

of Physicians and Surgeons of Manitoba (the “College”) for an order that allegations numbered 2 and 3 as set out in a Notice of Inquiry dated December 7, 2018 issued by the College (the “Notice of Inquiry”) be severed from the allegations numbered 1, 4 and 5 in the Notice of Inquiry.

On May 16, 2019, the College made a motion to be heard by the Inquiry Panel for an order amending allegation number 1 in the Notice of Inquiry. Both motions were heard by the Inquiry Panel on June 3, 2019.

Prior to June 3, 2019, the Inquiry Panel had received written Briefs with respect to both motions from counsel for the parties.

On June 3, 2019, the Inquiry Panel was advised that the parties had reached an agreement with respect to the College’s motion for an amendment to allegation number 1 in the Notice of Inquiry, but that the motion for severance by Dr. Warraich was contentious.

An order granting the amendment to allegation number 1 in the Notice of Inquiry was issued by the Inquiry Panel on consent, and the Amended Notice of Inquiry was marked as exhibit 2 in the proceedings. The Amended Notice of Inquiry is attached to these Reasons as Appendix 1.

The Inquiry Panel then proceeded to hear oral submissions on the motion for severance from counsel for Dr. Warraich and counsel for the Investigation Committee of the College. The Inquiry Panel reserved its decision on that motion, which decision is set forth herein.

OTHER PRELIMINARY MATTERS

At the outset of the hearing on June 3, 2019, certain other preliminary matters were raised and determined. Dr. Warraich admitted his membership in the

College. An Affidavit of Service with respect to the original unamended Notice of Inquiry was marked as an exhibit in the proceedings.

The jurisdiction of the Inquiry Panel was acknowledged by Dr. Warraich and both the Investigation Committee and Dr. Warraich acknowledged that they had no objection to any members of the Inquiry Panel serving on the Inquiry Panel.

Dr. Warraich waived the reading of the charges/allegations outlined in the Amended Notice of Inquiry.

Counsel for the Investigation Committee also made a motion at the outset of the hearing on June 3, 2019 for an order under subsection 56(3) of *The Medical Act*, protecting the identity of patients who may be called as witnesses in the proceedings or who may be referred to in the proceedings, including the patients referred to in allegations 2 and 3 of the Amended Notice Inquiry. Dr. Warraich, through counsel, consented to such an order.

The Inquiry Panel granted the order requested by the Investigation Committee pursuant to subsection 56(3) of *The Medical Act* and directed that any patients testifying in the proceedings or any patients referred to in the proceedings, be identified only by initials or in some other non-identifying manner. In granting the order, the Inquiry Panel was satisfied that such an order was appropriate because some of the personal and other private matters relating to patients, which may be disclosed at the hearing, would be of such a nature that the disclosure of such matters may adversely affect the interests of those patients and outweigh the desirability of adhering to the principle that hearings be open to the public.

Counsel for the Investigation Committee also made a motion for an order under subsection 56(3) of *The Medical Act*, relating to certain other individuals who may be called as witnesses in the proceedings, or may be referred to in the proceedings, which might include nurses and employees of Manitoba Health. The Inquiry Panel reserved its

decision with respect to an order relating to those witnesses, but indicated it would advise the parties of its decision prior to the calling of any witnesses in the proceedings.

ALLEGATIONS 1, 4, 5 AND 6 OF THE AMENDED NOTICE OF INQUIRY

At the hearing of June 3, 2019, Dr. Warraich, through his counsel, entered a plea of guilty to allegations 1, 4 and 5 in the Amended Notice of Inquiry and to allegation 6 (displaying a lack of knowledge of or a lack of skill and judgment in the practice of medicine). Counsel for Dr. Warraich made it clear that the plea of guilty to allegation 6 was in specific relation to and as a consequence of the guilty plea to allegations 1, 4 and 5.

Counsel for Dr. Warraich also indicated that some of the background facts relating to allegations 1, 4 and 5 of the Amended Notice of Inquiry remain contentious, and although Dr. Warraich and the Investigation Committee were attempting to reach an agreement on the necessary background facts, they had not been able to do so as of June 3, 2019. Therefore, notwithstanding Dr. Warraich's guilty plea to allegations 1, 4, 5 and 6, it may be necessary for evidence to be introduced, (some of which may be contested) to establish the background facts relating to those allegations.

THE MOTION FOR SEVERANCE

The facts and matters referred to in the various allegations (charges) in the Amended Notice of Inquiry are disparate.

At the risk of oversimplification, some of the key elements of each charge are outlined below:

- (i) Allegation 1 refers to Dr. Warraich breaching the record keeping requirements of the College and thereby failing to demonstrate adequate

care to patients as more particularly outlined in various interactive and chart audits and as observed by his practice supervisor;

- (ii) Allegation 2 relates to Dr. Warraich's management and treatment of a specific patient between November 2017 and March 2018, who was suffering from tuberculosis and congestive heart failure;
- (iii) Allegation 3 alleges Dr. Warraich, in his capacity as a hospitalist, displayed a lack of skill and judgment in the care and management of a different specific patient between May 7 and May 15, 2015;
- (iv) Allegation 4 refers to Dr. Warraich engaging in unethical and inappropriate billing practices for services he purportedly provided to residents in two personal care homes between September 2013 and September 2016;
- (v) Allegation 5 also deals with the time period between September 2013 and September 2016 and alleges that the medical records prepared by Dr. Warraich in relation to his attendances at one of the personal care homes was misleading as to the nature and extent of his involvement in the visits in question. It is alleged that the records indicated he had conducted assessments, examinations and provided care to various patients, when he had not done so; and
- (vi) Allegation 6 states that: "By reason of one or more of the foregoing, individually or cumulatively, you (Dr. Warraich) have displayed a lack of knowledge of or a lack of skill in the practice of medicine".

Dr. Warraich seeks a severance of allegations 2 and 3 in the Amended Notice of Inquiry from allegations 1, 4 and 5 on several grounds including that:

- (i) There is not a sufficient factual and legal nexus between allegations 2 and 3 and allegations 1, 4 and 5, and that it would therefore be prejudicial to Dr. Warraich for the allegations to be heard together; and

- (ii) Allegations 2 and 3 are so different from allegations 1, 4 and 5, that it would be procedurally inefficient and would impede the Inquiry Panel's fact-finding and truth-seeking function to mix the evidence.

Assuming Dr. Warraich's motion for severance is granted, two separate Inquiry Panels would be constituted, one to hear and determine the allegations with respect to charges 1, 4, 5 and 6, which will be the subject of Dr. Warraich's guilty plea. The Inquiry Panel which will hear those charges will either receive an Agreed Statement of Facts and Documents, with respect to those charges, or may hear contested evidence (in the context of Dr. Warraich's guilty plea), if the parties are unable to agree on the relevant background facts. The same Inquiry Panel would also hear submissions and make determinations as to the appropriate disposition, including penalties, relating to charges 1, 4, 5 and 6 (as charge 6 relates to charges 1, 4 and 5).

A separate Inquiry Panel, consisting of entirely different panel members, would be constituted in order to hear the evidence with respect to charges 2 and 3. Such an Inquiry Panel would determine Dr. Warraich's guilt or innocence of charges 2 and 3. If Dr. Warraich was found guilty of those charges that Inquiry Panel would also ultimately make determinations relating to the disposition and penalties associated with charges 2 and 3.

One of Dr. Warraich's fundamental concerns is prejudice. Specifically, he submits that, if the charges are not severed, there is a substantial risk that his interests will be seriously prejudiced.

Counsel for Dr. Warraich explained that many of the authorities recognize that there are two distinct types of prejudice which an individual who is subject to disparate charges may suffer, if all of the charges are heard by one judge or one panel.

The first type of prejudice, is sometimes referred to as "moral prejudice" or "general prejudice". This prejudice may arise because, if the Inquiry Panel is satisfied that Dr. Warraich is guilty of some of the charges, as they presumably will be in this case

(given Dr. Warraich's guilty plea to some of the charges), the Panel will be influenced to conclude that he is guilty of all charges (including charges 2 and 3) on the basis that Dr. Warraich is a person who is inclined to breach professional standards or engage in professional misconduct.

The second type of prejudice, which is sometimes referred to as "reasoning prejudice" may arise because evidence relating to one charge or set of charges may be improperly relied upon by the Inquiry Panel to make decisions relating to Dr. Warraich's guilt or innocence or the severity of any penalty to be imposed relating to the other set of charges. Specifically charges relating to charges 1, 4, and 5 may be relied upon by the Inquiry Panel in making its determinations relating to charges 2 and 3.

Dr. Warraich submits that the potential for either type of prejudice arising in this case is significant. He also submits that this is very concerning because, not only does such prejudice seriously detract from the principle of fundamental fairness to him, it also impairs the fact-finding process and truth-seeking function of the Inquiry Panel.

Dr. Warraich's counsel also refers to a concern that any hearing or hearings which combine all of the evidence relating to the diverse set of charges in this case, will be unduly complex and protracted.

Counsel for Dr. Warraich argues that the legal principles applicable to a motion for severance in professional disciplinary proceedings are very similar to the legal principles applicable to severance applications in criminal proceedings.

Reference was made to the Supreme Court of Canada decision in *R v. Last* 2009 SCC 45, [2009] 3 SCR 146, wherein the court stated:

"The ultimate question faced by a trial judge in deciding whether to grant a severance application is whether severance is required in the interests of justice, as per s. 591(3) of the Code. The interests of justice encompass the accused's right to be tried on the evidence admissible against him, as well as society's interest in seeking that justice is done in a reasonably efficient and cost-effective manner. The obvious risk when counts are tried together is that the

evidence admissible on one count will influence the verdict on an unrelated count.” [para 16]

In the *R v. Last* decision, the Supreme Court listed a number of factors to be considered when determining whether an order for severance will be granted. While not exhaustive, those factors include:

- (a) the factual and legal nexus between the counts;
- (b) the complexity of the evidence;
- (c) whether the accused person wishes to testify in some counts but not others;
- (d) the possibility of inconsistent verdicts;
- (e) the desire to avoid a multiplicity of proceedings;
- (f) the use of similar fact evidence at trial;
- (g) the length of trial having regard to the evidence to be called;
- (h) the potential prejudice to the accused with respect to the right to be tried within a reasonable time;
- (i) general prejudice to the accused.

In support of the motion for severance Dr. Warraich also relies on the following statement by James Casey in his textbook, *The Regulation of Professions in Canada*:

“Although the jurisprudence on criminal procedure regarding the severance of charges may offer a useful analogy at times, it is the broad principle of ensuring a fair hearing for the accused professional which must govern. While a disciplinary hearing differs from a criminal trial, there may be cases in which two or more charges should be heard separately as a matter of fairness and impartiality, either because of a real danger of prejudice or because the charges are so disparate that it would be extremely inconvenient to intermix the evidence . . .”

THE COLLEGE'S OPPOSITION TO THE MOTION

The Investigation Committee of the College strenuously opposed Dr. Warraich's motion for severance on several grounds. One important aspect of the Investigation Committee's position was that there are important principles which distinguish professional regulatory proceedings from criminal proceedings and those principles should inform the Inquiry Panel's consideration of Dr. Warraich's severance motion. Those principles are that:

- (i) The public interest is paramount in professional regulatory proceedings and the Panel must consider future patient safety.
- (ii) It is a privilege not a right to practice medicine.
- (iii) When concerns about a physician's care or conduct are identified, those physicians, as members of the College are expected to address those concerns to the satisfaction of the College.

The Investigation Committee also opposed the severance motion on other grounds. The basis for that opposition was summarized in the Conclusion section of their written brief as follows:

- The applicable law in Manitoba makes clear that severance should rarely be granted in disciplinary proceedings.
- Severance of the charges in this case would irreparably frustrate the Inquiry Panel's ability to fulfill its truth seeking function and public protection mandate by taking away its ability to assess the totality of the evidence relevant to Dr. Warraich's knowledge, skill and judgment.
- The evidence does not support the conclusion that Dr. Warraich will suffer prejudice or injustice if the allegations are heard together. Neither the risk of moral prejudice or reasoning prejudice is such to warrant severance. Regulatory tribunals such as the Inquiry Panel routinely hear matters involving voluminous evidence and care respecting numerous patients.

- Severance will deny an Inquiry Panel the ability to make the findings necessary to determine an appropriate disposition, including penalty. As such, the Inquiry Panel will be unable to properly fulfill its role in fulfilling the College's public protection mandate.
- Dr. Warraich has provided no authority from a civil, regulatory proceeding where severance was ordered in circumstances similar to this case, or in any other.
- Dr. Warraich must demonstrate on a balance of probabilities that severance is necessary to ensure fairness to him and the impartiality of the Inquiry Panel. He has not done so.

ANALYSIS

The Inquiry Panel recognizes that the principles which have been articulated with respect to severance applications in a criminal context, including the statements of the Supreme Court of Canada in *R v. Last*, are useful when considering severance applications in a professional regulatory context. However the Inquiry Panel also recognizes that there are distinctions between the principles applicable to severance applications in criminal proceedings and professional regulatory proceedings. Significantly, in a professional regulatory proceeding, an inquiry panel must be cognizant of the importance of protecting the public interest, including patient safety, when balancing the competing factors between those which support a severance of charges and those of which support hearing the charges together.

The Inquiry Panel is also aware of the prevailing law in Manitoba, as outlined in *Snider v. Manitoba Association of Registered Nurses (1999) 136 Man. R(2nd 1, 1999 CanLII 14104 (MBQB))*, a decision of the Court of Queen's Bench, which was affirmed by the Manitoba Court of Appeal. The law in Manitoba relating to professional regulatory proceedings favours one hearing, even if that one hearing involves several charges.

Two passages from Mr. Justice Clearwater's decision in *Snider* are helpful and instructive. They are:

“This is one of those difficult areas where competing principles must be balanced; and the rights of a professional person to a fair hearing and the corresponding obligation of the governing body of a profession to protect the broad public interest and the interests of the profession”. [para 34]

and;

“... In my view, generally speaking, the interests of the public and any self-governing profession mandate that investigations be carried out expeditiously and that separate hearings for a large number of charges are neither desirable nor necessary. ...” [para 36]

Nonetheless the Courts have recognized that there will be cases in which the severance of charges in a professional regulatory proceeding will be appropriate.

In determining whether severance would be appropriate in this case, the Inquiry Panel was particularly interested in the submissions made by the counsel for both parties on two important issues:

- (i) The factual and legal nexus between the allegations and charges 2 and 3 and the allegations in charges 1, 4 and 5 in the Amended Notice of Inquiry;
- (ii) Whether the fact finding and truth seeking function of the Inquiry Panel will be enhanced or impaired by a severance of those two sets of charges.

The Factual and Legal Nexus Between the Charges

Counsel for Dr. Warraich ably argued that there is no substantial factual or legal nexus between the two sets of charges or alternatively that if a nexus exists, it is insufficient to justify having the charges heard together by one Inquiry Panel.

The facts with respect to charge 2 and 3 are clearly distinct from the facts relating to charges 1, 4 and 5. The facts relating to charges 2 and 3 are narrow and relate to two specific patients, whereas the facts relating to the other charges are broader, relate

to a number of individuals and refer to events occurring, for the most part, in different time periods than the events relating to charges 2 and 3.

Counsel for the College argued that although there are factual distinctions between the two sets of charges, there is a common factual link, namely allegations of serious record keeping deficiencies with potential negative consequences for patient care. More importantly, the College argued that there is a significant legal nexus between the two sets of charges, because charge 6 is linked to all of the other charges and arises as a consequence of the other charges. The allegation in charge 6 is that as a result of the other charges, both individually and cumulatively, Dr. Warraich displayed a lack of knowledge of or a lack of skill and judgment in the practice of medicine.

In addition, the College maintains that there is both a factual and legal nexus between all of the charges relating to the ultimate disposition and penalties to be imposed. The College contends that it is essential for one Inquiry Panel to hear the evidence and understand the entire factual background relating to all of the charges in order to be able to properly determine the appropriate disposition of the charges and to make considered and fully informed decisions during the penalty phase of the proceedings.

The Inquiry Panel has determined that although charges 2 and 3 are factually distinct from charges 1, 4 and 5 there is nonetheless a nexus between the two sets of charges. Whether that nexus is sufficient to support all of the charges being heard together by one panel will depend on the risk of potential prejudice to Dr. Warraich. The issue of prejudice will be specifically addressed below.

Fact Finding and Truth Seeking

It was Dr. Warraich's submission that a proceeding which deals with all of the charges together will be complex, cumbersome and protracted. Since the charges are distinct and disparate, covering an extended time period, the evidence will be voluminous and some of it will be technical. This will result in an overly lengthy hearing and will present challenges to individual panel members in determining which evidence

is related to which charge. The fact finding and truth seeking function of the Inquiry Panel will thereby be impaired.

The College disagrees. It asserts that although the evidence relating to all of the charges will be extensive, it will not be overwhelming. The College also points out that:

- (i) The facts relating to charges 2 and 3 will be focused. Those facts will relate to the two specific patients referred to in those charges. The Inquiry Panel should be able to readily distinguish the evidence relating to those charges from the rest of the evidence;
- (ii) Although some of the evidence may be technical from a medical perspective, two of the panel members are physicians and will be well equipped to understand the medical evidence;
- (iii) The Inquiry Panel will receive advice if necessary, from their own counsel with respect to issues such as what portion of the evidence is relevant to what charge, and whether or not certain specific portions of the evidence can be considered in relation to a specific charge.

The College also emphasized that the fact finding and truth seeking of the Inquiry Panel will be enhanced, not impaired by hearing the charges together, because it will be beneficial for the Inquiry Panel to receive the totality of the evidence relating to all of the charges. In that way, the Inquiry Panel will have “the whole picture” when assessing the nature and the extent of Dr. Warraich’s breaches of professional standards, if any, and when determining the appropriate disposition of the charges.

Prejudice

A consideration of the issues relating to the “factual and legal nexus of the charges” and the “fact finding and truth seeking” function of the Inquiry Panel, should be

undertaken in the context of Dr. Warraich's arguments that he will be prejudiced in his defence of the charges if all of the charges are heard together.

The College submits that the onus is on Dr. Warraich to demonstrate that he will suffer either moral or reasoning prejudice if severance is not granted, and that he has not done so.

The Inquiry Panel is reluctant to decide the severance motion on the basis of an argument relating to "onus". It would be extremely difficult for a physician facing multiple charges in a notice of inquiry to establish actual moral or reasoning prejudice, prior to the commencement of a hearing and the calling of any evidence relating to the charges outlined in the notice of inquiry.

The Inquiry Panel understood Dr. Warraich's argument on prejudice to be that if the charges are not severed, there will be a significant risk that his defence will be prejudiced, because he may suffer either moral or reasoning prejudice, or both.

The Inquiry Panel acknowledges that there is a risk that a panel receiving evidence with respect to all of the allegations in the Amended Notice of Inquiry may be influenced by the totality of the evidence to conclude that Dr. Warraich may have a general disregard for professional standards. The Inquiry Panel is also sensitive to Dr. Warraich's arguments that the manner in which some of the factual particulars in the Amended Notice of Inquiry have been framed in relation to record keeping deficiencies and the failure to examine patients, may elevate the risk of such prejudice arising.

The Inquiry Panel also acknowledges that there is a risk of the panel members being unconsciously influenced by evidence relating to allegations 1, 4, or 5 in determining Dr. Warraich's guilt or innocence with respect to charges 2 and/or 3.

However, the Inquiry Panel has also asked itself two questions, namely:

1. How substantial are those risks?
2. Are there factors present in this case which minimize those risks?

The Inquiry Panel has concluded that the risk of either type of prejudice arising is relatively small. The Inquiry Panel understands that it must be rigorous in disciplining itself to receive and assess evidence dispassionately, objectively, and free of bias. Being aware of the risk of moral or reasoning prejudice is an important step in guarding against making decisions being tainted by such prejudice. Furthermore, the Inquiry Panel is aware of the importance of providing Dr. Warraich with a fair hearing, both procedurally and substantively. The Inquiry Panel is satisfied that it will be able to assess the evidence relating to charges 2 and 3 dispassionately and objectively, notwithstanding that it will also be dealing with charges 1, 4 and 5, and vice versa.

The Inquiry Panel has also determined that there are important factors present in this case which minimize the risk of such prejudice in this case. Those factors include:

- (i) The evidence relating to charges two and three will be distinct and different from the evidence relating to charges 1, 4 and 5. The evidence with respect to charges 2 and 3 will involve two specific patients and the care and management of those patients by Dr. Warraich. Those charges may be the subject of expert evidence called by one or both of the parties relating specifically to those charges. It will be relatively easy for the Inquiry Panel to distinguish and apply the evidence applicable to those charges in determining Dr. Warraich's guilt or innocence of those charges, from whatever evidence or information that they receive in relation to the other charges.

- (ii) The Inquiry Panel will receive advice, as necessary from its own counsel, both with respect to its responsibilities generally and with respect to specific evidentiary issues which may arise.

- (iii) The Inquiry Panel will likely be providing written Reasons for its various decisions which will reinforce to the Inquiry Panel the need for fairness and intellectual rigour in determining the issues which will arise during the course of the proceedings.

In his text, referred to earlier in these Reasons, Professor Casey emphasized the importance of ensuring a fair hearing for the professional facing charges, but in the same paragraph also stated that the principle of fairness is to be assessed “in the context of the public interest and the interests of the professional organization, whose duty it is to protect the public”.

In undertaking the balancing exercise referred to in *Snider* (between the rights of a professional person to a fair hearing and the corresponding obligation of the governing body of a profession to protect the broader public interest), the Inquiry Panel’s determinations that the risks of moral prejudice or reasoning prejudice arising in this case are relatively small and that there are factors in this case which minimize the risk of such prejudice, are very important.

In view of the Inquiry Panel’s conclusion that it will be able to assess the evidence relating to charges 2 and 3 dispassionately and objectively and to distinguish that evidence from any evidence or information relating to charges 1, 4 and 5, the Inquiry Panel is also satisfied that its fact finding and truth seeking functions will not be impaired by hearing the charges together.

The Inquiry Panel has therefore determined that it is fair, reasonable and appropriate in this case for all of the charges referred to in the Amended Notice of Inquiry to be heard and determined together, by one Inquiry Panel.

DECISION

Based on all of the foregoing, it is the decision of the Inquiry Panel that Dr. Warraich's motion for an order that the charges outlined in allegations 2 and 3 of the Amended Notice of Inquiry, be severed from the remainder of the charges, is dismissed.

Dated this 11th day of June, 2019.

Dr. Carry Martens-Barnes
Chairperson

Dr. Valerie St. John

Russ Toews, Public Representative