

**ONTARIO PHYSICIANS AND SURGEONS DISCIPLINE TRIBUNAL**

**Citation:** *College of Physicians and Surgeons of Ontario v. Matheson*, 2022 ONPSDT 27

**Date:** July 26, 2022

**Tribunal File No.:** 21-022

**BETWEEN:**

College of Physicians and Surgeons of Ontario

- and -

Dr. Jeffrey Rice Holmes Matheson

**FINDING AND PENALTY REASONS**

**Heard:** June 14, 2022, by videoconference

**Panel:**

Mr. David A. Wright (Tribunal Chair)

Ms. Julia Goyal

Dr. Peeter Poldre

Dr. Deborah Robertson

Ms. Shannon Weber

**Appearances:**

Ms. Elisabeth Widner, for the College

Ms. Samantha Coomara, for Dr. Matheson

**RESTRICTION ON PUBLICATION**

The Tribunal ordered, under ss. 45-47 of the Health Professions Procedural Code, that no one may publish or broadcast the names or any information that would identify patients referred to orally at the hearing or in the exhibits filed referred to during the Tribunal hearing or in any documents filed with the Tribunal. There may be significant fines for breaching this order.

## Introduction

- [1] Dr. Matheson ignored COVID-19 public health directives about mask wearing. A patient complained to the College, and the Inquiries, Complaints and Reports Committee (ICRC) considered making an interim order against him. The ICRC agreed to accept Dr. Matheson's promise (undertaking) instead of making an order. Within days, he broke that promise. Additionally, he gave patients information inconsistent with public health and College directives, including promoting conspiracy theories about COVID-19 and saying that masks don't work.
- [2] Dr. Matheson admitted, and we found, that he engaged in acts that would be reasonably regarded by members as disgraceful, dishonourable or unprofessional and contravened a term, condition or limitation on his certificate of registration. The parties made a joint submission that the penalty should be a nine-month suspension and a restriction on communicating advice or recommendations to patients that is contrary to public health guidelines.
- [3] Because this is a joint submission, we must implement it unless it would bring the system of physician professional regulation into disrepute. Applying that test, we accepted the joint submission at the hearing. We also ordered costs to the College, as agreed, at the standard rate of \$6,000 for a half-day hearing. These are our reasons.
- [4] Panel member David Wright was the pre-hearing chair and sat on the panel with the consent of both parties.

## Misconduct

- [5] Amid the COVID-19 pandemic, Ontario's Chief Medical Officer of Health (CMOH) issued a directive to health care providers that required that patients wear face coverings and that health care providers engaging in direct patient care wear personal protective equipment (PPE), including surgical/procedure masks: Directive #2 for Health Care Providers; COVID-19 Operational Requirements: Health Sector Restart. The legal power to do so came from the *Health Protection and Promotion Act*, RSO 1990, c. H.7, s. 77.1 (*HPPA*)
- [6] After the directive was issued, Dr. Matheson:

- greeted a patient at the front desk of his clinic with a mask held over his face, removed the mask from his face as they walked toward the exam room and told the patient she could remove hers. The patient took off her mask. (August 17, 2020, Patient B)
- did the same thing again, but this time the patient kept on her mask. (November 20, 2020, Patient B)
- didn't wear a mask and told a patient she didn't need to wear one either. He only put on a mask when the patient asked him to. (February 8, 2021, Patient A)

[7] Patient A complained to the College after the February 8 appointment. The ICRC provided notice to Dr. Matheson that it was considering making an interim order. It decided instead to accept Dr. Matheson's undertaking, dated March 3, 2021, that he would wear a surgical/procedure mask during all in-person patient encounters and require his staff to do the same while at work.

[8] About two weeks later, at an appointment with Patient B on March 15, 2021, Dr. Matheson greeted the patient at reception with his mask on properly but removed it once they arrived in the examination room.

[9] Dr. Matheson told Patient B during her appointments:

- A mask would not help with COVID-19. (August 17, 2020)
- COVID-19 was a media conspiracy and a money-making scheme involving Bill Gates. (November 20, 2020)
- Masks do not work and have potentially severe side effects, children cannot contract COVID-19 and should not be made to wear masks and COVID-19 tests are being sold to China for DNA sequencing. He told his patient, a teacher, that he recommended to parents that they send their children to school without masks and threaten to sue principals if challenged. (March 15, 2021)

[10] Dr. Matheson's actions were disgraceful, dishonourable and unprofessional. The CMOH issues directives like those at issue here when there is or may be an immediate risk to the health of Ontarians (*HPPA*, s. 77.7(1)). All health care providers, including physicians, are required by law to comply (*HPPA*, s. 77.7(3)).

- [11] In seeing patients without wearing a mask and telling patients they did not need to do so themselves, Dr. Matheson broke the law. He put his patients, the public and his staff at risk by not following measures that the CMOH had decided were necessary to protect Ontarians from risk. These measures were designed to protect the public during a global pandemic that has killed thousands of Ontarians and millions worldwide, causing serious disease and long-lasting consequences for many more. Dr. Matheson did this when vaccines were not yet developed or generally available and masking and social distancing were the primary public health responses to control the spread of the virus.
- [12] What is more, Dr. Matheson actively discouraged patients from following those public health measures, telling them they did not work or could cause harm. He promoted non-scientific, baseless conspiracy theories. This impaired the public health response at a time of crisis.
- [13] When a patient complained, Dr. Matheson formally committed to the College that he would follow public health directives. He broke that undertaking and failed to comply with a term, condition or limitation on his certificate of registration less than two weeks after signing it.
- [14] Patients and the public look to what physicians do and say during this pandemic. It is unprecedented in most of our lifetimes, and people may feel uncertain about what advice to take. When they see a *physician* ignoring and contradicting public health directives, it has a particular impact. Dr. Matheson wilfully spread misinformation about COVID-19. He should have been a role model, and he was not.
- [15] We recognize that the scope of any limits on professionals' expression about the pandemic is an issue that may come before this and other tribunals. This decision does not address rights under the *Canadian Charter of Rights and Freedoms* because Dr. Matheson has admitted misconduct.

### **Joint Submissions**

- [16] The parties' agreement on penalty must be implemented unless it is so "unhinged from the circumstances" that implementing it would bring the administration of the College's professional discipline system into disrepute: *College of Physicians and*

*Surgeons of Ontario v. Bahrgard Nikoo*, 2022 ONPSDT 15 at para. 34; *Bradley v. Ontario College of Teachers*, 2021 ONSC 2303. The test is adapted from the Supreme Court's analysis in the criminal law context in *R. v. Anthony-Cook*, 2016 SCC 43. While criminal law approaches should not be automatically imported into professional regulation, courts and discipline tribunals have found that on the issue of joint submissions, the test is the same.

- [17] The Tribunal will accept and implement a joint submission in all but the most exceptional circumstances. There must be something completely unacceptable, unusual or unconscionable to reject it, not just a disagreement or belief that a different outcome would better serve the public interest or be a more fit penalty. The Tribunal may not “tinker” with a joint submission, which is the result of a careful balancing by the parties of the relevant considerations.
- [18] There are many reasons for this high bar. It encourages settlement. If the College and physicians do not have confidence that settlements will be implemented, they will be less likely to happen, with negative consequences for the public interest. Settlements have many benefits for the discipline process. They avoid the stress of a hearing for witnesses, the physician and those close to them. They save time and costs and lead to a faster resolution of the issues for the parties and quicker action to protect the public interest.
- [19] Compromise also avoids an “all or nothing” situation for either party. Both parties avoid the risk that challenges in their case, such as weaknesses in witness testimony, legal arguments or evidence that may be inadmissible will affect the outcome. This information is not available to the panel but is usually an important factor in the parties’ decisions. Joint submissions help protect the public interest by making sure that, subject to very limited exceptions, a finding will be made and a penalty implemented. For the physician, they remove uncertainty about the result of the case and the penalty. Settlement can also involve creative and meaningful terms, conditions and limitations that would be difficult to order and implement without buy-in from both parties.
- [20] The Tribunal must consider a joint submission with humility and confidence that negotiations by the parties have resulted in both the public interest and the physician’s interest being balanced. As the Supreme Court said in *Anthony-Cook*,

at para. 44, counsel “are entirely capable of arriving at resolutions that are fair and consistent with the public interest.”

[21] Deciding whether a penalty meets the test is about the forest, not the trees. Neither the parties' arguments nor the panel's reasons need identify every consideration that a panel would apply if it were deciding what penalty to impose without an agreement. What is important are the key penalty factors that place this misconduct at a general point along the spectrum of potential penalties: see the factors set out in *College of Physicians and Surgeons of Ontario v. Fagbemigun*, 2022 OPSDT 22 at paras. 11-16. Comparing the penalty factors with those in other cases and their results helps the panel determine if the penalty is so far removed from what would be expected that it meets the high bar to consider rejection of the joint submission.

[22] If a panel is considering departing from a joint submission, it must advise the parties and provide them an opportunity to make submissions. The decision can only be based on the facts agreed upon in the agreed statement of facts and any other evidence the parties may have called. The parties are not required to share information about other facts or the circumstances that led to the joint submission: *Bradley* at para. 13.

### **Application to the Facts**

[23] The parties have agreed on a nine-month suspension and a requirement that Dr. Matheson not communicate any information inconsistent with public health guidelines. We would characterize a nine-month suspension as being at the high end of the moderate range.

[24] *Fagbemigun* identified four groups of factors that are central to identifying penalty: the seriousness of the misconduct (paras. 12-13), discipline history (paras. 14-15), the physician's actions since the misconduct (paras. 16-17) and the personal circumstances of the physician (para. 18).

[25] There are several factors that make Dr. Matheson's actions more serious. He put others at risk by not following public health rules during a dire global public health crisis. When his misconduct was identified, he promised to follow the rules and promptly broke that promise.

- [26] The misconduct is also more serious because it came following three cautions in person from the ICRC between 2015 and 2019, where the ICRC emphasized to him the importance of following the rules and policies that set out legal obligations and professional expectations that govern all physicians. In 2015, it was the policies on medical records, treating self and family members and physician relationships with industry. In 2018, it was the policy on complementary/alternative medicine and the regulations under the *Medicine Act, 1991*, SO 1991, c. 30. In 2019, following posts Dr. Matheson made on social media about vaccines, it was the College's position statement on social media and practice guide about professionalism. In two of the cases, he was required to learn more about his professional ethics and obligations. The ICRC decisions are not a discipline history, nor is there proof of the underlying events. However, the misconduct is more serious because Dr. Matheson committed it after the importance of following clear written rules and choosing his words carefully about public health issues was brought to his attention through the cautions and education.
- [27] Dr. Matheson also has a formal discipline history and therefore progressive discipline also applies. In 2017, the Tribunal found that he failed to maintain the standard of practice of the profession and engaged in disgraceful, dishonourable or unprofessional conduct in his prescribing of opioids and by his failure to follow the requirements of the College's Out of Hospital Premises Program: *College of Physicians and Surgeons of Ontario v. Matheson*, 2017 ONCPSD 32. He was suspended for four months and made subject to various terms, conditions and limitations. It is notable that in that case, like this one, he failed to follow clear rules for the profession.
- [28] Dr. Matheson has admitted misconduct. He has given another undertaking, in which he commits to comply with all COVID-19 rules that apply to physicians, and agreed to have a workplace monitor (a regulated Ontario health professional approved by the College) who will monitor all encounters with patients and office management practices to ensure he follows this undertaking. He will post signs in his office that say that he must comply with COVID-19 guidelines and that all patient encounters will be observed by the monitor. His admission and agreement to the penalty and undertaking point toward a less serious penalty. The undertaking, including a

workplace monitor to observe all his patient encounters, as well as the term on his certificate of registration directly protect the public.

[29] The parties relied on several cases involving a failure to comply with restrictions or undertakings: *College of Physicians and Surgeons of Ontario v. Beauchemin*, 2021 ONCPSD 30 (five months), *College of Physicians and Surgeons of Ontario v. Ismail*, 2020 ONCPSD 45 (six months); *College of Physicians and Surgeons of Ontario v. Gutman*, 2017 ONCPSD 47 (seven months). The somewhat longer length of suspension here reflects the seriousness of this case, notably Dr. Matheson's failure to follow fundamental public health measures during a pandemic, discipline history, immediate disregard for his own commitment and the fact that he did this in the face of having the importance of following the rules brought to his attention multiple times in recent years.

[30] The penalty and the costs order of \$6,000 would not bring the professional discipline system into disrepute and the joint submission is accepted. We note that Dr. Matheson has been suspended since April of 2021 as a result of an ICRC order and that order remains in effect.

## **Order**

[31] At the conclusion of the hearing, we ordered and directed:

- a. Dr. Matheson to attend before the panel to be reprimanded;
- b. the Registrar to suspend Dr. Matheson's certificate of registration for nine months commencing immediately;
- c. the Registrar to place the following terms, conditions and limitations on Dr. Matheson's certificate of registration effective immediately:
  - i. Dr. Matheson shall not communicate to his patients advice or recommendations that are contrary to directives and/or guidelines issued by the provincial government or public health authorities regarding public health measures related to COVID-19.
- d. Dr. Matheson to pay the College costs in the amount of \$6,000.00 by July 14, 2022.



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Dr. Jeffrey Rice Holmes Matheson

**The Tribunal delivered the following Reprimand**  
by videoconference on Tuesday, June 14, 2022.

**\*\*\*NOT AN OFFICIAL TRANSCRIPT\*\*\***

Dr. Matheson,

We are profoundly dismayed by your breach of an undertaking less than two weeks after you appended your signature to the commitment you made to abide by the Ministry of Health requirements for masking and wearing personal protective equipment.

It was very wrong to break your commitments, and to break the rules designed to protect your staff and patients during a global pandemic. The people of Ontario expect physicians to respect all laws and rules made under them, especially those that govern professional conduct during challenging times.

We are deeply concerned that your professional misconduct is not isolated to this most recent instance but represents the continuation of a pattern of involvement with the College that has included three cautions in person by the College's Inquiries, Complaints and Reports Committee and one prior Discipline Committee sanction, all occurring since 2015.

The issues of concern in your appearances at the College of Physicians and Surgeons of Ontario over the past seven years have been multi-faceted with most sharing the common theme of a disregard for the policies of the College. These policies exist to protect the public and ensure public confidence in the medical profession.

Your nine-month suspension is a strong signal that the current breach of an undertaking and significant failure to follow public health policies, in the context of the concerns noted over the past seven years, raises very serious concern about your governability. In the undertaking you have signed to resolve this proceeding, you are making important commitments that protect the public. You must follow them every day and in every situation.

We expect that you will reflect upon your misconduct during and after your suspension and that you will return to the practice of medicine with a profound respect for the laws of the land, the policies of the College and the importance of keeping your word.