

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. Manivasan Moodley**

HEARING COMMITTEE DECISION ON MOTION FOR SEVERANCE

Hearing dates:

March 2, 2023

Hearing Committee:

Mr. Raymond F. Larkin, K.C.
Dr. Zachary Fraser
Dr. Cathy MacDougall
Dr. Michael Teehan
Ms. Mary Hamblin

Counsel:

Marjorie Hickey, K.C., Solicitor for the
College of Physicians and Surgeons of Nova Scotia

Phillip Chapman, Solicitor for Dr. Manivasan Moodley

A. INTRODUCTION

1. The Investigation Committee has referred three disciplinary matters concerning Dr. Moodley for hearing. The Registrar has issued a notice of hearing which includes all the charges arising from those three matters. Dr. Moodley objects to hearing the charges in one hearing. He has presented a motion to hold separate hearings in each matter.

2. On March 2, 2023, having received written and oral submissions, the Hearing Committee made the following decision, with reasons to follow:

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 matters together.

These are our reasons for that decision.

B. FACTS

3. On May 28, 2020, [name redacted] filed a letter of complaint against Dr. Moodley with the College of Physicians and Surgeons ("the College"). On September 30, 2020, another patient [name redacted] filed a complaint against Dr. Moodley with the College. On April 26, 2021, a third patient [name redacted] filed a complaint. Each complaint arose from different facts at different times between 2017 and 2020.

4. In each case, the Registrar of the College did an initial screening of the complaint and, having determined in effect that each complaint alleged facts, if proven, which would constitute professional misconduct, conduct unbecoming or incompetence, referred the "matter" to the Investigation Committee under Section 89 of the Medical Practitioners Regulations.

5. After investigating each of these matters, the Investigation Committee referred three separate "matters" for hearing in accordance with Subsection 99 (7) of the Medical Practitioners Regulations.

6. In the matter arising from the complaint from [name redacted], the referral to hearing was April 4, 2022; the Investigation Committee decided the following:

In the current case, the Committee has determined the threshold test for referral to hearing has been met. Specifically, **the Committee has identified concerns of professional misconduct or incompetence that, if proven, would warrant a licensing sanction, including:**

- Performing an unwarranted episiotomy and failing to allow [name redacted] enough time to attempt to deliver without one;
- Demonstrating a deficiency of knowledge regarding the clinical indication for episiotomies;
- Failing to obtain [name redacted]'s consent to perform the episiotomy in accordance with the College's Professional Standards and Guidelines Regarding Informed Patient Consent to Treatment;
- Failing to inform [name redacted] he performed an episiotomy;
- Failing to allow [name redacted] the opportunity to expel the placenta naturally;
- Manually removing the placenta in such a manner that it caused [name redacted] pain and discomfort;
- Documenting the care provided either inaccurately, incompletely, or otherwise in a manner contrary to the College's Professional Standard Regarding Medical Records;
- Providing inaccurate information to the Investigation Committee respecting the comments of nursing staff during the delivery;
- Demonstrating an attitude towards nursing staff that does not support a collaborative approach to patient care.

...

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. It is the College’s intention to move the matters relating to this complaint forward in a timely and respectful manner.

An Official Notice of Hearing to this effect will be issued by the College. *[emphasis added]*

7. In the matter arising from the complaint of [name redacted], the referral to hearing was April 4, 2022. The decision of the Investigation Committee referring the matter to hearing stated as follows:

In the current case, the Committee has determined the threshold test for referral to hearing has been met. Specifically, the Committee has identified concerns of professional misconduct or incompetence that, if proven, would warrant a licensing sanction, including:

- Misleading [name redacted] when he stated “no other obstetrician/ gynecologist would do this procedure under the circumstances”;
- Failing to inform [name redacted] of both the risks and benefits of a tubal ligation, in a manner consistent with the College’s Professional Standard and Guidelines Regarding Informed Patient Consent to Treatment and to document same;
- Failing to discuss alternative methods of contraception and to document same; suggesting it was her future husband’s decision as to whether [name redacted] should have a tubal ligation, when she was requesting one in the present circumstances;
- Attempting to discourage [name redacted] from seeking a tubal ligation in the context of a sexist and paternalistic encounter;
- Failing to respect [name redacted] autonomy when it comes to her health and her body and her decision to not have children; and
- Interfering with the investigative process when he contacted a potential witness in an effort to gain information about the complainant, and in contravention of Sections 46 and 30(2) of the *Medical Act*.

...

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. It is the College's intention to move the matters relating to this complaint forward in a timely and respectful manner.

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

8. In its referral of the matter arising from [name redacted]'s] complaint, the matter was referred to hearing on September 29, 2022; the Investigation Committee decided as follows:

In the current case, the Committee has determined the threshold test for referral to hearing has been met. Specifically, the Committee has identified concerns of professional misconduct, conduct unbecoming, incompetence, or incapacity that, if proven, would warrant a licensing sanction, including:

- Failing to perform a cervical examination until much later in the day that possibly delayed the diagnosis of labour;
- Suggesting 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;
- Performing an unwarranted episiotomy and thus demonstrating a deficiency of knowledge regarding the clinical indication for episiotomies;
- Ordering oxytocin when the patient did not meet the criteria for labour dystocia and did not require oxytocin;
- Documenting the care provided either incompletely, or otherwise in a manner contrary to the College's Professional Standard Regarding Medical Records; and
- Demonstrating an attitude towards 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-centred care.

...

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.

9. On November 17, 2022, the Registrar issued a Revised Notice of Hearing ("Notice of Hearing") pursuant to Section 49 of the *Medical Act* and Section 106 of the Medical Practitioners Regulations which included the following:

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 [name redacted], in May, 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 wished 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 [name redacted] in July, 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 or 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 care provided to patient [name redacted], in October, 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.;

10. On February 17, 2023, counsel for Dr. Moodley made the following preliminary Motion:

“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 therefore 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.”

C. SUBMISSIONS OF THE PARTIES ON JURISDICTION

11. Dr. Moodley argues that each matter referred to hearing was based on separate complaints referred to the Investigation Committee for investigation separately and referred to hearing individually. In his submission, the Registrar had no jurisdiction to combine individual complaints in one hearing once the Investigation Committee had issued separate decisions. Accordingly, without proper notice of hearing, the Hearing Committee has no jurisdiction to hear these matters in one hearing.

12. Dr. Moodley’s argument on the jurisdiction of the Registrar starts with the wording of Subsection 49(1) of the *Medical Act* and Subsection 106(2) of the *Medical Practitioners Regulations*, which provide as follows:

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.

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

- (b) the details of the charges:

13. In his submission, Dr. Moodley argues that Section 49 of the *Act* and Section 106 of the *Medical Practitioners Regulations* require the Registrar to issue a notice of hearing in each matter referred by the Investigation Committee. In this case, the Investigation Committee made separate decisions in each of the three matters referred to hearing. Dr. Moodley says that Section 49 requires a notice of hearing in each matter. He submits that the role of the Registrar is simply to fix a date, time and place for hearing stating the charges as written by the Investigation Committee in each of the matters referred to hearing.

14. Dr. Moodley submits that the Registrar has not been granted any authority to set one hearing for more than one matter if each matter is separately referred. He argues that the Registrar has no "inherent authority ."The authority of an administrative decision-maker must be derived from the legislation within which the decision-maker operates. Dr. Moodley submits that, in this case, there is no express power to combine these three matters in one hearing, either in the *Medical Act* or the Medical Practitioners Regulations. That power does not arise by necessary implication from the Registrar's role under Section 49 of the *Act* or Section 106 of the Regulations.

15. Dr. Moodley also argues that the Registrar has no authority to change or enlarge the matters set out in each decision of the Investigation Committee. He says that the Registrar's role under Section 49 of the *Act* and Section 106 of the Regulations is to state the "details of the Investigation Committee's charges" not to edit or revise the words used by the Investigation Committee.

16. Regarding the Hearing Committee, Dr. Moodley submits that the Hearing Committee's jurisdiction is limited to hearing the matters referred to it by the Investigation Committee. The matters referred to hearing, in this case, were referred separately. Accordingly, in this case, the Hearing Committee's jurisdiction is limited to hearing each of the three matters referred by the Investigation Committee separately.

17. The College argues that the Investigation Committee and the Registrar have distinct roles under the *Medical Act* and the Medical Practitioners Regulations. The Investigation Committee investigates matters referred to it by the Registrar and decides whether to refer a "matter" or "matters" to hearing. The Registrar's job is to communicate to the Respondent the specific "charges" the College intends to pursue arising from the matters that had been referred to the Hearing Committee. So long as the "charges" have a factual foundation in the "matters" that have been referred to hearing, the Registrar is well within his authority to frame the charges in the Notice of Hearing, as he did in this case.

18. The College submits that "charging" a medical practitioner engages public interest considerations that may include 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. The legal and public interest considerations that are involved in preparing charges in a notice of hearing are not matters that must be considered by the Investigation Committee. It is not the Investigation Committee's role to determine what specific charges the College may ultimately prove in a hearing.

19. Further, the College argues that, for the same reasons, the Registrar may include charges arising from multiple matters to one notice of hearing. The Registrar must assess the public interest considerations in deciding whether multiple matters should be heard in one or separate hearings, including the importance of expeditious adjudication of those charges. The College argues that nothing in the Regulations prevents the Registrar from including multiple matters in a single notice of hearing.

20. With respect to the jurisdiction of the Hearing Committee to consider charges arising from the three matters referred to hearing in this case, the College argues that the Hearing Committee is authorized by Section 53 of the *Medical Act* to conduct the proceedings as it deems fit. The Hearing Committee has jurisdiction to hear the matters referred to it; if it deems it fit to hear multiple matters in a single hearing, Section 53 allows it.

21. Finally, the College argues that the practice of adjudicating multiple referrals from the Investigation Committee in one hearing is well established and refers to the previous decisions of the Hearing Committee in *Re Moodley, 2020 CanLII, 103050 (NSCPS)*; *Re Osif, 2008 CanLII 89671 (NSCPS)*; *Re Dhawan, 1997 CanLII 16148 (NSCPS NS)*; and *Re Ezema, 2018 CanLII 105365 (NSCPS) including the decision on a motion for severance in Re Ezema (June 12, 2017-unreported)*. For consistency, the Hearing Committee should follow its earlier consistent practice of hearing in one hearing all the charges arising from multiple referrals to hearing involving the same medical practitioner.

D. ANALYSIS OF THE JURISDICTION ISSUE

22. It is undisputed that the three complaints against Dr. Moodley were investigated in accordance with the Medical Practitioners Regulations. Neither is it disputed that the Investigation Committee had referred matters arising from those complaints to hearing and that the Hearing Committee has jurisdiction to hear and dispose of those matters.

23. Likewise, there is no dispute that the Hearing Committee can conduct its proceedings as it sees fit but that the proceedings must be conducted in accordance with the Medical Practitioners Regulations and, more broadly, in accordance with natural justice.

24. The dispute over whether the Hearing Committee has jurisdiction is whether the Hearing Committee has jurisdiction to hear all three of the matters referred separately to it in a single hearing.

25. In our opinion, that dispute turns on the distinction in the Medical Practitioners Regulations between the “matters” referred to hearing by the Investigation Committee and the “details of the charges” stated by the Registrar in the Notice of Hearing. This distinction follows from applying the rules of statutory construction interpretation to the words “the details of the charges” in Section 106 of the Medical Practitioners Regulations.

26. The words in Section 106 must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Medical Act* and the purpose of the *Act*. A textual, contextual and purposive analysis should lead to a meaning that is harmonious with the *Medical Act* and Medical Practitioners Regulations as a whole.

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) of the *Medical Act* as follows:

"complaint" means any report or allegation in writing and signed by a person regarding the conduct, actions, competence, or capacity of a member or former member, professional corporation or the employees thereof, or any similar complaint, report or allegation initiated by the Registrar or referred pursuant to this Act or the regulations.

29. Although "matter" is not defined, the term "disciplinary matter" is defined in Section 2(j) as follows:

“disciplinary matter” means any matter involving allegations or findings of professional misconduct, conduct unbecoming a medical practitioner or incompetence.

30. In context, a "matter" is what the Registrar refers to investigation after an initial screening in Section 89 of the Regulations. The Registrar must dismiss a complaint that "does not allege facts that, if proven, would constitute professional misconduct, conduct unbecoming, and incompetence or incapacity, or would merit a caution ."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.

32. Section 49 of the *Medical Act* provides as follows:

(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.

(3) At least thirty days prior to the hearing, the complainant must be provided information respecting the date, time and place for the hearing. *[emphasis added]*

33. Section 106 of the *Medical Practitioners Regulations* provides as follows:

(1) A notice of hearing must be served on the Respondent in accordance with the *Act*.

(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. *[emphasis added]*

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 in 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 judgment goes beyond merely stating the time and place of the hearing.

36. Other than this immediate context of Section 49 of the *Act* and the wording of Section 106 of the Regulations, the meaning of “charges” must be read in the broader context of the *Medical Act* as a whole. 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.

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.

38. Section 5 of the *Medical Act* sets out the purpose of the *Act* as follows:

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. *[emphasis added]*

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. In deciding how to state the details of the charges to be included in the notice of hearing, the Registrar has to determine whether stating the details of the charges serves to protect the public interest in the practice of medicine and maintain the confidence of the public and the profession and the ability of the College to regulate the practice of medicine. 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.

41. Although undefined, the word "charges" in Regulation 106 carries significant meaning in the scheme of the Regulations. In its ordinary and grammatical meaning, read in the context of the Act and the Regulations as a whole, "charges" in Regulation 106 must mean all of the allegations of professional misconduct or incompetence arising from the matters referred to hearing by the Investigation Committee that the College intends to prove at the hearing. It necessarily involves the exercise of judgment by the Registrar informed by public interest considerations arising from the purpose of the Act in Section 5, fairness to medical practitioners and the overall scheme of the Act and Regulations governing complaints against medical practitioners.

42. To resolve the issue of jurisdiction raised by Dr. Moodley, we have to apply this interpretation of the word "charges" in Section 106 of the Medical Practitioners Regulations to the decision of the Registrar, in this case, to include in one hearing all the charges arising from three separate matters referred to hearing by the Investigative Committee.

43. In the present case, the Registrar has stated the details of the charges arising from three separate referrals to hearing from the Investigation Committee in a single Notice of Hearing. Each referral from the Investigation Committee includes a statement of "concerns" of professional misconduct or incompetence in matters involving Dr. Moodley. Each referral decision says that the charges arising from the Investigation Committee decision would be provided to Dr. Moodley and his counsel in due course.

44. Some of the concerns listed in the referrals to hearing are not included in the Notice of Hearing. Discussions between counsel have led the Registrar to drop charges based on some of those concerns, and the Registrar has modified the wording of some of the charges related to those concerns, but, in our opinion, the details of the charges stated in the Notice of Hearing arise from the matters referred to the Hearing Committee from the Investigation Committee.

45. In our opinion, the Notice of Hearing issued by the Registrar on November 12, 2022, met the *Medical Act* and Medical Practitioners Regulations' requirements. In stating the details of the charges in the Notice of Hearing, the Registrar had to assess the circumstances and decide how best to give Dr. Moodley notice of what the College intends to prove at the hearing and to exercise his judgement on how best to apply the public interest considerations at stake in conducting one hearing arising from these three separate referrals to hearing. The Registrar was entitled to consider the consistent practice of the Hearing Committee of hearing multiple matters involving a medical practitioner in one hearing.

46. It follows from this conclusion that the Hearing Committee has jurisdiction to hear all three matters in one hearing. The Investigation Committee properly referred three matters for hearing under paragraph 99(7) (b) of the Medical Practitioners Regulations. We have jurisdiction over those three matters. The Registrar has properly issued a Notice of Hearing. We have broad discretion over conducting the proceedings as provided for in Section 53 of the *Medical Act*. We, therefore, must reject Dr. Moodley's submission that the Hearing Committee does not have jurisdiction to hear the charges in the Notice of Hearing in one hearing.

47. Hearing committees under the *Medical Act* have consistently conducted a single hearing when multiple matters involving a medical practitioner have been referred to hearing; see *Re Moodley, 2020 CanLII, 103050 (NSCPS)*; *Re Osif, 2008 CanLII 89671 (NSCPS)*; *Re Dhawan, 1997 CanLII 16148 (NSCPS NS)*; and *Re Ezema, 2018 CanLII 105365 (NSCPS)*. It is within our jurisdiction to conduct this proceeding hearing as we deem fit; that includes deciding to follow the previous practice of hearing committees of holding one hearing to consider multiple matters referred by the Investigation Committee.

E. ARGUMENTS OF THE PARTIES ON THE MERITS OF SEVERANCE

48. Dr. Moodley's Motion includes seeking, in the alternative, that, even if the Hearing Committee has jurisdiction to hear the charges detailed in the Revised Notice of Hearing, these charges ought to be severed on the following basis:

“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. “

49. Dr. Moodley acknowledges that the Hearing Committee has considerable latitude in the *Medical Act* and the Medical Practitioners Regulations to determine its procedure as long as this discretion is exercised in a manner that benefits natural justice. In his submission, "fairness" determines whether more than one matter should be dealt with in the same hearing. He cites the decision of the Supreme Court of Canada in *R. v. Last, 2009, SCC 45*, which outlines considerations for deciding whether severance should be granted in criminal cases to be tried before a jury. Dr. Moodley summarizes these factors as follows:

“The process basically involves weighing the pros and cons of severance, and the focus of inquiry is on whether the potential prejudice to the Respondent caused by hearing multiple complaints at once overrides the probative value of doing so. The fear is that if unrelated complaints are heard at once, the tribunal hearing the complaints will have a tendency to characterize the impugned conduct as a "pattern of behaviour" and not as separate and isolated events.”

50. Dr. Moodley submits that the three complaints giving rise to this hearing are isolated events taking place over three years; they are quite different in their circumstances.

51. He submits that there is the potential for prejudice against him in hearing multiple unrelated complaints in one hearing. He identifies two distinct types of prejudice. One is the tendency of the members of the Committee to engage in what the Supreme Court Canada in *R. v. Last* characterized as “prohibited propensity reasoning .” Dr. Moodley says it is human nature to form a negative impression of him if three complaints instead of one are heard in the same hearing.

52. The other potential prejudice to Dr. Moodley is possible damage to his reputation. Hearing all three matters in one hearing could result in the public suspecting that the complaints show a pattern of general incompetence when they are isolated incidents.

53. Dr. Moodley argues that the potential prejudice from hearing these matters in one hearing is not justified by a public interest in hearing them together. Public interest factors, including public safety and concern about delays if three separate hearings are held, do not outweigh the potential prejudice to Dr. Moodley in the process.

54. The College argues that the burden is on Dr. Moodley to show that he would suffer recognizable legal prejudice to his right to a fair hearing sufficient to displace the public interest in a single proceeding.

55. The College cites the decision of the Hearing Committee in *Re Ezema* (unreported decision dated June 12, 2017), which adopted the factors set out in *R v. Last* as an appropriate analytical framework for deciding this Motion. The College submits that the hearing of charges arising from the three matters referred to hearing will not prejudice him and that there is sufficient legal and factual nexus between the complaints to be heard together. It submits that there is a public interest in avoiding a multiplicity of proceedings, and the evidence is not so complex that separate hearings are needed.

56. The College argues that the potential of prejudice to Dr. Moodley must be a recognized legal prejudice; that is, something that would affect his right to a fair hearing. As discussed in *Re Ezema*, the members of the Hearing Committee are capable of conducting the hearing without the risk of engaging in propensity reasoning. The possible impact on Dr. Moodley's reputation is speculative and it has no bearing on his fair hearing rights.

F. ANALYSIS OF THE SEVERANCE ISSUE

57. In our opinion, the reasons the Hearing Committee gave in its decision on severance in *Re Ezema* apply equally in this case. In *Re Ezema*, the Investigation Committee referred three matters to hearing, and the Registrar issued a Notice of Hearing which combined all three sets of charges in one hearing. Dr. Ezema brought a motion to hold separate hearings in each of the three charges in the Notice of Hearing.

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. There is no real risk that Dr. Moodley will be prejudiced by doing so. In reaching these

conclusions, we adopt the reasoning given by the Hearing Committee in rejecting the severance motion in *Re Ezema* as set out in the following passages:

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.

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.

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.

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.

59. All of the considerations set out in the reasons for the decision in *Re Ezema* apply to Dr. Moodley's Motion for severance. 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.

60. Dr. Moodley argues that he may also suffer prejudice from hearing all three matters in one hearing because of potential harm to his reputation. This is difficult to assess because it is speculative. However, more fundamentally, reputational harm and the public's reaction to a hearing under the *Medical Act* does not constitute legal prejudice, i.e. prejudice that can affect his right to a fair hearing.

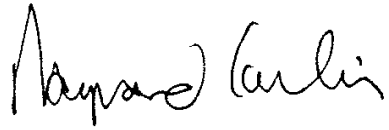
61. There is a sufficient connection between the matters referred to hearing to hear the charges together. Keeping alive to any risk of propensity reasoning, we can hear these cases together without unfairness to Dr. Moodley.

62. In our decision in *Re Osif*, there were many different charges which could have been considered unrelated both in their nature and their timing. Ultimately we had to decide if there was a pattern of carelessness that indicated incompetence. In *Re Ezema*, there were quite different complaints which raised a common legal issue of sexual harassment of workplace colleagues. In *Re Moodley*, there were complaints which were similar and presented a common issue of inappropriate communication of a sexual nature with patients. In this case, the College argues that there is a common factual and legal element of a failure to treat patients in a patient-centric manner, and overlap on issues of consent, acting contrary to accepted standards and lack of regard for the College's investigation process. The factual and legal issues do not appear to be complex. In this case, the differences between the three matters referred to hearing are not so significant that they must be heard separately.

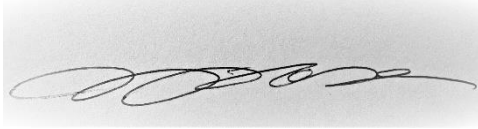
63. In our opinion, as in *Re Ezema*, the potential of prejudice is outweighed by a public interest in avoiding a multiplicity of proceedings in related matters. Conducting this hearing of all three charges together will avoid some of the inevitable delays that the hearing process creates. The evidence and the submissions can be made reasonably efficient and cost-effective. The public interest outweighs the potential of prejudice. On the other hand, severance of the three matters will likely lead to greater delay and increase the cost of adjudicating these matters.

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. The members of the Committee will assess the evidence to determine whether or not each of the allegations is proven by admissible evidence, and if the allegations in one or more of the charges are proven, assess whether or not the conduct constitutes professional misconduct or incompetence.

These reasons issued at Halifax, Province of Nova Scotia, this 17th day of March 2023.



Mr. Raymond F. Larkin, KC



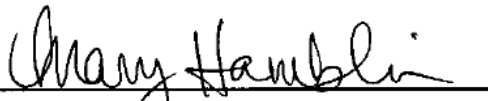
Dr. Zachary Fraser



Dr. Cathy MacDougall



Dr. Michael Teehan



Mary Hamblin