

IN THE MATTER OF: *The Medical Act*, CCSM c. M90

AND IN THE MATTER OF: DR. **GARY ALLAN JOSEPH HARDING**, A
MEMBER OF THE COLLEGE OF
PHYSICIANS AND
SURGEONS OF MANITOBA

AND IN THE MATTER OF: A RESOLUTION AND ORDER OF THE
INQUIRY PANEL DATED JULY 31, 2018

REASONS FOR DECISION

NOTE:

The publication of disciplinary decisions is consistent with the College's mandate to protect the public and the value it places on transparency. This publication relates to an Order of an Inquiry Panel ("the Panel") made pursuant to *The Medical Act*. It is a redacted version published pursuant to s. 59.9 of that legislation. Certain information has been redacted from the complete Reasons for Decision to protect the personal health information of Dr. Gary Allan Joseph Harding ("Dr. Harding") and in recognition of concerns expressed by the Inquiry Panel regarding publication set out below at p. 8.

INTRODUCTION

On July 31, 2018 the Panel issued a Resolution and Order pursuant to which Dr. Harding's license was indefinitely suspended, subject to him meeting several conditions.

On September 9, 2019, the Panel heard an application by Dr. Harding dated August 9, 2019 for:

- a) a declaration that Dr. Harding has substantially complied with the terms of a Resolution and Order issued by the Inquiry Panel dated July 31, 2018; and

- b) a declaration that Dr. Harding is fit to practice medicine; and
- c) a declaration that the indefinite suspension imposed by a Resolution and Order dated July 31, 2018 of the Inquiry Panel should be deemed to be adequately served and that Dr. Harding should be entitled to return to the practice of medicine.

The Investigation Committee of the College opposed Dr. Harding's application.

The Panel denied Dr. Harding's application.

REASONS

On July 31, 2018, the Panel found Dr. Harding, a member of the College, guilty of professional misconduct, of contravening By-Law No.1 of the College, contravening Statement 805 of the College and of displaying a lack of care, skill and judgment in the practice of medicine and of demonstrating unfitness to practice medicine.

The above-noted findings were made on the basis of a plea of "no contest" by Dr. Harding to allegations and particulars outlined in a Notice of Inquiry dated June 21, 2017 and on the basis of a lengthy and detailed Statement of Uncontested Facts and Statement of Additional Uncontested Facts filed at a hearing which was convened on May 29, 2018.

As a result of the findings of guilt against Dr. Harding, and pursuant to a Joint Recommendation made by the Investigation Committee and Dr. Harding, the Resolution and Order of this Inquiry Panel dated July 31, 2018 ordered, among other things that:

1. Pursuant to subsections 59.6(1)(b) of *The Medical Act*, Dr. Harding is suspended from the practice of medicine commencing at 24:00 on May 29, 2018, continuing for a period of six months.
2. Pursuant to subsection 59.6(1)(d) of *The Medical Act* Dr. Harding shall remain

suspended indefinitely, notwithstanding the six month suspension imposed in paragraph 1 hereof, until such time that Dr. Harding has demonstrated to the satisfaction of the Investigation Committee that he has received psychiatric and/or psychological counselling and/or other treatment to overcome any problem(s) that may have caused or contributed to the conduct that led to the findings of this Inquiry Panel in respect to the allegations in the Notice of Inquiry dated June 21, 2017 (the "Underlying Conduct"), and is fit to practice medicine;

3. Dr. Harding's participation in ongoing psychiatric and/or psychological counselling and/or other treatment must be in accordance with the following terms:

a) Dr. Harding must demonstrate that the psychiatrist(s) and/or psychologist(s) have been provided with sufficient information pertaining to the subject matter of the discipline and any other information which, in the Investigation Committee's sole discretion, it considers relevant, including information from any other disciplinary action(s) and complaint(s).

b) In attending for the counselling, Dr. Harding must:

(i) fully and frankly discuss and acknowledge the Underlying Conduct, including any conduct that he did not admit and/or matters in respect to which he provided false or misleading information to the College during its investigation, which is relevant to the proven allegations and findings of guilt; and

(ii) comply with any reasonable recommendations arising from psychiatric and/or psychological counselling.

4. In assessing Dr. Harding's fitness to practice medicine, the Investigation Committee will accept a written report from an assessment of his fitness and safety to practice by either the Alliance Assessment Centre or the

Comprehensive Occupational Assessment Program ("COAP") or, if either of them is unwilling or unable to conduct the assessment, another multi-disciplinary assessment program team, jointly chosen and approved by the Investigation Committee and Dr. Harding (the Assessors) stating that, in the opinion of the Assessors, Dr. Harding is fit and safe to practice medicine, provided that the report:

- a) is in a form acceptable to the Investigation Committee; and
 - b) addresses all issues to the satisfaction of the Investigation Committee, including, but not limited to, what, if any, conditions on Dr. Harding's entitlement to practice are recommended.
5. The assessment referred to in paragraph 4 hereof, will be at Dr. Harding's cost and his participation in the assessment must be in accordance with the following terms:
- a) The Investigation Committee must provide to the Assessors any information in the possession of or available to the Investigation Committee pertaining to the Underlying Conduct and the decision of this Inquiry Panel and any other information in the possession of or available to the Investigation Committee which, in the Investigation Committee's sole discretion, it considers relevant, including information from any other disciplinary action(s) and complaint(s) which the Investigation Committee considers relevant; ...
 - b) Dr. Harding must acknowledge and fully and frankly discuss with the Assessors all conduct pertaining to the Underlying Conduct, including any conduct that he did not admit and/or matters in respect to which he provided false or misleading information to the College during its investigation which is relevant to the Statement of Uncontested Facts and Plea of No Contest, proven allegations and findings of guilt;

The Resolution and Order dated July 31, 2018 also required that prior to Dr. Harding's return to practice, he must attend an interview with the Investigation Committee Chair of the College to discuss the "Underlying Conduct" and Dr. Harding's current understanding of ethical, boundary and professional issues and Dr. Harding's proposed plans for return to practice, so as to allow the Investigation Committee to assess and decide upon the conditions on Dr. Harding's licensure upon return to practice, as more particularly described in the said Resolution and Order. The contemplated conditions were strict and extensive and involved a prohibition against Dr. Harding being directly responsible for the supervision, overseeing or teaching of any medical learners and required Dr. Harding to practice under a practice supervisor acceptable to the Investigation Committee.

[redacted]

By Resolution and Order dated August 12, 2019, the Investigation Committee determined that Dr. Harding had not yet met the requirements set out in the Inquiry Panel's Resolution and Order dated July 31, 2018. Therefore, the Investigation Committee was not prepared to authorize Dr. Harding's return to the practice of medicine or to initiate the process required for such a return.

As a consequence of that decision by the Investigation Committee, Dr. Harding brought the application before the Panel for the three declarations referred to in the Introduction to these reasons, which would enable him to return to the practice of medicine, subject to certain conditions.

ANALYSIS

This case involves a fundamental clash between two diametrically opposed positions and perspectives.

[redacted]

This Inquiry Panel reached its decision and issued its Resolution and Order of July 31,

2018 based on the Statement of Uncontested Facts, a Joint Recommendation, and the submissions of both sets of counsel.

[redacted]

Dr. Harding's decision not to comply with those terms of the Resolution and Order can be reasonably characterized as Dr. Harding choosing to take a "calculated risk". He is arguably seeking to reap the benefits of the plea bargain ... while attempting to avoid [some of its requirements]. This approach is unacceptable.

However, the Inquiry Panel has not reached its decision to deny Dr. Harding's application solely on the basis that Dr. Harding has not fulfilled his part of the plea bargain. Framing the issue exclusively in terms of Dr. Harding failing to live up to his part of the plea bargain does not adequately reflect the legitimacy, value and public policy purpose of [certain requirements] of the Resolution and Order of July 31, 2018. Those provisions were included in the Resolution and Order for a very important purpose. They were not mere "hoops" which the Investigation Committee was requiring Dr. Harding to jump through as part of his penance for exploiting vulnerable medical students. They were not part of the punitive aspects of the Resolution and Order. Rather they were part of the process to which both parties had agreed, which allowed for Dr. Harding's rehabilitation and treatment of the causes of the Underlying conduct, and potentially a safe return to the practice of medicine. They were also included in furtherance of the College's mandate to protect the public interest and to preserve the public's faith in the medical profession's ability to regulate itself. Furthermore, the Resolution and Order specifically provided that it was the Investigation Committee's responsibility to ultimately determine whether and when Dr. Harding would be entitled to return to the practice of medicine [redacted]. The Inquiry Panel agrees with the Investigation Committee's arguments that, while the Alliance Center is able to provide important opinions with respect to Dr. Harding's fitness to return to practice from a mental health perspective, the Alliance Center does not have the responsibility nor the authority to ultimately determine whether Dr. Harding is entitled to return to practice

medicine or when he may do so.

Factual findings were made by this Inquiry Panel that by his misconduct, including the sexual touching of X and Y, Dr. Harding had demonstrated an unfitness to practice medicine. In the context of those findings, requirements were included in the Resolution and Order dated July 31, 2018 which were designed to allow for Dr. Harding's potential rehabilitation, and if such rehabilitation was achieved, to provide for his return to the practice of medicine. The Resolution and Order also stipulated that it was the Investigation Committee's responsibility to ultimately determine Dr. Harding's fitness to practice medicine and his readiness to return to the practice.

[redacted]

The Inquiry Panel has also concluded that the Investigation Committee's decision not to authorize Dr. Harding's return to the practice of medicine or to initiate the process set out in [redacted] the Resolution and Order dated July 31, 2018, was a fair and reasonable decision and entirely within the authority of that Committee, and consistent with the terms of the Resolution and Order dated July 31, 2018.

Accordingly, this Inquiry Panel will not interfere with the Investigation Committee's decision of August 12, 2019.

[redacted]

As noted elsewhere in these Reasons, the Resolution and Order stipulates that it is the Investigation Committee which makes the ultimate decision relating to Dr. Harding's fitness to practice medicine and his readiness to return to practice. In doing so, it must consider the assessment of the Alliance Center. It has done so.

The Investigation Committee is not obliged to accept the opinion of the Alliance Center. It is also not obliged to obtain additional opinions or assessments in order to determine

Dr. Harding's fitness to practice medicine. The Investigation Committee has extensive knowledge of the background of these matters, compiled throughout the investigation. It also has had the benefit of the factual findings made by this Inquiry Panel, as set forth in its Reasons for Decision of July 31, 2018. The Investigation Committee also has had access to the prior assessments and evaluations of Dr. Harding which were relied upon by the Alliance Center. All of this information provides the Investigation Committee with a solid foundation on which to base its decision.

[redacted]

Publication and Costs

The Investigation Committee, in its written submissions outlined its position that this Inquiry Panel is not responsible for deciding whether this decision will be published. The Investigation Committee nonetheless made it "clear for the record that it believes that the College should publish this decision pursuant to paragraph 13 of the Resolution and Order dated July 31, 2018. The Investigation Committee takes that position because it asserts that this decision has significant ramifications for the manner in which the College governs the medical profession as a whole, and the importance of the Investigation Committee being able to rely on Joint Recommendations as a reliable method of resolving cases.

This Inquiry Panel does not share the Investigation Committee's perspective with respect to publication of this decision. This Inquiry Panel acknowledges that it is not responsible for deciding whether this decision will be published. It also recognizes the importance of the issues raised by these proceedings, but believes the publication of the prior phase of the proceedings served the intended purpose. Moreover, the [Panel] is concerned that publication of this decision may negatively impact Dr. Harding's efforts at rehabilitation.

The Investigation Committee also seeks an order for costs pursuant to ss. 59.7 of *The Medical Act*. It does so on the basis that responding to Dr. Harding's application has required the use of extensive resources by the College, including much effort on the part of the Investigation Committee itself, its legal counsel, and the Inquiry Panel and its counsel.

This Inquiry Panel has determined that Dr. Harding should make a contribution to the College's costs because his application was unsuccessful and the College has incurred substantial costs in defending the application as a result of deliberate decisions made by Dr. Harding, which were inconsistent with the Resolution and Order dated July 31, 2018. However, the Inquiry Panel has decided that the costs of these proceedings, which are to be paid by Dr. Harding and which are in addition to the costs referred to in the Resolution and Order of July 31, 2018 are hereby fixed at \$2,500.00. The amount of \$2,500.00 is substantially less than the actual costs incurred by the College but that amount has been set recognizing that the application raised important issues which required resolution and that Dr. Harding has not been able to earn an income from practising medicine for an extended period.

DECISION

Based on all of the foregoing, this Inquiry Panel has decided that Dr. Harding's application dated August 9, 2019, is denied and that Dr. Harding shall be required to make a contribution to the College's costs related to his application in the amount of \$2,500.00.

Delivered on November 5, 2019