In that case the British Columbia Supreme Court considered an appeal brought by a teacher from a decision of the British Columbia College of Teachers to publish the teacher's name after a finding of misconduct in a closed hearing. The court indicated that if his full name was set out in the style of cause in the appeal, it would effectively destroy the right of confidentiality that he was seeking to protect through the appeal and that if the appeal was not allowed there would be no great public interest lost in the interim because the teacher's name would then be published. The court took into account in particular circumstance of Mr. G who had a school-aged child with a medical issue which would be adversely affected by the publication of the teacher's name.

28. Dr. Moodley's counsel also cites *Patient X v. College of Physicians and Surgeons of Nova Scotia*, 2013 NSSC 32. A complaint against a physician had been dismissed by the college and that decision was challenged by the Complainant in judicial review to the Nova Scotia Supreme Court. The court decided that the stigma attached to the allegations against the physician would be difficult if not impossible to erase even if they were later proved to be untrue. The court indicated that there was a public interest in protecting people who have done nothing wrong, not having their reputations and livelihoods unnecessarily damaged.

29. Counsel submitted that there were no proven allegations concerning Dr. Moodley and it was entirely possible that there would be no finding against him. Publication of his name

at this stage before a decision is made would unnecessarily harm Dr. Moodley given the interim restrictions imposed on him by the College.

30. Counsel for the College submitted that the fundamental question in an application for a publication ban is whether the principle of openness and the right of freedom of expression, should be compromised in a particular circumstance of the case. This is because a publication ban will have a negative effect on the s.2(b) Charter right to freedom of expression and on the open court principle which is the hallmark of a democratic society.

31. Counsel argued that the presumption of openness in the *Medical Act* is a rebuttable presumption but that the onus is on Dr. Moodley to displace that presumption. Counsel cited the *Sierra Club* test that the risk that had to be proven by Dr. Moodley must be real and substantial and well-grounded in the evidence. Counsel submitted that the test was not one of convenience or balance but of necessity.

32. Counsel submitted that the evidence provided by Dr. Moodley was speculative in nature and that there was no evidence of harm to patients or to the community. She acknowledged that stress and embarrassment and damage to Dr. Moodley's reputation may have an impact on Dr. Moodley but that it was not sufficient to displace the public interest in the open court process.

33. With respect to the salutary and deleterious effects of the publication ban, counsel for the College submitted that the only salutary effect, which is proven in the evidence, is the reduction of embarrassment and stress that would be caused to Dr. Moodley if a publication ban were granted. The deleterious effects included the loss of confidence by the public in the integrity of the College's processes by having a hearing where a physician's name is not published. Counsel submitted that the precedent value of a decision that protects a physician's name was deleterious, especially taken in light of the

consistent practice of the College of publishing the names of the physicians at the hearing stage.

34. Counsel argued that the reputation impacts of publication of the physician's name where there were allegations of sexual misconduct were not greater than a case where the allegations were, for example, surgical incompetence.

35. Counsel also noted the publication ban would not be particularly effective given the public notices of the restriction in Dr. Moodley's practice. Counsel submits that it would be unfair to the other male gynecologist in Cape Breton whose reputation could be harmed if there were a publication ban on Dr. Moodley's name as the public hearing proceeds.

Analysis

36. In our opinion, apart entirely from constitutional considerations, a temporary public ban on Dr. Moodley's name and place of origin is not necessary to protect the public interest in the practice of medicine or to maintain the confidence of the public and the ability of the college to regulate the medical profession.

37. It is clear that the publication of Dr. Moodley's name and place of origin will be embarrassing and stressful for him and it seems likely that it could have a negative impact on his practice. However, a ban on publishing his name is not necessary to ensure a fair hearing of the issues which have been referred from the Investigation Committee to the Hearing Committee.

38. Nor is a publication ban necessary to protect the public. Unlike the ban on the names of the complainants who are members of the public whose personal and medical information will be considered in open hearing, the temporary partial publication ban sought by Dr. Moodley would protect Dr. Moodley only. There is no evidence that the pubic will be harmed by publishing Dr. Moodley's name. Nor is there evidence that the publication of Dr. Moodley's name would jeopardize the health care of the public. Dr.

Moodley suggests that patients will be reluctant to see him. The evidence does show that the CBC story and the practise restrictions in 2017 were followed by a decline in new patients, but there is no evidence that any patients went without medical services that they needed as a result.

39. There is a public interest in the fair treatment of physicians who are charged with professional misconduct. However, the requirement of open hearings in the Medical Practitioner's Regulations and the limits on publication bans in the *Act* and the Regulations are inconsistent with a publication ban on the name of the physician where there is no risk to a fair hearing and no public interest separate from the physician's interest.

40. In our opinion, there is no overriding public interest in preventing the publication of a physician's name in the sense of that found by the British Columbia Court of Appeal in *Q. v College of Physician's* and *G. v British Columbia College of Teachers*. The principle in those cases that "...There is a public interest in not damaging professional reputations unnecessarily..." reverses the requirement in the *Medical Act* and Medical Practitioners Regulations that the Hearing Committee must be satisfied that the publication ban is necessary.

41. Apart from our conclusion that a temporary partial publication ban on Dr. Moodley's name and place of origin is not necessary for the purpose of the *Medical Act,* in our opinion, this case does not meet the requirement for infringement of freedom of expression as set out by the Supreme Court of Canada *R. v Mentuck* and *Sierra Club v Canada.* The proposed temporary partial publication ban of Dr. Moodley's name and place of origin does not meet the requirements either of necessity or proportionality that would justify infringing on freedom of expression.

42. In our opinion, a publication ban is not necessary in this case to prevent a serious risk to the regulation of the practice of medicine in the public interest under the *Medical Act.* In

our view, there is no risk to the fairness of the hearing of the matters which have been referred to us from the Investigation Committee. Dr. Moodley's interest in a publication ban is specific to him but there is no general principle at stake that would lead to the conclusion that a publication ban is necessary to prevent a serious risk either to a fair hearing or more generally the regulation of the practice of medicine by the College.

43. Furthermore, the request for a publication ban in this matter does not meet the requirements of proportionality. The salutary effect of a publication ban would be to protect Dr. Moodley from shame and embarrassment and the possibility of a reduction in his practice. On the other hand, the effect of a publication ban on open and accessible hearings under the *Medical Act* and the effect on freedom of expression more generally would be a deleterious effect of a publication ban in this case.

44. The specific reason for open hearings of serious allegations of professional misconduct in the *Medical Act* is to instill the confidence of the public in the College's regulation of the practice of medicine in the public interest. The consistent practice of the College publishing a Notice of Hearing containing the physician's name and conducting a hearing without a publication ban on the physician's name allows the public to see for themselves, through the media, that the College is meeting its responsibilities for regulating the practice of medicine in the public interest. A temporary partial publication ban on Dr. Moodley's name and place of origin with no clearly justifiable public interest is a deleterious effect that outweighs the salutary effects of the publication ban in this matter.

45. As a matter of general principle, in our view, the name of a physician facing allegations of misconduct which have been referred from the Investigation Committee to the Hearing Committee should be published unless the ban is necessary and the benefit of the ban outweighs the negative impact on freedom of expression and the ability of the College to regulate and the public interest. Not many allegations of professional misconduct go to hearing. Our hearings are open to the public and the allegations are usually serious

allegations that are stressful and embarrassing for the physician involved. We are unable to justify a distinction between Dr. Moodley and other physicians facing a hearing.

46. One member of the panel, Dr. Khan, thinks that it is reasonable to conclude that Dr. Moodley, because of his race, is more likely to suffer adverse consequences from the damage to his reputation that would result from publishing his name in connection with allegations of sexual misconduct in his practice as a gynecologist. In his opinion, it is not unreasonable to conclude that Dr. Moodley's practice would be substantially reduced to a greater degree than another physician who is not a visible minority or who is not a person of colour.

47. Furthermore, in Dr. Khan's opinion, the publication of Dr. Moodley's name may negatively impact public confidence in all physicians of colour or visible minority, regardless of their specialties. This negative impact can be avoided by a temporary publication ban until allegations against Dr. Moodley are proven, if that is the outcome of the hearing.

48. Dr. Khan believes that the racial dimension of publishing Dr. Moodley's name before a finding of misconduct is a matter of the public interest, not just a private interest, which, in his opinion, outweighs the benefit of a hearing which is completely open.

49. The other members of the panels do not agree that a publication ban to shield Dr. Moodley from publication of his name is appropriate because the open hearing principle and the consistent practice of the College in similar matters is more consistent with the mandate of the College to protect the public interest and to maintain the confidence of the public in the College as regulating in the public interest. We acknowledge that there is a public interest in treating Dr. Moodley fairly but conducting hearings into serious allegations in an open and transparent manner is required to assure the public that the College addresses possible misconduct vigorously and effectively.

50. For these reasons, the Panel dismisses the motion for a temporary partial publication ban on Dr. Moodley's name and country of origin.

Issued at Halifax, Nova Scotia this 16th day of December, 2019.

Raymond Larkin, Q.C.

Gwen Haliburton

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Dr. Erin Awalt

Dr. M. Naeem Khan (dissenting)