

NOTICE OF PUBLICATION BAN

In the College of Physicians and Surgeons of Ontario and Dr. Rodion Andrew Kunynetz, this is notice that the Discipline Committee ordered that no person shall publish or broadcast the names of patients and of any information that could disclose the names or identity of patients referred to orally or in the exhibits filed at the hearing, under subsection 45(3) of the Health Professions Procedural Code (the “Code”), which is Schedule 2 to the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18, as amended.

Subsection 93(1) of the Code, which is concerned with failure to comply with these orders, reads:

Every person who contravenes an order made under ... section 45 or 47... is guilty of an offence and on conviction is liable,

(a) in the case of an individual to a fine of not more than \$25,000 for a first offence and not more than \$50,000 for a second or subsequent offence; or

(b) in the case of a corporation to a fine of not more than \$50,000 for a first offence and not more than \$200,000 for a second or subsequent offence.

**Indexed as: Ontario (College of Physicians and Surgeons of Ontario) v. Kunynetz,
2019 ONCPSD 52**

**THE DISCIPLINE COMMITTEE OF THE COLLEGE
OF PHYSICIANS AND SURGEONS OF ONTARIO**

IN THE MATTER OF a Hearing directed by
the Inquiries, Complaints and Reports Committee of the College of Physicians and Surgeons of Ontario
pursuant to Section 26(1) of the **Health Professions Procedural Code**
being Schedule 2 of the *Regulated Health Professions Act, 1991*,
S.O. 1991, c. 18, as amended.

B E T W E E N:

THE COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO

- and -

DR. RODION ANDREW KUNYNETZ

PANEL MEMBERS:

**DR. B. LENT
MS. G. SPARROW (dissenting regarding finding)
DR. V. MOHR
MS. C. TEBBUTT
DR. J. RAPIN**

COUNSEL FOR THE COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO:

MS. ELISABETH WIDNER

COUNSEL FOR DR. KUNYNETZ:

**MR. MATTHEW SAMMON
MR. IAN MacLEOD**

INDEPENDENT COUNSEL FOR THE DISCIPLINE COMMITTEE:

MR. DAVID ROSENBAUM

**Hearing dates: September 4 and 13, 2019
Decision Date: September 13, 2019
Release of Reasons Date: October 24, 2019**

PUBLICATION BAN

DECISION AND REASONS FOR DECISION

The Discipline Committee (the “Committee”) of the College of Physicians and Surgeons of Ontario heard this matter at Toronto on September 4 and 13, 2019. At the conclusion of the hearing, the Committee released a written order stating its finding that Dr. Rodion Andrew Kunynetz committed an act of professional misconduct and setting out its penalty and costs order with written reasons to follow.

THE ALLEGATIONS

The Notice of Hearing alleged that Dr. Kunynetz committed an act of professional misconduct:

1. under clause 51(1)(b.1) of the *Health Professions Procedural Code* which is schedule 2 to the *Regulated Health Professions Act*, 1991, S.O. 1991, c.18 (the “Code”) in that he engaged in sexual abuse of patients;
2. under paragraph 27.29 of Regulation 448 of the *Revised Regulations of Ontario, 1980* made under the *Health Disciplines Act* (“O. Reg. 448/80”) and paragraph 29.30 of Regulation 548 of the *Revised Regulations of Ontario, 1990* made under the *Health Disciplines Act* (“O. Reg. 548/90”), in that he engaged sexual impropriety with patients; and
3. under paragraph 1(1)33 of Ontario Regulation 856/93 made under the *Medicine Act, 1991* (“O. Reg. 856/93”), in that he has engaged in conduct or an act or omission relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.

RESPONSE TO THE ALLEGATIONS

Dr. Kunynetz entered a plea of no contest regarding allegation 3, in that he has engaged in conduct or an act or omission relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional. The College withdrew the first and second allegations in the Notice of Hearing.

THE FACTS

The following facts were set out in a Statement of Uncontested Facts and Plea of No Contest which was presented to the Committee on September 4, 2019, and filed as an exhibit:

BACKGROUND

1. Dr. Kunynetz is a 67-year old physician who received his certificate of independent practice in 1978. He received his specialist certification in dermatology in 1982.
2. At the relevant times, Dr. Kunynetz was practicing dermatology in Barrie, Ontario.

DISGRACEFUL, DISHONOURABLE OR UNPROFESSIONAL CONDUCT

3. Dr. Kunynetz does not contest that, in respect of multiple patients, he engaged in disgraceful, dishonourable or unprofessional conduct in that he moved or removed their clothing, in the course of clinical examinations, without providing adequate warning or explanation of what he was doing, and without obtaining adequate consent from the patients. The conduct included pulling up patients' shirts, moving brassieres and underwear.
4. As a result of this conduct, Dr. Kunynetz's patients were left feeling upset and uncomfortable.
5. Dr. Kunynetz admits that, at the time of the misconduct in question, he had previously been provided with material from the College as a result of another patient complaint, emphasizing the importance of explaining to a patient ahead of time the nature and reason for any portion of a physical examination, particularly if the actions are relevant to, or involve, sensitive parts of the body.

NO CONTEST

6. Dr. Kunynetz does not contest the facts specified above, and does not contest that, based on these facts, he engaged in professional misconduct by engaging in conduct or an act or omission relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.

RULE 3.02 – PLEA OF NO CONTEST

Rule 3.02 of the Rules of Procedure of the Discipline Committee regarding a plea of no contest states as follows:

3.02(1) Where a member enters a plea of no contest to an allegation, the member consents to the following:

- a) that the Discipline Committee can accept as correct the facts alleged against the member on that allegation for the purposes of College proceedings only;
- b) that the Discipline Committee can accept that those facts constitute professional misconduct or incompetence or both for the purposes of College proceedings only; and
- c) that the Discipline Committee can dispose of the issue of what finding ought to be made without hearing evidence.

REQUEST FOR CLARIFICATION FROM THE PARTIES

The Committee requested clarification regarding certain aspects of the content of the Statement of Uncontested Facts and Plea of No Contest. First, the Committee questioned why Schedule “A”, which included details of allegations of Dr. Kunynetz’s inappropriate behaviour with 29 patients, had not been read into the record. Second, the Committee asked if more facts could be provided with respect to the specific conduct in question, including the number of patients involved, and the time frame of the alleged inappropriate behaviour. Third, the Committee asked for the legal authority in support of determining that Dr. Kunynetz’s behaviour (as described in paragraph 3 of the Notice of Hearing) constituted disgraceful, dishonourable or unprofessional conduct. Finally, the Committee asked for submissions on its authority to make a finding, and on whether it could give adequate reasons for that finding, based on the very basic facts that were contained in the Statement of Uncontested Facts and Plea of No Contest.

In response to the first question, College counsel indicated that, although the usual practice was to read Schedule “A” to the Notice of Hearing into the record, there was no requirement to do so. In this case, she had not done so because the College’s position on the facts was now substantially different from what it had alleged in Schedule “A”. College counsel did not consider it useful to read into the record what was no longer part of the College’s case. Dr. Kunynetz’s counsel and independent legal counsel to the Committee concurred with College counsel in this regard. The Committee was satisfied with this explanation.

Both College counsel and counsel for Dr. Kunynetz requested more time to address the Committee’s other questions. The Committee therefore agreed to adjourn the hearing until September 13, 2019.

SUPPLEMENTARY STATEMENT OF UNCONTESTED FACTS

The following Supplementary Statement of Uncontested Facts was presented to the Committee and filed as an exhibit on September 13, 2019:

1. Dr. Kunynetz received his medical degree from the University of Toronto in 1977 and completed his residency at the University of Ottawa. He was certified as a dermatologist by the Royal College of Physicians and Surgeons in 1982. For many years, he acted as an assessor in dermatology for the College of Physicians and Surgeons of Ontario.
2. Dr. Kunynetz carried on private practice in dermatology in the Barrie community from 1983 onwards. He serviced patients not only in the Barrie and Simcoe County area, but also from Collingwood, Midland, Penetanguishene, North Bay and Sudbury.
3. At the relevant times, Dr. Kunynetz maintained a very busy office practice. He generally saw 65 to 70 OHIP patients per day, as well as 12-15 patients per day participating in clinical trials. He typically worked from 7:15 a.m. until 6 or 6:30 p.m. Patients typically experienced long waits in the waiting room before seeing the doctor.
4. Accordingly, Dr. Kunynetz had a very busy practice with a large number of patients he saw daily. He developed an abrupt communication style in the course of examining patients.

5. In addition to the facts set out in paragraph 3 of the Statement of Uncontested Facts and Plea of No Contest, dated September 4, 2019 (set out above), Dr. Kunynetz does not contest the following facts:

- a. the plea of no contest pertains to eight patients, seen in different appointments between 1996 and 2015;
- b. Each of the patients was referred to Dr. Kunynetz for the examination of skin lesions (including mole checks for certain patients), which necessitated a dermatological examination of their skin. The patients were aware that their skin was to be examined;
- c. In the course of clinical examinations of the patients, Dr. Kunynetz moved clothing to visualize and examine their skin. Dr. Kunynetz had a medical reason to examine the skin underneath the clothing;
- d. Dr. Kunynetz does not contest that, prior to moving patients' clothing, he should have provided a more adequate explanation as to the nature of the examinations and how he intended to conduct them, to avoid any surprise, misunderstanding or patient distress, and to ensure adequate consent.

6. With respect to paragraph 5 in the Statement of Uncontested Facts and Plea of No Contest, Dr. Kunynetz received the material from the College in 2009. Four of the eight patient encounters occurred following his receipt of the material.

7. Dr. Kunynetz does not contest the facts specified above and does not contest that, based on these facts and the facts set out in the Statement of Uncontested Facts and Plea of No Contest, dated September 4, 2019, he engaged in professional misconduct by engaging in conduct or an act or omission relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.

“Disgraceful, dishonourable or unprofessional”

At the resumption of the hearing on September 13, 2019, counsel for the College provided authorities to the Committee in support of the College's position that the facts as stated in the

two Statements of Uncontested Facts constituted conduct relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional. Both counsel submitted that the Committee could make a finding based on the uncontested facts before it.

Dr. Kunynetz was the subject of a prior hearing before the Committee in 2016 that resulted in various findings of professional misconduct being made against him. The Divisional Court (*Ontario (College of Physicians and Surgeons of Ontario) v. Kunynetz*, 2019 ONSC 4300) quashed two of the Committee's findings in that case, including a finding of sexual abuse. It also quashed the Committee's penalty decision, which included revocation of Dr. Kunynetz's certificate of registration. However, it upheld as reasonable the Committee's finding that Dr. Kunynetz's moving or removing two patients' clothing without adequate warning or explanation constituted disgraceful, dishonourable or unprofessional conduct (see paragraphs 61 and 158 of the Divisional Court decision). Counsel for the College noted that this was the same finding the College was asking the Committee to make in this case (as described in paragraph 3 of the Statement of Uncontested Facts and Plea of No Contest: that Dr. Kunynetz engaged in disgraceful, dishonourable or unprofessional conduct "in that he moved or removed clothing....in the course of clinical examinations, without providing adequate warning or explanation of what he was doing, and without obtaining adequate consent"). Counsel for the College submitted that the finding in the previous case, which was based on substantially the same facts as in this case, supported the Committee's making the same finding in this case.

Three other cases involving disgraceful, dishonourable or unprofessional conduct were provided. College counsel submitted that these cases should also satisfy the Committee that the facts in the two Statements of Uncontested Facts were sufficient for the Committee to make a finding of disgraceful, dishonourable or unprofessional conduct.

In *CPSO v Raja*, 2018 ONCPSD 22 (CanLII) ("*Raja*"), the Committee found that Dr. Raja had engaged in disgraceful, dishonourable or unprofessional conduct by failing to provide an adequate explanation to one patient on a methadone maintenance program as to why it was appropriate for him to expose her breast while doing a cardiac examination.

Similarly, in *CPSO v Jiaravuthisan*, 2016 ONCPSD 50 (CanLII) (“*Jiaravuthisan*”), the physician’s failure “to explain the steps of his examination or to seek [the patient’s] informed consent to the examination which he was conducting” with two patients, and to “communicat[e] appropriately regarding the examination” with one of them was found to be disgraceful, dishonourable or unprofessional conduct.

In *CPSO v Wilson*, 2016 ONCPSD 46 (CanLII) (“*Wilson*”), in the course of conducting pelvic and breast examinations on a vulnerable adolescent female patient, the physician, among other things, failed to provide an adequate explanation to the patient for the purpose of obtaining her informed consent. The result was that the patient did not understand the purpose and steps involved. He also directed the patient to bend over, leaving her back fully exposed, including her buttocks; the patient did not understand the purpose of the examination and felt shocked and violated. The Committee found that Dr. Wilson’s conduct would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.

Making a Finding based on Brief Facts in the Statement of Uncontested Facts

In response to the concern that the Committee had expressed about whether it could make a finding on very basic facts, counsel for the College noted that the parties had provided additional facts in the Supplementary Statement of Uncontested Facts, and she asked the Committee to consider all the facts that were now before it. She noted further that even where the facts as presented to the Committee are sparse, they can be sufficient to ground a finding of misconduct. She presented the Committee with two prior cases in which findings of disgraceful, dishonourable or unprofessional conduct had been made on the basis of brief facts.

In *CPSO v Israel*, 2019 ONCPSD 27 (CanLII), the facts regarding the behaviour that led to a finding of disgraceful, dishonourable or unprofessional conduct were described in two sentences:

“During an appointment with Patient A, Dr. Israel told Patient A that a woman needs a man and that maybe her problem was that she did not have a husband or boyfriend. Dr.

Israel also asked Patient A, in an inappropriate and unprofessional manner, whether she was attaining sexual satisfaction by masturbating.”

In that case, the Committee accepted the facts as set out in the Statement of Uncontested Facts and Plea of No Contest as correct and made the finding that Dr. Israel’s conduct would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.

In *CPSO v. Gutman*, 2011 ONCPSD 6 (CanLII), the Committee made a finding of disgraceful, dishonourable or unprofessional conduct based on a single statement in an Agreed Statement of Facts, that “During the physician/patient relationship, Dr. Gutman committed boundary violations by repeatedly hugging the patient and sharing details about his personal life with her.”

FINDING

The Committee carefully considered the two Statements of Uncontested Facts, as well as the Divisional Court’s detailed analysis of Dr. Kunynetz’s 2017 case, along with the other cases provided by counsel. The Committee accepted the facts set out in the Statement of Uncontested Facts and Plea of No Contest and the Supplementary Statement of Uncontested Facts as correct. The Committee was satisfied, based on the submissions of counsel and the case law that was presented, that the facts were sufficient for it to make a finding of professional misconduct. The Committee agreed with the submissions of counsel for the parties, and the advice of its independent legal counsel, that the statement of the Supreme Court of Canada in *R. v. Anthony-Cook*, 2016 SCC 43 (“*Anthony-Cook*”) at paragraph 54 that counsel should provide the court with “a full account of the circumstances of the offender, the offence, and the joint submission without waiting for a specific request from the trial judge” applies at the penalty stage, not at the stage of determining whether to make a finding. At this earlier stage, the issue for determination is whether the facts as presented are sufficient to ground a finding of professional misconduct. As noted above, the Committee concluded that they were.

The Committee therefore found that Dr. Kunynetz committed an act of professional misconduct in that he has engaged in conduct or an act or omission relevant to the practice of medicine that,

having regard to all circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional. One panelist, Ms G. Sparrow, dissented with respect to finding and has provided separate dissenting reasons, which are set out following the Committee's decision and reasons.

AGREED STATEMENT OF FACTS ON PENALTY

The following facts were set out in an Agreed Statement of Facts on Penalty, dated September 13, 2019, which was presented to the Committee and filed as an exhibit:

1. Dr. Kunynetz has already been the subject of a lengthy College discipline hearing which addressed, amongst other things, allegations of moving clothing without adequate warning, allegations that are similar to the facts set out in the Statement of Uncontested Facts and Plea of No Contest, dated September 4, 2019 (Exhibit 2) and the Supplementary Statement of Uncontested Facts.

The Prior Hearing – 2015 Notice of Hearing

2. In July 2015, the Inquiries, Complaints and Reports Committee ("ICRC") referred allegations of sexual abuse with respect to four patients to the Discipline Committee. The principal allegation, in relation to two patients, was that Dr. Kunynetz had engaged in sexual abuse by rubbing or pressing his genitals against them during dermatology examinations. The 2015 Notice of Hearing also alleged that Dr. Kunynetz had engaged in sexual abuse by inappropriately touching a third patient's breasts. Finally, the Notice of Hearing alleged sexual abuse or disgraceful, dishonourable or unprofessional conduct, for three of the four patients, in failing to provide appropriate privacy to patients, and in moving clothing without adequate warning and consent.

3. In September 2015, the ICRC referred an additional allegation of breach of an interim order to the Discipline Committee.

4. The ICRC imposed an interim suspension of Dr. Kunynetz's certificate of registration effective October 1, 2015. Dr. Kunynetz remained suspended on an interim basis during the liability and penalty phases of the hearing, i.e. from October 1, 2015 through to February 20, 2018.

5. The liability hearing on all of the above-described allegations proceeded over 37 days from January 6, 2016 through to July 12, 2016.

6. With respect to the eight patients described in paragraph 5(a) of the Supplementary Statement of Uncontested Facts (the "Current Complainants"), two testified as similar fact witnesses at the first discipline hearing and gave evidence regarding (among other things) how Dr. Kunynetz moved their clothing during skin examinations. At the time of the first hearing, all of the Current Complainants had complained to the College. The complaints of the Current Complainants were ultimately referred to discipline in Notice of Hearing dated April 28th and December 18th, 2017 (Exhibit 1 in this hearing).

7. The Discipline Committee released its reasons on March 21, 2017. The panel dismissed all of the allegations of sexual abuse, with the exception of a finding that Dr. Kunynetz had engaged in sexual abuse of one patient by touching her breasts during the course of a dermatological examination. The panel also found that Dr. Kunynetz engaged in disgraceful, dishonourable or unprofessional conduct by moving patients' clothing without adequate warning or explanation and by allowing his abdomen to touch two patients. Finally, the panel found that Dr. Kunynetz breached an interim order of the ICRC. The decision and reasons for decision of the Discipline Committee dated March 21, 2017 are attached at Tab 1 [to the Agreed Statement of Facts on Penalty].

8. With respect to the allegations of moving patients' clothing, the Discipline Committee found as follows:

Dr. Kunynetz said that he commonly moved or shifted items of clothing such as bra straps to view the skin beneath, or lifted clothing that obscured a portion of the skin that needed to be inspected. He said that he usually gave the patient a reason for this, but he also admitted that his explanations were brief and often

occurred during the displacement of clothing. The Committee concludes that the removal of clothing occurred during the process of a clinical examination, and that Dr. Kunynetz was justified in needing to examine the skin underneath the clothing. Thus, the context in which this occurred was not one in which “viewed in the light of all the circumstances, the sexual or carnal content of the assault (or actions) was visible to a reasonable observer.” Thus, Dr. Kunynetz’s actions do not meet the test articulated by the Supreme Court of Canada in *R. v Chase* (1087) 2 S.C.R. 293 with respect to sexual assault. The Committee finds that Dr. Kunynetz’s actions in moving clothing does not constitute behaviour of a sexual nature and is therefore not sexual abuse.

The material that had been provided to Dr. Kunynetz by the College investigator emphasized the importance of explaining to a patient ahead of time the nature and reason for any portion of a physical examination. While this may not constitute formal seeking of consent in the way in which this term is usually used, the process of explanation demands that the physician take reasonable steps to ensure that the patient comprehends why something is being done, particularly if the actions are relevant to, or involve, sensitive parts of the body. This was clearly not done before the shifting of clothing performed by Dr. Kunynetz.

The Committee finds that the absence of adequate warning or explanation to Patients A and D by Dr. Kunynetz before moving or removing their clothing, constitutes conduct that would be reasonably be regarded by members as disgraceful, dishonourable or unprofessional.

9. The penalty hearing proceeded over four days in July and August 2017. In reasons released on February 20, 2018, the Discipline Committee revoked Dr. Kunynetz’s certificate of registration. The Discipline Committee found that the mandatory revocation provisions of the *Health Professions Procedural Code* applied retrospectively to the finding of sexual abuse. A copy of the decision and reasons for decision on penalty of the Discipline Committee dated February 20, 2018 are attached at Tab 2 [to the Agreed Statement of Facts on Penalty].

10. Dr. Kunynetz appealed the findings and penalty to the Divisional Court. In a judgment dated July 23, 2019, attached at Tab 3 [to the Agreed Statement of Facts on Penalty], the Divisional Court quashed the sexual abuse finding made by the Discipline Committee and quashed the finding of disgraceful, dishonourable or unprofessional conduct based on Dr. Kunynetz allowing his abdomen to touch patients. The Divisional Court upheld the Discipline Committee's finding of disgraceful, dishonourable or unprofessional conduct in moving patients' clothing without adequate warning or explanation as well as the finding that Dr. Kunynetz breached the interim order.

11. In the circumstances, the Divisional Court did not refer the matter back to the Discipline Committee for a further hearing on penalty, but instead quashed the revocation order and the reprimand, and held that no further suspension should be imposed, noting that Dr. Kunynetz had been vindicated of all of the serious allegations. The Court reasoned as follows:

[153] As indicated above, the Court is dismissing the allegation of sexual abuse of Patient B and dismissing the finding of professional misconduct with respect to Patients C and D. The usual remedy, when an appeal of a decision of an administrative decision maker is granted, is to remit the matter to the decision maker for re-determination of the issue of liability or for re-determination of penalty of the remaining findings. That respects the legislative policy to leave such decisions to the administrative body.

[154] The following are unique circumstances of this case that warrant the unusual remedy set out below:

- (a) The Notice of Hearing originated in July 2015 which is four years ago. Assuming the same five members are available, sending it back for a fresh *penalty* hearing on the remaining findings will likely take at least six months. Sending it back for a fresh *liability* hearing before a new panel on the allegations involving Patient B will likely take much longer. The single allegation involving Patient B occurred in August 2008, eleven years ago.
- (b) The Appellant, the College, the complainants and the public all share an interest in finality. It would be unfair to the witnesses to have to participate in another

hearing on the merits of the allegation of sexual abuse with respect to Patient B, particularly because she made the original complaint in 2008 and since then has been involved in both the College proceedings and the criminal proceedings. The evidence of witnesses has likely deteriorated over that lengthy period and, as a result, the prospects of the College providing “clear, convincing and cogent evidence” are dim.

- (c) The Appellant was under suspension from October 1, 2015 to February 20, 2018 when the penalty decision was released. Since then he has been subject to the revocation order. The period of suspension of almost 28 months and the 17 month period of revocation totals 45 months. We consider it unlikely that a penalty greater than 28 months or 45 months will be imposed with respect to the remaining findings of removal of clothing without warning or consent and two breaches of an interim order.
- (d) Other than the original complaint from Patient B, the Appellant had no prior record of discipline which is a mitigating factor in assessing penalty.
- (e) In her evidence during the hearing as to penalty, the Appellant’s wife described the enormous toll that the proceeding had had on the Appellant personally and professionally as well as on her and their children. She described the press reports as a “constant bombardment of ugliness”. In the end, the Appellant has been vindicated of all of the serious allegations. He and his family ought to be able to see a light at the end of the tunnel.
- (f) The College has a vested interest in sustaining the “usual remedy” that matters of liability and penalty are sent back. The outcome of substitution in this case is exceptional.

12. As set out in the judgment of the Divisional Court, Dr. Kunynetz was suspended for approximately 28 months under former s. 37 of the *Health Professions Procedural Code*, Schedule 2 to the *Regulated Health Professions Act, 1991*, (“the Code”), and was also subject to a period of revocation for 17 months, for a total of 45 months.

The Current Interim Suspension Order

13. Although the Order of the Divisional Court reinstated Dr. Kunynetz's certificate of registration as of July 23, 2019, Dr. Kunynetz has remained subject to an interim suspension of his certificate of registration, imposed by the ICRC on June 8, 2017, under section 25.4 of the Code, in respect of this hearing.

Remedial Work Undertaken by Dr. Kunynetz

14. In June 2016, Dr. Kunynetz completed the Understanding Boundaries and Managing Risks Inherent in Doctor-Patient Relationships course at Western University. A copy of the Certificate of Attendance is attached at Tab 4 [to the Agreed Statement of Facts on Penalty].

PENALTY AND REASONS FOR PENALTY

Counsel for the College and counsel for Dr. Kunynetz made a joint submission as to an appropriate penalty and costs order: that Dr. Kunynetz be ordered to attend before the Committee to be reprimanded, and that he pay costs to the College in the amount of \$6,000.00.

Public Interest Test regarding Joint Submissions on Penalty

Both counsel emphasized in their submissions the principle enunciated by the Supreme Court of Canada in the *Anthony-Cook* case: that the Committee should not depart from a joint submission as to penalty unless the proposed penalty would bring the administration of justice into disrepute, or is otherwise contrary to the public interest.

Penalty Principles

In considering the joint submission on penalty and costs, the Committee was mindful of its obligation to consider the well-recognized guiding principles which apply when determining the appropriate penalty in disciplinary proceedings. Protection of the public is the foremost

consideration. The penalty should also denounce wrongful conduct, serve as a specific deterrent to the member and a general deterrent to the membership as a whole, assist in maintaining public confidence in the integrity of the profession and in the College's ability to regulate the profession effectively in the public interest and, where possible, address the rehabilitative needs of the member. The penalty should be proportionate to the misconduct as found by the Committee and should generally be consistent with previous decisions of the Discipline Committee in similar cases. The Committee is guided by its previous decisions, although it is not bound by them. Each case will have unique facts or circumstances, which will be considered by the Committee in determining the just and appropriate penalty. The Committee should also consider aggravating and mitigating factors.

Aggravating Factors

The Committee noted that Dr. Kunynetz was found to have moved clothing without adequate communication with respect to eight patients. It also noted that the clinical encounters with four of these patients happened after the College had provided him with material in 2009, as a result of another patient complaint, that emphasized the importance of appropriate communication prior to and during physical examinations, especially where the actions involved or were relevant to sensitive areas of the body. The Committee considered the number of patients, and the fact Dr. Kunynetz's behaviour continued even he received this advice from the College, to be aggravating factors.

Mitigating Factors

The Committee recognized that, by his plea of no contest, Dr. Kunynetz saved the College the time and resources of a contested hearing and obviated the need for witnesses to appear before the Committee. In addition, the Committee noted that Dr. Kunynetz completed the Understanding Boundaries and Managing Risks Inherent in Doctor-Patient Relationships course in June 2016. The Committee considered these to be mitigating factors.

Unique Circumstances

The Committee appreciated the unique circumstances of this case, as described by the Divisional Court. Dr. Kunynetz had been unable to practise since October 1, 2015. He was initially suspended on an interim basis by the ICRC, pending the hearing of the allegations in the prior proceeding. He remained suspended for 28 months, until February 20, 2018 when the Committee in the prior proceeding revoked his certificate of registration. Seventeen months later, on July 23, 2019, the Divisional Court quashed the most serious finding against him, of sexual abuse, as well as one other finding, and quashed the penalty that the Committee had imposed. The Court upheld two of the Committee's findings of professional misconduct, but also stated that it considered it "unlikely that a penalty greater than 28 months or 45 months will be imposed with respect to the remaining findings of removal of clothing without warning or consent and two breaches of an interim order". It therefore held that no further suspension should be ordered. Even after the release of the Divisional Court decision, Dr. Kunynetz remained suspended as a result of an interim order of the ICRC in this case.

The finding in this case is based on conduct that was substantially the same as that in respect of which Dr. Kunynetz was found to have engaged in disgraceful, dishonourable or unprofessional conduct in the prior case, as upheld by the Divisional Court. Moreover, two of the patients described in the Supplementary Statement of Uncontested Facts testified as similar fact witnesses in the prior case.

Professional misconduct similar to Dr. Kunynetz's typically results in a suspension of a few months. However, the circumstances of Dr. Kunynetz's case are unique, in that the finding of sexual abuse was overturned on appeal but nonetheless he was prohibited from seeing patients for 45 months. The Committee took these unique circumstances into account when reaching its decision.

Prior Cases

Raja, described above, involved similar misconduct to that of Dr. Kunynetz. The Committee ordered that Dr. Raja be reprimanded, that his certificate of registration be suspended for two months, and that he pay costs. In *Jiaravuthisan*, also described above, the Committee ordered a reprimand and costs, noting that prior to the hearing, Dr. Jiaravuthisan had resigned his certificate of registration and had undertaken never to re-apply, which satisfied the need for protection of the public. In the *Wilson* case, a number of aggravating factors resulted in a suspension of Dr. Wilson's certificate of registration for four months, in addition to a reprimand and restrictions on his certificate of registration. The Committee also made an order requiring Dr. Wilson to pay costs to the College.

These cases suggest that an appropriate penalty for conduct similar to that of Dr. Kunynetz is a reprimand, costs and a suspension of between two and four months. However, in the unique circumstances of this case, with Dr. Kunynetz already having served the equivalent of a 45-month suspension for similar conduct, the Committee determined that an additional suspension would provide no further benefit with respect to patient protection.

CONCLUSION

The Committee accepted the jointly proposed penalty as reasonable and in the public interest. The reprimand expresses the profession's disapproval of the way in which Dr. Kunynetz engaged with his patients, especially having regard to the fact that he had previously received advice from the ICRC on that specific issue. The Committee hopes that the reprimand will act as a specific deterrent to Dr. Kunynetz against the repetition of this sort of behaviour. The reprimand also reinforces for the profession that the College expects its members to provide adequate explanations for all aspects of their clinical encounters with patients, and thus addresses general deterrence. As noted above, the Committee was satisfied that in the unique circumstances of this case, a further suspension of Dr. Kunynetz's certificate of registration was not warranted.

The Committee agreed that this was an appropriate case in which to order Dr. Kunynetz to pay costs in the amount of \$6,000.00.

ORDER

The Committee stated its finding in paragraph 1 of its written order of September 13, 2019. In that order, the Committee ordered and directed on the matter of penalty and costs that:

2. Dr. Kunynetz attend before the panel to be reprimanded.
3. Dr. Kunynetz to pay costs to the College in the amount of \$6,000.00 within thirty (30) days of the date of this Order.

At the conclusion of the hearing, Dr. Kunynetz waived his right to an appeal under subsection 70(1) of the Code and the Committee administered the public reprimand.

DISSENTING REASONS REGARDING FINDING OF PROFESSIONAL MISCONDUCT

For the reasons stated below, I dissent with respect to the finding. Unlike my fellow Committee members, I cannot accept the Statement of Uncontested Facts or Supplementary Statement of Uncontested Facts as submitted, on the basis that they are too brief, vague and perfunctory to provide a proper basis for determining penalty and informing the profession and the public of what occurred.

In the seminal case confirming long-established principles with regards to joint submissions, *R. v. Anthony Cook*, supra, the Supreme Court of Canada emphasizes at paragraph 54 the need for full recitation of the facts:

[54] Counsel should, of course, provide the court with a full account of the circumstances of the offender, the offence and the joint submission without waiting for a specific request from the trial judge. As trial judges are obliged to depart only rarely from joint submissions, there is a “corollary obligation upon counsel” to ensure that they “amply justify their position on the facts of the case as presented in open court” (Martin Committee Report, at p.329). Sentencing – including sentencing based on a joint submission – cannot be done in the dark. The Crown and the defence must “provide the trial judge not only with the proposed sentence, but with a full description of the facts relevant to the offender and the offence”, in order to give the judge “a proper basis upon which to determine whether [the joint submission] should be accepted” (*DeSousa* at para.15; see also *Sinclair* at para.14)

At paragraph 57, the Court goes on to say:

[57] A thorough justification of the joint submission also has an important public perception component. Unless counsel put the considerations underlying the joint submission on the record, “though justice may be done, it may not have the appearance of being done; the public may suspect, again rightly or wrongly, that an impropriety has occurred” C.C. Ruby, G.J. Chan and N.R. Hasan, *Sentencing* (8th ed. 2012) at p. 73).

Although paragraph 57 follows a discussion of considerations which may not have to be put on the record, in my view, it is clear that the facts, which are one of the justifications for the penalty, must be detailed sufficiently in order to further the goal of public perception.

In paragraph 3 of the Statement of Uncontested Facts cited above, Dr. Kunynetz does not contest that he moved or removed clothing without adequate warning or consent, by conduct that included “pulling up patients’ shirts, moving brassieres and underwear”. In the Supplementary Statement of Facts, he does not contest that eight patients, seen between 1996 and 2015, were involved. His counsel submits that these facts should be accepted as they are worded exactly as the findings of the Committee in the earlier discipline case dated March 21, 2017. He refers to page 37:

The Committee finds that the absence of adequate warning or explanation to Patients A and D by Dr. Kunynetz before moving or removing their clothing, constitutes conduct that would be reasonably regarded by members as disgraceful, dishonourable or unprofessional.

Counsel also submits that the Divisional Court found to be adequate this finding of fact regarding moving and removing clothing in its decision of July 23, 2019, after a brief reference to the evidence of two patients. The Court states at paragraph [61]:

[61] The factual findings made by the Committee are supported by the evidence, including the Appellant’s evidence. The identification of the principles and the analysis of the evidence leading to the findings that the actions did not constitute sexual abuse but did constitute disgraceful, dishonourable or unprofessional conduct are sound. The findings by the Committee in the regard are reasonable.

I agree with counsel that the Committee’s ultimate finding is a brief summary of facts, upheld by the Court. However, it must be noted that the Committee’s decision included an analysis of the patients’ testimony at p. 36, where it states, “However their memories of the events which caused them distress were clear, consistent and persisted in the face of cross-examination” and

continues, “Patient A admitted that Dr. Kunynetz provided a reason for lifting her dress, but only after she had asked what he was doing, and said that she would not have felt embarrassed had the explanation preceded the movement of her dress. Similarly, her complaint of his having pulled out her bra and panties focused on the fact that he did so abruptly and without warning, rather than that the action was of a sexual nature.”

In testimony, Patient A described having been left standing in her underwear when her dress was pulled up, and Dr. Kunynetz pulling out her bra and panties to view her, all without adequate reasons being provided or her consent being given.

In my view, the Committee’s ultimate brief finding of fact in the earlier case refers to this testimony and taken in context, indicates that the Committee accepted this testimony. The Committee’s reasons clearly provide a more detailed version of the facts than what was presented in this case, which along with the summary, helped provide a basis for the decision on penalty.

I also note that two of the cases submitted by counsel in this case, involving violations of privacy during examinations without proper explanation or consent, are based on agreed statements of fact which are much more detailed than the Statements of Uncontested Facts in this case.

In *Jiaravuthisan*, the Agreed Statement of Facts contained the following paragraphs regarding one patient:

5. As part of his physical examination, Dr. Jiaravuthisan began to palpate Patient A’s abdomen while she lay on an examination table. As he did so, he moved his hands below the waist band of her trousers to the suprapubic area below her navel, again without explanation or seeking informed consent. In doing so, Dr. Jiaravuthisan failed to show sensitivity and respect for Patient A’s comfort, which was unprofessional.

6. Patient A was confused and upset by Dr. Jiaravuthisan’s actions and did not know why he had moved his hands below the waist band of her trousers. She sat up and demanded

to know what he was doing, then left the examination room and complained to his office staff about his behaviour.

In *Wilson*, paragraph 6(b) of the Agreed Statement of Facts and Admission revealed that Dr. Wilson performed pelvic and breast examinations on a patient without obtaining informed consent. Paragraph 6(d) stated:

6(d) Dr. Wilson directed Patient A to bend over with her back to him, without explaining the clinical reason or seeking her consent. Patient A bent over as directed, but had only the drape to hold in place at her front, while her back (which was towards Dr. Wilson) was fully exposed, including her buttocks. Patient A did not understand the purpose of this examination and felt shocked and violated.

In *Jiaravuthisan*, the Committee notes at page 10 in a review of similar cases that there is a “spectrum of misconduct that may require removal of a physician from practice in order to ensure protection of the public.” In both of these cases submitted by counsel, the nature of the misconduct and its effect on the patients was explained in some detail, obviously to allow the case to be compared to others and placed on the spectrum.

It should be noted that the facts in the three decisions referred to in the reasons of the Committee are more straightforward than those in the cases cited in dissent: hugging in *Gutman*, two remarks in *Israel* and the unexplained exposing of a breast in *Raja*.

Ultimately, I dissent on the basis that, in keeping with the directives cited in *R. v Anthony-Cook*, *supra*, and with the degree of detail provided in the cases referred to above, the Committee should exercise its discretion to refrain from accepting the Statements of Uncontested Facts, and

from making a finding of liability, until greater detail is provided regarding what happened, and when, to the eight complainants in this case. Although the submission is joint, the profession, the public and future Committee panels analyzing and comparing cases deserve more information.

TEXT of PUBLIC REPRIMAND
September 13, 2019
in the case of the
COLLEGE OF PHYSICIANS and SURGEONS of ONTARIO
and
DR. RODION ANDREW KUNYNETZ

Dr. Kunynetz,

The panel recognizes that you and your family have been through a long and arduous process.

However, we are troubled by your repeated and persistent failure to communicate appropriately with patients about how your clinical examinations would unfold.

Your abrupt manner and your minimal explanations showed a lack of respect for your patients.

The College expects all members to meet their professional responsibilities with respect to proper physical examinations. You neglected to do so, even after the Inquiries, Complaints and Reports Committee provided you with relevant guidance way back in 2009.

Should you decide to return to practise, we trust that you will communicate with your patients more explicitly and abide by your professional responsibilities carefully.

We trust that we will not see you before the Discipline Committee again.