

IN THE MATTER OF: THE MEDICAL ACT, C.C.S.M. c. M90
AND IN THE MATTER OF: Dr. SONNY SUREJ DHALLA, a member of the College
of Physicians and Surgeons of Manitoba
AND IN THE MATTER OF: A Notice of Inquiry dated December 7, 2018

INQUIRY PANEL:

Dr. Alex Vajcner, Chairperson
Dr. Brent Anderson
Sandra Benavidez, Public Representative

**REASONS FOR DECISION OF AN INQUIRY PANEL OF THE
COLLEGE OF PHYSICIANS AND SURGEONS OF MANITOBA
RE COSTS UNDER S. 59.7 OF THE MEDICAL ACT**

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REASONS FOR DECISION OF THE INQUIRY PANEL

INTRODUCTION

On May 6th, 2020, following a hearing which took place over a seven day period in September 2019 (and the subsequent receipt of extensive written and oral submissions from the parties), this Inquiry Panel (the “Panel”) issued a Resolution and Order and Reasons for Decision in these proceedings. Pursuant to that Resolution and Order, Dr. Dhalla was found guilty of committing acts of professional misconduct and of contravening Article 9 of the Code of Conduct of the College, relating to his treatment and management of a patient (Patient Y) for a gastric volvulus and subsequent complications between November 10th and November 12th, 2015. During that period, Patient Y required urgent surgical intervention and Dr. Dhalla failed to ensure continuity of care for Patient Y and failed to provide appropriate assistance in circumstances in which he remained responsible for Patient Y.

Dr. Dhalla was also found guilty of professional misconduct and of contravening Article 24.1 of By-Law 1 of the College by failing to adequately document his involvement in the care and management of Patient Y in the medical record.

The two charges against Dr. Dhalla, which were the subject to the hearing in September 2019 were outlined in a Notice of Inquiry dated December 7, 2018. The first charge consisted of three subparagraphs, 1(a), 1(b) and 1(c).

The allegations in subparagraph 1(a) were that following the performance of an endoscopy procedure, Dr. Dhalla failed to ensure that the patient in question (Patient Y) was in stable condition prior to Dr. Dhalla departing the operating room, rendering himself no longer immediately available to address any surgical complications that required urgent attention.

The allegations in subparagraph 1(b) were that Dr. Dhalla failed to address surgical complications in a timely manner, including failing to appreciate and address a known perforation and evidence of ongoing ischemic changes.

The allegations in subparagraph 1(c) were that on November 12, when Patient Y required urgent surgical intervention, Dr. Dhalla failed to ensure continuity of care for the patient or to provide appropriate assistance when Dr. Dhalla remained responsible for Patient Y.

The allegations against Dr. Dhalla in subparagraphs 1(a) and 1(b) of the Notice of Inquiry were dismissed. He was found guilty of the allegations in subparagraph 1(c) of the Notice of Inquiry.

Dr. Dhalla pled guilty to charge 2 which alleged that he had failed to adequately document his involvement in the care and management of Patient Y in the medical record.

On August 24, 2020, a further hearing was convened before the Panel to receive the parties' submissions with respect to the order or orders which should be issued by the Panel pursuant to s.59.6(1) of *The Medical Act* (the "Act"). On September 21, 2020, the Panel ordered that Dr. Dhalla be reprimanded for committing acts of professional misconduct and for contravening Article 9 of the Code of Conduct of the College and Article 24.1 of By-Law No. 1 of the College, and that his license to practice medicine be suspended for a period of two months from November 1, 2020. The Panel also ordered that there would be publication of the proceedings, including Dr. Dhalla's name as determined by the College.

The Panel retained jurisdiction with respect to the issue of costs pursuant to s.59.7 of the *Act*, recognizing that a further hearing to deal with the issue of costs would likely be necessary.

On December 3, 2020, a further hearing was convened before the Panel to receive the parties' submissions as to costs. Prior to the hearing of December 3, 2020, the Panel had received:

- (a) a written submission from the Investigation Committee of the College (the "Committee") on the issue of costs;

- (b) a written submission from Dr. Dhalla with respect to his motion to admit new evidence relating to his settlement communications with the Committee prior to the hearing which occurred in September 2019 and with respect to his position on costs generally; and
- (c) a written reply submission from the Committee responding both to Dr. Dhalla's motion to admit new evidence and his submission as to costs.

The relevant provisions of the *Act* with respect to the issue of costs are contained in s.59.7 of the *Act*. Those provisions state as follows:

Costs and fines

59.7(1) A panel may, in addition to or instead of dealing with the conduct of the member in accordance with section 9.6, order that the member pay to the college

- (a) all or part of the costs of the investigation and hearing;
- (b) a fine not exceeding \$10,000.; or
- (c) both the costs under clause a) and a fine under clause (b);

within the time set by the order.

Nature of costs

59.7(2) The costs referred to in subsection (1) may include, but are not limited to,

- (a) all disbursements incurred by the college, including
 - (i) fees and expenses for experts, investigators and auditors whose reports or attendances were reasonably necessary for the investigation or hearing,
 - (ii) travel costs and reasonable expenses of any witnesses required to appear at the hearing,
 - (iii) fees for retaining a reporter and preparing transcripts of proceedings,

- (iv) costs of service of documents, long distance telephone and facsimile charges, courier delivery charges and similar miscellaneous expenses,
- (b) payments made to members of the panel or the investigation committee; and
- (c) costs incurred by the college in providing counsel for the college and the panel, whether or not counsel is employed by the college.

THE MOTION TO ADMIT EVIDENCE

Before making its determination with respect to the costs, if any, to be ordered pursuant to s.59.7 of the *Act*, the Panel must first consider and determine Dr. Dhalla's motion to admit evidence relating to his pre-hearing settlement communications with the Committee.

The evidence which Dr. Dhalla sought to have admitted consists of a letter from his counsel dated June 4, 2018 and a form of proposed Censure which was attached. In the letter dated June 4, 2018, counsel for Dr. Dhalla indicated that he was not prepared to accept a Censure in respect of the allegations in subparagraphs 1(a) and 1(b) of the Notice of Inquiry (with respect to which he was not ultimately found guilty), but that he was prepared to accept a Censure, subject to an agreement as to its wording, with respect to his failure to provide continuity of care to Patient Y on November 12, 2015 (with respect to which he was ultimately found guilty).

The Committee opposed Dr. Dhalla's motion to admit such evidence, and argued in the alternative that if such evidence was to be admitted, the Panel should also admit additional evidence submitted by the Committee, which consisted of further communications exchanged between the parties prior to the September, 2019 hearing. According to the Committee, the purpose of receiving the additional evidence would be to provide the Panel with a much broader context for the settlement discussions between the parties which occurred prior to the contested hearing. The additional communications included an alternate form of Censure proposed by the Committee.

The Committee advanced several arguments in opposition to Dr. Dhalla's motion to admit evidence, but those arguments can be distilled into two essential submissions. Those submissions were that:

1. The communications between the parties which occurred prior to the September, 2019 hearing, including the discussions about whether or not the proceedings could be resolved by the acceptance by Dr. Dhalla of an appropriately worded Censure, were clearly communications directed to a resolution of the dispute and are covered by "settlement privilege" and are therefore inadmissible.
2. Settlement communications between the Committee and members of the College being investigated for misconduct are crucial to the processes of the College. Privilege over such communications must be maintained. If not, there will be "terrible consequences" for the College including a "chilling effect" on the types of settlement discussions which frequently occur and which lead to a resolution of many proceedings.

The Committee also submitted that, in addition to the costs of the proceedings which the Committee was seeking, a further award of costs in the amount of \$5,000.00 should be awarded against Dr. Dhalla in specific relation to his motion to admit additional evidence.

Dr. Dhalla's position with respect to the motion to admit evidence can also be distilled into two essential points, namely that:

1. Based on various judicial authorities, it is clear that not all privileges are of indefinite duration. With respect to "settlement privilege", once the litigation is concluded, the reasons for the privilege have expired. Therefore absent any specific agreement between the parties, any settlement privilege (also known as the "without prejudice" privilege) should be presumed to expire once the merits of the case have been decided.

2. Excluding the letter from Dr. Dhalla's counsel dated June 4, 2018 and the proposed Censure would be unfair to Dr. Dhalla because those communications clearly demonstrate that he was reacting reasonably to the charges against him and that he was willing to cooperate with the Committee. The exclusion of those communications would be prejudicial to Dr. Dhalla. Such exclusion would also deprive the Panel of important information with which to assess the fairness and reasonableness of each party's position on costs.

As a result of the way in which materials were submitted to the Panel in advance of the December 3, 2020 hearing, and the submissions which were made on December 3, the Panel had the opportunity to review the letter dated June 4, 2018 from Dr. Dhalla's counsel and the proposed Censure which was attached, as well as the additional evidence referred to by the Committee, being the more extensive exchange of communications between the parties relating to a potential resolution of the proceedings. The Panel was able to review all of those communications before deciding whether some or all of them should be admitted into evidence.

Counsel for Dr. Dhalla submitted that the form of Censure which Dr. Dhalla was willing to accept demonstrates that:

- (a) he was prepared to acknowledge at a relative early stage of the proceedings, that he had failed to ensure continuity of care for Patient Y in relation to the events of November 12, 2015 (which was the subject of subparagraph 1(c) in the Notice of Inquiry); but that:
- (b) he was not willing to accept a Censure in relation to subparagraphs 1(a) or 1(b) of the Notice of Inquiry (which contained the allegations against him which were ultimately dismissed).

In other words, Dr. Dhalla submitted that the Censure he was prepared to accept prior to the September 2019 hearing in essence reflected the findings which were made by the Panel at the conclusion of that lengthy hearing.

Accordingly, Dr. Dhalla argued that most, if not all of the lengthy hearing in September, 2019 was unnecessary and that the costs of that hearing should not be borne by him, but should be borne by the membership of the College as a whole.

Counsel for the Committee, while maintaining the position that none of the settlement communications should be admitted into evidence, also argued that if Dr. Dhalla's proposed Censure is to be admitted, the Committee's communications relating to its settlement position must also be admitted. The Committee submitted that its communications demonstrated that Dr. Dhalla's willingness to accept a form of Censure did not reflect an acknowledgement or an admission of the full nature and extent of the deficiencies in his care of Patient Y. There were at least two important elements to the Committee's submissions in that regard which were:

- (i) Dr. Dhalla's purported acceptance of responsibility for a failure to provide continuity of care to Patient Y was qualified in the Censure he was proposing and was based on the false premise that there was a reasonable basis for some confusion as to which physician was most responsible for the care of Patient Y on November 12, 2015;
- (ii) the deficiencies in Dr. Dhalla's care of Patient Y as ultimately determined by the Panel, were significantly more serious than the deficiencies which Dr. Dhalla was prepared to acknowledge in the Censure which he proposed. Therefore, the Committee was justified in insisting that the matter proceed to a hearing in order to establish the true extent of the deficiencies in Dr. Dhalla's care of Patient Y.

The Panel appreciates the opportunity it was given to review the settlement communications prior to making a determination of the admissibility of those materials.

The Panel has decided not to admit any of those communications, i.e. it will not admit either the letter of June 4, 2018 and the attached Censure nor will it admit the additional communications referred to by the Committee.

The Panel is refusing to admit those materials, not because they are not relevant to the issue of costs, but because in this case those communications are inconclusive and therefore not helpful to a determination of a fair and reasonable order as to costs.

In an appropriate case, evidence of pre-hearing negotiations between the Committee and a member under investigation may be helpful in revealing the reasonableness of their respective settlement positions and as to whether a full hearing on the merits was required. The Panel does not accept the Committee's arguments that allowing evidence of such negotiations during the cost phase of disciplinary proceedings (after all factual determinations relating to the substance of the allegations against the member have been made) will have a chilling effect on settlement discussions.

However, in this case, having had the benefit of reviewing various pre-hearing settlement communications between the parties, the Panel has concluded that those communications do not assist in the task of determining an appropriate award of costs. The Panel's impression of the pre-hearing settlement communications was that both parties were asserting reasonable positions based on their own differing perspectives. Those differing perspectives were derived from their contrasting understandings of the facts which they considered to be provable at that time, i.e. prior to the full hearing of the substance of the charges.

In the ultimate result, neither party was entirely correct in their assessments of the factual findings which might be ultimately made by the Panel after a lengthy, contested hearing. Therefore, in this case, admitting evidence of the parties' settlement discussions would not be helpful, and could be detrimental to a determination of an appropriate cost award. Accordingly, such evidence will not be admitted.

Given that Dr. Dhalla's motion for the introduction of evidence of settlement negotiations in relation to the issue of costs was the first time such a motion had been brought before the College and recognizing that bringing such a motion was reasonable in the unique circumstances of this case, no order of costs will be made in relation to that

motion. The Committee's request that costs of the motion in the amount of \$5,000.00 be awarded to the College is therefore denied.

COSTS PURSUANT TO S.59.7 OF THE ACT

The Panel must decide upon an order with respect to costs which will be fair and reasonable in the circumstances of this case. To make that decision the Panel will refer to the principles which have been established by the courts and by other professional regulatory tribunals as being applicable to a determination of costs in disciplinary proceedings.

The parties helpfully submitted several authorities articulating those principles. They have been usefully summarized by James Casey in his text "*The Regulation of Professions in Canada*" and by the Saskatchewan Court of Appeal in *Abrametz v. Law Society of Saskatchewan 2018 SKCA 27*, quoting favourably from the Nova Scotia Court of Appeal in *Hills v. Nova Scotia (Provincial Dental Board) (2009) 307 DLR (4th) 341*.

Those principles are outlined below.

1. A member of a profession who is found to have committed an act of professional misconduct or to have breached a standard of conduct of his or her profession should bear a substantial portion of the costs of the investigative and disciplinary process. The membership of the profession as a whole should not be responsible for bearing those costs.
2. The nature and extent of proven versus unproven allegations in reference to the factual findings of a panel must be considered. This involves consideration of the relative time and expense of the investigation and hearing relating to each of the charges and the results of each of the charges.
3. The extent to which the conduct of each of the parties resulted in costs either being incurred or being saved.

4. The impact of other penalties imposed upon the member.
5. The costs to the member should not be punitive. Furthermore, costs should not be so prohibitive as to prevent a member from advancing a full answer and defence.

When applying the above-noted principles to these proceedings, three salient considerations emerge.

Firstly, these proceedings were made much more difficult than they otherwise would have been, by the failure of Dr. Dhalla to adequately document his involvement in the care and management of Patient Y from November 9, 2015 onward. The shortcomings in Dr. Dhalla's charting and recordkeeping handicapped the College's investigation, undermined Dr. Dhalla's own ability to recall important events and explain the course of his care and treatment of Patient Y, and hampered the experts retained by the parties in performing their analyses and in providing their opinions. The defective charting also made it difficult for the Panel to properly assess the relevant events and to make the necessary factual determinations.

Secondly, the results of the proceedings were mixed. The Committee failed to prove the allegations against Dr. Dhalla outlined in subparagraphs 1(a) and 1(b) of the Notice of Inquiry. However the Committee was successful in proving the allegations against Dr. Dhalla as outlined in subparagraph 1(c) of the Notice of Inquiry.

The mixed results of the proceedings are challenging to assess in terms of costs. Dr. Dhalla asserted that after the College's investigation was substantially concluded and once expert reports were available, it should have been clear to the Committee that it was very unlikely that convictions could be obtained in relation to the allegations in subparagraphs 1(a) and 1(b) of the Notice of Inquiry. According to Dr. Dhalla, most of the time spent at the hearing related to those two charges and therefore most of the costs of the hearing itself should be the responsibility of the College. Conversely, the Committee asserted that all or substantially all of the evidence at the hearing was required. Although the allegations outlined in subparagraphs 1(a) and 1(b)

of the Notice of Inquiry were not proven, the allegations relating to subparagraph 1(a) were reasonable and the Panel concluded that Dr. Dhalla had made an error in judgment relating to the events referred to in charge 1(a). Furthermore, the Committee submitted that much of the evidence relating to charge 1(b) was necessary to provide the complete context of what had occurred and to establish the basis for Dr. Dhalla's failure to ensure continuity of care to Patient Y on November 12, 2015.

The Panel's assessment differs from both that of Dr. Dhalla and the Committee.

The Panel's position is that the evidence relating to charge 1(a) was appropriate as part of a reasonable (although ultimately unsuccessful) effort on the part of the Committee to establish a serious breach of a professional standard in relation to the events of November 9, 2015.

On the other hand, the Panel agrees with Dr. Dhalla's contention that the Committee's allegations in charge 1(b) were not supportable and that much of the evidence relating to those allegations was not required and resulted in an unnecessary lengthening of the hearing. However, the Panel accepts the Committee's submissions that a significant amount of evidence relating to the events of November 10 and 11, 2015 was necessary to enable the Panel to fully understand the background events and to provide a basis for the serious findings against Dr. Dhalla relating to his failure to provide continuity of care to Patient Y at a time when Dr. Dhalla was responsible for the care of Patient Y.

Thirdly, it is also challenging to assess whether there was a lack of cooperation on the part of Dr. Dhalla, which should be reflected in the cost award. It would not be accurate to say Dr. Dhalla did not cooperate with the investigation. He responded to all enquiries made of him by the College. It is true that his position changed with respect to the important issue of whether he was the responsible physician in relation to Patient Y throughout the relevant time period, and that his fluid position on that issue was a source of frustration to the Committee, up to and including the hearing itself.

However, some of the variability in Dr. Dhalla's position on that issue likely arose from understandable lapses in his memory and his own deficient recordkeeping, rather than a deliberate intention on Dr. Dhalla's part to undermine the College's investigation. Nonetheless, the Panel recognizes that there may have been an element of self-interest in Dr. Dhalla's delayed acknowledgement that he was indeed the responsible physician on November 12, 2015.

Dr. Dhalla did plead guilty to charge 2 relating to his inadequate documentation. His reluctance to enter into a Statement of Agreed Facts with respect to some of the relevant events was reasonable given his legitimate disagreement over some of the background facts relating to the allegations in subparagraphs 1(a) and 1(b) of the Notice of Inquiry and in the context of Dr. Dhalla's not guilty plea to the entirety of charge 1. His reluctance to agree to a Statement of Agreed Facts was also consistent with his right to advance a full answer and defence.

The Committee was critical of Dr. Dhalla's opposition to allowing evidence from Dr. X to be introduced by way of an affidavit. The Panel disagrees with that criticism and has concluded that Dr. Dhalla's opposition to that motion, even though unsuccessful, was reasonable in the circumstances.

Bearing all the foregoing in mind, the Panel has decided that some significant portion of the costs of the investigation and of the disciplinary proceedings must be borne by Dr. Dhalla and not by the membership of the College as a whole.

The Panel does not agree with Dr. Dhalla's suggestion that he should pay only \$17,000.00 representing the approximate costs of the investigation, or his alternate suggestion that he should pay less than \$50,500.00 (i.e. less than 30% of the College's total costs).

Either of those dispositions would require the membership of the College to assume disproportionate responsibility for Dr. Dhalla's breaches of professional standards. The Panel specifically rejects Dr. Dhalla's arguments based on the proposition that an inordinate amount of time was spent at the hearing dealing with the allegations in

subparagraphs 1(a) and 1(b) of the Notice of Inquiry, which were not proven. As noted above much of that evidence was required to establish what Patient Y experienced between November 9 and November 12 and was helpful in informing the Panel's findings and decisions with respect to the allegations in subparagraph 1(c) of the Notice of Inquiry.

However, the Panel disagrees with the Committee that Dr. Dhalla should pay \$134,699.00 in costs, representing 80% of the total costs of the proceedings. Such an award would overlook Dr. Dhalla's successful defence of charges 1(a) and 1(b), and that charge 1(b) was arguably unwarranted. The Panel is also concerned that costs in the amount of \$134,699.00, in the context of this case, could be regarded as punitive, whereas the substantive punishment in this case was the two month suspension of Dr. Dhalla's licence to practice medicine from November 1, 2020 to December 31, 2020.

In the result, the Panel has concluded that a fair and reasonable disposition with respect to costs is to order Dr. Dhalla to pay \$85,000.00 as a contribution to the costs of these proceedings. Such an order reflects:

- (i) Dr. Dhalla's responsibility for the inadequate documentation of his care and management of Patient Y and the adverse impact which that inadequate documentation had on the investigation of these matters and on the conduct of the hearing itself;
- (ii) Dr. Dhalla's responsibility for the investigation costs (approximately \$17,000.00) incurred by the College;
- (iii) the nature and extent of the proven versus unproven allegations in reference to the factual findings of the Panel, recognizing that the College failed to prove the allegations in charge 1(a) and 1(b) but that it was reasonable to proceed with charge 1(a), and that much of the evidence at the hearing was necessary to provide the Panel with a complete context for what had occurred in relation to the care and management of Patient Y for the entire period between November 9 and November 2, 2015.

DECISION

By reason of the foregoing, the Panel orders that pursuant to s. 59.7 of the *Act*, Dr. Dhalla shall pay the all-inclusive sum of \$85,000.00 to the College as a contribution to the costs of the investigation and hearing, and that payment of that sum shall be made as soon as reasonably practical.

DATED this 15th day of January, 2021.