

NOVA SCOTIA COURT OF APPEAL

Between:

Dr. Manivasan Moodley

Appellant

-and-

College of Physicians and Surgeons of Nova Scotia Hearing Committee
(composed of Raymond F. Larkin, K.C. as Chair, Dr. Zachary Fraser, Dr. Cathy MacDougall, Dr. Michael Teehan and Ms. Mary Hamblin), College of Physicians and Surgeons of Nova Scotia, and the Attorney General of Nova Scotia

Respondents



ORDER FOR JUDGMENT

UPON HEARING Philip Chapman for the Appellant and Marjorie Hickey, K.C., for the Respondent College of Physicians and Surgeons of Nova Scotia, the Respondents the Attorney General of Nova Scotia, the Hearing Committee and its members not appearing;

AND UPON this Court having issued written reasons for judgment on this day;

IT IS ORDERED that the appeal is dismissed without costs.

DATED at Halifax, Nova Scotia, this 12th day of October, 2023.

IN THE NOVA SCOTIA
COURT OF APPEAL

I hereby certify that the foregoing document, identified by the Seal of the Court, is a true copy of the original document on file herein.

Dated the 12th day of October A.D., 2023
Sharon MacLeod
Deputy Registrar

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Deputy Registrar

SHARON MACLEOD
Deputy Registrar
Nova Scotia Court of Appeal

NOVA SCOTIA COURT OF APPEAL

Citation: *Moodley v. College of Physicians and Surgeons of Nova Scotia (Hearing Committee)*, 2023 NSCA 70

Date: 20231012

Docket: CA 522989

Registry: Halifax

Between:

Dr. Manivasan Moodley

Appellant

v.

College of Physicians and Surgeons of Nova Scotia Hearing Committee
(composed of Raymond F. Larkin K.C., as Chair, Dr. Zachary Fraser, Dr. Cathy MacDougall, Dr. Michael Teehan and Ms. Mary Hamblin), College of Physicians and Surgeons of Nova Scotia, and the Attorney General of Nova Scotia

Respondents



Judges: Bourgeois, Fichaud and Derrick, J.J.A.

Appeal Heard: September 21, 2023, in Halifax, Nova Scotia

Held: Appeal dismissed per reasons for judgment of Fichaud J.A., Bourgeois and Derrick J.J.A. concurring

Counsel: Philip Chapman and Sarah MacCallum for the Appellant
Marjorie Hickey, K.C. and Andrew Kinley for the Respondent
the College of Physicians and Surgeons of Nova Scotia
Edward Gores, K.C. for the Respondent the Attorney General
of Nova Scotia, not appearing
The Respondent Hearing Committee and its members, not
appearing

IN THE NOVA SCOTIA
COURT OF APPEAL

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copy of the original document on file herein.

Dated the 12th day of October A.D., 2023

Shawn MacLeod
Deputy Registrar

Reasons for judgment:

[1] Three of Dr. Moodley’s patients filed complaints of professional misconduct with the College of Physicians and Surgeons of Nova Scotia. The complaints triggered the process in Nova Scotia’s *Medical Act*, SNS 2011, c. 38, as amended (“*Act*”) and the *Medical Practitioner Regulations*, N.S. Reg. 225/2014, as amended by N.S. Reg. 18/2015 (“*Regulations*”) under the *Act*. In separate Decisions, the College’s Investigation Committee sent the three matters to a hearing before a Hearing Committee. The *Act* authorizes the College’s Registrar to issue a notice of hearing that states the details of the charges and the date of hearing. The charges listed in Dr. Moodley’s Notice of Hearing revised some of the wording from the descriptions of the matters in the Investigation Committee’s Decisions. The Notice of Hearing consolidated the three matters into one hearing before a single Hearing Committee.

[2] By a preliminary motion to the Hearing Committee, Dr. Moodley objected to the changed wording and the consolidation. Alternatively, he sought a severance into three hearings. The Hearing Committee issued a Decision that dismissed his objections and declined a severance.

[3] Dr. Moodley appeals to the Court of Appeal on issues of law. The issues are whether the Hearing Committee erred either by accepting the altered wording of the charges or by approving the consolidation of the hearing.

Background

[4] Dr. Manivasan Moodley is an obstetrician and gynecologist who practices in Sydney, Cape Breton.

[5] The College of Physicians and Surgeons of Nova Scotia regulates the medical profession in Nova Scotia further to the *Act* and its Regulations. This legislation sets out the functions of the College’s Registrar, investigation committees and hearing committees for professional conduct review.

[6] A professional conduct review starts with a complaint. Section 2(e) of the *Medical Act* defines “complaint” as “any report or allegation in writing and signed by a person regarding the conduct, actions, competence, or capacity” of a physician who is registered with the College. Section 43(1) says the “complaint must proceed in accordance with the process set out in the regulations”.

[7] The College received complaints from three individuals respecting Dr. Moodley's conduct and competence during patient encounters between 2017 and 2020:

- **Patient A:** On May 28, 2020, Patient A submitted a complaint concerning Dr. Moodley's performance of an episiotomy during Patient A's labour and Dr. Moodley's removal of her placenta following the birth.
- **Patient B:** In July 2017, Dr. Moodley advised Patient B about a possible tubal ligation. On September 3, 2020, the College received a complaint that alleged Dr. Moodley discussed inappropriate matters with Patient B and performed an ultrasound that was unrelated to whether there should be a tubal ligation.
- **Patient C:** In October 2020, Patient C, who was pregnant, attended at the hospital and reported back pain. Dr. Moodley advised her the back pain was unrelated to active labour. Patient C disagreed and, on April 26, 2021, filed a complaint with the College.

[8] Regulations 88 and 89 say, on receiving a complaint, the Registrar is to conduct a preliminary screening and then follow one of several courses. If the complaint has substance and cannot be resolved, the Registrar may "refer the matter to an investigation committee" further to Regulation 89(1)(e).

[9] Under ss. 31 and 32 of the *Act*, the Council of the College appoints an Investigation Pool of medical practitioners and public representatives, and the Chair of the Pool appoints an Investigation Committee of at least three persons, including one public representative, to investigate a complaint. By s. 33, the Investigation Committee has the powers of a commissioner under the *Public Inquiries Act*.

[10] The College's Registrar screened the complaints against Dr. Moodley then, under Regulation 89(1)(e), referred them to an investigation committee.

[11] The legislation describes the issues before an investigation committee as "matters". Regulation 96(2) says the investigation committee "may receive any information relevant to the matters before it". Regulation 97 says:

New matters reviewed by investigation committee

97 If any matter in addition to a complaint is considered by an investigation committee, the matter is part of the same investigation and is subject to all the same procedural rules and rights as the initial complaint.

Regulation 99(1) states the investigation committee “must give the respondent a reasonable opportunity to appear before the investigation committee disposes of the matter ...”. See also the reference to “matters” in Regulation 99(7)(b), quoted below.

[12] Regulation 99 provides for the disposition of the complaint by an investigation committee:

Disposition of complaint by investigation committee

...

99(5) After providing an opportunity to appear before the investigation committee under subsection (1), the committee must do 1 or more of the following:

- (a) dismiss the complaint;
- (b) if considered useful by the committee, provide advice relevant to the complaint that is of a non-disciplinary nature to 1 or more of the following persons:
 - (i) the complainant,
 - (ii) the respondent,
 - (iii) any other person affected by the complaint;
- (c) informally resolve the complaint;
- (d) caution the respondent;
- (e) refer the respondent to the Registrar for a competence assessment as determined by the Registrar, and require the respondent to pay for any costs arising from the assessment;
- (f) make a determination that there is sufficient evidence that, if proven,**
 - (i) would constitute any of the following:
 - (A) professional misconduct,
 - (B) conduct unbecoming,
 - (C) incompetence,
 - (D) incapacity, and

(ii) warrants imposing a licensing sanction.

...

(7) If an investigation committee makes a determination under clause (5)(f), the investigation committee must do 1 of the following:

(a) with the respondent's consent, order 1 or both of the following:

(i) that the respondent receive a reprimand,

(ii) that conditions or restrictions be imposed on the respondent's license;

(b) **refer the matter or matters for a hearing**, and if the committee considers it appropriate, direct the Registrar on behalf of the College to attempt to negotiate a settlement agreement in accordance with Section 101.

[bolding added]

[13] The Investigation Committee for the complaints against Dr. Moodley interviewed witnesses in September 2020 respecting Patient A, October and December 2020 respecting Patient B, and March 2022 respecting Patient C.

[14] The Investigation Committee issued separate Decisions on April 4, 2022 for Patient A, April 4, 2022 for Patient B and September 29, 2022 for Patient C.

[15] Further to Regulation 99(5)(f), the Investigation Committee's Decisions concluded that there were concerns about professional misconduct, conduct unbecoming or incompetence that, if proven, would warrant a licensing sanction. According to the summaries of the Decisions set out in the affidavits, the Investigation Committee identified the following concerns:

- **Patient A** - That Dr. Moodley may have (1) performed an "unwarranted" episiotomy and failed to allow Complainant A enough time to attempt to deliver without one, (2) demonstrated a deficiency of knowledge regarding the clinical indication for episiotomies, (3) failed to obtain Patient A's consent to perform the episiotomy in accordance with the College's Professional Standards and Guidelines Regarding Informed Patient Consent to Treatment, (4) failed to inform Patient A he had performed an episiotomy, (5) failed to allow Patient A the opportunity to expel the placenta naturally, (6) manually removed the placenta in such a manner that it caused Patient A pain and discomfort, (7) documented the care provided inaccurately, incompletely or otherwise in a manner contrary

to the College's Professional Standard Regarding Medical Records, (8) provided inaccurate information to the Investigation Committee respecting the comments of nursing staff during the delivery, and (9) demonstrated an attitude towards nursing staff that does not support a collaborative approach to patient care.

- **Patient B** – That Dr, Moodley may have (1) misled Patient B when he stated “no other obstetrician/gynecologist would do this procedure under the circumstances”, (2) failed to inform Patient B of both the risks and benefits of tubal ligation in a manner consistent with the College's Professional Standard and Guidelines Regarding Informed Patient Consent to Treatment and to document same, (3) failed to discuss alternative methods of contraception and to document same, suggesting it was her future husband's decision whether she should have a tubal ligation, when she was requesting one in the present circumstances, (4) attempted to discourage Patient B from seeking a tubal ligation in the context of a sexist and paternalistic encounter, (5) failed to respect Patient B's autonomy when it comes to her health and her body and her decision not to have children, and (6) interfered with the investigative process when Dr, Moodley contacted a potential witness in an effort to gain information about the complainant, and in contravention of ss. 46 and 30(2) of the *Medical Act*.

- **Patient C** – That Dr. Moodley may have (1) failed to perform a cervical examination until much later in the day that possibly delayed the diagnosis of labour, (2) suggested the patient could not have been in an early/latent stage of labour at the time she suggests, as it was confirmed by ultrasound that there was no funneling of the cervix, (3) performed an unwanted episiotomy, thus demonstrating a deficiency of knowledge regarding the clinical indication of episiotomies, (4) ordered oxytocin when the patient did not meet the criteria for labour dystocia and did not require oxytocin, (5) documented the care either incompletely, or otherwise in a manner contrary to the College's Professional Standard Regarding Medical Records, and (6) demonstrated an attitude toward the patient and her questions about whether a C-section was warranted that could be considered dismissive, and not in keeping with the College-endorsed CMA Code of Ethics and Professionalism, and not in keeping with patient-centered care.

[16] Further to Regulation 99(7)(b), the Investigation Committee referred the matters involving Patients A, B and C to a hearing committee. Each of the three Decisions said:

As a result, the Committee hereby **refers this matter** to a hearing committee.

The complaint file has been forwarded to the College's legal counsel at McInnes Cooper. The **charges** arising from our decision **will be provided** to Dr. Moodley and his counsel in due course.

An Official Notice of Hearing to this effect will be issued by the College.

[bolding added]

[17] Section 49 of the *Act* prescribes the next step, *i.e.* a Notice of Hearing:

Notice of Hearing

49(1) Where an investigation committee refers a matter to a hearing committee, **the Registrar shall, at the earliest opportunity from the date of the referral, fix a date, time and place for holding a hearing** to commence not later than ninety days from the date of the referral, or such later date as the respondent and the College may agree or the Hearing Committee may order following an opportunity for submissions from both parties as to such date.

(2) A notice of hearing, **containing such information as required by the regulations**, must be forwarded by the Registrar to the respondent at least thirty days before the hearing.

[bolding added]

[18] Regulation 106(2) prescribes the contents of the notice of hearing:

106 (2) A notice of hearing must state all of the following:

(a) the **details of the charges;**

(b) that the respondent may be represented by legal counsel.

[bolding added]

[19] On September 29, 2022, the Registrar issued a Notice of Hearing that set out the charges arising from the three referrals. After a pre-hearing conference in October 2022, a fourth matter that had earlier been referred to a hearing was withdrawn and one of the allegations respecting Patient A was withdrawn. On November 17, 2022, the Registrar issued a Revised Notice of Hearing.

[20] The Revised Notice of Hearing identified the matters for the hearing as follows:

The Hearing Committee will consider the following matters:

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

1. With respect to his encounter with patient [Patient A], in [redacted] 2020, and in the College's investigation of this matter that followed, Dr. Moodley committed professional misconduct and/or was incompetent by:
 - a) demonstrating a deficiency in knowledge and judgment regarding the clinical indication for episiotomies;
 - b) failing to treat the patient in a patient-centric manner, and in particular:
 - (i) Failing to obtain the patient's consent to perform the episiotomy in accordance with the College's Professional Standard and Guidelines regarding Informed Consent to Treatment;
 - (ii) Performing an episiotomy contrary to the expressed wishes of the patient; and
 - (iii) Failing to inform the patient that he performed the episiotomy;
 - c) manually removing the placenta which was not clinically indicated, and without providing the patient with pain relief medication or allowing the patient an opportunity to expel the placenta naturally, thereby causing the patient unnecessary or otherwise avoidable pain and discomfort;
 - d) demonstrating an attitude towards nursing staff that did not support a collaborative approach to patient care;
 - e) documenting the care provided to the patient either inaccurately, incompletely, or otherwise contrary to accepted standards; and
 - f) providing inaccurate, incomplete or misleading information to the College's Investigation Committee respecting comments made by staff during the clinical encounter.
2. With respect to patient [Patient B] in [redacted] 2017, and in the College's investigation of this matter that followed, Dr. Moodley committed professional misconduct and/or was incompetent by:
 - a) failing to communicate with the patient throughout the clinical encounter in accordance with accepted standards, and in particular:
 - I. acting contrary to the College's Professional Standard and Guidelines regarding Informed Patient Consent to Treatment by:

- A. failing to inform the patient of both the risks and benefits of tubal ligation; and
 - B. failing to discuss alternative methods of contraception;
 - II. Misleading the patient on the probability of another physician performing a tubal ligation in similar circumstances;
 - b) failing to respect the patient's autonomy regarding decisions about her reproductive health by doing one or more of the following:
 - I. suggesting it was her future husband's decision as to whether she should have a tubal ligation in the present circumstances; and/or
 - II. attempting to discourage the patient from seeking a tubal ligation by negatively focusing the discussion in a sexist and paternalistic manner;
 - c) interfering with the College's investigative process by contacting a potential witness in an effort to gain information about the complainant after the complaint was under investigation, contrary to section 46 of the *Medical Act*.
3. With respect to patient [Patient C], in [redacted] 2020, Dr. Moodley committed professional misconduct and/or was incompetent by:
- a) performing an episiotomy that was not clinically indicated;
 - b) demonstrating a deficiency in knowledge, skill, or judgment:
 - I. regarding the clinical indication for episiotomies, and
 - II. by wrongly stating in his response to the complaint that the patient could not have been in the early/latent stage of labour at the time she suggests, as it was confirmed by ultrasound that there was no funneling of the cervix;
 - c) failing to treat the patient in a patient-centric manner, by demonstrating a dismissive attitude in response to her request for a C-section;
 - d) failing to perform a cervical examination in a timely manner, to determine if the patient was in labour;
 - e) ordering oxytocin when the patient did not meet the criteria for receiving that treatment; and
 - f) documenting the care provided to the patient inaccurately, incompletely, or otherwise contrary to accepted standards.

[21] The Revised Notice of Hearing referred the charges from the Investigation Committee's three Decisions to one consolidated hearing before the Hearing Committee.

[22] Under s. 47 of the *Act*, the Council of the College has appointed a Hearing Pool of medical practitioners and public representatives. Section 48 says the Chair of the Hearing Pool is to appoint a hearing committee of at least five persons, to include at least one public representative. Section 52 gives the Hearing Committee the powers of a commissioner under the *Public Inquiries Act*.

[23] Section 53 of the *Medical Act* prescribes the process before a hearing committee:

Hearing committee proceeding

53 (1) A proceeding held by a hearing committee shall be conducted **in accordance with the regulations and otherwise as the hearing committee deems fit.**

(2) In a proceeding before a hearing committee, **the parties have the right to**

(a) **natural justice;**

(b) be represented by legal counsel at the parties' own expense;

(c) present evidence and make submissions, including the right to cross-examine witnesses;

(d) know all the evidence considered by the committee;

(e) receive written reasons for a decision within a reasonable time.

[bolding added]

[24] Regulation 110 states the Hearing Committee's powers to manage the hearing:

Hearing procedures

110 (1) A complainant other than the Registrar cannot participate as a party at a hearing.

(2) A hearing committee may determine any additional rules of procedure for hearings that are not covered by the Act or these regulations.

(3) A hearing committee may exclude a complainant or any witness other than the respondent from a hearing until the complainant or witness is required to give evidence.

(4) Witnesses at a hearing must testify under oath or solemn affirmation.

(5) An oath or affirmation taken at a hearing may be administered by any member of a hearing committee or other person in attendance authorized by law to administer oaths or affirmations.

(6) A hearing committee may require a respondent to do 1 or more of the following during a hearing:

(a) submit to physical or mental examinations by a qualified person or persons designated by a hearing committee, and authorize examination reports to be given to the hearing committee;

(b) submit to a review or audit of the respondent's practice by a qualified person or persons designated by a hearing committee, and authorize a copy of the review to be given to the hearing committee;

(c) submit to a competence assessment or other assessment or examination a hearing committee directs to determine whether the respondent is competent to practise, and authorize the assessment report or examination to be given to the hearing committee;

(d) produce any records kept about the respondent's practice that the hearing committee considers appropriate.

(7) If a respondent fails to comply with a requirement under subsection (5), a hearing committee may order that the respondent's licence be suspended until the respondent complies.

(8) Expenses incurred for a respondent to comply with a requirement under subsection (5) must be initially paid by the College, but may be awarded as costs against a respondent under Section 121.

[bolding added]

[25] The Hearing Committee has not yet heard the merits of the charges. On February 17, 2023, Dr. Moodley filed a preliminary motion with the Hearing Committee. The motion said:

The Nature of the Motion is two-fold:

- a. These three complaints have been improperly referred by the Registrar to be heard as one "complaint". Simply put, the Registrar doesn't have jurisdiction to combine individual complaints once separate decisions have been issued by the Investigation Committee under the *Medical Act* and *its Regulations*. The Hearing Panel lacks jurisdiction to deal with them as one.
- b. In the alternative, these complaints ought to be severed. They are unrelated and entirely different from one another. The prejudice to Dr. Moodley outweighs any probative value of having all three

complaints dealt with in one hearing. There is also no overriding public interest that is being served by dealing with the complaints in one hearing.

[26] For the motion, Dr. Moodley and the College each filed affidavits and written submissions. The affidavits quoted passages from the Decisions of the Investigation Committee. However, the full texts of the Decisions of the Investigation Committee were not entered before the Hearing Committee. This followed the usual practice for professional conduct proceedings under the *Act*, that the evidence presented to a hearing committee relevant to the merits of a complaint should be limited to that formally adduced at the merits hearing. Counsel for Dr. Moodley and the College filed briefs and, on March 2, 2023, made oral argument to the Hearing Committee on Dr. Moodley's motion.

[27] The Hearing Committee sent the parties a letter dated March 2, 2023, with a "bottom line" Decision, with reasons to follow. The bottom line was:

In our opinion, the Hearing Committee has jurisdiction to consider the charges arising from these matters in a single hearing as set out by the Registrar in his Revised Notice of Hearing dated November 17, 2022.

We have decided that the College has followed the proper procedures under the Medical Act and the Medical Practitioners Regulations to bring forward the charges arising out of these three matters in one hearing rather than in three separate hearings. In our opinion, there is no prejudice to Dr. Moodley's right to a fair hearing by hearing these three matters together.

[28] On March 17, 2023, the Hearing Committee provided the parties with its formal written Decision. The Decision explained why the Hearing Committee concluded it had jurisdiction to hear the consolidated charges and why the Committee dismissed Dr. Moodley's alternative submission that the charges be severed. Later, I will discuss the Hearing Committee's reasons.

[29] Section 58 of the *Act* authorizes an appeal to the Court of Appeal:

Appeals

58(1) A party **may appeal on an error of law** from the findings of a hearing committee to the Nova Scotia Court of Appeal.

...

(3) The record on appeal from the findings of the hearing committee consists of a copy of the transcript of the proceedings, the decision of the committee and the evidence before the committee certified by the chair of the committee.

(4) The *Civil Procedure Rules*, governing appeals from the Supreme Court of Nova Scotia to the Nova Scotia Court of Appeal, that are not inconsistent with this Act, apply *mutatis mutandis* to appeals to the Court of Appeal pursuant to this section.

[bolding added]

[30] Dr. Moodley appealed the Hearing Committee's Decision to this Court.

[31] By s. 58(3), the record in this Court is the same as that before the Hearing Committee. This means the Court's appeal record has the extracts from the Decisions of the Investigation Committee that appear in the affidavits, but not the full Decisions of the Investigation Committee.

Issues

[32] Dr. Moodley's factum lists five issues. The factum says the fifth is not being pursued. The other four are:

- a. Whether the [Hearing] Committee erred in law when it decided it had the jurisdictional ability to conduct one hearing to adjudicate all three complaints/matters and sets of charges that were the subject of each complaint;
- b. Whether the [Hearing] Committee erred in law by failing to find that the Registrar of the College lacked authority to issue a Notice of Hearing combining or including all three complaints/matters and sets of charges in one hearing before the Committee;
- c. Whether the [Hearing] Committee erred in law when it decided that the Registrar of the College had the authority to edit, revise or enlarge the matters referred to the hearing by the Investigation Committee(s);
- d. Whether the [Hearing] Committee erred in law by concluding that its discretion over hearing procedure allowed it to assume jurisdiction to hear all three complaints/matters and sets of charges in one hearing.

[33] At the hearing in this Court, Dr. Moodley's counsel confirmed that the Hearing Committee's alternative ruling to deny severance is not appealed.

[34] The submissions on points a, b and d freely overlapped. I will consider those points together and address two issues:

First issue: Did the Hearing Committee err in law by ruling it should proceed with charges in the Revised Notice of Hearing that reworded the

matters referred by the Investigation Committee's Decisions? [Dr. Moodley's point c]

Second issue: Did the Hearing Committee err in law by deciding to hear the three separately referred matters in a consolidated hearing? [Dr. Moodley's points a, b and d]

Standard of Review

[35] Section 58(1) of *Act* permits an "appeal on an error of law". In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, para. 37, the Supreme Court said, for a statutory appeal, the standard is correctness for an issue of law. I will apply correctness to both issues.

First Issue – Reworded Charges

[36] The charges in the Notice of Hearing reorganized and recategorized and, in some respects, altered the wording of the matters referred by the Decisions of the Investigation Committees (see above, paras. 15 and 20).

[37] Section 49(2) of the *Medical* and Regulation 106(2) authorize the Registrar to prepare a Notice of Hearing that contains "the details of the charges". The question is – when, if at all, may the Registrar draft a "charge" that does not replicate the wording of a "matter" referred by the Investigation Committee?

[38] Dr. Moodley's counsel submits any meaningful rewording, beyond "tinkering", exceeded the Registrar's jurisdiction. Dr. Moodley's factum explains:

60 ... The Registrar is not the one who creates the details of the charges. That role implicitly falls within the jurisdiction of the Investigation Committee who made the charges to begin with.

61. One must look at the overall context in which the Registrar operates. He has no role in the decision-making process once something has been referred to hearing. ...

...

63. Since the Act and Regulations require that an Investigation Committee define the charges of professional misconduct, conduct unbecoming, incompetence or incapacity, the Investigation Committee is the one who decides the details of the charges. ...

...

67. Given the circumstances, and using well-recognized aids to statutory interpretation instead of seeking to justify the status quo, the only rational conclusions that can be made are:

...

c. Deciding the details of the charges is a job that an investigative committee performs, not the Registrar.

[39] The Hearing Committee's Decision addressed the point as follows:

27. The Medical Practitioners Regulations use the words "complaints", "matters" and "charges". All include an element of allegations of misconduct or incompetence. In the ordinary and grammatical sense, using these different words suggests a different meaning for each word. Depending on the context, this indicates the intention of the regulation makers to give a different meaning to those words.

28. "Complaint" is defined in Section 2(e) ... as ... "any report or allegation in writing and signed by a person regarding the conduct, actions, competence, or capacity of a member ...".

...

30. In context, a "matter" is what the Registrar refers to investigation after an initial screening in Section 89 of the Regulations. ... After screening and referral for investigation, a complaint becomes a "disciplinary matter" as defined in Section 2(j) of the *Act*. After the investigation of that matter and any other matters considered by an Investigation Committee under Section 97 of the Regulations, the Investigation Committee has the authority under paragraph 99(7)(b) to "refer the matter or matters for hearing ...".

31. The word "charges" is not defined in the *Act* or the Regulations. Its literal meaning is similar to "matters"; charges also involve allegations of professional misconduct or incompetence. However, read in context, the "details of the charges" in a notice of hearing means something different from the "matters" referred to hearing.

...

34. In context, under these provisions, "the details of the charges" in Section 106 of the Regulations means the allegations of professional misconduct or incompetence that the College intends to prove in a formal hearing. The purpose of providing "the details of the charges" is to give the medical practitioner a fair notice of their jeopardy at the hearing.

35. In an eventual hearing, the College has the burden of proving the charges stated by the Registrar in the Notice of Hearing on the balance of probabilities. Section 106 requires that the Registrar make clear to the practitioner what the College intends to prove at the hearing. As such, the statement of the "details of

the charges” in Section 106 must involve an element of assessment and judgement by the Registrar about which specific allegations can be proved in a hearing. This element of evaluation and judgement goes beyond merely stating the time and place of the hearing.

36. ... The Hearing Committee is bound by Subsection 53(2) of the *Medical Act* to protect the parties’ right to “natural justice”. Natural justice in proceedings held by a hearing committee under the *Medical Act* requires fair notice to a medical practitioner of the accusations of misconduct or incompetence which the College will attempt to prove in the hearing. In giving notice of hearing in Section 49 of the *Act* and Section 106 of the Medical Practitioners Regulations, the Registrar must meet the requirements of natural justice.

[40] Both parties cite *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4 as governing the scope of an administrative tribunal’s powers by necessary implication. Justice Bastarache for the majority set out the principles:

38 But more specifically in the area of administrative law, tribunals and boards obtain their jurisdiction over matters from two sources: (1) express grants of jurisdiction under various statutes (explicit powers); and (2) the common law, by application of the doctrine of jurisdiction by necessary implication (implicit powers) [citation omitted].

...

2.3.3 Implicit Powers: Entire Context

...

49 ... As in any statutory interpretation exercise, when determining the powers of an administrative body, courts need to examine the context that colours the words and the legislative scheme. The ultimate goal is to discover the clear intent of the legislature and the true purpose of the statute while preserving the harmony, coherence and consistency of the legislative scheme [citation omitted]

“[S]tatutory interpretation is the art of finding the legislative spirit embodied in enactments” [citation omitted].

50 Consequently, a grant of authority to exercise a discretion as found in s. 15(3) of the AEUBA and s. 37 of the PUBA does not confer unlimited discretion to the Board. As submitted by ATCO, the Board’s discretion is to be exercised within the confines of the statutory regime and principles generally applicable to regulatory matters, for which the legislature is assumed to have had regard in passing that legislation [citation omitted]. In the same vein, it is useful to refer to the following passage from *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722, at p. 1756:

The powers of any administrative tribunal must of course be stated in its enabling statute but they may also exist by necessary implication from the

wording of the act, its structure and its purpose. Although courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law-making, they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes.

51 The mandate of this Court is to determine and apply the intention of the legislature [citation omitted] without crossing the line between judicial interpretation and legislative drafting [citation omitted]. That being said, this rule allows for the application of the “doctrine of jurisdiction by necessary implication”; **the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature** [citation omitted]. ...

[bolding added]

[41] I will turn to the statutory regime under the *Medical Act*.

[42] The *Act* describes the “purpose and duties of the College” 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.

[43] Clearly the statutory regime assumes the operation of a fair and effective process for professional conduct review. To that end, the *Act* and the Regulations

establish a stepped progression from (1) an initial screening and disposition of “complaints” which on their face have no substance, or which may be resolved informally, to (2) a detailed investigation of “matters” of concern that, if proven, could warrant sanction, to (3) a *quasi*-judicial hearing of “charges” that emanate from those investigated matters of concern.

[44] The Registrar is the common thread. The Registrar may initiate a complaint [s. 36(1)(a) of the *Act*]. For a complaint initiated by someone else, usually a patient, the Registrar conducts the initial screening to assess *prima facie* substance [Reg. 88]. Then, if feasible, the Registrar facilitates an early resolution or, if not feasible, commits a complaint with substance to an investigation [Reg. 89]. By drafting the “charges”, the Registrar bridges the investigatory and prosecutorial stages [s. 49 of the *Act* and Reg. 106(2)]. At the hearing, a complainant other than the Registrar “cannot participate as a party” [Reg. 110(1)]. The statutory regime expects the Registrar to steward the fair and effective operation of the process.

[45] In drafting the charges, the Registrar is both constrained and enabled by the statutory regime.

[46] To commit a “matter” for hearing, the *Act* engages the efforts and expertise of the Investigation Committee. That is the constraint: the Registrar may not “charge” a new “matter”, *i.e.* a free-standing concern of substance, to accompany the matters that the Investigation Committee sent to a hearing. To do so would undermine the function of the Investigation Committee.

[47] However, where the legislation opens a leeway of discretion, the Registrar may exercise the discretion to marshal the process fairly and effectively. Necessary implication empowers the Registrar to fulfill the objective of the statutory regime.

[48] An example is when the Investigation Committee’s description of a “matter” is factually imprecise or disassociated from an identified professional standard. Revised wording in the charge would enhance the fairness and effectiveness of the hearing.

[49] The legislation confirms this view. Section 53(2)(a) of the *Medical Act* requires that the proceeding before a hearing committee comply with “natural justice”.

[50] What are the fundamentals of natural justice in the context of professional conduct proceedings? I agree with the following passage from James T. Casey,

Regulation of Professions in Canada, (Carswell: online, 1994), chapter 8 (Procedural Rights at a Disciplinary Hearing):

8.5 Knowing the Case to be Met – Wording of the Charge

One of the fundamental precepts of the *audi alteram partem* rule is that the individual must know the case against him or her so that he or she can adequately prepare and present their defence. ...

There are two requirements for a charge of professional misconduct:

1. the charge must comply with the specific legislative requirements; and
2. the charge must comply with the common law requirements of the *audi alteram partem* rule such that a professional has adequate notice of the case which he or she must be prepared to meet.

...

The common law requirements of *audi alteram partem* as it applies to a charge of professional misconduct have been described as follows:

...the charge must allege conduct which if proved could amount to professional misconduct and it must give the person charged reasonable notice of the allegations that are made against him so that he may fully and adequately defend himself. This proposition has been stated by many authorities. ...

[51] The legislation directs the Registrar to draft the formal charges. This directive necessarily implies that the Registrar may re-word the Investigation Committee's description of the "matter" to satisfy principles of natural justice. When the Investigation Committee's description of the matter is insufficiently precise to give fair notice, the Registrar may revise the charge to cite a recognized standard and notify the medical practitioner of the facts the College alleges offend the standard.

[52] Here, the Revised Charges (above, para. 20) may be compared to the matters referred by the Reports of the Investigation Committee (above, para. 15).

[53] With one possible exception, the Revised Charges reproduced the substance of the matters referred by the Investigation Committee. The Revised Charges reorganized and re-categorized some of those matters, or identified the governing standard, but added no new "matter" of substance.

[54] The possible exception is this. For Patient A, item 1(b)(ii) of the Revised Notice of Hearing charges Dr, Moodley with "[p]erforming an episiotomy contrary

to the expressed wish of the patient”. The Investigation Committee’s list of “matters” does not cite this infraction. Rather, it says Dr. Moodley performed an “unwarranted episiotomy” on Patient A. In the Revised Notice of Hearing, the Registrar has replaced “unwarranted” with “performing an episiotomy contrary to the expressed wishes of the patient”.

[55] As I have explained, the record does not include the full text of the Investigation Committee’s Decision. Consequently, the Court cannot trace the genealogy of the charge back to the Investigation Committee’s recitation of evidence.

[56] At the appeal hearing, both counsel were asked to identify any changes of substance from the Investigation Committee’s Decisions to the charges in the Revised Notice of Hearing. Dr. Moodley’s counsel was content to allow the College’s counsel to address charge 1(b)(ii) for Patient A. The College’s counsel informed the Court that the wording in the Amended Notice of Hearing (“performing an episiotomy contrary to the expressed wish of the patient”) replaced “unwarranted” in the Investigation Committee’s Decision. The College’s counsel explained the reason was to provide clearer notice of the charge.

[57] I accept this explanation of the reason for the changed wording.

[58] A charge that a procedure was “unwarranted” is unclear. For instance, it might involve alleged negligence in a diagnostic assessment and trigger the need for expert evidence. Or it may mean something else for which expert evidence is unnecessary. Without particulars, “unwarranted” is a question-begging adjective. The wording in the Revised Notice of Hearing notifies Dr. Moodley of the specific case he must meet. The revision applies the notice requirement of natural justice as directed by s. 52(3)(a) of the *Act*. In my view, the Registrar had the necessarily implied authority to replace “unwarranted” with “[p]erforming an episiotomy contrary to the expressed wishes of the patient”.

[59] The Hearing Committee did not err in law by dismissing Dr. Moodley’s challenge to the reworded charges in the Revised Notice of Hearing. I would dismiss this ground of appeal.

Second Issue – Consolidated Hearing

[60] The Investigation Committee investigated three complaints. For each, the Committee issued a Decision that referred “matters” for hearing. The Registrar’s

Notice of Hearing consolidated the three referrals into one scheduled hearing. Dr. Moodley submits the consolidation was impermissible. He says the legislation requires three separate hearings before three differently constituted Hearing Committees.

[61] Dr. Moodley's factum summarizes the submission:

33. In our motion before the Hearing Committee, we maintained that the three matters/complaints that were set down for hearing by the Registrar had been improperly placed before the Committee. The key fact was that each complaint had arisen separately, had been investigated separately, and had been referred separately to hearing. Because the complaints had been distinctly dealt with in this manner, the Registrar had no power to combine them after-the-fact by issuing a Notice of Hearing that essentially consolidated the three separate matters into one.

34. Central to our position was that, in these circumstances, the disciplinary process set out in the *Medical Act* and the Regulations both contemplated and required that each complaint be heard and dealt with separately by hearing committees appointed for that purpose. Had the complaints been combined, investigated, and referred to hearing as one matter, the situation would be different.

...

43. We submit the Act and Regulations contemplate one hearing per matter referred to hearing. This does not necessarily mean that multiple matters cannot be dealt with at the same hearing. It just means all matters must arise from the same referral.

[62] The Decision of the Hearing Committee dealt with Dr. Moodley's similar submission as follows:

37. In our opinion, read in context and considering the purpose of the notice of hearing in Section 49 of the *Act* and Section 106 of the Regulations, there is an important difference between the meaning of the word "charges" in Section 106 and meaning of the word "matters" in the provision for referral to hearing. The Registrar must use judgment not only in stating the details of the charges to assure fair notice to the medical practitioner but also to reflect the purpose of the *Medical Act* as a whole.

...

39. In our opinion, the requirement to state the details of the charges in Section 106 of the Regulations includes assessing how best to protect the public interest broadly in hearing the matters referred to hearing. ... Expediency, efficiency, proportionality, the willingness of witnesses to testify, and the necessity to

maintain public confidence in the College's ability to regulate its members may well all be factors in the Registrar's decision on how to state the details of the charges.

40. Faced with the referral of three separate matters, the Registrar is to state the details of the charges, not just to ensure fair notice to the Respondent medical practitioner but also to take into account the need to conduct the hearing expeditiously and to maintain the confidence of the public in the College.

[63] Later in its Decision, the Hearing Committee dismissed Dr. Moodley's alternative motion for severance.

[64] On this appeal, Dr. Moodley has not challenged the Hearing Committee's exercise of discretion to dismiss his severance motion. Rather, he submits, as a matter of law or jurisdiction, the Registrar may not refer charges from the three matters to a consolidated hearing, nor may the Hearing Committee hold a consolidated hearing.

[65] Section 49(1) of the *Act* says after the Registrar initially fixes a date of hearing, the Hearing Committee may set "such later date as ... the Hearing Committee may order following an opportunity for submissions from both parties as to such date". At the Hearing Committee's proceeding on March 2, 2023, both parties had the opportunity for submissions. The Hearing Committee's Decision then ordered the consolidated date of hearing for the three referrals. The Hearing Committee's ruling exercised its literal authority under s. 49(1).

[66] Section 53(1) of the *Act* says the proceeding before the Hearing Committee "shall be conducted in accordance with the regulations and otherwise as the hearing committee deems fit". Regulation 110, titled "Hearing procedures", is silent on whether the hearing committee may hear consolidated matters, but says:

110(2) A hearing committee may determine any additional rules of procedure for hearings that are not covered by the Act or these regulations.

[67] Nothing in the *Act* or Regulations constrains the Hearing Committee's authority either under s. 53(1) to consolidate the hearings if the Committee "deems fit", or under Regulation 110(2) to determine additional rules of procedure respecting consolidation of hearings.

[68] Under the legislation, the Hearing Committee had the discretion to order a consolidated hearing. That conclusion disposes of Dr. Moodley's submission to this Court.

[69] I will add this. The procedural safeguard is a motion for severance, which is a discretionary issue for the Hearing Committee. Here, the Committee weighed the submissions and dismissed Dr. Moodley's motion for severance. He has not appealed that ruling.

[70] The outcome does not turn on Dr. Moodley's failure to appeal. The Hearing Committee's denial of severance shows no appealable error.

[71] As I have discussed, an element of the *Medical Act's* regime is that, in the public interest, the College is to operate a fair and effective process of professional conduct review. As with the Registrar, by necessary implication the Hearing Committee may exercise its discretion to fulfill the statutory objective.

[72] I agree with the following from the Hearing Committee's Decision:

58. In our opinion, there is a public interest in seeing that hearing these charges is done expeditiously and reasonably cost-effectively by hearing all three charges together in this case. ...

[73] Of course, expedition and cost-effectiveness may not sacrifice fairness, for instance by inviting inappropriate propensity reasoning. The Hearing Committee accepted that proposition. The Committee's Decision said:

59. ... The members of the Hearing Committee understand that each charge must be proved by admissible evidence and that no inference of guilt on one of the charges should be drawn on conclusions reached in the hearing of the other charges. The Hearing Committee, unlike a jury in a criminal matter, is made up of three physicians and a public representative chaired by a lawyer experienced in matters of professional regulation. All members of The Committee are alive to the risk of inappropriate propensity reasoning.

...

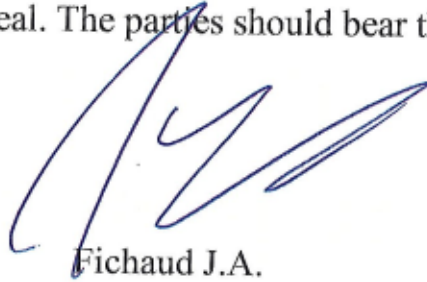
64. The Hearing Committee has decided to reject Dr. Moodley's Motion for severance and conclude that the three charges can be heard together without unfairness to him and without the risk that the Committee will engage in propensity reasoning. ...

[74] I take the Committee at its word.

[75] The Hearing Committee did not err in law by directing a consolidated hearing. I would dismiss these grounds of appeal.

Conclusion

[76] I would dismiss the appeal. The parties should bear their own costs.

A large, stylized handwritten signature in blue ink, consisting of several sweeping loops and a long horizontal stroke at the end.

Fichaud J.A.

Concurred: Bourgeois J.A. 

Derrick J.A. 

NOVA SCOTIA COURT OF APPEAL

Citation: *Moodley v. College of Physicians and Surgeons of Nova Scotia (Hearing Committee)*, 2023 NSCA 70

Date: 20231012
Docket: CA 522989
Registry: Halifax

Between:

Dr. Manivasan Moodley

Appellant

v.

College of Physicians and Surgeons of Nova Scotia Hearing Committee
(composed of Raymond F. Larkin, K.C. as Chair, Dr. Zachary Fraser, Dr. Cathy MacDougall, Dr. Michael Teehan and Ms. Mary Hamblin), College of Physicians and Surgeons of Nova Scotia, and the Attorney General of Nova Scotia
Respondents

- Judge:** The Honourable Justice Joel Fichaud
- Appeal Heard:** September 21, 2023, in Halifax, Nova Scotia
- Subject:** Professional conduct review under *Medical Act*, SNS 2011, c. 38 – Powers of Registrar and Hearing Committee of the College of Physicians and Surgeons
- Summary:** Three of Dr. Moodley’s patients filed complaints of professional misconduct with the College of Physicians and Surgeons. The complaints triggered the process in the *Medical Act*. The College’s Investigation Committee issued separate Decisions that committed the matters to a formal hearing. The *Medical Act* authorizes the College’s Registrar to issue a Notice of Hearing that states the charges. The Registrar’s Notice of Hearing revised some of the wording from the descriptions in the Investigation Committee’s Decisions. The Notice of Hearing scheduled the three matters as one consolidated hearing before a Hearing Committee.

By a preliminary motion to the Hearing Committee, Dr. Moodley objected to the changed wording and the consolidation. The Hearing Committee issued a Decision that dismissed his motions.

Dr. Moodley appealed to the Court of Appeal.

Issues: Did the Hearing Committee err in law by either (1) accepting the altered wording of the charges or (2) approving the consolidation of the hearing?

Result: The Court of Appeal dismissed the appeal.

With one possible exception, the charges in the Notice of Hearing reproduce the substance of the matters referred by the Investigation Committee. The charges merely reorganized or re-categorized some of those matters. The possible exception was to replace the Investigation Committee's allegation that an episiotomy was "unwarranted" with a charge that the episiotomy was "contrary to the expressed wishes of the patient". This revision was appropriate as it gave clearer notice of the charge further to the requirement in s. 53(3)(a) of the *Medical Act* that the hearing conform with principles of natural justice.

The provisions of the *Medical Act* and its Regulations allowed the Hearing Committee to hear a consolidated hearing if the Committee "deems fit" in the circumstances. A consolidated hearing would be cost-effective and expeditious. Cost-effectiveness and expedition may not sacrifice fairness by inviting inappropriate propensity reasoning. The Hearing Committee's Decision acknowledged that the Committee would avoid inappropriate propensity reasoning. The Committee should be taken at its word.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 23 pages.