ONTARIO PHYSICIANS AND SURGEONS DISCIPLINE TRIBUNAL

Citation: *Kitakufe v. College of Physicians and Surgeons of Ontario,* 2021 ONPSDT 41
Date: October 18, 2021
Tribunal File No.: 21-011-I

BETWEEN:

Dr. John Justin Chrozy Kitakufe

- and -

College of Physicians and Surgeons of Ontario

REINSTATEMENT APPLICATION REASONS

Heard: August 23-26, 2021, by videoconference

Panel:

Mr. Peter Pielsticker (chair)
Dr. Ida Ackerman
Dr. Michael Franklyn
Mr. Pierre Giroux
Dr. James Watters

Appearances:

Ms. Emily Graham, for the College
Mr. Samuel Baker, for Dr. Kitakufe
Ms. Jennifer McAleer, Independent Legal Counsel

Introduction

[1] Dr. Kitakufe has two criminal convictions arising from his medical practice at different times. In 1986, Dr. Kitakufe was convicted for his involvement in a conspiracy related to fraud against Medicaid and trafficking in narcotic-based drugs in the United States. He fled the US prior to sentencing but was eventually extradited back to that country where he was incarcerated.

[2] In 2001, the Discipline Committee found Dr. Kitakufe's US criminal conviction constituted professional misconduct as he had been found guilty of an offence relevant to his suitability to practise medicine. *College of Physicians and Surgeons of Ontario v. Kitakufe*, 2001 ONCPSD 5. He was reprimanded and received a six-month suspension.

[3] In 2007, Dr. Kitakufe was convicted in Toronto of conspiracy to commit fraud and traffic in a controlled substance. Over an 18-month period, he wrote a large number of fraudulent prescriptions for OxyContin, created false medical records to legitimize the prescriptions and submitted fraudulent billings to OHIP. He was sentenced to 32 months in custody and ordered to pay restitution to the province.

[4] In 2010, the Committee found that Dr. Kitakufe had engaged in professional misconduct and revoked his certificate of registration. *College of Physicians and Surgeons of Ontario v. Kitakufe*, 2010 ONCPSD 15.

[5] Dr. Kitakufe has not practised medicine since 2006. He now applies for reinstatement of his certificate of registration. He tells us he has engaged in ongoing psychotherapy, has been successful in understanding and addressing the factors leading to his past misconduct, and has accepted responsibility for his misconduct. As well, Dr. Kitakufe notes that his personal circumstances have changed significantly, he has made continuing efforts to maintain his clinical competence and he has sought to make restitution through volunteer activities in his community.

[6] The College opposes his application on the basis that Dr. Kitakufe's misconduct was extremely serious, he lacks insight and has failed to accept responsibility for the harms that resulted and he has failed to take reasonable remedial measures proposed to him many years ago. In the College's view, we have no assurance

that Dr. Kitakufe has maintained his clinical competence and his proposal for returning to practice is wholly inadequate. Further, the College argues that to allow Dr. Kitakufe to return to practice would fundamentally undermine public trust in the integrity of the profession and in the profession's ability to regulate itself.

[7] We find that Dr. Kitakufe has not demonstrated the suitability of his reinstatement at this time and dismiss his application. These are our reasons.

The Application

[8] Section 72 of the Health Professions Procedural Code (Code), schedule 1 to the *Regulated Health Professions Act, 1991*, SO 1991, c. 18 provides that a person whose certificate of registration has been revoked as a result of disciplinary proceedings may apply to have their certificate reinstated. The application cannot be made earlier than one year after revocation when the revocation was for misconduct other than sexual abuse of a patient.

[9] Following a hearing on the application, the Tribunal may direct the Registrar to issue a Certificate of Registration to the applicant with, or without, the imposition of specified terms, conditions and limitations.

The Test for Reinstatement

[10] The onus is on Dr. Kitakufe to establish his suitability for reinstatement. We must determine, based on evidence at the reinstatement hearing, whether Dr. Kitakufe has met this onus. The standard of proof is a balance of probabilities, based on clear, cogent and convincing evidence.

[11] The parties agree that the general requirements for a certificate of registration that are set out in O. Reg. 865/93 under the *Medicine Act, 1991*, SO 1991, c. 30 apply to an application for reinstatement. These provide, in part, that:

> It is a non-exemptible standard and qualification for a Certificate of Registration that the applicant's past and present conduct afford reasonable grounds for belief that the applicant:
>
> (a) is mentally competent to practise medicine;
>
> (b) will practise with decency, integrity and honesty and in accordance with the law;

(c) has sufficient knowledge, skill and judgement to engage in the kind of medical practice authorized by the Certificate; and

(d) can communicate effectively and will display an appropriately professional attitude.

[12] While there is no statutory guidance as to criteria we must consider, we adopt the framework used in *College of Physicians and Surgeons of Ontario v. Gillen*, 2010 ONCPSD 14 and several recent reinstatement decisions, where the Tribunal addressed two broad issues:

1. What is the risk of further misconduct, and if there is a risk, is it manageable with terms, conditions and limitations?

2. Is the applicant suitable to practise both in terms of protection of the public and the confidence of the public in the profession's ability to govern itself?

[13] In determining these broad issues, we considered the following specific factors that were articulated in *College of Physcians and Surgeons of Ontario v. Manohar*, 2014 ONCPSD 17, and applied in recent decisions as appropriate to their facts and circumstances:

- The facts giving rise to the misconduct that led to revocation, and other past conduct relevant to the physician's suitability to return to practice;
- Changes in the physician's circumstances since the time of revocation;
- The success of rehabilitation, including the degree of insight into past inappropriate conduct;
- The physician's current mental health and future prognosis;
- The physician's attempts at restitution, if any;
- The physician's current knowledge, skill and judgment;
- The physician's present character – will the physician practise medicine with decency, integrity and honesty and in accordance with the law;
- The protection of the public; and
- The impact of the physician's reinstatement on the reputation of the profession.

Analysis

[14] The protection of the public from a physician who presents a risk of future misconduct or who lacks the knowledge, skills and judgment to practise safely is the paramount consideration in our decision.

[15] Encompassed in the principle of public protection is the need to maintain public confidence in the integrity of the profession and the College's ability to govern the profession in the public interest. As stated in *Gillen* at paras. 243 and 245:

> With the monopolistic right of self-regulation, the College bears an extraordinary responsibility…;
>
> That responsibility includes not only maintaining public safety but also the confidence of the public in the medical profession. The two go hand-in-hand. If the public does not have confidence and trust that the College is maintaining standards of professionalism, integrity, and quality, then public safety is also compromised.

[16] Our analysis of the case-specific factors and the broader issues relevant to our decision on reinstatement is as follows.

<u>The facts giving rise to the misconduct that led to revocation, and other relevant past conduct</u>

[17] The revocation of Dr. Kitakufe's certificate of registration in 2010 resulted from his actions in his family practice in Toronto from 2005 to 2006 and his criminal conviction in 2007. His earlier criminal conviction in 1986 in the United States and the professional misconduct finding in 2001 are also relevant. These events and Dr. Kitakufe's misconduct are summarized as follows.

US criminal conviction

[18] In late 1982, between residency positions in the United States, Dr. Kitakufe worked briefly as a salaried physician in a clinic in Chicago.

[19] In 1985, Dr. Kitakufe learned that he had been indicted in a conspiracy related to fraud against Medicaid and trafficking in narcotic-based drugs, which was alleged to have occurred while he was working at the clinic. Dr. Kitakufe was subsequently convicted of racketeering, conspiracy to commit racketeering, illegal drug distribution and mail fraud.

[20] Dr. Kitakufe's evidence is that he was unaware that his prescriptions at the clinic were being altered by others, he had no involvement in clinic billing, he would have left the position if he had known of the illegal activity and he had no financial means to appeal the guilty verdict.

[21] Dr. Kitakufe was released on bail, resumed surgical practice in Manitoba and returned briefly to the United States for a pre-sentencing hearing. Subsequently, while awaiting sentencing, he panicked and went to Nigeria where he worked for several months. Dr. Kitakufe returned to Toronto in 1987, acquired privileges at the York-Finch Hospital and gradually established what became a busy solo family practice.

[22] Dr. Kitakufe was arrested in Toronto some years later and extradited to Chicago. In October 1999, he was sentenced and served 14 months in a United States federal penitentiary.

[23] On his release, Dr. Kitakufe returned to Toronto and resumed his solo family practice.

2001 Suspension

[24] On the basis of Dr. Kitakufe's criminal conviction in the US, the Committee found in an uncontested hearing that he had engaged in professional misconduct in that he had been found guilty of an offence relevant to his suitability to practise medicine.

[25] The Committee accepted a joint submission as to penalty, taking note of the highly unusual circumstances of the case, the lengthy period of incarceration served by Dr. Kitakufe and the fact that the events in question had occurred many years previously.

[26] The Committee ordered a reprimand, a six-month suspension of Dr. Kitakufe's certificate of registration and monitoring of his OHIP billing for five years. The suspension was deemed to have been served concurrent with Dr. Kitakufe's incarceration and he was able to resume practice immediately.

Canadian criminal conviction

[27] Between February 2005 and September 2006, while in family practice in Toronto, Dr. Kitakufe engaged in a conspiracy to commit fraud and trafficking in a controlled substance. His two co-conspirators were initially patients in his practice. At an early point in their relationship he gave them money to buy cars for him, but he never received either the cars or reimbursement.

[28] Dr. Kitakufe saw as many as 30 to 40 individuals per week who had been recruited by his co-conspirators to appear in his office as “patients” pretending to suffer from chronic pain. The “patients” typically brought pre-filled pain forms with them, meant to illustrate where they were experiencing pain. Dr. Kitakufe would prescribe a large quantity of OxyContin. He would record a cursory physical exam and include the pain forms in clinical charts so that the OxyContin prescriptions would appear justified. The “patients” would receive the OxyContin from a pharmacy without charge because they qualified for the Ontario Drug Benefit Plan. They would then be paid a small amount for the OxyContin by the co-conspirators who would in turn traffic the tablets. The “patients” would typically return every other month.

[29] Dr. Kitakufe’s evidence is that he did not initially know that the patients were not legitimate. When he did learn this and that the drugs were being taken from the patients and diverted to the “street,” he indicated to his co-conspirators that he wanted them to stop sending “patients” to him. At that point, they offered - and he accepted - cash kickbacks of up to $200 per prescription or approximately $251,000 in total. In addition, Dr. Kitakufe billed OHIP for unnecessary medical services to the “patients,” approximately $97,000 in total.

[30] The fraud and diversion of narcotics to drug trafficking depended on Dr. Kitakufe’s actions which continued over 18 months and only ended because of his arrest. His conduct victimized approximately 500 “patients” recruited to the scheme, many of whom were indigent and vulnerable. Dr. Kitakufe’s actions are likely to have caused severe harm or death to many individuals with opioid addictions. They would have harmed their families and undoubtedly contributed to the societal harms arising from drug addiction and trafficking. The magnitude of the fraud was estimated to exceed $382,000 in direct charges to the Ministry of

Health, and the street value of the diverted OxyContin tablets estimated to be several million dollars.

[31] Dr. Kitakufe pleaded guilty to criminal charges of fraud and trafficking in a controlled substance. At his sentencing in November 2007, the Court rejected Dr. Kitakufe's comment that he misunderstood the seriousness of OxyContin and that this was somehow a rationale for his actions. Dr. Kitakufe was sentenced to 32 months in custody and ordered to pay restitution to the province in the amount of $50,000.

[32] Dr. Kitakufe served 14 months of pre-trial custody and an additional six months of custody after sentencing. He was released on parole in May 2008.

2010 Revocation

[33] Based on the facts above and Dr. Kitakufe's admission, the Committee found that Dr. Kitakufe had engaged in professional misconduct in that he had been convicted of an offence relevant to his suitability to practise medicine and had engaged in disgraceful, dishonourable or unprofessional conduct.

[34] Following a contested penalty hearing, the Committee ordered Dr. Kitakufe's certificate of registration be revoked and that he be reprimanded and pay costs.

[35] To summarize, we find that Dr. Kitakufe's misconduct in 2005 and 2006 was extremely serious. It was intentional, persistent and motivated by financial gain. It must have been profoundly harmful to a great many individuals, to society and to the confidence of the public in the profession. This misconduct is even more shocking given its similarity to Dr. Kitakufe's earlier criminal conduct, for which he was convicted and incarcerated in the US and later disciplined.

[36] While the facts of Dr. Kitakufe's misconduct do not preclude reinstatement in themselves, we must take them into account in our analysis of the suitability of reinstatement and particularly the risk of reoffence.

<u>Changes in the physician's circumstances since the time of revocation</u>

[37] Dr. Kitakufe's financial responsibilities have decreased considerably as he is no longer supporting multiple family members. Dr. Kitakufe's children are grown. He

is now divorced and lives alone but gets along with his ex-wife and family, particularly his daughter who is a family physician in the United States. As well, others are now contributing to the costs of the ongoing care required by his adult son. Dr. Kitakufe supports himself with CPP and other government programs. Dr. Kitakufe's family, friends and other supporters have assisted him with the legal fees arising from his reinstatement application.

[38] Dr. Kitakufe describes himself as having become more spiritually involved in recent years. He is a member of and has volunteered for the Church of Latter-Day Saints, which espouses strong ethical values, devotion to family and community, altruism and service. His description of these activities is supported by the character witnesses and others who wrote letters on his behalf. Dr. Kitakufe has become an active contributor to various church and community programs and has endeavoured to make use of his knowledge by participating in information sessions on common health topics, for example.

[39] The Committee's reasons for its 2010 decision for revocation note that Dr. Kitakufe was described then by character witnesses as having changed emotionally and spiritually since his incarceration in Toronto, having become more involved in his church and having expressed remorse for his criminal activity. We find that any positive effect of sustained and/or further changes in Dr. Kitakufe's circumstances on the suitability of his reinstatement is limited and far outweighed by other factors, set out below.

<u>The success of rehabilitation, including the degree of insight into past conduct</u>

[40] The degree to which Dr. Kitakufe has gained insight into his actions, accepts responsibility and been successful in rehabilitation is central to our analysis of the risk of reoffence. Based on the evidence that follows, we find that Dr. Kitakufe's rehabilitation and insight into his misconduct are at best incomplete and insufficient.

Why did Dr. Kitakufe become involved in the Toronto scheme and what is different now?

[41] Dr. Kitakufe's criminal conduct in Toronto bears significant similarities to the crimes for which he was convicted in the US. At his 2010 hearing, Dr. Kitakufe explained that he should have received treatment after his incarceration in the

United States. He stated that he let his anger overtake him and blind him, resulting in his becoming morally weak and making terrible decisions.

[42] At this hearing, Dr. Kitakufe testified that he was in “a very dark spot” in 2005 and 2006, was very bitter and was not thinking clearly. As a result, he “paid a huge price.” Dr. Kitakufe stated that he has since gained a great deal of insight and now recognizes that he should have dealt with the situation differently. He provided no specifics beyond mentioning forgiveness and commenting on his reading of two books that he said had helped him with his personal development.

[43] Dr. Hy Bloom is a psychiatrist who provided independent forensic psychiatric reports in 2009 and 2010 at the request of Dr. Kitakufe’s counsel. He was qualified as an expert witness and gave opinion evidence at Dr. Kitakufe’s discipline hearing later in 2010.

[44] In his June 2009 report, Dr. Bloom noted that he was “puzzled” by Dr. Kitakufe’s criminal conduct in Toronto after his experience in Chicago. As explanation, Dr. Bloom offered only the possible contributions of psychological factors such as unresolved anger over his circumstances, frustration, sense of loss and personal inadequacy in the context of various stressors, vulnerabilities and financial pressures. He opined that at the time, Dr. Kitakufe had been dealing with various forms of loss and disappointment for many years, including:

- the lost opportunity to become a surgeon resulting from the events in Chicago;
- loss of image and self-esteem as a result of the Chicago conviction;
- the stress of living as a fugitive and then, when extradited, the loss of his liberty;
- the loss of his professional status and ability to practise when arrested and extradited; and
- the dissolution of his marriage.

[45] Dr. Sandy Horodezky is a psychiatrist who engaged in psychotherapy with Dr. Kitakufe in 2001, 2008 to 2009 and 2012 to the present. We qualified Dr. Horodezky at this hearing as a treating psychotherapist, qualified to give opinion

evidence in respect of his diagnosis, treatment and prognosis for Dr. Kitakufe but not on the risk of reoffence.

[46] Dr. Horodezky wondered, in his report to Dr. Kitakufe's counsel in November 2014, why Dr. Kitakufe appeared to have been so blasé about his criminal involvement in 2005-2006 and the danger it placed him in. He opined that Dr. Kitakufe's actions were initially enabled by a number of psychological mechanisms, including a need for approval which led to boundary problems and denial of the danger to himself from his actions. As well, he suggested that Dr. Kitakufe's continued misconduct was fueled in part by greed, a desire to assist needy family members and possibly survivor guilt.

[47] Dr. Horodezky also testified about the serious traumas in Dr. Kitakufe's life:

- the terror in Uganda and killing of family members and friends that led Dr. Kitakufe to withdraw from his surgical residency program in Ottawa;
- the racial discrimination that Dr. Kitakufe experienced in his surgical residency program in the United States; and
- the criminal charges in Chicago, the ensuing loss of a position as a surgeon in the United States Army and the end of his professional career in the United States.

Dr. Horodezky's opinion on Dr. Kitakufe's insight

[48] The original purpose of Dr. Horodezky's psychotherapy with Dr. Kitakufe was supportive, while in more recent years the aim has been for Dr. Kitakufe to gain insight into his past actions.

[49] Dr. Horodezky described Dr. Kitakufe as having worked hard in psychotherapy. He opined that Dr. Kitakufe had developed more awareness of how his vulnerabilities contributed to his offences. In November 2014, he wrote to counsel that Dr. Kitakufe:

> …has developed sufficient insight into his criminal behavior that he would be able to detect quickly any situation that could make him vulnerable (unlike in the past);
>
> …now realizes he was fully responsible for whatever he was punished for…I feel that the "blind spots" that allowed [Dr. Kitakufe] to stray have been corrected and…he will exercise much better judgment in the future, and

> …has expressed much remorse during the treatment and elaborated on how much he feels that he betrayed the trust that the public placed in him as a physician and how he has wronged the medical profession by his dishonorable conduct. He is well aware of the scourge of narcotic addiction and how his actions contributed further harm to this vulnerable population.

[50] In his October 2020 letter to counsel, Dr. Horodezky stated that his opinion of Dr. Kitakufe's character and fitness to practise medicine was unchanged.

[51] For a number of reasons, we put very limited weight on Dr. Horodezky's conclusions about Dr. Kitakufe's engagement in therapy and insight:

- In his November 2014 letter, Dr. Horodezky wrote that he believed that Dr. Kitakufe had "been completely candid with [him] in respect to his past behavior" and he reiterated this belief in May 2016. This was not so. Specifically, Dr. Kitakufe:
    - acknowledged to Dr. Horodezky in late 2013 that he may have misled him about his guilt in writing fraudulent prescriptions.
    - misled Dr. Horodezky by telling him that he had won his lawsuit against his former US residency program when he had not, and that he had received a three-month suspension in 2001 when his suspension was for six months.
    - was not open with Dr. Horodezky in respect of other facts: not making him aware that he had fled to Nigeria prior to sentencing in Chicago, that he had received kickbacks from his co-conspirators for each prescription he wrote in Toronto and that he had not taken the boundaries course recommended by Dr. Bloom in 2010.
- Dr. Kitakufe's commitment to psychotherapy was limited. When asked on cross-examination whether he was doing therapy with Dr. Horodezky only to help him with reinstatement, Dr. Kitakufe testified: "I don't think that's what I was thinking, but you're probably right." Dr. Kitakufe agreed that, in October 2014, he thought he had had enough therapy and asked Dr. Horodezky to discuss with his (Dr. Kitakufe's) lawyers whether he could continue with less frequent sessions. Dr. Kitakufe agreed that he wanted his counsel's view on whether to continue psychotherapy rather than Dr. Horodezky's clinical opinion. Dr. Kitakufe also acknowledged at this hearing that he would have stopped his therapy with Dr. Horodezky at that time if his lawyers had agreed, although he now sees that view as "dumb" and "wrong."
- Dr. Horodezky's clinical notes show that he discussed the draft of his November 2014 report to counsel with Dr. Kitakufe before submitting it and received suggestions about modifying it from Dr. Kitakufe.

[52] Dr. Horodezky has been engaged in Dr. Kitakufe's therapy for many years, has properly formed a therapeutic alliance with him and has supported him in his efforts to achieve reinstatement. In our view, Dr. Horodezky's opinion on Dr. Kitakufe's insight and rehabilitation reflects an optimism that, while natural, is not consistent with other facts and is not fully warranted.

[53] As well, it would not be wholly reassuring to take at face value Dr. Horodezky's opinion that Dr. Kitakufe would recognize situations of vulnerability in the future, as recognition alone may be insufficient to prevent reoffence. For example, Dr. Kitakufe chose to continue to engage in criminal activity in Toronto despite his recognition of how wrong it was to do so, knowing full well the consequences he might face, and knowing that his OHIP billings were being monitored.

Does Dr. Kitakufe continue to see himself as a "victim?"

[54] Whatever the roles of his co-conspirators, Dr. Kitakufe's own choices and actions were fundamental to the Toronto conspiracy. If his understanding of his part in those crimes is limited, and particularly if he sees himself as a victim of forces outside his control, then he is not in a position to fully accept responsibility for his actions and the harm they caused or to avoid reoffending in the future. On the other hand, if Dr. Kitakufe now has reasonable insight into his role and why he engaged in the crimes, then the risk of reoffence may be significantly less.

[55] Many of Dr. Horodezky's notes from 2013 to 2021 indicate that Dr. Kitakufe was exploring factors in his own background and character and elsewhere that may have contributed to his misconduct. These include:

- his vulnerability to being taken in by "scam artists" (October 2013);
- his anger at unjust treatment in the US, including racial discrimination (January 2014);
- not being "street-smart" and having grown up in an environment that did not help him anticipate dishonesty by other people (February 2014);
- his fear of violence against himself by the men who had drawn him into the conspiracy, in the context of the recent murder of a local family physician by a patient and the past violence to his friends and family in Uganda (April 2014);

- his wishful thinking and denial in the face of his need to support his family financially (April 2014);
- the irresponsibility of the government in allowing OxyContin to enter the country (July 2014);
- the irresponsibility of the drug companies in marketing OxyContin to physicians when "so much bad was known" about it (July 2014);
- whether a curse had been placed on him or the "sins of the father" were being visited on him (April 2015);
- how his experience with the US government and justice system was akin to a trauma, which led to a form of PTSD and his poor judgement about OxyContin (July 2019); and
- the persistence of the institutionalized racism in the United States, of which he was a victim, and its aggravation of his PTSD (June 2020).

[56] Dr. Horodezky's clinical notes do not make clear in each instance the extent to which Dr. Kitakufe may have been seeking to minimize his own sense of culpability or was simply exploring questions that were reasonable in the context of psychotherapy. However, Dr. Horodezky did comment specifically in his April 4, 2014 note that Dr. Kitakufe's "view of himself primarily as a victim" was inconsistent with his knowing participation in the Toronto conspiracy.

[57] We are particularly concerned by Dr. Kitakufe's comment in February 2019 to Dr. Horodezky to the effect that if his certificate is not reinstated, it will be because he [Dr. Kitakufe] is a victim of the opioid crisis or society's response to it, when in fact he was a knowing and active contributor. Although Dr. Kitakufe now identifies the comment as regrettable, it suggests that as recently as 2019, he did not adequately appreciate the significance of his own actions or the magnitude and scope of the harm they caused.

[58] Overall, we see little in Dr. Horodezky's notes over a number of years to suggest any positive change in Dr. Kitakufe's insight or acceptance of responsibility, or that Dr. Kitakufe would now be better able to avoid reoffending. The notes suggest, instead, that Dr. Kitakufe's insight into his past actions remained incomplete and insufficient at least until relatively recently.

Dr. Kitakufe's testimony on insight

[59] Dr. Kitakufe testified that he has changed and that he now understands and accepts responsibility for his actions. We accept that this is his honest belief. However, beyond the simple statement that he accepts responsibility, he provided very little in terms of explanation, detail or how he now sees his own role in his misconduct. His testimony overall was not clear about where he now believes responsibility for his misconduct lies, if indeed he has resolved this in his own mind.

[60] We are concerned that Dr. Kitakufe was reluctant to acknowledge directly a number of aspects of his misconduct and crimes in Toronto that should be well known to him. Examples include that Dr. Kitakufe performed cursory physical exams of the "patients" and placed their pre-filled pain forms in their charts so as to legitimize his OxyContin prescriptions, that he knew by February 2005 that there was no legitimate need for most of the OxyContin he was prescribing, that his co-conspirators were diverting the OxyContin to resale on the "street" and that, when he told his co-conspirators he was going to stop prescribing OxyContin, they started making cash payments to him so that he would continue.

[61] On each of these points, when taken to previously agreed statements of fact and other documentary evidence, Dr. Kitakufe said in essence that if the facts were recorded and he had accepted them in the past then they must be true.

[62] We also found Dr. Kitakufe's description of the harm resulting from his actions to be brief, general and not indicative of a clear understanding on his part. For example, Dr. Kitakufe barely acknowledged the most direct victims of his misconduct, that is, the individuals with opioid addiction to whom the large quantities of OxyContin he prescribed illegally were trafficked.

[63] Dr. Kitakufe's evidence indicates to us that he is not able to accept full responsibility for his misconduct and criminal actions.

Does Dr. Kitakufe have sufficient insight into his actions that the risk of reoffence is low?

[64] Public protection is paramount in our decision. We agree with the view expressed in *Roberts v. College of Physicians and Surgeons of Ontario*, 2018 ONCPSD 2 at para. 28*:*

> (…) The practice of medicine is a privilege, not a right. Regardless of the personal interests of the physician, reinstatement should only be granted if it is in the public interest to do so…

[65] Dr. Kitakufe has faced many personal and professional challenges in his life and has paid a high price for his misconduct and criminal behaviour. We do not criticize Dr. Kitakufe if he was not "street-smart," had "blind spots" and vulnerabilities or for having explored these in psychotherapy with Dr. Horodezky. We also recognize that he is not responsible for the larger societal context in which he engaged in misconduct or for the actions of others. However, Dr. Kitakufe is unquestionably responsible for his own choices and actions and their consequences.

[66] Given the life-altering consequences of his US experiences, we are surprised that in 2005-2006 Dr. Kitakufe was not highly sensitized to the possibility of being drawn into further criminal activities and did not assiduously avoid any such involvement. Yet, despite these prior experiences, many years to reflect and his ongoing psychotherapy, we found Dr. Kitakufe's articulation of why he first became involved and then continued in the 2005-2006 conspiracy to be very limited and not particularly introspective. His evidence failed to persuade us that he had changed in critical ways or that he now has the knowledge and capacity to resist any future involvement in similar criminal conduct.

[67] We are not persuaded that the evidence supports a finding that Dr. Kitakufe has sufficient understanding of his own actions and resulting harm that the risk of him reoffending is acceptably low.

<u>The physician's current mental health and future prognosis</u>

[68] Dr. Horodezky testified that Dr. Kitakufe had reactive depression when he first saw him in 2001 and that he has been treating him for some time for that diagnosis, which has some features of post-traumatic stress disorder as well. Dr. Horodezky opined that the prognosis depends very much on what happens in Dr. Kitakufe's life; that is, his mental state is reactive. Were Dr. Kitakufe to be permitted to return to practice, his prognosis would be excellent.

[69] Consistent with this, Dr. Bloom opined in 2009 that Dr. Kitakufe was experiencing a major depressive episode, which he found understandable in light of the

stressors and circumstances Dr. Kitakufe faced. Dr. Bloom observed deficits in Dr. Kitakufe's concentration and memory which he hypothesized were related to his depression. These observations have not been followed up.

[70] There is no evidence that issues of mental health played a role in Dr. Kitakufe's misconduct. We put little weight on them as a factor in determining the suitability of reinstatement.

The physician's attempts at restitution

[71] Dr. Kitakufe has engaged in various volunteer activities in his church and community, as attested to by several witnesses. His counsel submits that this is indicative of Dr. Kitakufe's strong desire to make restitution for his past actions wherever possible. This view is consistent with Dr. Horodezky's comment that Dr. Kitakufe's religious faith has been a source of strength for him in recent years and has allowed him to forgive himself and spend what remains of his life making amends for his wrongdoing.

[72] We heard no evidence that Dr. Kitakufe has attempted to make restitution in respect of those who were harmed by his misconduct, or that he has paid the $50,000 he was ordered to reimburse the province in 2007. Dr. Kitakufe testified that he did not think he had paid the costs awarded to the College in 2010.

[73] While Dr. Kitakufe's efforts in his community and church are commendable, we give little weight overall to his attempts at restitution in determining the suitability of reinstatement.

The physician's current knowledge, skill and judgment

[74] Beyond the facts of his misconduct set out above, we have no evidence that up to 2006 Dr. Kitakufe was other than a competent, busy and respected physician. However, Dr. Kitakufe has not been in any form of clinical practice since he was arrested 15 years ago.

[75] With his application for reinstatement, Dr. Kitakufe submitted documentation of his participation in numerous online activities, hospital rounds and primary care conferences and his journal reading during the period of 2012 to 2016 as evidence of continuing medical education. We have no evidence about whether

these activities may have satisfied the requirements for continuing maintenance of competence for physicians in practice during this period, in whole or in part. We have no evidence of any educational activity before 2012 or since 2016, although Dr. Kitakufe testified that he thought that he had submitted more recent documentation.

[76] The College policy "Ensuring Competence: Changing Scope of Practice and/or Re-Entering Practice" requires physicians:

- To report when they wish to re-enter practice after having not practised for two years or more;
- To submit an application form; and
- To participate in a review process which, while tailored to individual needs, typically includes a needs assessment, an education plan, a period of clinical supervision - initially at a high level and gradually decreasing, and a final assessment.

[77] Dr. Kitakufe acknowledged that he is aware that his return to practice is subject to compliance with this policy. He acknowledged as well that the proposed Supervision Arrangement he submitted makes no provision for an assessment of his learning needs, an individualized education plan or a final clinical assessment.

[78] An assessment of Dr. Kitakufe's potential learning needs as contemplated in the policy is essential. In *Roberts*, for example, the physician had been absent from practice for eight years. Without an assessment of his clinical skills and a remediation plan, the Committee was unable to assess whether Dr. Roberts's knowledge, skills and judgment were adequate for safe practice and how deficiencies would be addressed. This is equally true of Dr. Kitakufe.

[79] Dr. Libman is a family physician who has agreed to serve as a clinical supervisor should Dr. Kitakufe's certificate be reinstated and has signed Dr. Kitakufe's proposed Supervision Arrangement. While Dr. Libman's willingness to assist is commendable, we have concerns about his diligence in reviewing the relevant documentation and understanding his proposed commitment.

- First, Dr. Libman affirmed by signing the proposed Supervision Arrangement that he had read the Guidelines for College-Directed Supervision and knew of no reason why he might not be objective in supervising Dr. Kitakufe. In fact, he and Dr. Kitakufe have a longstanding

personal and professional relationship. Their close friendship began in medical school more than 50 years ago. They have been professional colleagues at times and Dr. Libman and his spouse have been physicians for members of Dr. Kitakufe's family. The requirement to disclose any such relationship is very clearly described and apparent in the Guidelines.

- Second, Dr. Libman testified that he was "not really" familiar with the College's Ensuring Competence policy although he was aware that Dr. Kitakufe's compliance with the policy, including in respect of clinical supervision, would be required for Dr. Kitakufe's proposed return to practice.

[80] In his 2010 report, Dr. Bloom recommended that Dr. Kitakufe work initially as a surgical assistant where the level of stress and responsibility would be low, then in directly supervised practice within the offices of another physician and lastly, in a monitored practice in which Dr. Kitakufe would practise family medicine independently but still meet regularly with another family physician. Dr. Bloom's proposal generally aligns with the graduated supervision described in the College policy.

[81] By contrast, Dr. Kitakufe proposes simply to return to full independent family practice with an off-site supervisor.

[82] Dr. Kitakufe testified that he recognizes that family medicine has changed tremendously but asserts that he has maintained the currency of his medical knowledge and stayed up to date with continuing medical education requirements. Dr. Kitakufe has not practised in the past 15 years, has provided no evidence of engagement in continuing professional development in the last five years at least and has provided no assessment of his clinical competence - recent or otherwise. While it may be Dr. Kitakufe's honest belief that his current knowledge, skills and judgment are satisfactory, we find that he has failed to demonstrate this to be the case. Indeed, it is much more likely that Dr. Kitakufe has significant clinical deficits. We are concerned that he has not seen any need to consider this possibility, nor has he presented a plan that has adequate safeguards.

[83] With the lack of meaningful evidence about Dr. Kitakufe's current clinical competence, allowing him to return to full independent practice as he proposes would expose the public to risk. This risk is not manageable in any reasonable way with terms, conditions or limitations and certainly not by the means Dr.

Kitakufe proposes. We conclude that on this basis alone, reinstatement is not appropriate, regardless of what view we might hold on other factors.

Is the physician's present character such that will he practise medicine with decency, integrity and honesty and in accordance with the law?

[84] In respect of Dr. Kitakufe's character, Dr. Bloom wrote in 2009:

> All collateral information that I received about Dr. Kitakufe was positive, and strongly suggests that Dr. Kitakufe is a morally grounded, caring, hardworking, and conscientious physician, co-worker, friend, spouse, and father.

[85] More recently, Dr. Horodezky wrote in 2016:

> (…) I have now known him now [*sic*] for over 14 years. He is a reserved, dignified man with great humanity, tolerance and compassion for others. He is capable of hard work and self-sacrifice. He has a following of loyal patients, co-workers and colleagues who have sorely missed his presence in their lives.

[86] We heard testimony from seven witnesses about Dr. Kitakufe's present character, including from his daughter who is a physician, two other physicians and members of Dr. Kitakufe's church and community. All have known him for some years and know of his past misconduct and criminal actions.

[87] In addition, Dr. Kitakufe submitted 12 letters of support dated in late 2015 and 2016, including letters from Dr. Libman and three other individuals who also testified at this hearing. Not all mentioned Dr. Kitakufe's misconduct.

[88] Common themes brought out by the witnesses were Dr. Kitakufe's acknowledgement of his misconduct, his introspection and development of insight into his personal weaknesses, deep remorse and acceptance of his responsibility for the harms he has caused, genuine repentance, commitment to the values of his faith and willingness to serve his church and community in various roles. Some commented as well on the regard with which he is still held in his community as a physician.

[89] Each of the witnesses was surprised and shocked when they learned of Dr. Kitakufe's criminal actions, and there were several comments about how they found such behaviour very much out of keeping with his character as they

believed it to be. Indeed, when Dr. Libman learned of his misconduct, he questioned whether he really knew Dr. Kitakufe as well as he had thought he did.

[90] Despite the many comments about Dr. Kitakufe's positive personal qualities and, in a number of instances, positive change in his character, we put limited weight on this evidence. The witnesses' shock and surprise demonstrate that Dr. Kitakufe successfully concealed his misconduct and deceived those who knew him, including his daughter, for an extended period. Their knowledge of Dr. Kitakufe's character is limited in the sense that it would have arisen in a different context and been based on very different interactions with him than those of, for example, the individuals he harmed or his co-conspirators.

[91] We agree with the view expressed in *College of Physicians and Surgeons of Ontario v. Taylor*, 2017 ONCPSD 17, that individuals can be misled as to the "good character" of others, citing the Court of Appeal in *R. v. Drabinsky*, 2011 ONCA 582, at para 167:

> (…) [I]ndividuals who perpetrate fraud…are usually seen in the community as solid, responsible, and law-abiding citizens…The offender's prior good character and standing in the community are to some extent the tools by which they commit and sustain the frauds over lengthy time periods.

[92] We find the level of insight and acceptance of responsibility attributed to Dr. Kitakufe by the character witnesses is inconsistent with considerable other evidence, analyzed above.

[93] Dr. Kitakufe's misconduct was completely antithetical to the "practising medicine with decency, integrity and honesty and in accordance with the law" component of the non-exemptible standard for a certificate of registration. We are not persuaded that there are now sufficient grounds to believe that Dr. Kitakufe would meet this standard.

Protection of the public

Clinical competence

[94] As addressed above, we are not persuaded that the risk to public safety in respect of Dr. Kitakufe's current knowledge, skills and judgment is acceptably low

or reasonably manageable with terms, conditions or limitations on his certificate were it to be reinstated.

Risk of reoffence

[95] For the reasons below, we are also not persuaded that the risk of Dr. Kitakufe engaging in further misconduct is acceptably low or manageable.

No recent risk assessment

[96] In 2009, Dr. Bloom reported on earlier psychological testing which indicated that Dr. Kitakufe presented a low risk to reoffend. However, he also stated that he was puzzled by Dr. Kitakufe's involvement in the Toronto conspiracy. He opined that Dr. Kitakufe's experience in Chicago should have been a powerful deterrent and went on to conclude that deterrence alone would be insufficient to ensure that Dr. Kitakufe does not reoffend. He commented as well that Dr. Kitakufe had not profited from psychotherapy to the degree he would have hoped.

[97] The lack of a recent expert assessment of the risk of reoffence is significant as it leaves us only with the uncertainty articulated in Dr. Bloom's report. In *Roberts*, for example, which is similar to this matter in several ways, the physician's insight into his misconduct was incomplete and past assessments of his suitability to practise were equivocal. The panel in that case found that a recent independent assessment and risk management plan were required in the interests of public safety. We agree that such evidence is also required here.

Failure to adopt recommended measures

[98] Dr. Bloom opined that a "concerted plan that included psychotherapy/counselling, education, a graduated return to practice, and a practice monitor would reduce [Dr. Kitakufe's] risk from mild-to-moderate to where it could be seen as low." We note that even with this opinion and these safeguards, in 2010 the Committee was not satisfied that Dr. Kitakufe would not reoffend. We have no new evidence that would provide such reassurance now, especially as Dr. Kitakufe has chosen not to adopt such a plan.

[99] Dr. Bloom also recommended in 2010 that Dr. Kitakufe take a course on professional boundaries, based on the boundary violations associated with his

becoming involved in the Toronto scheme and in other areas of his professional life.

[100] Dr. Kitakufe has not taken a boundaries course. He testified that he was rejected but has reviewed the course website material and done other self-directed reading. We are not persuaded by Dr. Kitakufe's assertion that he in fact now is "very aware" of boundaries that should not be crossed.

Inadequate risk mitigation

[101] Dr. Kitakufe's proposal for returning to practice does not reassure us that any further misconduct or criminal activity would be prevented or promptly identified by Dr. Libman or others.

- Dr. Kitakufe would be practising by himself with Dr. Libman in his own office elsewhere. Dr. Libman would have no meaningful ability to identify business dealings with patients or other boundary violations if Dr. Kitakufe chose to conceal them.
- Dr. Kitakufe failed to make Dr. Libman aware that he had falsified medical charts to legitimize the OxyContin prescriptions. The chart review process that Dr. Kitakufe proposes would be unreliable in detecting such actions should Dr. Kitakufe repeat his misconduct.
- Dr. Libman would have no ability to identify fraudulent OHIP billings by Dr. Kitakufe.
- Dr. Kitakufe has not been completely open and honest with his psychotherapist, Dr. Horodezky, as set out above. As well, Dr. Bloom testified (in 2010) that Dr. Kitakufe had not been fully candid with him in regard to past events.

[102] We also question whether Dr. Libman could be sufficiently objective and independent as a supervisor given their longstanding relationship, and are concerned by Dr. Libman's lack of familiarity with the College's policy and expectations of physicians re-entering practice.

[103] In summary, we have no evidence from which to conclude that the risk of Dr. Kitakufe reoffending is acceptably low or manageable. Dr. Kitakufe proposes returning to practice with few safeguards. He stated that he would accept any conditions proposed by the College but also testified that in essence, it falls to the College to work out an appropriate plan for his return to practice and to present its requirements to him. We are concerned that Dr. Kitakufe's approach to re-

entering practice reflects a lack of understanding of how and why he came to engage in his misconduct and how future misconduct might be prevented.

Impact of the physician's reinstatement on the reputation of the profession

[104] The public and the profession have no tolerance for the extremely serious misconduct that led to Dr. Kitakufe's revocation. Dr. Kitakufe abused his position of authority and trust as a physician by engaging in a conspiracy to commit fraud and traffic in OxyContin. He did so for personal gain over an extended period and in the context of a previous conviction for similar offences.

[105] That said, revoked physicians have the opportunity for reinstatement when appropriate rehabilitation and sufficient public protection can be demonstrated. Both the public and the profession would consider the successful rehabilitation of a physician as commendable and worthy of effort on the part of the physician, the profession and the College. The public interest would be served by the successful return to practice of a physician who is competent, is of good character, has insight into their past misconduct and presents no appreciable risk of reoffending.

[106] As a corollary though, the reinstatement of a physician when rehabilitation and protection of the public are not adequately demonstrated would undermine public confidence in the profession and its ability to regulate itself in the public interest. We agree with the view in *Roberts* that neither the public nor the profession would support reinstatement where questions persist about the physician's insight and acceptance of responsibility for past misconduct, their current competence and the extent of the risk to public safety which a return to practice would entail.

[107] We find that important questions remain in respect of Dr. Kitakufe's insight into his past misconduct, his acceptance of responsibility and his current clinical knowledge, skills and judgment. We conclude that reinstatement of Dr. Kitakufe's certificate of registration would diminish public confidence in the profession and its ability to regulate itself in the public interest.

Conclusion

[108] After considering the evidence and submissions of counsel, we find that Dr. Kitakufe has not met the onus of establishing the suitability of reinstatement at this time.

[109] We find there are not reasonable grounds to believe that Dr. Kitakufe would meet the non-exemptible standard in respect of his current knowledge, skill and judgment or the expectation that he would practise medicine with decency, integrity and honesty and in accordance with the law if reinstated.

[110] We are not persuaded that the risk of further misconduct is acceptably low or that the risk could reasonably be managed. We are concerned that Dr. Kitakufe lacks the insight into his misconduct that would allow him to reliably avoid such misconduct in the future. In addition, Dr. Kitakufe's proposal for returning to clinical practice lacks safeguards against further misconduct and his incomplete insight suggests that terms, condition and limitations on his certificate would not be adequate to manage that risk.

[111] We are not persuaded Dr. Kitakufe's current clinical knowledge, skills and judgment are such that the risk to the public is acceptably low or could reasonably be managed.

[112] For all the above reasons, we conclude as well that the confidence of the public in the integrity of the profession and its ability to regulate itself in the public interest would be diminished were Dr. Kitakufe's certificate to be reinstated.

Order

[113] The application for reinstatement is dismissed.