

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

and

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

and

IN THE MATTER OF:                    Dr. Enyinnaya Ezema

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**Hearing Committee Decision on Motion for Severance**

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Date Heard:                    June 6, 2017

Location:                    Halifax, Nova Scotia

Hearing Committee: Mr. Raymond F. Larkin, Q.C  
Dr. Brian Moses  
Dr. P. Scott Theriault  
Dr. Ethel Cooper-Rosen  
Ms. Gwen Haliburton

Counsel:                    Hector J. MacIsaac, Ms. Loretta M. Manning, Q.C. and Amy E. MacGregor,  
Counsel to Dr. Enyinnaya Ezema

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

1. Dr. Enyinnaya Ezema has brought a Motion to hold a separate hearing on each of the three charges set out in the Notice of Hearing, dated December 21, 2016. These charges are:

That being registered under the *Medical Act* and being a physician in the Province of Nova Scotia, it is alleged that:

1. You are guilty of professional misconduct, conduct unbecoming, or both by having breached profession and/or sexual boundaries arising from one or more of the following:
  - a. On a number of occasions in 2013, you made inappropriate comments to Colleague A. More particularly, you invited her for coffee at your home and told her that your wife would not be at home, invited her to go on a trip to Scotland with you, and made inappropriate comments about her appearance.
  - b. On or around January 6, 2014, after asking questions about her personal relationship status, you told Colleague B that you would be taking her out for a drink.
  - c. On or about December 16, 2014, while discussing a mutual patient with Colleague C, you put your arms around her and ran your tongue along her bottom lip and held on to her.

2. The reason for seeking separate hearings is set out in the brief filed on behalf of Dr. Ezema and captured by paragraphs 26 and 28 of the brief. These paragraphs state:

[26] It is submitted that the effect having one hearing on separate and distinct charges can only be to give the evidence a cumulative effect so that the Hearing Committee is perhaps unconsciously disposed to reach a decision on one charge based on evidence heard in relation to another charge. This is highly prejudicial to Dr. Ezema and an injustice given the potentially severe consequences and is not designed to ensure a fair hearing when the onus is on the College to prove each individual charge.

...

[28] The result of hearing these three separate alleged incidents in one hearing is that, taken together, the allegations create an appearance of a propensity of conduct on Dr. Ezema's part. This risk must be zealously guarded against. The risk of testimony from one colleague bolstering the testimony of the other two colleagues outweighs any administrative efficacy that the College may point to.

3. In oral submissions, Counsel for Dr. Ezema argued that the hearing of these three charges together is prejudicial to Dr. Ezema because it is human nature to accept an allegation if it is grouped with other similar allegations. He argues that there is a danger of a "pack" mentality.

4. Counsel for Dr. Ezema expressed the view that similar fact evidence would not be admissible in a separate hearing and that the College was attempting to bring inadmissible evidence in the "back door" by joining the three separate charges to be heard in a single hearing.

#### Evidence

5. The Committee was provided with the Affidavit of Dr. Ezema, sworn to on May 29, 2017. In his Affidavit, Dr. Ezema expresses a number of concerns about the investigation of the charges in this matter. He expressed the belief that the Investigation Committee was prejudiced against him and that the hearing of the three separate charges related to three different individuals in one hearing would result in further prejudice against him.

6. Dr. Ezema says that the Investigation Committee misunderstood his words and actions by failing to take into account his cultural background. He believes that the members of the Investigation Committee were biased against him and that this was reflected in improper questions that may have influenced the individuals referred to in paragraphs 1(a) and (b) of the charges. He points to portions of the transcripts of interviews of those individuals to suggest that they have shared information against him during the investigation.

7. Dr. Ezema believes that the Investigation Committee temporarily restricted his license to practice without any basis other than their bias towards him.

#### Considerations

8. Section 53(1) of the *Medical Act* and Regulation 110(2) of the Medical Practitioners Regulations give a hearing committee discretion on matters of procedure. We are bound to exercise that discretion in a manner consistent with the overall purpose of the College. The primary purpose of the College, as stated in Section 5 of the *Medical Act*, is to serve and protect the public interest in the practice of medicine.

9. The public interest requires the charges referred to a hearing committee be dealt with expeditiously. It is not uncommon in matters of professional regulation for a number of related and unrelated charges to be referred to adjudication together. For example, in *College of Physicians and Surgeons of Nova Scotia v. Dr. Stan Osif* a large number of charges were referred to hearing grouped into different categories. The referral of multiple charges to a single hearing may not only be appropriate, but necessary.

10. There is also an important public interest in fair treatment of medical practitioners who are charged with professional misconduct, conduct unbecoming or both. Medical practitioners, like Dr. Ezema, provide important essential services to the public. The outcome of proceedings in the hearing can have a significant negative impact on the medical practitioner. It is essential that the process for considering charges against a medical practitioner be fair in each case.

#### **Alleged Bias of the Investigation Committee**

11. In our opinion, the concerns expressed by Dr. Ezema about the Investigation Committee do not assist in sorting out whether these three charges should be heard together or in separate hearings. Whether there is a single hearing or three separate hearings, Dr. Ezema will have the opportunity to cross-examine the individuals referred to in paragraphs 1(a) and (b) of the charges. He can determine whether these individuals shared information or whether they were led to certain statements by inappropriate questions. Cross-examination with this purpose would not differ in a single hearing or multiple hearings.

12. Likewise, whether in a single hearing or multiple hearings, Dr. Ezema will be able to provide evidence of his cultural background and how it relates to the charges against him.

#### **Risk of Propensity Reasoning**

13. The fundamental question raised by this Motion is whether hearing these three charges together runs the risk of inappropriate propensity reasoning by members of the Hearing Committee.

14. The risk from Dr. Ezema's perspective is that members of the Committee may draw conclusions about his character or disposition from evidence on one of the charges and find him guilty on the other charges based on, or influenced by, those conclusions. The concern is that members of the Hearing Committee will draw an inference of guilt on one of the charges based on the Committee's perception that Dr. Ezema is the type of person to ignore professional and sexual boundaries.

15. The task of a hearing committee under the *Medical Act* in addressing charges against a medical practitioner is to examine the admissible evidence and conclude whether the College has met its burden of proving the alleged conduct on the balance of probabilities and whether that conduct constitutes professional misconduct, conduct unbecoming or both. In Dr. Ezema's case, this task will be the same whether or not there is one hearing or three separate hearings before differently constituted hearing committees.

16. The members of the Hearing Committee are alive to the risk of inappropriate propensity reasoning. We know that we may not make a decision on any one of the charges based on reasoning that assumes that Dr. Ezema is the type of person to engage in the conduct on that charge. It is clear to us that no inference of guilt on one of the charges should be drawn based

on the repetition of evidence of breach of professional and sexual boundaries, producing a sort of cumulative likelihood of guilt on all of the charges.

#### **Whether Conduct amounts to Professional Misconduct**

17. Counsel for Dr. Ezema expressed the concern that hearing these three charges together could lead the Committee to conclude that Dr. Ezema was guilty of professional misconduct, where that would not be the conclusion that would result from separate hearings.

18. It is quite possible that the College could prove the conduct set out in charges 1(a), (b) and (c) and conclude that Dr. Ezema breached professional and sexual boundaries but that on any one of the charges the proven conduct does not amount to professional misconduct.

19. Not every breach of boundaries is necessarily professional misconduct. Looking in particular at charges 1(a) and (b) it is possible that, if heard separately, Dr. Ezema could argue that even if he made certain comments they would not amount to professional misconduct. His concern is that the Hearing Committee would treat what would otherwise be a breach of professional boundaries that did not amount to misconduct as professional misconduct, because there are a number of examples of similar conduct.

20. This is another example of the risk of inappropriate propensity reasoning. In general, the Hearing Committee recognizes that its task is to assess each charge independently and conclude not only that the alleged conduct may or may not have occurred but, if it did occur, that it amounted to professional misconduct.

#### **Similar Fact Evidence – Pattern of Misconduct**

21. The College may or may not wish to rely on similar fact evidence as part of the evidence to prove one or more of the charges. If so, the College will have to justify the introduction of similar fact evidence and the Committee will have to decide if that evidence is admissible. It is premature at this time to draw any conclusion about whether similar fact evidence would be admissible and, if admitted, what weight it would be given.

22. Similarly, it is premature at this time to consider whether a finding of guilt on all three charges would show a pattern of misconduct and what the impact of those findings would be. At this stage, it is clear that each of the charges must be proven on the balance of probabilities with admissible evidence that shows the conduct which is alleged and supports the conclusion that the conduct constitutes professional misconduct.

#### **R v. Last**

23. Counsel have referred the members of the Committee to the decision of the Supreme Court of Canada in *R v. Last*, 2009 SCC 45. Although this is a decision in a case arising under the *Criminal Code* the Court does identify a number of factors that may be considered in ensuring

that a reasonable balance is struck between the risk of prejudice to the person charged and the public interest in a single proceeding. The Court states as follows, at paragraphs 17-18:

[17] Courts have given shape to the broad criteria established in s. 591(3) and have identified factors that can be weighed when deciding whether to sever or not. **The weighing exercise ensures that a reasonable balance is struck between the risk of prejudice to the accused and the public interest in a single trial. It is important to recall that the interests of justice often call for a joint trial.** *Litchfield*, where the Crown was prevented from arguing the case properly because of an unjudicial severance order, is but one such example. Severance can impair not only efficiency but the truth-seeking function of the trial.

[18] The factors identified by the courts are not exhaustive. They simply help capture how the interests of justice may be served in a particular case, avoiding an injustice. **Factors courts rightly use include; the general prejudice to the accused; the legal and factual nexus between the counts; the complexity of the evidence; whether the accused intends to testify on one count but not another; the possibility of inconsistent verdicts; the desire to avoid a multiplicity of proceedings; the use of similar fact evidence at trial; the length of the trial having regard to the evidence to be called; the potential for prejudice to the accused with respect to the right to be tried within a reasonable time; and the existence of antagonistic defences as between co-accused persons...**

[Emphasis Added]

24. A number of the factors listed in *R v. Last* do not apply to this case. These include whether the accused intends to testify, the possibility of inconsistent verdicts, the right to be tried within a reasonable time and the existence of antagonistic defences as between co-accused persons. However, it is useful to consider the factors which do apply.

*i. The General Prejudice to the Accused*

25. As discussed above, the concerns identified specifically in Dr. Ezema's Affidavit do not indicate any prejudice to Dr. Ezema from hearing the three charges together as compared to hearing them separately.

26. The potential prejudice to Dr. Ezema is that the Committee could engage in inappropriate propensity reasoning and therefore be influenced in dealing with one or more of the charges because of conclusions drawn in the hearing of the other charges. In our view, this risk is not great in the circumstances of this case. The Hearing Committee is comprised of three physicians, a senior public representative with long experience in these matters and chaired by a lawyer. We are capable of segregating the evidence relevant to different allegations. We recognize the need to make our findings with respect to each allegation separately. The

members of the Committee are alive to the risk of propensity reasoning in their assessments of the matters before them.

***ii. The Legal and Factual Nexus between the Counts***

27. The legal and factual nexus between the three charges is that they all involve issues of professional boundaries between Dr. Ezema and female colleagues in the workplace, where there is a power imbalance between Dr. Ezema and the complainants. The legal nexus involves consideration of what the professional boundaries are in these relationships and whether or not breach of professional boundaries amounts to professional misconduct. All three charges have in common the potential that his conduct can be explained by acceptable cultural differences arising from Dr. Ezema's background.

***iii. The Complexity of the Evidence***

28. It appears that the evidence in this matter is not complex. It is likely that there will be evidence relevant to all three charges about the workplace and the professional requirements of physicians to maintain appropriate boundaries with other staff in the workplace. Hearing all three charges together will be more expedient and efficient than hearing them separately.

***iv. The Use of Similar Fact Evidence***

29. It is premature to consider whether similar fact evidence would be admissible either if the three charges are heard together or heard separately.

***v. Desire to Avoid a Multiplicity of Proceedings***

30. These charges have been referred to the Hearing Committee under Section 49 of the *Medical Act*. The Hearing Committee has a duty under Section 53 of the *Act* to conduct the hearing in accordance with the Regulations. The Regulations contemplate that the Hearing Committee will deal with the charges that have been referred to them.

31. Section 5 of the *Act* mandates the College to "serve and protect the public interest in the practice of medicine". In our view, there is a public interest in the expeditious disposition of charges that have been referred to hearing. There has already been considerable delay since the Notice of Hearing and referral to the Hearing Committee was made. If the Hearing Committee agrees that the three charges should be heard separately, one of the charges can be dealt with in the dates presently scheduled, but it is likely that the task of constituting two separate hearing panels for the remaining charges and the scheduling of a hearing would delay the disposition of these charges at least until the Fall of 2017.

32. In the circumstances of this case, there is a public interest in seeing that justice is done in a reasonably efficient and cost effective manner by hearing all three charges together.

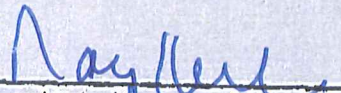
**Conclusion**

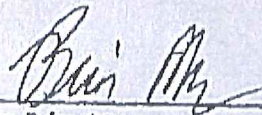
33. In *Bonin v. The College of Physicians and Surgeons (Ontario)*, 2011 CarswellOnt 14453 the discipline committee in that matter adopted the principle that the physician has the burden to prove that the interests of justice require severance of charges in circumstances which are very similar to those in the matter.


34. Weighing the factors from *R v. Last* together, the Hearing Committee has concluded that these three charges can be heard together without the risk that the Committee will engage in propensity reasoning and draw inferences from the evidence on one of the charges that Dr. Ezema is the type of person who would engage in the conduct alleged in the other charges. The members of the Committee are capable of dealing with more than one allegation in the same hearing, assessing the evidence to determine whether each of the allegations is proven by admissible evidence and, if the allegations in one or more of the charges are proven, assessing whether or not that conduct constitutes professional misconduct in each case.

35. In our opinion, Dr. Ezema has not met the burden to prove that the interests of justice require severance. Dr. Ezema's Motion for severance is therefore dismissed.

Decision Issued this 12<sup>th</sup> day of June, 2017.

  
Raymond F. Larkin, Q.C., Chair

  
Dr. Brian Moses

  
Dr. P. Scott Therlault

  
Dr. Ethel Cooper-Rosen

  
Ms. Gwen Haliburton