

IN THE MATTER OF: The *Medical Act*, S.N.S. 2011, c. 38

and

IN THE MATTER OF: A Settlement Agreement

BETWEEN:

The College of Physicians and Surgeons of Nova Scotia

(“the College”)

-and-

Dr. Harvey Damacén

(“Dr. Damacén”)

HEARING COMMITTEE DECISION

Date Heard by Teleconference: March 5, 2021

Location: Halifax, Nova Scotia

Hearing Committee: Mr. Raymond F. Larkin, Q.C.
 Dr. Erin Awalt
 Ms. Gwen Haliburton
 Dr. Steven Gruchy
 Dr. Karl Logan

Counsel: Ms. Jane O'Neill, Q.C., Counsel for the College of
 Physicians and Surgeons of Nova Scotia

 Ms. Jillian B. Strugnell, Counsel for Dr. Harvey
 Damacén

1. On March 5, 2021, the Hearing Committee agreed to accept, with reasons to follow, a Settlement Agreement which had been agreed to by the Registrar of the College of Physicians and Surgeons of Nova Scotia (“College”) and Dr. Harvey Damacen and been recommended for acceptance by the Investigation Committee of the College.
2. Dr. Damacen does not qualify for a full license to practice in Nova Scotia. He has been licensed to practice medicine in the specialty of Orthopedic Surgery within a defined scope of practice. Dr. Damacen knowingly disregarded the limits of his license and performed a prohibited practice on an employee.
3. The proposed Settlement Agreement includes a suspension of Dr. Damacen’s certificate of registration for a period of nine months, less seventeen days of time served in 2018.
4. These are the reasons for the Decision of the Hearing Committee to accept the proposed Settlement Agreement.

Facts

5. The facts are set out in the proposed settlement agreement as follows:
 1. Dr. Harvey Damacen is a defined licensed physician, licensed to practise medicine in Nova Scotia in the specialty of Orthopedic Surgery within a particular scope of practice.
 2. Dr. Damacen obtained his M.D. and did his post-graduate training in Peru. He has not successfully completed Canadian certification examinations.
 3. Dr. Damacen had a defined locum licence in 2011-2012 and was granted a Defined License in 2012.
 4. Dr. Damacen’s Defined License restricts his scope of practice to office-based Orthopedic Surgery. Dr. Damacen’s practice is limited to consulting on orthopedics and performing minor surgical procedures under local anaesthetic in his office.
 5. In 2016, Dr. Damacen asked the College to expand his scope of practice to permit him to include office-based arthroscopy.
 6. On October 12, 2016, the College notified Dr. Damacen, in writing, that he would not be permitted to expand his scope of practice to

include office-based arthroscopy as he was not a fully licensed Orthopedic Surgeon.

7. On October 14, 2016, Dr. Damacen communicated to the College he felt it was unfortunate he would not be permitted to do arthroscopy but respected the College's decision.

8. On May 17, 2017, Dr. Damacen attended at the College to discuss his scope of practice, supervision, and alternative medical treatments. At the conclusion of that meeting, Dr. Damacen agreed he was not to change his scope of practice without first consulting with the College.

9. On August 17, 2017, Dr. Damacen performed a left knee examination, arthroscopy and minor debridement on one of his employees. Dr. Damacen did not charge the employee a fee or submit a claim to MSI, although he did charge the employee for the cost of the material used in the procedure.

10. Dr. Damacen did not document the procedure.

11. Dr. Damacen acknowledges the left knee arthroscopy and minor debridement he did for his employee was outside the scope of practice authorized under his Defined License. It was a serious infringement for him to have performed the procedure when he knew that he was not permitted to do so.

12. The employee filed a complaint with the College on January 12, 2018 alleging that Dr. Damacen sexually harassed her while he employed her and that he touched her inappropriately. The complainant did not complain about the procedure Dr. Damacen performed in August 2017. However, during the course of its investigation, the Investigation Committee learned of the August 2017 procedure.

13. The Investigation Committee imposed an interim suspension on Dr. Damacen's license to practice medicine effective January 12, 2018. The interim suspension was lifted by the Investigation Committee on January 29, 2018. Dr. Damacen stopped working again on December 1, 2020, with agreement from the College that it would recommend the period of time after December 1, 2020 count as time served towards any suspension approved by the Hearing Committee.

14. Dr. Damacen admits that he made comments that are not appropriate in the workplace but denies that ever he touched the employee or sexually harassed her.

6. Dr. Damacen admits these facts and that his actions constitute professional misconduct. He admits that he performed a procedure that he had specifically been told he was not permitted to perform.

7. The Hearing Committee agrees with the Investigation Committee that these facts support Dr. Damacen's admissions and that his conduct constituted professional misconduct.

Settlement Agreements under the *Medical Act*

8. After investigating a complaint against a medical practitioner, an investigation committee may refer the matter involved to a hearing committee. Section 51 of the Medical Act, NSNS 2011, c 38 permits the College to enter into a settlement agreement with the medical practitioner instead of conducting a hearing. The Medical Practitioners Regulations include the following provisions dealing with settlement agreements:

Preparing and tendering settlement agreements

101 (1) A proposed settlement agreement may be initiated in writing by the Registrar or the respondent at any time before a hearing begins.

(2) A proposed settlement agreement must include all of the following:

- (a) sufficient facts and admissions to support the agreed disposition;**
- (b) an agreement on costs;
- (c) the respondent's consent to a specified disposition conditional on the acceptance of the settlement agreement by an investigation committee and a hearing committee.

(3) A settlement agreement may include any disposition that could be ordered by a hearing committee under the Act or these regulations.

(4) If both the Registrar and the respondent agree with the content of a proposed settlement agreement, the Registrar must refer the settlement agreement to an investigation committee for consideration in accordance with Section 102.

(5) The Registrar and the respondent may agree to use a mediator to prepare a settlement agreement, and the costs for the mediator must be divided equally between the College and the respondent unless otherwise agreed.

(6) If the Registrar and the respondent cannot agree on the content of a proposed settlement agreement, the matter must be referred for a hearing.

Investigation committee recommendations on settlement agreement

102 (1) An investigation committee may recommend acceptance of a settlement agreement if it is satisfied that all of the following conditions are met:

- (a) the public is protected;**
- (b) the conduct or its causes can be, or have been, successfully remedied or treated, and the respondent is likely to successfully pursue any remediation or treatment required;**
- (c) the content of the proposed settlement agreement provides sufficient facts and admissions to support the agreed disposition;**
- (d) settlement is in the best interests of the public and the profession.**

(2) If an investigation committee recommends acceptance of a settlement agreement, the investigation committee must refer the settlement agreement to the hearing committee for consideration in accordance with Section 103.

(3) If the investigation committee does not recommend acceptance of a settlement agreement, the investigation committee must do 1 of the following:

- (a) recommend changes to the settlement agreement that:
 - (i) if agreed upon by the Registrar and the respondent will result in acceptance by the investigation committee, or
 - (ii) if not agreed upon by the Registrar and the respondent will result in rejection by the investigation committee;
- (b) reject the settlement agreement and refer the complaint considered by the investigation committee to a hearing committee for a hearing.

Hearing committee acceptance or rejection of settlement agreement

103 (1) **If a hearing committee accepts a settlement agreement, the settlement agreement forms part of the order of a hearing committee disposing of the matter and, except as provided in subsections 104(3) and (4) for breaches of the settlement agreement, there is no hearing.**

(2) If a hearing committee does not accept a settlement agreement, it must do 1 of the following:

- (a) suggest amendments to the settlement agreement and return it to the Registrar and the respondent for review;
- (b) reject the settlement agreement, in which case the matter is referred to another panel of a hearing committee for a hearing.

(3) If both the Registrar and the respondent do not agree with the amendments to a settlement agreement suggested under clause (2)(a), the settlement agreement is deemed to be rejected and the matter must be referred to another panel of the hearing committee for a hearing.

(4) If both the Registrar and the respondent agree with the amendments to a settlement agreement suggested under clause (2)(a), the settlement agreement must be approved by a hearing committee.

(5) A person who sits on a panel of a hearing committee that considers a settlement agreement must not sit on a panel of a hearing committee that conducts a hearing related to the same complaint.

Settlement agreements and hearings

104 (1) If a settlement agreement is rejected by a hearing committee, a hearing must proceed without reference to the settlement agreement or any admissions contained in the settlement agreement until after the hearing committee has determined whether professional misconduct, conduct unbecoming, incompetence or incapacity has been proven.

(2) Before deciding whether to award costs in a hearing, a hearing committee may be given a copy of any settlement agreements exchanged between the parties.

(3) An admitted breach by a respondent of any term in an accepted settlement agreement must be referred to a hearing committee for a hearing.

(4) An alleged breach by a respondent of any term in an accepted settlement agreement must be referred to an investigation committee as a Registrar's complaint.

[emphasis added]

9. This process permits the College Registrar to agree to a proposed settlement agreement and refer that agreement to an investigation committee. If the investigation committee is satisfied that the proposed settlement agreement meets the stringent requirements set out Section 102, the committee can recommend acceptance of the settlement agreement by the hearing committee. A settlement agreement recommended for approval by an investigation committee and accepted by the hearing committee becomes an order of the hearing committee and disposes of the matter referred to hearing, and no hearing is required.

10. The Hearing Committee has three options:

- a. accept the settlement agreement recommended by the investigation committee;
- b. suggest amendments to the settlement agreement, and if the Registrar and the medical practitioner agree, the amended settlement agreement is accepted by the Hearing Committee; or
- c. reject the settlement agreement with the result that the matter is referred to a different panel of the Hearing Committee for a hearing.

11. In its decision dated June 26, 2019, in *Re Jones*, 2019 CanLII 92700 (NSCPS) the Hearing Committee set out its approach to applying Section 103 of the Medical Practitioners Regulations and deciding whether or not to accept a proposed Settlement Agreement. The decision included the following:

30. In its previous decisions, the Hearing Committee has accepted the principle of deference to the Investigation Committee's

recommendation for approval of a settlement agreement reached between the Registrar and a practitioner. There are good reasons for this.

31. In most cases, the Investigation Committee will have a much more detailed knowledge of the facts than a hearing committee because of their involvement in investigating a complaint over an extended period of time. Furthermore, the Investigation Committee makes a recommendation of a settlement agreement within a legislative framework in Section 102 of the Medical Practitioners' Regulations which ensures a rigorous and exacting approach to whether a complaint should be settled.

32. In our view, settlement agreements should be encouraged because they permit the Registrar and the Investigation Committee to negotiate the resolution of complaints without the delay and expenses of a formal hearing. As in this case, there may be significant issues of proof that make the outcome of a formal adjudicated hearing uncertain. Likewise for the practitioner subject to a complaint, the prospect of success in a hearing may be uncertain, and the possibility of a significant costs award provide an incentive to make appropriate admissions and consent to a disposition they can accept. Some agreed dispositions are possible in a settlement agreement that may not be possible in a formal hearing.

33. It is true that the settlement agreement process is not as transparent to the public as a formal hearing but to be acceptable settlement agreements have to include detailed statements of the facts. The decision of a hearing committee to accept a settlement agreement requires the reasons for accepting it. These are made public.

...

36. The Hearing Committee does not just rubberstamp a settlement agreement recommended by the Investigation Committee. We not only assess the criteria for the recommendation of a Settlement Agreement by the Investigative Committee set out in Section 102 of the Medical Practitioners Regulations, but we examine the settlement agreement closely for its consistency with the purposes of the College, as set out in Section 5 of the *Medical Act* which provides as follows:

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

(c) regulate the practice of medicine and govern its members

Through

(i) the registration, licensing, professional conduct and other processes set out in this Act and the regulations,

(ii) the approval and promotion of a code of ethics,

(iii) the establishment and promotion of standards for the practice of medicine, and

(iv) the establishment and promotion of a continuing professional development program; and

(d) do such other lawful acts and things as are incidental to the attainment of the purpose and objects of the College. 2011, c. 38, s. 5.

37. In our opinion, the public interest in the practice of medicine is first and foremost the protection of the public. Members of the public as patients depend fundamentally on the assessment, diagnosis and treatment of illness or injury by medical practitioners for life, health and happiness. The public depends on medical practitioners working in accordance with the accepted standards of the practice of medicine, including high standards of integrity and ethics. The College strives to ensure the protection of the public by regulating the practice of medicine and governing the conduct of its members to the high standards that the public expects.

38. Serving and protecting the public interest in the regulation of professional conduct under the *Medical Act* also requires fair treatment of medical practitioners who are subject to complaints. There is a strong public interest in ensuring that the process for the investigation and adjudication of complaints, and the substance of decisions made in that process, are fair to the medical practitioners.

39. There is an important public interest in finding appropriate dispositions that keep medical practitioners in practice so they can serve the public in accordance with the standards of the medical profession. There continues to be a shortage of physicians in Nova Scotia. If possible, medical practitioners who engage in professional

misconduct should be returned to practice with appropriate conditions and restrictions.

40. There is also a public interest in maintaining the credibility of the College as a regulator of the practice of medicine. It is important that the public is assured that genuine complaints are not swept under the rug, and that the College is effective in protecting the public and in maintaining high standards among medical practitioners.

41. In our view, in considering whether to accept this Settlement Agreement, the Hearing Committee has to balance all of these aspects of the public interest so that the approval of this Settlement Agreement serves to protect the public, treats Dr. Jones fairly, and maintains the confidence of the public and profession in the College.

42. We recognize that there can often be more than one reasonable conclusion about how to balance these aspects of the public interest in assessing a particular settlement agreement. If the Investigation Committee recommends a disposition that falls within a reasonable range of alternative conclusions we will defer to their judgement.

12. We have followed this approach in coming to our decision to accept the proposed Settlement Agreement in this matter. In our opinion, the proposed Settlement Agreement falls within the range of reasonable measures that protect the public and maintain the College's credibility as the regulator of the practice of medicine in Nova Scotia while treating Dr. Damacén fairly in all of the circumstances. We, therefore, accept the recommendation of the Investigation Committee.

Disposition in the Proposed Settlement Agreement

13. In the proposed Settlement Agreement, the Registrar and Dr. Damacén have agreed to the following:

- a. Dr. Damacén is reprimanded ;
- b. Dr. Damacén Certificate of Registration shall be suspended for a period of 9 (nine) months less 17 days for time served in 2018; and
- c. Dr. Damacén's period of suspension will be served beginning December 1, 2020 and ending August 15, 2021.

14. The proposed Settlement Agreement also includes agreement that Dr. Damacén will pay costs to the College in the amount of \$15,000 payable in 12 (twelve) equal monthly installments of \$1,250 beginning on October 1, 2021.

15. We have no hesitation in accepting the proposed disposition as to costs. The real question as to whether the proposed Settlement Agreement has a disposition that falls within a range of reasonable alternatives in light of the public interest is the proposed nine-month suspension of Dr. Damacén's Certificate of Registration.

16. A licensing sanction must be proportionate to the misconduct of the medical practitioner. At first, glance, although Dr. Damacén's misconduct is serious, a nine-month suspension seems disproportionate to the misconduct set out in the agreed facts.

17. The assessment of the proportionality of a sanction is assisted by comparing the circumstances of a case to earlier decisions of the Hearing Committee or similar tribunals in other provinces. The nine-month suspension in the proposed Settlement Agreement is out of the range of similar cases. Counsel have cited a number of decisions of the Discipline Committee of the Ontario College of Physicians and Surgeons, which provide a range of three to six months suspensions for analogous conduct:

- a. *Ontario (College of Physicians and Surgeons of Ontario) v. Thaeanaghan*, 2020 ONCPSD 14;
- b. *Ontario (College of Physicians and Surgeons of Ontario) v. Young*, 2019 ONCPSD 44;
- c. *College of Physicians and Surgeons (Ontario) v. Gay*, 2005 Carswell Ont 10601;
- d. *Ontario (College of Physicians and Surgeons of Ontario) v. Attuah, K.*, 2013 ONCPSD 30; and
- e. *Ontario (College of Physicians and Surgeons of Ontario) v. Lee*, 2020 ONCPSD 21.

18. In most of these cases, the medical practitioner's misconduct was arguably more serious than Dr. Damacén's, particularly given his cooperation with the College, including his admission at the earliest opportunity that he performed an out-of-scope procedure.

19. Likewise, a nine-month suspension is longer than the suspensions in past dispositions by the Hearing Committee after a full hearing. In *Re Exema*, 2018 CanLii 105365 (NSCPS), the Hearing Committee imposed a four-month suspension for the repeated sexual harassment of work colleagues by the medical practitioner. In *Re Osif*, 2008 CanLii 89674 (NSCPS), the disposition included a three-month suspension for numerous failures to meet the standards expected of medical practitioners in Nova Scotia. In *Fashoranti v. College of Physicians and Surgeons of Nova Scotia*, 2014 CarswellNS 1090, the Hearing Committee imposed a three months suspension where the medical practitioner violated the patient/physician boundaries by engaging in an inappropriate examination of the patient. In *Dhawan v. College of Physicians and Surgeons* (Nova Scotia), 1998 NSCA 83, the Nova Scotia Court of Appeal upheld a decision of the Hearing Committee on sanctions that included a six-month suspension where the physician had engaged in inappropriate comments of a personal nature during appointments with patients, inappropriate sexual touching and attempts to form personal relationships with patients.

20. To address the possible absence of proportionality between Dr. Damacen's admitted misconduct and the nine-month suspension, the College and Dr. Damacen rely on the principle that the Hearing Committee should not disregard a "joint submission" on "penalty". They cite the decisions listed in paragraph 17 above, which all include the statement that "... the Committee should not depart from a joint submission unless the proposed penalty is so disproportionate to the finding of misconduct that it would bring the administration of justice into disrepute or is otherwise contrary to the public interest". This principle was adapted from the Supreme Court of *Canada's decision in R. v. Anthony-Cook*, 2016 S.C.C. 43, which involved sentencing in criminal cases where there is a plea bargain between the Crown and the Defendant.

21. In our opinion, that principle does not apply to the Hearing Committee's decision on whether or not to accept the recommendation of the investigation committee on a proposed Settlement Agreement. In **Re Jones**, 2019 CanLII 92700 (NSCPS), we noted the

difference between the approach to disciplinary sanctions in the Ontario legislation as applied by the Discipline Committee and the approach to sanctions under the Medical Act and Medical Practitioners Regulations:

44. Neither the Medical Act or the Medical Practitioners Regulations aim primarily at penalizing or punishing medical practitioners who engage in professional misconduct. Section 54 of the Act authorizes a hearing committee to “dispose of the matter in accordance with the Regulations.” Section 115 of the Medical Practitioners Regulations sets out the possible dispositions when a hearing committee finds professional misconduct, conduct unbecoming, incompetence or incapacity 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 1 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 to 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.

45. In our view, these provisions in the Medical Act and the Medical Practitioners Regulations require orders that are remedial in nature, not punitive. In our opinion, the Medical Act and the Medical Practitioners Regulations require a hearing committee to dispose of a matter by adopting orders that promote the public interest in the circumstances of the matter. Most often, this will be best accomplished by 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.

46. There is a role for including sanctions in a set of dispositions that together reflect the public interest. The purpose of a suspending a medical practitioner's license should be correction of the medical practitioner who has engaged in professional misconduct and to 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.

47. We would not be inclined to defer to a recommendation from the Investigation Committee which included a proposed disposition that put excessive emphasis on punishment of the medical practitioner for professional misconduct or conduct unbecoming.

22. The approach taken in the Ontario cases cited by counsel requires a much higher level of deference to an investigation committee's recommendation than has been recognized by the Hearing Committee in the past. In our opinion, that approach is inconsistent with the approach in the Medical Practitioners Regulations.

23. Regulation 101(3) of the Medical Practitioners Regulations points to the application of the approach taken in Section 115 to Settlement Agreements. It provides:

101(3) A settlement agreement may include any disposition that could be ordered by a hearing committee under the Act or these regulations.

24. In our opinion, the *Medical Act* and the Medical Practitioners Regulations differ significantly from the legislation applied in the Ontario cases. The cases in Ontario have a legislative framework that employs a penalty where there is professional misconduct. This framework acts within a structure of "charges". A practitioner is "found guilty", based on this framework. Accordingly the decisions in Ontario tend to import the principles of sentencing under the Criminal Code.

25. This difference in approach in the governing legislation is explicitly reflected in the provisions for settlement agreements. The legislation considered in the Ontario cases does not have a provision for settlement agreements. The cases that are cited to us by counsel deal with joint submissions on penalty. These are cases in which the adjudication of misconduct has been considered in a hearing, and the Discipline Committee then considers the issue of "penalty" in light of the findings on misconduct.

26. Regulations 101 to 103 of the Medical Practitioners Regulations provide for a Settlement Agreement as an alternative to a hearing. Under Regulation 103, the Hearing Committee may not only accept or reject a proposed Settlement Agreement but may propose amendments. In our opinion, the approach taken in Regulations 101 to 103 is inconsistent with the approach advocated by counsel for the College and Dr. Damacén regarding this proposed Settlement Agreement.

27. We do not accept that we are limited to considering whether the disposition in the proposed Settlement Agreement would bring the judicial system into disrepute or otherwise contrary to the public interest. On the contrary, we need to be satisfied that the nine-month suspension falls within a range of reasonable alternatives to protect and

promote the public interest. If it does, we should accept the proposed Settlement Agreement. If not, we should either suggest a different period of suspension or reject the proposed Settlement Agreement.

28. Dr. Damacen's conduct is serious misconduct. He deliberately performed a procedure he knew he was not permitted to perform. He had obtained his M.D. and did post-graduate training in Peru, and he has not completed Canadian certification examinations. He has been authorized to practice under a defined license limited to consulting on orthopedics and performing minor surgical procedures under local anesthetic in his office. His communications with the College in October of 2016 and in May of 2017 left him in no doubt that he was not permitted to expand his scope of practice to include office-based arthroscopy.

29. The first priority of the College in promoting the public interest in the practice of medicine is, of course, the protection of the public. Members of the public depend on the College to license only physicians qualified to provide the medical services they offer. In Dr. Damacen's case, the College put extensive time and effort into defining his practice scope to allow him to be licensed to conduct procedures that he could safely perform.

30. In our opinion, Dr. Damacen's conduct is very serious misconduct that directly engages the College's mandate to protect the public and thereby maintain the confidence of the public in the medical profession and the ability of the College to regulate the practice of medicine. It, therefore, justifies a lengthy suspension as a licensing sanction.

31. The arthroscopy performed by Dr. Damacen on August 17, 2017, on one of his employees was not simply a minor surgical procedure under local anesthetic in his office as required by his defined license. When he performed the arthroscopy, he understood that this was beyond his license's limits and therefore didn't submit a claim to MSI or document the procedure. This was a deliberate breach of the limitations on his practice.

32. A lengthy suspension will help protect the public by deterring Dr. Damacen from repeating his conduct and will also constitute general deterrence to other medical

practitioners from practicing outside of their scope of practice. It should assure the public that the College is serious about ensuring that licensed physicians can safely perform the medical procedures that patients need.

33. The real issue in this matter is whether the proposed nine-month suspension is fair to Dr. Damacen when a suspension in the three to six-month range could likely reflect the seriousness of his misconduct and the need to deter future conduct either by him or by others. Dr. Damacen has no disciplinary history, and he cooperated with the College and took responsibility for his misconduct. Yet, he has agreed to a nine-month suspension.

34. We have concluded that the proposed nine-month suspension in this Settlement Agreement is fair to Dr. Damacen in all the circumstances of this case. The matter arose because the employee/patient who had the arthroscopy filed a complaint with the College alleging that Dr. Damacen had sexually harassed her while he employed her and that he touched her inappropriately. Dr. Damacen admits that he made comments that are not appropriate in the workplace but firmly denies that he ever engaged in sexual harassment or touched the employee inappropriately.

35. If the Settlement Agreement is not accepted, Dr. Damacen's conduct as alleged by the employee and denied by him would have to be considered in a formal hearing. It would be reasonable for him to be uncertain whether a Hearing Committee would accept his employee's evidence or whether it would accept his denial. It would also be reasonable for him to be unsure about when a suspension would be served if the hearing panel found that he had deliberately practised beyond the scope of his defined license. In the written submissions from his counsel, Dr. Damacen makes the following submission:

21. Dr. Damacen has taken responsibility for his actions, and the Proposed Settlement Agreement represents a negotiated compromise between the parties.

22. Dr. Damacen wished to avoid the expense, publicity and embarrassment of a full hearing. Dr. Damacen is eager to put this matter behind him and have the opportunity to return to practice within the scope of his license.

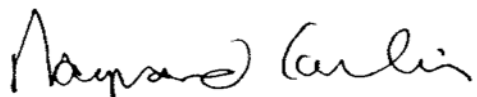
36. The nine-month suspension is a compromise that permits Dr. Damacén to avoid a hearing considering the allegations of sexual harassment of an employee by admitting that he made inappropriate comments. That limited admission might well be the Hearing Committee's finding after a hearing, but he would still have to face a suspension for practicing beyond the scope of the defined license. The proposed disposition will allow him to start the period of suspension on December 1, 2020, and therefore to return to practice on August 15, 2021, which gives him certainty about the timing of the interruption of his practice.

37. We don't think that the proposed disposition has put excessive emphasis on punishment of Dr. Damacén for his conduct. In our opinion, given the seriousness of the misconduct and all of the circumstances, a nine-month suspension falls within a reasonable range of dispositions that are fair to Dr. Damacén. Suspending Dr. Damacén's license for nine months in these circumstances meets the requirements for correction of Dr. Damacén. It sends a strong message to the profession that practicing beyond a medical practitioner's license will not be tolerated.

38. For these reasons, the Hearing Committee has concluded that the proposed Settlement Agreement falls within a range of reasonable alternatives and should therefore defer to the investigation committee's conclusions in recommending the proposed Settlement Agreement.

39. The Hearing Committee accepts the Settlement Agreement that we attach as Appendix "A" as the Hearing Committee order.

Decision issued this 19th day of March 2021



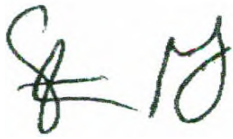
Raymond F. Larkin, Q.C., Chair



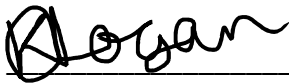
Dr. Erin Awalt



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Dr. Steven Gruchy



Dr. Karl Logan

Schedule "A"

IN THE MATTER OF: The Medical Act, SNS 2011, c. 38

and

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

and

IN THE MATTER OF: Dr. Harvey Damacén

SETTLEMENT AGREEMENT

Dr. Harvey Damacén, a medical practitioner in the Province of Nova Scotia, and a member of the College of Physicians and Surgeons of Nova Scotia (the "College"), hereby agrees with, and consents to, the following in accordance with the provisions of the *Medical Act*.

STATEMENT OF FACTS

1. Dr. Harvey Damacén is a defined licensed physician, licensed to practise medicine in Nova Scotia in the specialty of Orthopedic Surgery within a particular scope of practice.
2. Dr. Damacén obtained his MD and did his post-graduate training in Peru. He has not successfully completed Canadian certification examinations.
3. Dr. Damacén had a defined locum licence in 2011-2012 and was granted a Defined License in 2012.
4. Dr. Damacén's Defined License restricts his scope of practice to office-based Orthopedic Surgery. Dr. Damacén's practice is limited to consulting on orthopaedics and performing minor surgical procedures under local anaesthetic in his office.
5. In 2016, Dr. Damacén asked the College to expand his scope of practice to permit him to include office-based arthroscopy.

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6. On October 12, 2016, the College notified Dr. Damacen, in writing, that he would not be permitted to expand his scope of practice to include office-based arthroscopy as he was not a fully licensed Orthopedic Surgeon.
7. On October 14, 2016, Dr. Damacen communicated to the College he felt it was unfortunate he would not be permitted to do arthroscopy but respected the College's decision.
8. On May 17, 2017, Dr. Damacen attended at the College to discuss his scope of practice, supervision, and alternative medical treatments. At the conclusion of that meeting, Dr. Damacen agreed he was not to change his scope of practice without first consulting with the College.
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10. Dr. Damacen did not document the procedure.
11. Dr. Damacen acknowledges the left knee arthroscopy and minor debridement he did for his employee was outside the scope of practice authorized under his Defined License. It was a serious infringement for him to have performed the procedure when he knew that he was not permitted to do so.
12. The employee filed a complaint with the College on January 12, 2018 alleging that Dr. Damacen sexually harassed her while he employed her and that he touched her inappropriately. The complainant did not complain about the procedure Dr. Damacen performed in August 2017. However, during the course of its investigation, the Investigation Committee learned of the August 2017 procedure.
13. The Investigation Committee imposed an interim suspension on Dr. Damacen's license to practice medicine effective January 12, 2018. The interim suspension was lifted by the Investigation Committee on January 29, 2018. Dr. Damacen stopped working again on December 1, 2020, with agreement from the College that it would recommend the period

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of time after December 1, 2020 count as time served towards any suspension approved by the Hearing Committee.

14. Dr. Damacen admits that he made comments that are not appropriate in the workplace but denies that ever he touched the employee or sexually harassed her.

ADMISSIONS

15. Dr. Damacen admits that he performed a procedure that he had specifically been told he was not permitted to perform.
16. Dr. Damacen admits the facts set out in the Statement of Facts and admits that his actions constitute professional misconduct.

MITIGATING FACTORS

17. In reaching this Agreement, the Registrar has taken into consideration the following mitigating factors:
 - a. Dr. Damacen does not have a disciplinary history with the College; and
 - b. Dr. Damacen cooperated with the College and admitted that he performed an out-of-scope procedure from the outset of the complaint, thereby reducing the cost of investigation.

AGGRAVATING FACTORS

18. In reaching this Agreement, the Registrar has taken into account the following aggravating factors:
 - a. Dr. Damacen does not qualify for a full license to practice in Nova Scotia;
 - b. Despite this, the College put extensive time and effort into defining the scope of Dr. Damacen's practice to allow him to be licensed to conduct procedures that he could safely perform; and

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- c. Dr. Damacen knowingly disregarded the limits of his license and performed a prohibited procedure on an employee.

DISPOSITION

19. Dr. Damacen and the Registrar agree to the following sanctions:
 - a. Dr. Damacen is reprimanded;
 - b. Dr. Damacen's certificate of registration shall be suspended for a period of nine (9) months, less 17 days for time served in 2018; and
 - c. Dr. Damacen's period of suspension will be served beginning December 1, 2020 and ending August 15, 2021.

COSTS

20. Dr. Damacen agrees to pay costs to the College in the amount of \$15,000 inclusive of HST, representing a portion of the College's cost of investigating this matter.
21. Such costs are payable in 12 equal monthly installments of \$1,250.00, beginning on October 1, 2021.

PUBLICATION

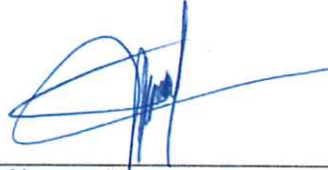
22. This Settlement Agreement and any decision rendered by a Hearing Committee approving it, as prepared by the Registrar, shall be published on the College's website.

EFFECTIVE DATE

23. This Settlement Agreement shall only become effective and binding when it has been recommended for acceptance by an Investigation Committee of the College and accepted by the Hearing Committee appointed to hear this matter.

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Dated this 17 day of March, 2021.



Dr. Harvey Damacén

Dated 17 March 2021



Dr. D.A. Grant

Dated 19 March 2021



Chair Investigation Committee

Dated 19 March 2021



Chair Hearing Committee

Dated 19 March 2021