IN THE MATTER OF: *"THE MEDICAL ACT" C.C.S.M.*

AND IN THE MATTER OF: DR. TAHSEEN MAHDI, a member of the College of Physicians and Surgeons of Manitoba

REASONS FOR DECISION OF THE INQUIRY PANEL

INTRODUCTION AND BACKGROUND

On May 25, 26, 27, 30 and June 1, 2016, a hearing was convened before an Inquiry Panel (the "Panel") of the College of Physicians and Surgeons of Manitoba (the "College") for the purpose of conducting an inquiry pursuant to Part X of *The Medical Act* (the "Act") into charges against Dr. Tahseen Mahdi ("Dr. Mahdi") as set forth in an Amended Notice of Inquiry dated May 13, 2015.

The Amended Notice of Inquiry charged Dr. Mahdi with two counts of professional misconduct and with contravening Article 43 of the College's Code of Conduct (the "Code of Conduct"). The specific allegations against Dr. Mahdi as outlined in the Amended Notice of Inquiry are reproduced below:

> "1. On or about August 1, 2013, you made one or more accusations against a colleague which you knew or ought to have known were false, thereby committing acts of professional misconduct and/or contravening Article 43 of the Code of Conduct.
>
> PARTICULARS
>
> a) You stated to a physician that Dr. [A] attempted to strangle you and pushed you to the floor in your office at the [X] Clinic.
>
> b) You stated to the police that on the morning of August 1, 2013 in your office at the [X] Clinic you were surprised by an attack by Dr. [A], who came from behind you, choked you with his hands, said "you better drop the charges or

you are going to lose your life", and pushed you to the floor.

c) While pointing across the hall from your office in the [X] Clinic to Dr. [A]'s examination room, you stated to a staff member of the [Y] Regional Health Authority that he choked you.

2. On or about January 6, 2014 and on or about April 15, 2014, you made accusations to the College against a colleague which you knew or ought to have known were false, thereby committing an act of professional misconduct and/or contravening Article 43 of the Code of Conduct.

PARTICULARS

a) In your letter of January 6, 2014 to the College, you stated that on August 1, 2013

(i) you were assaulted by Dr. [A], in that he put both hands around you neck and began to choke you and threw you from your chair to the ground, and

(ii) you were threatened by Dr. [A] who stated "Drop the charges or you will lose your life".

b) In your April 15, 2014 interview with the Investigation Chair of the College you stated that Dr. [A] choked you and pushed you to the floor, and that Dr. [A] stated, "Drop the charges or you will lose your life"."

The Code of Conduct which is set forth in Schedule "G" of By-Law No. 1 of the College is intended as a guide to the professional and ethical conduct of the members of the College. Article 43 of the Code of Conduct reads as follows:

> "Avoid impugning the reputation of all colleagues for personal motives; however, report to the appropriate authority any unprofessional conduct by colleagues".

Count #1 of the Amended Notice of Inquiry, which alleges both professional misconduct and a contravention of Article 43 of the Code of Conduct

against Dr. Mahdi, relates to allegedly false statements by Dr. Mahdi, on August 1, 2013 about acts allegedly committed by Dr. A, to three separate individuals or organizations, namely:

(i) another physician;

(ii) the RCMP; and

(iii) a staff member, employed by the Y Regional Health Authority, working at the X Clinic.

Count #2 of the Amended Notice of Inquiry, which also alleges both professional misconduct and a contravention of Article 43 of the Code of Conduct against Dr. Mahdi, relates to allegedly false statements made by Dr. Mahdi about Dr. A to the College, in a letter written by Dr. Mahdi to the College on January 6, 2014, and to the Investigation Chair of the College in an interview of Dr. Mahdi conducted on April 15, 2014.

All of the false statements allegedly made by Dr. Mahdi relate to an incident which Dr. Mahdi says occurred at the X Clinic (the "Clinic") on the 3rd Floor of the X General Hospital (the Hospital) on the morning of August 1, 2013. Among other things, Dr. Mahdi asserts that on that day he was assaulted by Dr. A, and that Dr. A threatened his life. Dr. A denies the assault and says that he did not see Dr. Mahdi and had no communications or interactions with him whatsoever on the morning of August 1, 2013.

The hearing commenced before the Panel on May 25, 2016 in the presence of Dr. Mahdi and his counsel, and in the presence of counsel for the Investigation Committee of the College. Dr. Mahdi entered a plea of not guilty to all of the allegations and both of the counts set forth in the Amended Notice of Inquiry.

Counsel for the Investigation Committee moved for an order under subsection 56(3)(b) of the Act for the non-disclosure of the names of any patients or other third parties referred to in the evidence during the proceedings. Counsel for

Dr. Mahdi did not object to such an order as it related to any patients who might testify or be referred to in the proceedings. However, counsel for Dr. Mahdi expressed reservations about such an order applying to the other witnesses, namely certain physicians, nurses, and other individuals working in the Clinic on August 1, 2013. According to counsel for Dr. Mahdi, those individuals would be testifying about matters which occurred in a public setting in the course of their duties in the health care system, and their testimony would not warrant the protection contemplated by subsection 56(3)(b) of the Act.

Section 56 of the Act stipulates that subject to certain exceptions, a hearing of a Panel shall be open to the public. Subsection 56(2) of the Act permits a member, or the College to request that a hearing or any part of it be held in private. Subsection 56(3)(b) of the Act states:

> "56(3) When a request is made under subsection (2), the panel may make an order excluding the public from the hearing or any part of it or directing that the member, the complainant, or any witness be identified only by initials, if the panel is satisfied that:
>
> (a) . . .;
>
> (b) financial or personal or other matters may be disclosed at the hearing that are of a such a nature that the desirability of avoiding public disclosure of those matters in the interest of any person affected or the public interest outweighs the desirability of adhering to the principle that meetings be open to the public;
>
> . . ."

The Panel granted an order for the non-disclosure of the names of any patients called to testify or any patients referred to in the proceedings, but declined to grant such an order with respect to the names of any other witnesses or individuals who may be referred to during the course of the proceedings. The Panel was not satisfied that the limited encroachment on the privacy of any non-patient witnesses or individuals who may be referred to during the proceedings, by having their names referred to in the

record of these proceedings, outweighs the desirability of adhering to the principle that hearings of Inquiry Panels should be open to the public.

EVIDENCE

The Witnesses and Exhibits

The evidence in these proceedings consisted of the testimony of seven witnesses called by the Investigation Committee, the testimony of Dr. Mahdi on his own behalf, and 23 exhibits. One of the exhibits (Ex 18) was a DVD of an interview conducted by the RCMP of Dr. Mahdi on August 1, 2013. The DVD was played before the Panel in its entirety, in the presence of the parties and their counsel during the hearing. Exhibits 21 and 22 were affidavits sworn by Mr. B on May 21 and May 24, 2016. Mr. B is a member of the RCMP who was stationed in the X detachment of the RCMP on August 1, 2013. Attached as Exhibit A to the Affidavit of May 21, 2016 was a heavily redacted copy of a General Report prepared by Officer B relating to his investigations, conducted on August 1, 2013 of the complaint of Dr. Mahdi against Dr. A relating to an alleged assault on August 1, 2013. In his Affidavit of May 24, Officer B explained, among other things, that the General Report did not consist of his field notes relating to the alleged occurrence, but rather was a summary of the information provided by the persons he had interviewed.

The witnesses called by the Investigation Committee, in the order in which they were called were:

(i) Ms C - on August 1, 2013, Ms C was the Executive Director of Clinical Services, X and area, for the Y Regional Health Authority.

(ii) Ms D - on August 1, 2013, Ms D was a Receptionist at the Clinic.

(iii) Mr. E (patient “E”) - E was a patient who at various times was seen and attended to by Dr. Mahdi and by Dr. A. On the morning of August 1, 2013, he saw Dr. A pursuant to an appointment which he had made to see him.

(iv) Dr. F - On August 1, 2013, Dr. F was the Medical Director of the primary clinics for the Y Regional Health Authority. Dr. F had also been active, since approximately 2006, sitting on various committees dealing with the provision of Electronic Medical Records (EMR) systems. In 2006, Dr. F had sat on a provincial committee which ultimately selected four approved vendors as suppliers in the province of such EMR Systems. Subsequently, Dr. F sat on a committee set up by the Winnipeg Regional Health Authority ("WRHA") to select an approved vendor to provide an EMR System to the WRHA. Thereafter Dr. F was also involved on behalf of the V Health Authority and the W Health Region (which amalgamated to form the Y Regional Health Authority) in relation to the selection of EMR systems for those entities.

(v) Dr. A - On August 1, 2013, Dr. A was a member of the College, licensed to practice medicine in the Province of Manitoba with hospital privileges in the Hospital, and who regularly worked at the Clinic as part of his family medicine practice. Dr. A also worked regularly in the Emergency Department in the Hospital.

(vi) Nurse G - Nurse G testified at the hearing by way of "Skype". She is a Licensed Practical Nurse and was working in that capacity at the Clinic on August 1, 2013.

(vii) Dr. H - On August 1, 2013, Dr. H, who has since retired, was the Chief of Staff of the Physicians at the Hospital.

Dr. Mahdi was called to testify on his own behalf at the hearing. On August 1, 2013, Dr. Mahdi was a member of the College, licensed to practice medicine in the Province of Manitoba, who worked at the Hospital. His medical practice consisted of a family medical practice in the Clinic, in-patient care in the Hospital, and work in the Emergency Department of the Hospital.

Contentious Evidentiary Issues

Throughout the course of the proceedings, various evidentiary issues arose, which were contentious and which required decisions by the Panel. Two of those issues were sufficiently important to warrant comment in these Reasons.

One issue related to the scope of the admissible evidence relating to certain background events involving Dr. Mahdi and Dr. A. Counsel for the Investigation Committee forcefully argued that given the specific allegations with respect to the allegedly false statements made by Dr. Mahdi about Dr. A, namely that Dr. A had attempted to choke or strangle him, that Dr. A had threatened him and Dr. A had pushed him to the floor, any evidence as to events which had happened one or more weeks previously, involving the two doctors, would be entirely irrelevant to the issues to be determined by the Panel and therefore ought not to be admitted into evidence.

This issue arose in the context of a question put to Dr. A by counsel for Dr. Mahdi in cross-examination. The question put to Dr. A was: “It was the case in July and August, 2013 that there was a dispute concerning the scheduling of shifts in the Emergency Department at X General Hospital, correct?” The question was objected to by counsel for the Investigation Committee on the above-noted grounds. Counsel for Dr. Mahdi was adamant that the question was permissible, and sought information that was not only relevant, but was fundamentally important to Dr. Mahdi’s ability to put forward a full answer and defence to the allegations against him.

Counsel for Dr. Mahdi explained that there was a dispute between Dr. Mahdi and Dr. A with respect to the scheduling of shifts in the Emergency Department at the Hospital, and that the dispute had resulted in two incidents in July, 2013, which were relevant to the issues in these proceedings. The first incident was a confrontation between the two men on July 17, 2013, in which Dr. A was belligerent and threatening towards Dr. Mahdi and had physical contact with him. That incident was witnessed by at least three other members of the medical staff at the Hospital. The second incident occurred on July 23, 2013; Dr. Mahdi asserts that on that day, he was threatened by Dr. A.

Counsel for Dr. Mahdi argued that those incidents were relevant, either directly or indirectly to the issues to be determined by the Panel, on several grounds. Counsel for Dr. Mahdi argued that:

(i) The existence of “charges”, and particularly criminal charges, and a threat with reference to those charges, is expressly referenced in the allegations set forth in the Amended Notice of Inquiry, and therefore background facts with respect to those “charges” is relevant to the proceedings;

(ii) Dr. Mahdi should be permitted to make full answer and defence to the allegations against him and that would include providing the Panel with evidence that he had been threatened and assaulted by Dr. A on prior occasions, shortly before August 1, 2013;

(iii) Dr. Mahdi should be entitled to challenge the credibility of Dr. A inasmuch as the determination of what did or did not happen on August 1, 2013, will be based in whole or in part on an assessment of the relative credibility of Dr. Mahdi and Dr. A;

(iv) If the Panel ultimately determines that Dr. Mahdi has not been truthful with respect to the events of August 1, 2013, the earlier events will be relevant to the issue of the sanction to be imposed on Dr. Mahdi.

After considering the arguments of counsel for the Investigation Committee and Dr. Mahdi, the Panel ruled the specific question relating to whether a disagreement existed between Dr. Mahdi and Dr. A in July and August, 2013 with respect to the scheduling of shifts in the Emergency Department at the Hospital would be allowed. By way of a more general direction, the Panel indicated that the primary basis for its ruling was to ensure that Dr. Mahdi would be given an opportunity to make full answer and defence to the allegations against him, and therefore the Panel was inclined to give Dr. Mahdi’s counsel some latitude to explore issues relating to the

relationship between Dr. Mahdi and Dr. A in July and August, 2013 and their interactions during that period. The Panel concluded that Dr. Mahdi should be entitled to introduce evidence to prove that Dr. A had assaulted and threatened him in late July, 2013, because such evidence could be relevant to an assessment of the probability of whether or not Dr. A also assaulted and threatened Dr. Mahdi on August 1, 2013.

As further evidence was introduced, it became apparent the difficulties and issues relating to the scheduling of shifts in the Emergency Department had existed prior to July, 2013. Counsel for Dr. Mahdi sought to introduce evidence through various witnesses, including Dr. H and Dr. Mahdi himself, with respect to those earlier matters. The Panel allowed such evidence to be introduced, to a limited extent, but with the general direction that having been made aware of prior difficulties relating to the scheduling of shifts in the Emergency Department, and the tensions which existed between Dr. Mahdi and Dr. A, the Panel did not think it necessary that they receive lengthy and detailed evidence about those prior difficulties. Instead the Panel encouraged counsel for the parties to concentrate on evidence relating to the events of late July, 2013 and August 1, 2013.

The second contentious evidentiary issue which warrants comment in these Reasons relates to the documents which were ultimately marked as Exhibits 7, 8, 9, 10 and 11. Those documents consisted of:

(i) various “log summaries” relating to Dr. A and Dr. Mahdi from August 1, 2013 (Exhibits 7 and 8);

(ii) a log summary relating to Nurse G from August 1, 2013 (Exhibit 9);

(iii) a specific chart entry relating to a specific patient (Patient C) (Exhibit 10); and,

(iv) a log summary from August 1, 2013 relating to Patient E (Exhibit 11).

All of those documents had been generated from the “Accuro” EMR system which, in August, 2013, had been recently installed and was operating in the Hospital. The Accuro system was being utilized by the physicians, including Dr. A and Dr. Mahdi, and other staff at the Hospital.

Counsel for the Investigation Committee initially attempted to introduce Exhibits 7 through 10, as business records at the outset of the testimony of Ms C (who is not the maker of the documents) pursuant to s.49 of *The Manitoba Evidence Act*. He had served counsel for Dr. Mahdi with a Notice of Intention to produce those documents pursuant to s.49(3) of *The Manitoba Evidence Act*.

Counsel for Dr. Mahdi did not consent to the documents being admitted as business records. After hearing submissions for the parties and upon being advised that another witness with some familiarity with the documents would be called to testify, the Panel directed that the documents would be marked as Exhibits “B” through “E” for identification and that a decision as to their ultimate admissibility would be deferred until that other witness had testified.

The other witness was Dr. F. The admissibility of those documents was then determined by a “voir dire” in which counsel for the Investigation Committee conducted a direct examination of Dr. F with respect to the proof of the documents, including questions relating to Dr. F’s involvement on the various committees dealing with EMR system and his familiarity with the Accuro EMR system. Counsel for Dr. Mahdi then conducted a cross-examination of Dr. F with respect to the proof of the documents, following which the Chairperson of the Panel asked several follow-up questions. At the conclusion of that process, and upon Dr. F confirming that he had the capability of printing identical log summaries, and in fact had previously printed log summaries which were identical to the summaries which had been marked for identification, and that he (Dr. F) was able to identify the chart entry with respect to Patient C, counsel for Dr. Mahdi stated that he did not object to the documents being entered as Exhibits. As a result, they were entered and marked accordingly, as Exhibits

7 through 10. Exhibit 11, a log summary relating to Patient E was entered and marked on the same basis at a later stage of Dr. F's testimony.

However, at the conclusion of the hearing, during his final submissions, counsel for Dr. Mahdi raised certain issues with respect to the accuracy and reliability of the log summaries, particularly the notations with respect to the "time" associated with each entry on the log summaries. Counsel for Dr. Mahdi asserted that:

(i) Dr. F was not called as an expert, he did not work in the information technology field, and hadn't designed or repaired the Accuro EMR system;

(ii) No expert evidence was introduced at the hearing, with respect to the accuracy of the entries, in a system involving multiple entries by multiple users using multiple computers;

(iii) Neither Dr. A nor Dr. Mahdi confirmed the log summaries introduced into evidence relating to August 1, 2013 were accurate summaries of their activities on that day, or that the time entries on the summaries were accurate;

(iv) The time entries on the log summaries had never been the subject of an audit confirming their accuracy;

(v) Evidence given by Dr. F with respect to an automatic "log out", after 15 minutes of inactivity on a particular chart or file, (except for simply moving the mouse on the screen) was arguably incorrect, based on an examination of the log summaries in the context of the oral evidence given by various witnesses.

As a result, counsel for Dr. Mahdi argued that the Panel required expert evidence or access to the individual medical charts of each of the patients involved, in order to properly interpret the log summaries. In the absence of such evidence, counsel for Dr. Mahdi submitted that the log summaries cannot be relied upon to establish the

activities of either Dr. Mahdi or Dr. A on August 1, 2013, or more importantly the time in which those activities may have taken place.

Counsel for the Investigation Committee dismissed the arguments relating to the unreliability or potential inaccuracy of the log summaries as being a "complete red herring". He referred to the provisions of *The Manitoba Evidence Act* with respect to electronic documents. Subsections 51.1, 51.2, 51.3 and 51.4 of *The Manitoba Evidence Act* state:

> "**Definitions**
> **51.1** In this section and sections 51.2 to 51.7,
>
> **"computer system"** means a device that, or a group of interconnected or related devices one or more of which,
>
> (a) contains computer programs or other data, and
>
> (b) pursuant to computer programs, performs logic and control, and may perform any other function;
>
> **"data"** means representations of information or of concepts, in any form;
>
> **"electronic document"** means data that
>
> (a) is recorded or stored on any medium in or by a computer system or other similar device, and
>
> (b) can be read or perceived by a person or by a computer system or other similar device,
>
> and includes a display, printout or other output of that data;
>
> **"electronic documents system"** includes a computer system or other similar device by or in which data is recorded or stored, and any procedures related to the recording or storage of electronic documents;
>
> **"electronic signature"** means an electronic signature as defined in section 1 of *The Electronic Commerce and Information Act*.

Authentication of electronic documents
51.2 Any person seeking to admit an electronic document as evidence has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic document is that which it is purported to be.

Application of best evidence rule to electronic documents
51.3(1) The best evidence rule in respect of an electronic document is satisfied

(a) on proof of the integrity of the electronic documents system by or in which the electronic document was recorded or stored; or

(b) if an evidentiary presumption established under section 51.5 applies.

Printouts
51.3(2) Despite subsection (1), in the absence of evidence to the contrary, an electronic document in the form of a printout satisfies the best evidence rule if the printout has been manifestly or consistently acted on, relied on or used as a record of the information recorded or stored in the printout.

Presumption of integrity
51.4 For the purposes of subsection 51.3(1), in the absence of evidence to the contrary, the integrity of an electronic documents system by or in which an electronic document is recorded or stored is proven

(a) by evidence capable of supporting a finding that at all material times the computer system or other similar device used by the electronic documents system was operating properly or, if it was not, the fact of its not operating properly did not affect the integrity of the electronic document and there are no other reasonable grounds to doubt the integrity of the electronic documents system;

(b) if it is established that the electronic document was recorded or stored by a party who is adverse in interest to the party seeking to introduce it; or

(c) if it is established that the electronic document was recorded or stored in the usual and ordinary course of business by a person who is not a party and

> who did not record or store it under the control of the party seeking to introduce it."

Counsel for the Investigation Committee argued that the above noted provisions apply to the log summaries and (Exhibits 7 through 11 inclusive) and that Dr. F's evidence was more than sufficient to prove that the EMR system was operating properly and to establish the integrity of the system and Exhibits 7 through 11 inclusive.

Furthermore, counsel for the Investigation Committee submitted that Dr. Mahdi did not introduce any reliable or compelling evidence to demonstrate that the EMR system was not working properly on August 1, 2013. In the absence of such evidence, whether expert or otherwise, the integrity of the system and the accuracy of the records produced by the system, are presumed.

Those competing arguments and their specific application to this case will be commented upon more fully in the Analysis section of these Reasons.

The Events of July, 2013

The events of July, 2013 with respect to which the Panel heard evidence, related primarily to two incidents, one of which occurred on July 17 and the other on July 23, 2013.

The witnesses who provided most of the evidence relating to the July 17 incident were Dr. Mahdi, Dr. A and Dr. H. Although there are some differences in the accounts of Dr. Mahdi and Dr. A as to what occurred on July 17, the Panel feels able to resolve most, if not all of those differences, on the basis of the evidence of Dr. H.

Dr. H was an impressive witness. He was disinterested in the outcome of these proceedings at least in comparison to both Dr. Mahdi and Dr. A. Moreover Dr. H had a good recollection of the events in questions and described them in a calm and articulate manner.

Dr. H testified that as part of his administrative responsibilities at the Hospital, he would chair meetings of the physicians working in the Emergency Department of the Hospital. Dr. H called such a meeting on July 17, 2013. The meeting proceeded, in the doctor's lounge in the Hospital; present at the meeting were Dr. H, Dr. Mahdi, Dr. A, Dr. J and Dr. K.

Dr. H's purpose in calling the meeting was to review a procedure which had been developed in 2012 with respect to the allocation of shifts among physicians working in the Emergency Department of the Hospital. Dr. H recalled that the process was not operating as intended, because the Hospital was not being covered adequately. He explained that one or more of the physicians would leave the Hospital or the community prematurely, leaving only one physician to fulfill significant duties and responsibilities with respect to a large number of patients.

At the outset of the July 17 meeting, Dr. A asked Dr. H who had called the meeting. Dr. H replied that he had called the meeting. Dr. H testified that before the meeting progressed further, Dr. A started verbally abusing Dr. Mahdi, saying that he was incompetent and had been sent away to Winnipeg for extra training, and otherwise denigrating his abilities. Notwithstanding Dr. H's efforts to calm Dr. A down, he "verbalized for a considerable period of time". Dr. H ultimately asked Dr. Mahdi if he wanted to reply, and Dr. Mahdi began to respond.

However in the course of Dr. Mahdi's reply, Dr. A, who was standing, wagged his finger at Dr. Mahdi and walked towards him saying things such as "I am going to beat you. I am going to throw you down. I am going to send you to hell".

According to Dr. H, there was physical contact between Dr. A and Dr. Mahdi. Specifically he recalled that Dr. A's finger contacted Dr. Mahdi (who was still sitting) in the face. Dr. H also testified that Dr. A punched Dr. Mahdi in the chest. Dr. J intervened to separate Dr. A and Dr. Mahdi, and Dr. A left the meeting, still vocalizing. Dr. H described Dr. A as being "out of control".

Dr. Mahdi's account of the same events were substantially similar to that of Dr. H. Dr. Mahdi provided more detail of the abusive language which Dr. A directed at him, testified that Dr. A had jabbed his index finger into his face more than once, and that Dr. A had punched him hard with his two fists, striking his chest twice during this incident. Dr. Mahdi also recalled that Dr. A elbowed Dr. J in the chest as Dr. J had tried to pull Dr. A away from him (Dr. Mahdi).

Dr. Mahdi described Dr. A as being "very very angry". After being struck in the chest a second time, Dr. Mahdi testified that he told Dr. A that he (Dr. Mahdi) would be reporting him (Dr. A) to the RCMP. Dr. Mahdi in fact went to the RCMP the next day (July 18) and reported the events of July 17. He explained at the hearing that he had done so because he had been abused verbally and physically and that his life had been threatened by Dr. A.

When Dr. A testified, he was asked various questions in cross-examination about his position relating to shifts in the Emergency Department and his interactions with Dr. Mahdi with respect to that issue.

In cross-examination, Dr. A acknowledged that:

(i) There was a dispute between himself and Dr. Mahdi in July, 2013 with respect to scheduling the coverage in the Emergency Department at the Hospital;

(ii) Working in the Emergency Department was lucrative;

(iii) Shifts in the Emergency Department were 24 hour shifts and he was typically scheduled to work five or more such shifts in a month. The earnings he received from working in the Emergency Department were a significant portion of his overall earnings;

(iv) In July, 2013 there were up to six physicians working in the Emergency Department, including himself and Dr. Mahdi;

(v) The majority of the physicians had earlier agreed that Dr. Mahdi would be responsible for scheduling Emergency Department coverage;

(vi) By July, 2013, he (Dr. A) was unhappy about the way emergency shifts were being scheduled and that he felt Dr. Mahdi was taking too many shifts for himself;

(vii) By early July, 2013, he (Dr. A) had become aware that he had been excluded from the Emergency Department scheduling rota for the month of August, and he was not happy about being excluded.

With respect to the events of July 17, 2013, Dr. A testified that he may have touched Dr. Mahdi with his finger. He acknowledged that he said the words "I will beat you" to Dr. Mahdi. He also conceded that his behaviour on July 17, 2013 was inappropriate, that he lost control of his emotions and he regretted doing so. Dr. A indicated he might have touched Dr. Mahdi's chest but denied punching him. Dr. A recalled Dr. Mahdi saying he was going to report him to the RCMP, but when Dr. Mahdi made that statement, Dr. A didn't think it would "go into that level".

To the extent that Dr. A's evidence as to the actual events in the doctors' lounge on July 17, 2013 differs from the evidence of Dr. H, the Panel prefers and accepts the evidence of Dr. H, recognizing that in most respects, Dr. H's evidence corroborates and supports Dr. Mahdi's account of those events. As noted above, Dr. H was a relatively disinterested witness. He was also responsible for calling and chairing the meeting of July 17, 2013 and would undoubtedly have a vivid recollection of the dramatic events which occurred during that meeting. In contrast, Dr. A has acknowledged he was highly emotional during that meeting. Therefore the Panel recognizes that his recollection of the details of the events of that day is likely to be unreliable in some respects.

Sometime in the second or third week of July, 2013, Dr. A also altered the master scheduling rota for the positions at the Hospital for August, with specific reference to the Emergency Department shifts. He did so by inserting his name to work particular shifts, which had not actually been assigned to him. That issue was brought to the attention of Dr. H, in his capacity as Chief of Staff, who wrote a letter to Dr. A dated July 24, 2013, criticising him for doing so, reminding him that Dr. Mahdi had been elected to do the Emergency Department scheduling, and cautioning Dr. A against ever unilaterally altering the schedule again.

According to Dr. Mahdi, another interaction occurred between him and Dr. A on July 23, 2013. He testified that he was working in the Clinic and Dr. A entered the room in which he was working and demanded to know how he (Dr. Mahdi) had dared to contact the RCMP, and stated: “Do you think they are going to help you?” He also allegedly made a threatening remark, namely: “I will hunt you down wherever you go”.

Dr. Mahdi testified that he ended this incident by telling Dr. A that he didn’t want to communicate with him further and by leaving the room and going to the Nursing Station. Shortly thereafter he telephoned the RCMP to report this incident and subsequently went to see the RCMP.

In his testimony, Dr. A denied the events of July 23, as described by Dr. Mahdi, ever occurred.

Dr. A was away from X for several days from on or about July 24, 2013 to July 29 or 30, 2013. On July 30, 2013, Dr. A was charged with two offences under the Criminal Code of Canada, namely with an assault on Dr. Mahdi on July 17, 2013, and with uttering threats to cause death or bodily harm to Dr. Mahdi on July 23, 2013. Dr. A was served with those charges and detained in custody for several hours on July 30, 2013.

The Events of August 1, 2013

By the morning of August 1, 2013, both Dr. A and Dr. Mahdi had been advised that Dr. I, the Vice-President of the Y Regional Health Authority was coming to X that afternoon to address the circumstances which had caused the problems between Dr. A and Dr. Mahdi, and which had manifested themselves so dramatically in late July, 2013.

The issue of what happened or did not happen at the Clinic between Dr. Mahdi and Dr. A on August 1, 2013 is very contentious.

Dr. Mahdi asserts that sometime after 9:20 a.m. on August 1, 2013, he was assaulted by Dr. A in Room 305 of the Clinic. Dr. Mahdi specifically says that he was working on a computer in Room 305, seated on a chair with his legs underneath the keyboard tray, which slides out from under the table, with his attention focussed on the computer screen, when he was surprised by someone coming from behind him who choked him with two hands wrapped around his neck. Dr. Mahdi alleges that one of the hands was at the front of his neck and the other was at the back of his neck, and his alleged assailant was squeezing forcefully so that Dr. Mahdi couldn't breathe. The man that was choking him said "Drop the charges or you will lose your life". Dr. Mahdi recognized the voice as being Dr. A because "he has a very distinctive accent".

According to Dr. Mahdi, he immediately tried to push the hands away from his neck while Dr. A was forcing him backwards and uttering the above noted threat. The whole incident happened very quickly but at some point, Dr. Mahdi glanced over his left shoulder and saw Dr. A's face about one and a half feet from his own face. Dr. Mahdi was then pushed forcefully out of his chair, which overturned, and he struck his head on the floor and was dazed, with no clear memory of anything until a nurse came into the room sometime later.

Dr. A adamantly denies that he assaulted or threatened Dr. Mahdi on August 1, 2013. In fact, he denies that he even saw Dr. Mahdi that morning.

Dr. A specifically says that he was at the Clinic on August 1, 2013, was seeing his third patient that morning (Patient E) commencing at approximately 9:22 a.m., and that he was with that Patient continuously in examination room 312 until the patient departed. Immediately thereafter he met with Ms C in the same room from approximately 9:44 a.m. until after 10:00 a.m.

In order to assess the relative veracity and reliability of these starkly divergent accounts of the events of August 1, 2013, it is useful to briefly comment on the testimony of the other witnesses who were present in the Clinic that day.

Ms C, whose office is on the second floor of the Hospital walked up a set of stairs to the Clinic on the third floor because she wanted to meet with Dr. A that morning. She estimated that she went to the third floor between 9:25 a.m. and 9:30 a.m. She walked towards the two rooms that she knew Dr. A used to see patients (Rooms 306 and 312). The door to one of the rooms was closed, and so Ms C assumed Dr. A was seeing a patient. Accordingly she went to Room 313, the Nurses' Room, where she spoke to Nurse G, advising her that she wished to see Dr. A. Nurse G advised Ms C that Dr. A was with a patient, but suggested she should wait, because she (Nurse G) thought Dr. A would be finished with that patient in a few minutes.

Accordingly, Ms C waited in the Nurses' Room and chatted with Nurse G. She waited there, for what she estimated to be between 10 and 20 minutes. A patient came in to see Nurse G who performed an ear flush on the patient. During that procedure, Dr. A telephoned Nurse G advising her that he was having some difficulty with his computer, or the printer, and asking for assistance.

Nurse G was unable to assist because she had not finished with the ear flush procedure. Therefore Ms C went to the reception area to determine if there was anyone there who could be of assistance. According to Ms C, she spoke to one of the receptionists, Ms D, who was computer literate, and they both went to Room 312 to assist Dr. A. Ms C saw that Dr. A was in Room 312 with a male patient. Ms D offered to assist Dr. A, and Ms C left and went back to the Nurses' Room to wait for an opportunity to see Dr. A.

A few minutes later, Ms C saw the male patient leave Room 312. She then went directly to Room 312 and asked Dr. A if he had a couple of minutes to speak to her. Dr. A said that he did, and she went into Room 312, closed the door and sat down to talk to him. She estimated she went into Room 312 at approximately 10:00 a.m. and finished her discussions with Dr. A and left Room 312 at approximately 10:20 a.m.

In Ms C's direct examination, she stated that she walked past Room 305, one of the rooms which Dr. Mahdi typically used to examine patients, on at least two occasions between 9:25 a.m. and 10:00 a.m. on August 1. On both occasions, she testified that she observed Dr. Mahdi sitting at the desk working on his computer. She indicated that she was able to see his back and left arm and shoulder. In cross-examination, Ms C was challenged as to whether she had actually seen Dr. Mahdi in Room 305 on either occasion. Ms C's evidence as to the extent to which the door to Room 305 was open (i.e. whether the door was about half open as she recalled) was inconsistent with the evidence of Ms D (who described the door as being only open "a crack" i.e. 3 to 4 inches). Ms D testified that she had not been able to see into Room 305 when she walked past that room and therefore was unable to state whether Dr. Mahdi was in that room at that time. As a result, the Panel is <u>not</u> satisfied that Ms C saw Dr. Mahdi in Room 305 on either of the occasions she referred to, and the Panel has placed no reliance on Ms C's evidence in that regard, in making its factual findings in this case.

Ms D also testified as to her activities on the morning of August 1, 2013. Her evidence also differed from that of Ms C in some other respects. She recalled

receiving the telephone call from Dr. A seeking assistance with his computer directly from him. She stated that she went to assist Dr. A in Room 312, but she was not with Ms C and did not recall speaking to Ms C at all that morning. However, her evidence was similar to that of Ms C in that she (Ms D) stated that when she arrived at Room 312, Dr. A was present there with a male patient, and that she assisted Dr. A for a minute or two with a problem he was having with the computer, before returning to the reception area.

Patient E testified in his direct examination that he had an appointment to see Dr. A on the morning of August 1 for the purpose of having a prescription renewed. He waited in the reception area for 5 to 10 minutes and he was then escorted by a nurse to an examination room which was empty when he arrived. Patient E went into the examination room and waited for Dr. A, who arrived in "a couple of minutes".

Patient E indicated that his sole purpose in making the appointment was to get his prescription renewed, and that he recalled when Dr. A "went to prescribe the medication, the computer system would not allow him to prescribe the medication, he did require some assistance from a nurse for that". Patient E also recalled that "the computer was saying that he was trying to prescribe the same medication twice. But the difference was, one was a cream, one was a gel". People came to the door of the examination room to offer assistance, but according to Patient E, the problem persisted, and as a result Dr. A was required to write out a prescription on paper and to call the pharmacy to make sure there was not going to be an issue "because they were supposed to be using this new computer system".

In Patient E's direct examination, he stated that he had no recollection of Dr. A leaving the examination room at any time during his appointment and that he had no recollection of being left alone during the appointment. He testified that Dr. A's demeanor was professional throughout the appointment and that the time period from when Dr. A first entered the examination room until the appointment was concluded was between 15 and 30 minutes.

In Patient E's cross-examination, he indicated that it was possible he may have waited up to 20-25 minutes in the reception area before being taken into the examination room. He also stated that while he was waiting for Dr. A in the examination room, he heard a scraping sound which he described as follows:

> "Somebody moving a ladder, somebody standing with a chair, and the chair slides behind them on the floor, it is the easiest way I could explain the sound".

In cross-examination, it was suggested to Patient E that it was possible that Dr. A may have left the examination room for 1 to 2 minutes. Patient E repeated that he did not recall being left alone at any time after the examination started and stated:

> "A: 1 to 2 minutes would be stretching it as far as you could really stretch it without starting to call it a tall tale. Like it would have been less than a minute tops.
>
> Q: So 30 seconds to a minute it sounds like?
>
> A: Absolute tops. Yes."

Nurse G and Dr. H were witnesses who were able to comment on the events which occurred on August 1, shortly following the alleged assault.

In the initial portion of her testimony, Nurse G explained that after a patient checks in at reception, a nurse enters their name in the computer and notes on the computer, the examination room in which they will be placed. A nurse then escorts the patient to the assigned examination room.

On August 1, 2013, following Nurse G's completion of the ear flush procedure, she was aware that Dr. Mahdi had a patient waiting for him in Room 303. She was aware that Dr. Mahdi had finished with his prior patient, whom he had seen in Room 305, and accordingly she went to Room 305 to make sure that Dr. Mahdi knew that there was a patient waiting for him in Room 303.

The door to Room 305 was open, but not completely open. She walked into the room and saw Dr. Mahdi lying on the floor on his back with his eyes closed. A chair was tipped over between Dr. Mahdi and a desk.

Nurse G asked Dr. Mahdi if he was okay and inquired as to what happened. He opened his eyes and put his hands to his throat and said “he was choking me”. Nurse G asked who was choking him and Dr. Mahdi pointed across the hall to one of the rooms typically used by Dr. A and said: “He was”.

Nurse G then asked Dr. Mahdi if he was okay and whether he had hit his head, and Dr. Mahdi said he wanted to get up because he felt that he was going to be sick. Nurse G recalled that Dr. Mahdi went to the sink and that he was dry heaving at the sink. She encouraged him to lie down or to sit on the examination table.

Nurse G indicated that she thought they needed help. Dr. Mahdi wanted the RCMP to be contacted. According to Nurse G, he offered her his cell phone, but she instead used the phone on the desk in the examination room. Dr. Mahdi gave her the name of the person to ask for at the RCMP, but that person was not available. Nurse G advised the RCMP that Dr. Mahdi had indicated that he had been attacked and that they should send someone to the Clinic. After the call to the RCMP, Nurse G checked Dr. Mahdi’s pupils while he was on the examination table. They appeared fine to her. She wanted to have Dr. Mahdi examined by a doctor. Dr. Mahdi indicated that he wanted Dr. H to conduct the examination. By that time another receptionist was in the examination room and Nurse G recalled that the receptionist went to get Dr. H.

On August 1, 2013, Dr. H was working in the Emergency Department at the Hospital. He was notified that Dr. Mahdi had been injured and that his (Dr. H’s) attendance was required in the Clinic. Dr. H went to the Clinic immediately and had a brief conversation with Nurse G, who advised him that she had found Dr. Mahdi on the floor and that he needed attention. Nurse G then took Dr. H to Room 305.

Dr. H asked Dr. Mahdi what had happened. Dr. Mahdi told him that while he was putting an entry into the computer, with his back to the door, Dr. A had choked him and pulled him to the ground.

In this conversation between Dr. Mahdi and Dr. H, Dr. Mahdi was sitting on the examination table. Dr. H testified that he "seemed to be very agitated and distressed". Dr. H conducted an examination of Dr. Mahdi and asked him what his complaints were; Dr. Mahdi responded that he had a painful neck and he had a pain in the back of his head. Dr. H testified that there were two findings arising from his examination of Dr. Mahdi:

(i) Dr. Mahdi had a hyperemic area around his neck, i.e. redness;

(ii) There was a diffuse swelling on the left side of Dr. Mahdi's occiput, about 2 inches by 2 inches, tender to palpation.

In Dr. H's cross-examination, he described the redness on the neck as being approximately 3 inches wide, on the front and sides of his neck. He also testified that the two findings he made on his examination of Dr. Mahdi were consistent with what Dr. Mahdi had told him had occurred. Although Dr. H concluded that Dr. Mahdi did not require medical care, he did suggest that Dr. Mahdi get some rest.

In Dr. H's cross-examination, he also stated that later that day (August 1, 2013) he received a telephone call from Dr. Mahdi, who told Dr. H that he had been in contact with the RCMP, who had suggested that a further examination be conducted and that a report be prepared. Although Dr. H initially suggested that Dr. Mahdi should come to the Emergency Department for the second examination, Dr. Mahdi preferred to have the examination conducted in the Clinic for privacy reasons. Accordingly, Dr. H went to the Clinic and performed a second examination. His findings were similar to those from his earlier examination of Dr. Mahdi. He still had a persistent redness of his neck, front and sides, and the swelling on the back of his head had "pretty well subsided", but the area was still tender.

Dr. H prepared a written report of his findings on both examinations. The typewritten report dated August 7, 2013 (being a version of his handwritten report made on August 2, 2013) was marked as Exhibit 13 in the proceedings. Dr. H's report was consistent with his oral testimony.

The findings Dr. H made on the second examination were also consistent with what Dr. Mahdi had told him had occurred. Dr. H estimated that the first examination of Dr. Mahdi had been conducted shortly after 10:00 a.m., and the second examination had been conducted shortly after 1:30 p.m., on the same day, namely August 1, 2013.

Dr. H was asked some further questions on re-examination by counsel for the Investigation Committee. Dr. H acknowledged in his re-examination that the swelling on the back of Dr. Mahdi's head was consistent with a fall, and there was no evidence available to connect Dr. A to a fall. Dr. H also acknowledged that with respect to the red marks around Dr. Mahdi's neck, those marks could have been created in other ways, and that those marks could have been self-inflicted.

In addition to the testimony of the witnesses who were at the Clinic on the morning of August 1, 2013 and who testified as to their activities and observations on August 1, 2013, the log summaries contain information which is potentially important to the determination of the issues in these proceedings.

The log summary relating to Dr. A (Exhibit 7) indicates activities on the part of Dr. A relating to Patient E between 9:22:48 and 9:44:28. The log summary relating exclusively to Patient E for August 1, 2013 (Exhibit 11) is consistent with Exhibit 7. Exhibit 11, which is unredacted, provides greater detail than Exhibit 7 with respect to the specific activities of Dr. A relating to Patient E.

The log summary relating to Dr. Mahdi indicates activities on the part of Dr. Mahdi relating to Patient C from 9:21:13 to 9:24:55.

There are "gaps" or "intervals" in Dr. A's log summary which are noteworthy. For example, there is an interval of approximately 3 minutes between his

last activity relating to Patient W at 9:19:59 and his first activity relating to Patient E at 9:22:48. There is another interval of more than 5 minutes within the entries relating to Patient E between 9:23:17 and 9:28:23. There is also an interval of almost 4 minutes between two other entries relating to Patient E (namely between 9:38:48 and 9:37:28). The potential significance of those intervals will be discussed in greater detail in the Analysis section of these Reasons.

Following Nurse G's call to the RCMP, a member or members of the RCMP promptly attended at the Clinic. As part of their investigation, they interviewed Dr. Mahdi at the RCMP detachment offices on August 1, 2013, and made a DVD of that interview. As previously noted, the DVD was reviewed by the Panel during the hearing. The statements made by Dr. Mahdi during that interview, to the effect that Dr. A choked him, threatened his life and pushed him to the ground (which statements the College asserts were false), form the subject of Count 1(b) of the Amended Notice of Inquiry.

The letter from Dr. Mahdi to the College dated January 6, 2014, was filed as Exhibit 19 in these proceedings. The College alleges that letter contained false statements by Dr. Mahdi relating to Dr. A choking him, threatening his life and throwing him from his chair to the ground. Those are the statements referenced in Count 2(a) in the Amended Notice of Inquiry.

The transcript of the interview of Dr. Mahdi conducted on April 15, 2014 by Dr. A. MacDiarmid, the Investigation Chair of the College (in which Dr. Mahdi allegedly made false statements about Dr. A choking him, threatening his life and pushing him to the floor), was filed as Exhibit 20 in these proceedings. Those are the statements referenced in Count 2(b) of the Amended Notice of Inquiry.

ANALYSIS

The Standard of Proof

In *F.H. v. McDougall [2008] 3 S.C.R. 41*, the Supreme Court of Canada made it clear that there is only one standard of proof in civil proceedings, namely proof on the balance of probabilities. Justice Rothstein, writing for the Court stated:

> "In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred."

The College bears the onus of proof in this case. It is therefore necessary for the College to prove, on the balance of probabilities, that Dr. A did not assault or threaten Dr. Mahdi on August 1, 2013. In other words, the College must establish on the basis of convincing evidence that it is more probable than not, that Dr. A did not assault or threaten Dr. Mahdi on August 1, 2013. If the College discharges that burden, it thereby establishes that the various statements made by Dr. Mahdi on August 1, 2013, as particularized in Count 1 of the Amended Notice of Inquiry, and the various statements subsequently made by Dr. Mahdi to the College as particularized in Count 2 of the Amended Notice of Inquiry, were false.

Assessing the Evidence

Dr. Mahdi asserts that he was assaulted and threatened by Dr. A on August 1, 2013. Dr. A denies that he assaulted or threatened Dr. Mahdi on that day. The Panel is accordingly required to undertake an assessment of the credibility of the two doctors. There are many judicial dicta which provide guidance to "fact finders" who are required to undertake credibility assessments. One of the most frequently quoted is found in *Farnya v. Chorny [1952] 2 D.L.R. 354 (B.C.C.A.)* in which it was stated:

> "If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors combine to produce what is called credibility, …. A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding

> circumstances in the case may point decisively to the conclusion that he is actually telling the truth. …
>
> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those circumstances. …"

A series of useful judicial directions were outlined by the Supreme Court of British Columbia in *Bradshaw v. Stenner [2010] B.C.S.C. 1398* wherein the Court said:

> "Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (Raymond v. Bosanquet (Township) (1919) 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanor of a witness generally… Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time…
>
> Most helpful in this case has been the documents created at the time of events, particularly the statements of adjustments. These provide the most accurate reflection of what occurred, rather than memories that have aged with the passage of time, hardened through this litigation, or been reconstructed…"

As noted elsewhere in these Reasons, Dr. Mahdi and Dr. A both testified as to the events of the morning of August 1, 2013 and provided starkly different, entirely incompatible versions of those events. It is not possible that both of their versions of the events can be correct. It is not possible that their differing versions can be reconciled on the basis that both of them may have testified with a sincere belief in the truth of their testimony but from differing personal perspectives. In short this is a case in which one of them is lying about what occurred on August 1, 2013.

Neither Dr. Mahdi nor Dr. A can be regarded as disinterested in the outcome of these proceedings. Dr. Mahdi will be directly affected by the outcome, whatever it may be. If he is found guilty, he will likely be subject to discipline and/or penalties and his reputation will likely be diminished. Dr. A's reputation may also be affected by the Panel's ultimate decision.

It is difficult to ascertain a logical motive for Dr. Mahdi fabricating an untrue story about being choked and threatened by Dr. A on August 1, 2013.

Dr. A was already facing criminal charges as a result of his actions towards Dr. Mahdi in July, and it would therefore have been reckless in the extreme for him to assault and threaten Dr. Mahdi August 1, 2013. Dr. H, the Chief of Staff at the Hospital had personally witnessed the events of July 17 and was undoubtedly sympathetic to Dr. Mahdi's position in relation to those events. Dr. H had also admonished Dr. A in writing for his alteration of the scheduling rota. Furthermore, Dr. I, the Vice-President of the Health Authority was attending in X on the afternoon of August 1, 2013, presumably to investigate the causes and to develop solutions to the serious problems between Dr. Mahdi and Dr. A which had manifested themselves in July. In short, both the criminal justice system and the administrative processes of the Health Authority had been engaged to address the problematic issues. In short there was no reason for Dr. Mahdi to falsely accuse Dr. A of assaulting him on August 1, 2013.

However, it is similarly difficult to ascertain a logical motive for Dr. A to choke and threaten Dr. Mahdi on August 1, 2013. Given the fact that he was facing

criminal charges relating to his behaviour in July, he would have significantly compounded the problems he was already facing by assaulting and threatening Dr. Mahdi again. Moreover, to commit an assault on the morning of the day Dr. I was expected to arrive in X would have been both foolhardy and idiotic.

Therefore, the Panel will not attempt to ascribe a motive to either Dr. Mahdi or Dr. A as part of its process of determining what occurred or did not occur at the Clinic on the morning of August 1, 2013.

A comparative credibility assessment of Dr. Mahdi and Dr. A is also challenging because there are aspects of the evidence of both of them, which are troubling, and which detract from the reliability of their testimony.

In the case of Dr. A, his description of the events of July 17, 2013 tended to minimize the level of disrespect and belligerence he had demonstrated towards Dr. Mahdi on that day. The Panel has already concluded that Dr. H's and Dr. Mahdi's evidence with respect to the events of July 17 is to be preferred over the evidence of Dr. A.

Dr. A did acknowledge he lost control of his emotions on July 17, 2013 and that his behaviour on that day was inappropriate. The picture of Dr. A which emerges, based on the evidence relating to the July 17 incident, is of a man who, in the summer of 2013 was impulsive, experiencing serious anger control issues and was seriously frustrated and displeased with Dr. Mahdi with respect to the scheduling of shifts in the Emergency Department.

Finally, Dr. A's evidence was suspect when he denied that he had submitted his availability in writing to Dr. Mahdi for the month of July with respect to shifts in the Emergency Department, even after being confronted with Exhibit 14, a document which suggested he had in fact submitted his availability to Dr. Mahdi. Dr. A had a motive for denying he had done so, because he had testified that he had a separate arrangement with Dr. Mahdi, (which Dr. Mahdi denied) whereby he (Dr. A)

wouldn't be required to submit information as to his availability, except if he was going to be away from the community for a period of time.

In the case of Dr. Mahdi, his testimony was unsatisfactory in relation to at least two important portions of his evidence.

Firstly, his description of the assault itself was unsatisfactory in at least one respect. His testimony relating to the manner in which he had allegedly sustained injuries to his head, by being pushed or pulled out of his chair, was unclear and unconvincing, particularly since the injuries apparently caused him to be seriously dazed or semi-conscious for close to thirty minutes.

Secondly, Dr. Mahdi's evidence in cross-examination with respect to whether or not he had finished his charting with respect to Patient C, at the time the alleged assault occurred, and his evidence relating to what he had told the RCMP about when the assault had occurred was imprecise and evasive.

This evidence is potentially important because it relates to when the assault may have occurred and what Dr. Mahdi was doing when the assault occurred. Some of Dr. Mahdi's testimony in his direct examination during the hearing, and the information which he gave to the RCMP during their investigation (in his interview as shown on the DVD, Exhibit 18, conducted on August 1, 2013 at 12:25:11), indicated that the assault had occurred while he was "charting" his attendances relating to Patient C. However, Dr. F testified that a physician using the system must take a physical step in order to save a document. The information contained in Dr. Mahdi's log summary for the morning of August 1, 2013 (Exhibit 8) noted the time of the final completed entry as being 9:24:55, and the activity as "viewed medical summary". It is therefore very likely (as was ultimately acknowledged by Dr. Mahdi), that he had done everything with respect to Patient C's visit, including all of the charting, prior to the alleged assault occurring.

In the face of the conflicting and inconclusive evidence from Dr. Mahdi and Dr. A, the Investigation Committee of the College asserts that a combination of the

evidence from a significant number of other witnesses and the information derived from the EMR system, account for Dr. A's activities at all material times on the morning of August 1, 2013. According to the College, the cumulative effect of all of that evidence establishes that Dr. A could not have choked or strangled or otherwise assaulted or threatened Dr. Mahdi on August 1, 2013.

Accordingly, it is necessary to carefully consider the evidence of the witnesses other than Dr. Mahdi and Dr. A as to the events of August 1, 2013, and to assess that evidence in relation to the information derived from EMR system.

In certain important respects, the evidence of Dr. H with respect to his attendances on Dr. Mahdi on August 1, 2013 are supportive of Dr. Mahdi's version of events. The findings of Dr. H following his two examinations of Dr. Mahdi on August 1, 2013 were consistent with what Dr. Mahdi had told him, namely that he had been choked and pushed or pulled from his chair and had hit his head in the process.

The hyperemic area around Dr. Mahdi's neck and the swelling on the left side of his occiput were consistent with a choking and an assault. Nonetheless the corroborative impact of that evidence is reduced by Dr. H's acknowledgement that:

(i) The redness on the neck could have been caused by other means, including being self-inflicted;

(ii) Dr. H was not aware of any evidence other than Dr. Mahdi's accusations, linking Dr. A to an assault that day;

(iii) The swelling on the back of his head was also consistent with a fall;

(iv) The swelling on the back of his head had substantially subsided by the time of his second examination and Dr. Mahdi did not require any medical intervention, other than rest.

It is also noteworthy that Dr. H did not report observing anything on either of his two examinations of Dr. Mahdi, or in any of Dr. Mahdi's behaviours on August 1, suggesting that Dr. Mahdi had suffered a concussion.

Similarly, Nurse G's evidence with respect to discovering Dr. Mahdi in Room 305, after she had finished the ear flush procedure and the charting of that procedure, does not conclusively establish that an assault occurred or that Dr. A had committed any assault.

Conversely, there is substantial evidence from other witnesses indicating that Dr. A did not assault Dr. Mahdi at the Clinic on August 1, 2013.

Specifically, there is evidence from other witnesses that substantially accounts for Dr. A's activities from the time he commenced attending upon Patient E, sometime prior to 9:30 a.m. on August 1, 2013, until after 10:00 a.m., when he finished his meeting with Ms C.

Patient E did not testify as to the time at which Dr. A came into the examination room to deal with the renewal of the prescription. However, even on the basis of Patient E's evidence, considered in isolation, it is clear that Dr. A spent more than a few minutes with him. Dr. A performed a brief physical examination of Patient E (who pulled his pant leg up so Dr. A could examine his leg). Dr. A also spent some unproductive time on the computer because he encountered difficulties in renewing the prescription, telephoned for assistance with the computer, received that assistance in the examination room, placed a call to the pharmacy, and wrote out a prescription for Patient E.

Patient E's evidence in his direct examination was that Dr. A remained with him in the examination room throughout the appointment. He did concede in cross-examination that Dr. A may have left the examination room during the appointment, but <u>if</u> he did, he was only away for a brief period. Patient E was uncomfortable with the suggestion that Dr. A may have been absent for as much as a minute.

A reasonable construction of Patient E's evidence is that it is probable that Dr. A was with him in the examination room for the entire duration of his appointment. However, if Dr. A did leave the room, he was away for less than a minute. Patient E also

testified that Dr. A's demeanour was composed and professional throughout the appointment.

Four witnesses testified that Dr. A encountered computer difficulties during his appointment with Patient E, that he telephoned for assistance, that Ms D went to the examination room to assist him, and that he was with a male patient in that examination room when she arrived to provide assistance. Those four witnesses were Patient E, Ms C, Ms D, and Dr. A himself. In addition, Nurse G also stated that Dr. A had telephoned for assistance with his computer while she was engaged in the ear flush procedure.

Ms C went to the Clinic on the morning of August 1, 2013. She estimates that she arrived there between 9:25 and 9:30 a.m., at which time the door to Examination Room 312 was closed. It is likely that Dr. A was already with Patient E in Room 312 when Ms C arrived in the Clinic.

Ms C also testified that immediately upon seeing Patient E leave Examination Room 312 at the conclusion of his appointment, she went to see Dr. A in the same examination room. She testified it was between 9:50 and 10:00 a.m. when she went in, and recalled looking at the clock in the room because she was conscious of not taking up too much of Dr. A's time, as he had patients waiting. She left the examination room following her meeting with Dr. A at approximately 10:20 a.m.

The Panel recognizes that Patient E testified that he did not encounter anyone in the hallway when he left the examination room, which might suggest that there was a delay before Ms C went to see Dr. A in Room 312. However, Ms C didn't say she was in the hallway when she saw Patient E leave. She testified she was in the Nurses' Room (313) when she saw Patient E depart, whereupon she immediately went to Room 312 to see Dr. A. The Panel is satisfied that the interval between Patient E leaving Room 312 and Ms C going to Room 312 to speak with Dr. A, was very brief.

On the basis of the evidence of Patient E, Ms C and Ms D, without reference to any other evidence, there is a reasonable basis for concluding that Dr. A

was in Examination Room 312 continuously from some time before 9:30 a.m. until approximately 10:20 a.m.

This is important, because on the basis of the evidence of Dr. Mahdi, the alleged assault occurred sometime after he had finished with his third patient of the day, namely Patient C.

It is also necessary to consider and assess the log summaries and other documents generated by the EMR system. Given the potential importance of the documents generated by the EMR system, it is also important to reflect upon the legitimacy of the criticisms of counsel for Dr. Mahdi with respect to the reliability of the log summaries and the other entries in the EMR system, and to determine the weight to be given to Exhibits 7, 8, 9, 10 and 11.

As noted earlier in these Reasons, Exhibits 7 through 11 inclusive were admitted into evidence after a “voir dire”, in which Dr. F was examined by counsel for the Investigation Committee, cross-examined by counsel for Dr. Mahdi, and questioned by the Chairperson of the Panel with respect to the proof of the documents. Following that process, counsel for Dr. Mahdi stated that he did not object to the documents being entered into evidence as exhibits.

Furthermore, counsel for the Investigation Committee relies on subsections 51.1 to 51.4 of *The Manitoba Evidence Act* (reproduced earlier in these Reasons) to authenticate Exhibits 7 through 11 inclusive and to prove the integrity of those documents.

With respect to authenticity, ss.51.2 of *The Manitoba Evidence Act* requires the College to prove the authenticity of the documents by evidence “capable of supporting a finding that the electronic document is that which it is purported to be”.

With respect to proving the integrity of the information contained in Exhibits 7 through 11, the College is required to introduce evidence “capable of supporting a finding that the computer system was operating properly” or, if it was not, that any deficiency in its operation did not affect the integrity of the documents in

question and "there are no other reasonable grounds to doubt the integrity of the electronic documents system" (underlining added).

Counsel for the Investigation Committee submits that Dr. F's evidence was more than sufficient to prove that the Accuro system in place at the Hospital on August 1, 2013 was operating properly and to establish the integrity of Exhibits 7 through 11 inclusive. The Panel agrees that Dr. F's evidence in its entirety fulfills the requirements of ss.51.2, 51.3 and 51.4 of *The Manitoba Evidence Act*.

This is particularly so, in view of:

(i) Dr. F's experience in assessing and evaluating EMR systems as a member of the various committees described elsewhere in these Reasons;

(ii) His familiarity with the Accuro system based on his committee work;

(iii) His personal use of the Accuro system as the Medical Director for the primary clinics in the Health Authority; and,

(iv) His evidence that he had the capability of printing identical log summaries, and in fact had previously printed log summaries identical to the summaries marked as Exhibits 7, 8, 9, and 11 and was able to identify the chart entry marked as Exhibit 10.

In addition, each of the individuals for whom log summaries for the morning of August 1, 2013 were marked as Exhibits, namely Dr. A, Dr. Mahdi and Nurse G, gave evidence as to their general activities that morning, and their evidence was not inconsistent with the information contained in their respective log summaries. Furthermore, Exhibit 10, which were chart notes made by Dr. Mahdi with respect to Patient C, derived from the Accuro EMR System, were consistent with Dr. Mahdi's evidence relating to his interactions with that Patient.

The Panel therefore finds that the authenticity and integrity of Exhibits 7 through 11 have been proven.

Notwithstanding that Dr. F was not called as an expert, and had not designed the Accuro system, and that no expert evidence was introduced with respect to the accuracy of the entries outlined in Exhibits 7 through 11, the Panel has concluded that the above noted provisions of *The Manitoba Evidence Act* are operative, and the information contained in Exhibits 7 through 11 can be relied upon by the Panel in reaching its decision. Furthermore, the Panel is cognizant that no evidence was introduced on behalf of Dr. Mahdi, either by way of opinion evidence through an expert, or by factual evidence through Dr. Mahdi or any other witness, which would provide reasonable grounds to doubt the overall integrity of the documents generated by the Accuro system.

The Panel is sensitive to the point that the evidence given by Dr. F with respect to an automatic “log out” after 15 minutes of inactivity on the screen, may be potentially inconsistent with some of the entries on the log summaries themselves and with some of the evidence provided by the witnesses. However, that potential incongruity does not undermine or discredit the evidence contained in Exhibits 7 through 11 inclusive, except that the Panel must be mindful that in some cases an automatic “log out” may not have occurred on August 1, 2013 until more than 15 minutes had elapsed since the last activity on the screen.

Having concluded that it is entitled to receive consider and assess the information contained in Exhibits 7 through 11, the Panel is also acutely aware that there are time gaps or intervals with respect to Dr. A’s activities outlined in the log summaries. Therefore, before placing significant reliance on the information contained Exhibits 7 through 11, the information will be considered in the context of all of the other evidence in these proceedings.

Some of the information contained in the log summaries for Dr. Mahdi, Nurse G and Dr. A is interesting and informative.

As noted earlier in these Reasons, Dr. Mahdi alleges that the assault occurred after he had finished seeing his third patient of the day, Patient C. The last entry on Dr. Mahdi's log summary for the morning of August 1, 2013 (Exhibit 8) with respect to Patient C was made at 9:24:55. It is therefore likely that if an assault occurred, it occurred at or shortly after 9:24:55.

According to Exhibit 9, Nurse G's log summary for that morning, she finished charting the ear flush procedure at 9:55:14. She went to examination room 305 shortly thereafter and discovered Dr. Mahdi lying on his back on the floor in that room. This means that if Dr. Mahdi is to be believed, the injuries which he sustained, particularly the injury to his head were sufficiently serious to cause him to be dazed or semi-conscious for between 20 and 30 minutes, before Nurse G discovered him. However, there was no evidence in these proceedings to indicate Dr. Mahdi had suffered a concussion.

More importantly, the log summary for Dr. A for the morning of August 1, 2013 (Exhibit 7) indicates that Dr. A initiated activity on the computer with respect to Patient E at 9:22:48 (i.e. prior to the alleged assault occurring). Dr. A presumably (but not necessarily) initiated that activity on the computer in Room 312, the room in which Patient E was examined. The last activity on the computer with respect to Patient E was logged at 9:44:28. Based on Dr. Mahdi's testimony, if an assault occurred, it likely occurred sometime during that period, and yet Dr. A says he was with Patient E in an examination room continuously for that entire period.

As noted elsewhere, a reasonable construction of Patient E's testimony on that point is that it is probable that Dr. A was with him in the examination room for the entire duration of the appointment, but if he did leave the room, it was for less than a minute. In other words, Patient E's evidence is substantially corroborative of Dr. A's testimony.

Significantly, Exhibits 7 and 11, the log summaries for Dr. A, relating to the morning of August 1, 2013, are supportive of Dr. A's testimony and that of Patient E.

Exhibit 7 provides the time period within which activity relating to Patient E was logged into the computer (9:22:48 to 9:44:28). Exhibit 11, an unredacted version of all of the log entries relating to Patient E that morning, provides details as to the type of activities being undertaken. Several of those entries (at 9:31:15, 9:32:13, 9:33:46) are noted as “add prescription”, and other of those entries (at 9:41:16 and 9:43:30) are accompanied by references to a prescription of a specific medication. All of the above noted entries are consistent with Patient E’s description of wanting a prescription renewed and of Dr. A attempting to provide the renewal, but not being able to do so, as a result of difficulties with the computer. Moreover, the entries on Exhibits 7 and 11 during the time period relating to Patient E are relatively extensive, indicating a significant amount of activity by Dr. A on the computer during that period.

However, even within those extensive entries relating to Patient E from 9:22:48 to 9:44:28, there are intervals of several minutes of inactivity during which Dr. A may have left examination room 312, (which is across the hall from examination room 305), and gone to examination room 305 and choked Dr. Mahdi and thrown him to the ground. However, the Panel must ask itself whether it is probable that Dr. A did so.

The Panel has concluded that it is <u>not</u> probable that he did so.

Dealing with the first interval, the final entry relating to Dr. A’s preceding patient was at 9:19:59, and the next entry is at 9:22:48, which is the first entry relating to Patient E. That time gap is not unusually large, and can be accounted for in terms of the time it takes to commence computer activity relating to Patient E, the time to move from room to room and to greet Patient E. More importantly, that interval occurred minutes before Dr. Mahdi had finished his charting with respect to Patient C, and Dr. Mahdi says he was not assaulted until after he had finished that charting.

The second interval occurred between 9:23:17 and 9:28:23. This interval is interesting because a portion of it occurred after Dr. Mahdi had finished his charting with respect to Patient C. However, the Panel has concluded that the period from 9:23:17 to 9:28:23 is very likely the period during which Dr. A examined Patient E, may

have called the pharmacy, and was making unsuccessful attempts to fill the prescription using the computer.

The third interval occurred between 9:38:48 and 9:37:28. However given the detailed description of the activities on Exhibit 11 relating to prescriptions around that time period, the Panel agrees with the submissions of counsel for the Investigation Committee that this is likely the time period during which Dr. A called for assistance with the computer, waited for such assistance, and ultimately received assistance from Ms D.

Therefore, the Panel has decided that it is probable that Dr. A was engaged in the above noted activities during the three intervals which have been identified and improbable that he went across the hall to room 305, assaulted and threatened Dr. Mahdi, and then resumed his appointment with Patient E.

The Panel recognizes that its analysis and conclusions depend in part on:

(i) The time entries on the log summaries being accurate, while not providing much information about the specific activities being undertaken;

(ii) No individual other than Dr. A making entries on the computer with respect to his patients.

The Panel, for the reasons earlier outlined, has accepted the authenticity and integrity of the information contained in the log summaries. Having done so, it was open to Dr. Mahdi through his counsel to introduce evidence demonstrating that the time entries are, or may be inaccurate. Although there were suggestions made that the time entries may not be accurate, no evidence was introduced to support those suggestions. Furthermore, the time entries are generally consistent with the evidence from various witnesses as to the times or approximate times when various events occurred. Accordingly, the Panel has placed some reliance on the accuracy of the time entries in the log summaries.

Evidence was introduced that physicians and other individuals using the EMR system, gain entry into the system by use of a password. There was no evidence that as of August 1, 2013 Dr. A had given his password to anyone, or that anyone other than Dr. A himself was using the computer system to make the entries which are outlined on Exhibits 7 and 11.

In summary, the Panel has decided that the College has proven on the basis of strong and convincing evidence that is more probable than not that Dr. A did not assault or threaten Dr. Mahdi on August 1, 2013. Indeed, the Panel has decided that is it more probable than not that Dr. Mahdi was not assaulted by anyone on August 1, 2013 and that his continuing assertions that he was assaulted, are untrue.

The Panel recognizes that there is some evidence to suggest Dr. A did assault and threaten Dr. Mahdi on August 1, 2013, namely the evidence of Dr. Mahdi himself, supported to some extent by the observations of Dr. H and the findings of the two examinations which Dr. H conducted, and to a lesser extent by the evidence of Nurse G as to what she observed and what Dr. Mahdi told her when she discovered him in room 305.

The Panel also recognizes that there is a basis for being skeptical of Dr. A's adamant denial that he choked or otherwise assaulted and threatened Dr. Mahdi on that morning. The Panel accepts that Dr. A was belligerent and threatening and was physical with Dr. Mahdi on July 17, 2013, and that he was not fully forthcoming about those matters when he testified in these proceedings. The Panel also accepts that Dr. A had been angry and resentful towards Dr. Mahdi in July with respect to the scheduling of shifts in the Emergency Department, and may have continued to be angry and resentful with Dr. Mahdi on August 1, 2013.

Given the evidence suggesting that Dr. A assaulted and threatened Dr. Mahdi, and the three time intervals referred to above, the Panel acknowledges that it is possible that Dr. A assaulted and threatened Dr. Mahdi on August 1, 2013. Notwithstanding those factors, the Panel has concluded that the evidence as a whole, consisting of the testimony of all of the witnesses, but particularly the evidence of the

witnesses other than Dr. A and Dr. Mahdi, and the Exhibits, particularly the log summaries, establish on the balance of probabilities that Dr. A did not choke, strangle and throw Dr. Mahdi to the ground, or threaten him on August 1, 2013.

An important factor in the Panel reaching this conclusion is the consistency between the evidence of Patient E, Ms D and Ms C with respect to many of the material facts, and the information derived from the EMR system, and particularly Exhibits 7, 8, 9 and 11.

Conversely the Panel has concluded that it is not probable that on the morning of August 1, 2013, knowing that Dr. I was attending at the Hospital that afternoon, Dr. A, while attending on patients, would briefly leave a patient, seriously assault and threaten Dr. Mahdi, and immediately return to work without the assault and threats being heard or observed by anyone in the Clinic except Dr. Mahdi.

Having concluded that Dr. A did not assault or threaten Dr. Mahdi on August 1, 2013, it follows that the statements made by Dr. Mahdi, as particularized in the Amended Notice of Inquiry were false.

Is it possible however that Dr. Mahdi may have had a sincere belief that his statements were true? It would be necessary to seriously consider that proposition if this case involved an actual assault upon Dr. Mahdi, by an unknown assailant.

However, in this case, Dr. Mahdi has specifically identified Dr. A as the assailant based on Dr. A's distinctive accent and Dr. Mahdi's testimony that during the struggle he saw Dr. A's face.

This is not a case involving an assault by an unknown perpetrator, who Dr. Mahdi sincerely, but mistakenly believed was Dr. A. The Panel has in fact determined that no assault took place on August 1, 2013 and that Dr. Mahdi, for unknown reasons, has fabricated a story in order to falsely accuse Dr. A of assaulting and threatening him. Accordingly, the Panel has rejected the possibility that Dr. Mahdi had a sincere belief that Dr. A assaulted and threatened him on August 1, 2013.

Do Dr. Mahdi's Statements Constitute Professional Misconduct?

The Panel's findings that Dr. A did not assault or threaten Dr. Mahdi on August 1, 2013, and that Dr. Mahdi's statements that he did are false, are not determinative of all of the issues in this case.

Counsel for Dr. Mahdi made strong arguments that in the factual context of this case, Dr. Mahdi's statements, as particularized in Count 1 and Count 2 of the Amended Notice of Inquiry, do not constitute professional misconduct. His arguments were as follows:

(i) The College's regulatory jurisdiction is outlined in *The Medical Act* and relates to the practice of medicine. The statements by Dr. Mahdi to Dr. H, to the RCMP, and to Nurse G had nothing to do with the practice of medicine.

(ii) There are no "quality of care" issues in this case, nor any issues relating to patient safety or well-being.

(iii) The statements made by Dr. Mahdi about Dr. A arose from problems in their private relationship and their personal dispute about the provision of services in the Emergency Department of the Hospital.

(iv) There was no evidence in these proceedings that any patient at the Clinic or Hospital or anyone in the community of X was harmed by the statements of Dr. Mahdi, or that the statements were made public in a way which was likely to undermine the faith of the residents of X in their health care system.

(v) False statements by a physician to the College may or may not constitute professional misconduct, depending on the factual context in which they were made. In this case, Dr. Mahdi's

statements did not constitute professional misconduct because they did not relate to patient care, safety or well-being.

Counsel for the Investigation Committee, by way of rebuttal, made the following counterpoints:

(i) There was a definite nexus between the statements of Dr. Mahdi and the practice of medicine. The dispute between Dr. Mahdi and Dr. A related to the provision of medical services through the Emergency Department of the Hospital.

(ii) Trust is at the heart of the effective practice of medicine. False statements by a physician about another physician to the police, to co-workers, and to other physicians working in the same Clinic undermine that trust.

(iii) Statements by a physician, accusing another physician of criminal conduct may have serious consequences, including a potential period of incarceration for the person accused. A physician being sent to jail as a result of accusations about him by another physician would have seriously impacted the faith of the people of X in their health care system. Such potential consequences demonstrate that there is a link between the false statements of Dr. Mahdi and the practice of medicine.

(iv) False statements to the College by a physician, about the behaviour of another physician constitute professional misconduct. In some respects, there are features of this case which are similar to a decision of another Inquiry Panel of the College in the case of *Dr. K.D. (IC 06-02-03)*, in which the doctor involved pled guilty to charges of misconduct, with respect to false statements she had made to the College, relating to communications she had with two other physicians, which had resulted in a criminal investigation.

As part of their respective final submissions, both parties provided the Panel with helpful judicial authorities relating to the meaning of professional misconduct in circumstances in which the actions of the professional person were not related to the practice of his or her profession.

The Panel finds the following passage from the Court of Appeal of Alberta in *Erdmann v. Complaints Inquiry Committee [2013] A.B.C.A. 147* to be authoritative. The Court of Appeal of Alberta adopted with approval the language of Taylor J. in *Ratsoy v. Architectural Institute of British Columbia (1980) 113 D.L.R. (3rd) 439*:

> "I would paraphrase those words by saying that reprehensible conduct outside the actual practice of the profession may render a professional person liable to a disciplinary action if it can be said to be significantly more reprehensible in someone of his particular profession than in the case of others."

In this case, the Panel is of the view that Dr. Mahdi's misconduct was related to the medical profession and the practice of medicine. Dr. Mahdi made false statements to several people about being assaulted by a physician who was working in the Clinic. Dr. Mahdi said the assault occurred in the Clinic at a time when patients were present and were being attended to at the Clinic. There was a tangible risk that such statements would become public in which case they might have seriously undermined the faith of community members in their health care system.

Therefore, the Panel has determined that there was a nexus between the false statements of Dr. Mahdi and the practice of medicine. Several months later, Dr. Mahdi repeated those false statements to the College in the course of a College investigation. As a result, the Panel has concluded that Dr. Mahdi's false statements, as particularized in Counts 1 and 2 of the Amended Notice of Inquiry constituted professional misconduct.

Furthermore, the Panel has also concluded that even if it had decided that Dr. Mahdi's false statements were not directly connected to the practice of medicine, a statement by a physician, falsely accusing anyone of criminal conduct is reprehensible.

It is significantly more reprehensible when the false statements by the physician are made to colleagues and to the RCMP, and denigrate the conduct and character of another physician. Therefore, the Panel has decided that Dr. Mahdi's false statements constituted professional misconduct, regardless of whether or not they occurred outside the actual practice of medicine.

The Panel also wishes to emphasize the seriousness of Dr. Mahdi's false statements to the College, as particularized in Count 2 of the Amended Notice of Inquiry. Dr. Mahdi made those statements knowing they were false. They were made several months after the events of July and August, 2013, at a time when Dr. Mahdi had had ample opportunity to reflect upon the appropriateness of his actions.

Furthermore, the effective operation of a self-governing profession requires that the members of the profession be honest and forthright in their dealings with their governing body. Dr. Mahdi's false statements to the College were therefore incompatible with the self-governance of the medical profession.

On the basis of all of the foregoing, the Panel has concluded that Dr. Mahdi's false statements, as particularized in Counts 1 and 2 of the Amended Notice of Inquiry constituted professional misconduct.

Did Dr. Mahdi's statements constitute a breach of Article 43 of the College's Code of Conduct? If so, can a breach of Article 43 of the Code result in disciplinary consequences?

Counsel for Dr. Mahdi also advanced strong arguments that Dr. Mahdi's statements as particularized in the Amended Notice of Inquiry did not constitute a breach of Article 43 of the College's Code of Conduct (the Code), and even if they did, such a breach should not result in any disciplinary consequences. Those arguments can be briefly summarized as follows:

(i) The Code is expressly stated to be a “guide” to the professional and ethical conduct of members of the College. The Code is not a list of specific prohibitions. Rather the Code is a statement of values and by its nature is an “aspirational document”;

(ii) Such an aspirational document should not be used as a prosecutorial instrument because the provisions of the Code are not sufficiently explicit, specific, or precise to be used as a basis for imposing a disciplinary penalty on a physician, as a consequence of a breach of the Code’s provisions.

(iii) Article 43 of the Code is a statement of broad principle, using ambiguous words and phrases such as “impugning a reputation” and “for personal motives”. Article 43 is incapable of being precisely understood or applied.

Counsel for the Investigation Committee responded to those arguments as follows:

(i) Subsection 59.5 of *The Medical Act* expressly states that at the conclusion of a hearing, if a panel finds that a member has “contravened…the code of conduct of the college”, discipline may be imposed in accordance with *The Medical Act*.

(ii) The Code is not merely “aspirational”. Article 43 is specific. It deals with impugning the reputation of a colleague for personal motives. Dr. Mahdi clearly impugned the reputation of Dr. A by falsely accusing him of criminal conduct. He did so to advance his own interests. According to the College, Dr. Mahdi’s false accusation advanced his own interests in at least three ways, namely he was worried about his personal safety and presumably thought involving the RCMP would make him safer, he wanted to have Dr. A removed from the shift rotations in the Emergency Department, and

he wanted to provide an explanation for being found lying on the floor in one of the examination rooms on August 1, 2013.

(iii) All of the elements of a breach of Article 43 of the Code have been established, and such a breach of the Code should result in disciplinary consequences.

The Panel has concluded that Article 43 of the Code is not merely aspirational. It is sufficiently clear and explicit that a breach of its provisions, if proven, may form the basis of discipline and attack disciplinary consequences.

Impugning the reputation of a colleague is a straight-forward concept and easy to understand. To “impugn” means to dispute or to call into question the truth, veracity or honesty of a statement or motive. To impugn the reputation of a colleague therefore means to call into question the reputation of that person. Doing so is a serious matter.

In this case, the Panel is satisfied that Dr. Mahdi impugned the reputation of Dr. A by falsely stating to a variety of individuals and organizations that he had assaulted and threatened him on August 1, 2013. The first required element of Article 43 has therefore been proven.

However, the Panel is not satisfied that the other required element of Article 43, namely that Dr. Mahdi did so “for personal motives” has been proven.

As stated earlier in these Reasons, it is difficult to ascertain a motive for Dr. Mahdi fabricating an untrue storey about being choked and threatened by Dr. A on August 1, 2013.

Dr. Mahdi may have been concerned about his own safety after the July 17, 2013 incident, but it has not been established that those concerns motivated him to make the false statements.

Providing an explanation for being found on the floor of the examination room is not a motive for Dr. Mahdi impugning the reputation of Dr. A. Rather providing the explanation which he did is an essential component of Dr. Mahdi's overall deceit.

It is possible that Dr. Mahdi lied about Dr. A's conduct on August 1, 2013 to put himself in a better position with respect to the ongoing dispute about Emergency Department shifts. However, acknowledging that possibility is not the same as being satisfied on the balance of probabilities that Dr. Mahdi made the false statements for that reason.

The Panel has been unable to make any determinations as the Dr. Mahdi's motive or purpose for making false statements about Dr. A. Therefore the Panel has decided that a breach of Article 43 of the Code has not been proven according to the required evidentiary standard.

DECISION

Pursuant to ss.59.5 of *The Act*, the Panel hereby finds that Dr. Mahdi is guilty of professional misconduct by virtue of making accusations against Dr. A, as particularized in Counts 1 and 2 of the Amended Notice of Inquiry, which Dr. Mahdi knew were false.

The Panel accordingly directs that an additional date or dates be set for a further hearing before the Panel for the purpose of determining the order or orders to be made pursuant to ss.59.6 and or 59.7 of *The Act*, as a consequence of the finding of professional misconduct against Dr. Mahdi.

Dated this 19th day of September, 2016.

IN THE MATTER OF:	*"THE MEDICAL ACT" C.C.S.M.*
AND IN THE MATTER OF:	DR. TAHSEEN MAHDI, a member of the College of Physicians and Surgeons of Manitoba

REASONS FOR DECISION OF THE INQUIRY PANEL ON PENALTY AND COSTS

INTRODUCTION AND BACKGROUND

On September 19, 2016, after a multi-day inquiry hearing conducted pursuant to Part X of *The Medical Act* (*the "Act*"), this Inquiry Panel (the "Panel") issued written Reasons for Decision, in which it found that Dr. Tahseen Mahdi ("Dr. Mahdi") was guilty of two counts of professional misconduct as particularized in an Amended Notice of Inquiry dated May 13, 2015. The Panel also directed that an additional date or dates be set for a further hearing for the purpose of determining the Order or Orders to be made with respect to penalty and costs pursuant to ss.59.6 and 59.7 of the *Act*.

The further hearing was convened before the Panel on December 19, 2016, in the presence of Dr. Mahdi and his counsel, and in the presence of counsel for the Investigation Committee of the College of Physicians and Surgeons of Manitoba (the "Investigation Committee"). No further evidence was presented by the College. Dr. Mahdi testified briefly as to his personal circumstances and professional activities subsequent to August 1, 2013. Two letters of reference in support of Dr. Mahdi were also admitted into evidence by consent. In addition, counsel for the College and counsel for Dr. Mahdi both provided written briefs and made oral submissions to the Panel with respect to penalty and costs.

Following the hearing of December 19, 2016, the Panel met to discuss and consider the additional evidence and the written and oral submissions it had received from the parties. Thereafter, on February 10, 2017, counsel for the Panel wrote to the lawyers for the parties indicating that the Panel would like to receive further submissions on various issues. Those issues included whether it would ever be appropriate for a Panel to suspend a physician's licence to practice medicine, but then to remit the suspension in whole or in part and if so (in the context of remitting a suspension in whole or in part) whether it would be within the authority and jurisdiction of the Panel to impose a condition requiring the physician to continue to practice medicine in a particular community for a specific period of time.

The Panel received written submissions from the parties on those issues. The Investigation Committee provided its submissions on March 24, 2017, Dr. Mahdi provided his submissions on April 10, 2017, and the Investigation Committee provided its reply on April 17, 2017.

On the basis of the additional evidence and the thorough and helpful submissions which it has received from both the Investigation Committee and Dr. Mahdi with respect to penalty and costs, the Panel is satisfied that it is able to make its decision with respect to the Orders to be made pursuant to ss.59.6 and 59.7 of the *Act,* resulting from the findings of misconduct which have been made against Dr. Mahdi.

Dr. Mahdi has been found guilty by the Panel of two counts of professional misconduct. The first count related to false statements made by Dr. Mahdi on August 1, 2013 with respect to being assaulted by Dr. A ("Dr. A") in the X Clinic. The false statements referred to in the first count of the Amended Notice of Inquiry were made to another physician, the RCMP and a staff member employed by the Y Regional Health Authority, working at the X Clinic. The second count of professional misconduct related to false statements made by Dr. Mahdi to the College in a letter to the College dated January 6, 2014 and in an interview conducted by the Chair of the Investigation Committee of the College on April 15, 2014.

In considering the submissions of both the Investigation Committee and Dr. Mahdi with respect to penalty and costs, the Panel has been mindful that once findings of professional misconduct have been made against a physician, the primary purpose of orders under ss 59.6 and 59.7 of the *Act* is to protect the public interest. The Panel accepts the proposition that the phrase "public interest" should be construed broadly, to not only mean the protection of the individual interests of specific patients, but also to encompass the protection of the health, safety and well-being of the public generally, by maintaining proper standards of conduct and behaviour by physicians.

The Panel also recognizes that the following factors should be taken into account when assessing the types of orders under the *Act* which will be required to protect the public interest in specific cases:

(a) the specific deterrence of the physician involved;

(b) general deterrence of the members of the medical profession generally;

(c) the denunciation of the misconduct in question;

(d) the punishment of the physician involved;

(e) the rehabilitation of the physician involved;

(f) proportionality in sentencing, meaning that the penalty must be proportionate to the specific misconduct involved in the case in question;

(g) consistency in sentencing, meaning the imposition of similar penalties for similar misconduct. However, it is also recognized that each case should be decided on its own unique facts.

THE POSITIONS OF THE PARTIES

The submissions of both counsel were very thorough and touched on a variety of issues and considerations, all of which have been taken into account by the Panel.

With respect to penalty, counsel for the Investigation Committee submitted that Dr. Mahdi's licence to practice medicine should be suspended for a period of one year. The College also assets that Dr. Mahdi should be required to complete a course in medical professionalism and ethics, at his own expense, to the satisfaction of the Chair of the Investigation Committee. Moreover, the course should be completed before he resumes practice following the suspension of his licence. The College also seeks an order requiring Dr. Mahdi to pay the College's costs in the amount of $122,292.52. In support of those position, counsel for the College emphasized the following:

(i) Integrity and trust are fundamentally important elements of the professional relationship between doctors and patients, between doctors and their professional colleagues, and between doctors and the College.

False statements, knowingly made by one physician about another, to a variety of individuals and/or organizations are potentially destructive of those relationships;

(ii) The false statements made by Dr. Mahdi were planned and deliberate. They were also made over an extended period of time. Dr. Mahdi has never acknowledged his deceit nor accepted responsibility for his actions. Indeed, he provided false testimony under oath at the hearing before the Panel. All of those facts reflect a very troubling lack of integrity;

(iii) A 12 month suspension, and a course in medical professionalism and ethics is necessary to protect the public interest and to maintain public confidence in the medical profession and the medical profession's ability to effectively govern itself. A 12 month suspension is necessary to deter Dr. Mahdi, to denounce his misconduct and to punish him for his knowingly false statements to the RCMP, his professional colleagues and to the College;

(iv) The penalties sought by the Investigation Committee are both proportionate to Dr. Mahdi's misconduct and are consistent with prior cases. By way of example, the Investigation Committee referred to the Manitoba Court of Appeal Decision in *Ahluwalia v College of Physicians and Surgeons of Manitoba (1999) 138 Man. Reports 3*, which was a case involving attempts by a physician to mislead the College with respect to a medical chart which the physician had falsified. The College had revoked the physician's licence but the Court of Appeal set aside the revocation of the licence and substituted a six month suspension. The Investigation Committee also referred to various other cases, some of which involved shorter suspensions or other less serious sanctions. However the Investigation Committee emphasized that in all of those cases there had been an acknowledgement of wrongdoing and some form of acceptance of responsibility by the physician involved. In this case, the Investigation

Committee emphasizes that there has been no acknowledgement of wrongdoing or acceptance of responsibility by Dr. Mahdi.

With respect to the Investigation Committee's submission that Dr. Mahdi be required to pay the College's costs in the amount of $122,292.52, counsel for the Investigation Committee stressed that the Investigation Committee had been successful in all but one minor aspect of the charges. The Investigation Committee also stressed that Dr. Mahdi had not cooperated in the hearing process and had put the College to the strict proof of most of the material facts necessary to prove the charges. According to the Investigation Committee many of those facts should have been the subject of an agreement. The Investigation Committee also argued that although the total costs being sought by the College are significant, it should be Dr. Mahdi who bears the costs of his misconduct, not the members of the College as a whole. Furthermore, given Dr. Mahdi's ability to earn a significant income, the costs are well within his ability to pay.

Regarding the issue of a potential remittance of any suspension which may be imposed upon Dr. Mahdi, the Investigation Committee's position was that the Panel has the authority to remit or suspend a sentence, but must only do so within the confines of the legislation and the applicable principles of sentencing. Community resource issues are not relevant considerations with respect to the suspension or remittance of a sentence, because they do not relate to the degree of responsibility of Dr. Mahdi or any of the other accepted principles of sentencing.

The Investigation Committee was adamant that a remittance or suspension of the sentence to be imposed on Dr. Mahdi would not be appropriate, and should not be part of any Order or Orders under ss.59.6 of the *Act*.

In contrast, counsel for Dr. Mahdi, while accepting the requirement that Dr. Mahdi complete a course in medical professionalism and ethics, argued that a reprimand is a sufficient penalty for Dr. Mahdi's misconduct and that no suspension of his licence is required. Alternatively, counsel for Dr. Mahdi argued that if the Panel concluded that a suspension is required, a short suspension (between one to three months) would be appropriate, which should then be remitted if the course in medical

professionalism and ethics is completed earlier. With respect to costs, Dr. Mahdi submits that he should only be required to pay one half of the costs being sought by the College.

In support of those submissions, counsel for Dr. Mahdi argued that:

(i) Dr. Mahdi's misconduct did not involve incompetence or substandard patient care. Dr. Mahdi is a competent physician, providing very valuable professional medical services to the community. The two letters of reference which were forthcoming from physicians in Altona, where Dr. Mahdi is currently working, referred to both his value as a colleague and his value to the community which he is serving.

(ii) This case does not involve any patient harm. Moreover, no evidence was introduced to show that any community members became aware of the incidents in question, or that there was a loss of confidence by residents of the Y Regional Health Authority in their healthcare system.

(iii) Punishment is not the primary purpose of orders under ss.59.6 and 59.7 of the *Act*. A lengthy suspension will constitute punishment. Such a suspension is not necessary to protect the public interest. A reprimand, being a public condemnation by the College of Dr. Mahdi's misconduct, coupled with a course in medical professionalism and ethics is sufficient to protect the public interest. Given the very unique background facts of this case, a lengthy suspension is not required in order to achieve the objectives of either specific or general deterrence.

(iv) A 12 month suspension is not proportionate to Dr. Mahdi's misconduct, because his misconduct did not relate to patient care or his competence as a physician. Similarly, a 12 month suspension is not consistent with past decisions of the College. Counsel for Dr. Mahdi reviewed many recent decisions of this College and of Colleges from other jurisdictions,

and argued that most or all of those cases involved more serious misconduct and lesser penalties than the penalties being sought by the College in this case.

With respect to costs, counsel for Dr. Mahdi submitted that an order requiring him to pay 50% of the costs claimed by the College, namely $61,146.26 (payable in monthly instalments of $3,000.00) would be an appropriate order. Costs are not to be punitive. Dr. Mahdi should not be punished for exercising his right to defend himself at a full hearing. Costs should also be proportionate. According to Dr. Mahdi's counsel, costs in excess of $120,000.00, with respect to making false statements about a single incident, would not be proportionate.

Regarding the issue of a potential suspension or remittance of any sentence to be imposed, Dr. Mahdi's position was that the Panel has the authority to remit or suspend a sentence, and is also entitled to consider the potential impact of a suspension of Dr. Mahdi on his patients and on the Community in which he practises. Dr. Mahdi's counsel emphasized his argument that no suspension should be imposed in this case, but if the Panel decides to impose a suspension, it should be remitted in whole, or alternatively, in part.

ANALYSIS

After considering and assessing the arguments made by the College and Dr. Mahdi, the Panel has reached the following conclusions:

Although there is no issue in these proceeding with respect to patient care or Dr. Mahdi's competence as a physician, the misconduct of Dr. Mahdi was nonetheless very serious. If Dr. Mahdi's statements had been accepted as true, it is likely that Dr. A would have suffered grave consequences both professionally and personally. The public must be protected from dishonest physicians. Dr. Mahdi's dishonesty must be punished. Doing so will fulfill the objectives of specific and general deterrence.

Integrity is a cornerstone of a physician's relationship with his or her patients, with his or her professional colleagues and with the College. Dr. Mahdi's false statements to his colleagues and to the police must be forcefully denounced. Similarly, Dr. Mahdi's false statements to the College, which were premeditated and which persisted for a lengthy period of time, must be condemned. A reprimand is insufficient to achieve those purposes because a reprimand, in isolation, does not reflect the seriousness of Dr. Mahdi's misconduct. Similarly, a course in medical professionalism and ethics, while necessary and useful, does not adequately fulfill the purpose of protecting the broader public interest, either alone, or in combination with a reprimand.

Given the very unique facts of this case, the Panel has not placed significant reliance on any of the cases referred to by either of the parties. The facts of this case are so unusual, that it is challenging to compare this case to many of the others to which the Panel was referred, in terms of the seriousness and severity of the misconduct involved. Nonetheless, it is noteworthy that in most, if not all of the other cases, the physicians ultimately accepted responsibility for their actions. Notwithstanding the differences between this case and the others which were referred to, the cases which the Panel found most instructive were:

Ahluwalia v College of Physicians and Surgeons of Manitoba, supra;

the decision of the College in *Re: Dr. Randy Raymond Allan*. That caseinvolved a physician who had misconducted himself, who then made false statements to the College relating to his misconduct which resulted in the physician receiving a censure, rather than a more serious penalty. The College subsequently discovered that the physician had made false statements relating to his misconduct. As a result, the physician was suspended for a period of six months with additional rigorous conditions being imposed with respect to his return to practice;

the decision of the College in *Re: Dr. K. Moran de Muller*. That case involved harassing phone calls being made by a physician to two colleagues, and false

> and misleading statements by the physician to the College, denying those calls. A police investigation and a prosecution resulted. The prosecution was stayed on the basis of the physician providing a letter of apology. The physician was suspended for three months by the College, with the suspension being remitted upon the fulfillment of certain conditions. As noted above, specific and general deterrence, punishment, and the denunciation of the misconduct involved, must be elements of the sentence in this case. It is also necessary to address the critically important issue of the protection of the public interest, although Dr. Mahdi's competence, medical knowledge and technical skills as a physician were not in question in these proceedings. Honesty is an essential element of the physician patient relationship. It is also an essential element of a physician's relationship with other physicians and with other colleagues in the health care system. Honesty and candor are also vital in the context of a self-governing medical profession, which must maintain the public's faith in the profession's ability to regulate itself. As part of the privilege of practising medicine, physicians must fulfill their obligations to the College which include being truthful and responsive to inquiries and requests for information from the College. Dr. Mahdi was deceitful in his responses to the College for an extended period of time, thereby impeding an investigation into his conduct and interfering with the College's ability to regulate the profession and to protect the public interest.

On the basis of the evidence of Dr. Mahdi given on December 19, 2016 and some of the information in the letters of reference, it is clear that Dr. Mahdi has integrated well into the Altona medical community. He has quickly developed a large practice and is providing valuable services to that community. The Panel has been cognizant of those factors in deciding upon the orders to be granted in this case, as those factors relate to rehabilitation. The rehabilitation of Dr. Mahdi is one of the objectives of the sentencing process. The course in medical professionalism and ethics is one aspect of such rehabilitation. However, the Panel also believes that enabling

Dr. Mahdi to practice his profession in a community which needs his services is another aspect of rehabilitation.

With respect to costs, the Panel recognizes that Dr. Mahdi should not be punished for exercising his right to plead not guilty and to have a full hearing into the allegations against him. Conversely, Dr. Mahdi did not have the right to provide false testimony at the hearing. He cannot expect the profession as a whole, to pay for his misconduct or for the decisions which he made as to the manner in which he defended the allegations against him.

Regarding the issue of a potential suspension or remittance of any sentence to be imposed upon Dr. Mahdi, the Panel raised the issue and sought further submissions from the parties because Dr. Mahdi's competence, his medical knowledge, and his technical skills as a physician was not at issue in the proceedings. The Panel was therefore interested in whether or not the objectives of deterrence, punishment and denunciation could be fulfilled by a sentence imposing a suspension of Dr. Mahdi's licence to practice medicine, while the objective of rehabilitation could be achieved by requiring Dr. Mahdi to complete a course in medical professionalism and ethics in combination with a partial or total remittance of his suspension. A partial or total remittance of his suspension would afford him the opportunity to use and develop his medical skills and knowledge for the benefit of the community in which he practises.

The Panel is satisfied that it has the authority and jurisdiction to suspend or remit any sentence it imposes upon Dr. Mahdi, but should only do so in conformity with the *Act*, and the principles of sentencing. In this case, the Panel is not convinced that community resource issues should be an important sentencing consideration. The Panel has decided that this is not an appropriate case for the remittance or suspension of any portion of the sentence.

The Panel has also noted that as a result of the events of late July and early August, 2013, Dr. Mahdi's licence to practice medicine, which was conditional upon him practising in X, Manitoba, was suspended by the Y Regional Health Authority

for two periods of 30 days (60 days in total). He has therefore already been punished to some extent for the behaviour which was the subject of the professional misconduct charges, of which he has been found guilty.

DECISION

The Panel has concluded that a suspension of Dr. Mahdi's licence to practice medicine is required, and that a suspension of six months is proportionate to the misconduct involved and generally consistent with analogous cases decided by the College and Colleges in other jurisdictions. However, the actual suspension to be imposed will also recognize the two-month suspension imposed by the Y Regional Health Authority, which Dr. Mahdi has already served. In the result, Dr. Mahdi's licence to practice medicine will be suspended for an additional period of four (4) months.

The Panel has specifically decided that:

1. Pursuant to ss.59.6(1)(a) of the *Act*, Dr. Mahdi shall be reprimanded for the misconduct for which he was found guilty by the Panel in its decision dated September 19, 2016.

2. Pursuant to ss.59.6(1)(b) of the *Act*, Dr. Mahdi's licence to practice medicine shall be suspended for a period of four (4) months, commencing September 1, 2017.

3. Pursuant to ss.59.6(1)(e)(vii) of the *Act*, Dr. Mahdi shall complete, at his own expense, to the satisfaction of the Chair of the Investigation Committee, a course in medical professionalism and ethics on or before December 31, 2017, which course must be completed before he returns to practice following the suspension of his licence to practice medicine referred to in paragraph **2** hereof.

4. Pursuant to ss.59.7 of the *Act*, Dr. Mahdi shall be required to pay to the College a substantial portion of the costs of the investigation and hearing in the amount

of $110,000.00, in two equal instalments of $55,000.00, the first instalment to be paid on or before August 31, 2017, and the second to be paid on or before June 30, 2018.

5. There shall be publication, including Dr. Mahdi's name in accordance with ss.59.9 of the *Act*.

Dated this 19th day of May, 2017.