

NOTICE OF PUBLICATION BAN

In the College of Physicians and Surgeons of Ontario and Dr. R.A. Kunynetz, this is notice that the Discipline Committee ordered that no person shall publish or broadcast the names of sexual abuse witnesses (complainants and similar fact witnesses) or information that could identify them, under subsection 47(1) of the Health Professions Procedural Code (the Code), which is Schedule 2 to the Regulated Health Professions Act, 1991.

The Committee also made an order to prohibit the publication of the names of patients disclosed at the hearing or any information that could identify them, under section 45(3) of the Code.

The Committee also made an order prohibiting the publication of photos of Dr. Kunynetz unclothed filed as exhibits at the hearing.

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, 2017
ONCPSD 11**

**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. P. POLDRE (CHAIR)
MR. P. PIELSTICKER
DR. J. WATTS
MAJOR A. KHALIFA
DR. C. LEVITT**

**COUNSEL FOR THE COLLEGE OF PHYSICIANS AND SURGEONS OF
ONTARIO:**

**MS. C. SILVER
MS. S. SULEVANI**

COUNSEL FOR DR. KUNYNETZ:

**MR. M. SAMMON
MR. I. MACLEOD**

INDEPENDENT COUNSEL FOR THE DISCIPLINE COMMITTEE:

MR. R. COSMAN

Hearing Dates: January 6 to 8, 18 to 21, 25 to 28; March 14 to 17, 28, 30,
31; April 1, 29; May 3 to 6, 9, 13, 16, 26, 27; June 3, 13 to
16, 28; July 11 to 12, 2016
Decision Date: March 21, 2017
Release of Reasons Date: March 21, 2017

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 January 6 to 8, 2016; January 18 to 21, 2016; January 25 to 28, 2016; March 14 to 17, 2016; March 28, March 30 to April 1, 2016 (a conference with the Chair was held March 29, 2016); April 29, 2016; May 3 to 6, 2016; May 9, 2016; May 13, 2016; May 16, 2016; May 26 to 27, 2016; June 3, 2016; June 13 to 16, 2016; June 28, 2016; and July 11 to 12, 2016. At the conclusion of the hearing, the Committee reserved its finding.

THE ALLEGATIONS

The Notice of Hearing alleged that Dr. Rodion Andrew 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 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; and
3. under paragraph 1(1)1 of O.Reg 856/93 made under the medicine Act 1991 (“O.Reg 856/93”) in that he contravened a term, condition or limitation on his certificate of registration.

RESPONSE TO THE ALLEGATIONS

Dr. Kunynetz denied all the allegations in the Notice of Hearing.

OVERVIEW

Dr. Kunynetz is a dermatologist.

The allegations of sexual abuse and of disgraceful, dishonourable or unprofessional conduct arose from complaints made by four patients who testified at the hearing.

In the case of Patients A, B and D, the allegations included that: Dr. Kunynetz failed to leave the room while the patient was undressing; failed to use drapes or any form of covering; and, removed or moved clothing without warning, explanation, consent or agreement, in order to view potentially sensitive areas of the patient's body.

In the case of Patients C and D, Dr. Kunynetz was alleged to have pressed his genitals against the patient's leg during the course of an examination and, in the case of Patient B, was alleged to have touched her breasts in a manner that was not consistent with the clinical examination.

In addition, three similar fact witnesses (Patients SA, SB and SC) gave testimony that Dr. Kunynetz pressed his genitals against their legs or knees during the course of an examination and, in two cases, also removed clothing without their consent or explanation.

Dr. Kunynetz had no individual memory of the patients' examinations or consultations and his defence relied upon what he would have done or what his usual practice would be with patients or with patients with that specific condition.

With respect to the genital touching, Dr. Kunynetz maintained that it was impossible for his genitalia to come into contact with the legs of the patients because of the presence of a panniculus (a fold of adipose tissue which extends downwards from the lower abdomen covering all or part of the genitalia) and because of his overall obesity. If any contact had occurred, he maintained that it would have been incidental during the course of the

examination or procedure. Two expert opinions were provided to the Committee by consultant urologists who examined Dr. Kunynetz's genitalia both before and after the chemical induction of an erection. The second of these examinations occurred in the presence of two observers who also testified.

The allegation that he contravened a term, condition or limitation on his certificate of registration arose from Dr. Kunynetz seeing two female patients without the presence of a chaperone, after he had signed an undertaking to see female patients only in the presence of a chaperone.

Dr. Kunynetz defence of the breach of the undertaking was that it was an unintentional, non-deliberate lapse occasioned by his focusing on the patients' problems, and also by the failure of the system that he had put in place to ensure such lapses did not occur.

During the course of the hearing, the Committee heard the following motions:

- a motion to hear similar fact evidence;
- a motion to hear a portion of evidence in camera;
- a motion for a directed verdict or non-suit;
- a motion to obtain third party records;
- a motion to disclose foundational material for both experts;
- a motion to hear re-enactment evidence; and,
- a motion for the re-opening of the College case, or the calling of reply evidence.

THE ISSUES

The case raises three issues:

1. Did any of the conduct of Dr. Kunynetz with the four complainants, as specified in the allegations, constitute sexual abuse?

2. Did any of the conduct of Dr. Kunynetz, as specified in the allegations, constitute disgraceful, dishonourable or unprofessional conduct?
3. Did Dr. Kunynetz contravene a term, condition or limitation on his certificate of registration by breaching an undertaking to the College?

THE EVIDENCE

Summary of the Evidence

The Committee heard evidence from: 1) the four complainants, and in two instances, from companion witnesses (a friend and a spouse); 2) three similar fact witnesses and in relation to each, from a companion witness (a daughter, a friend and a spouse); 3) two expert urologists and observers of the clinical examination performed by one of them; and, 4) Dr. Kunynetz.

The Committee also heard from: a number of patients of Dr. Kunynetz (including those who were the subjects of the alleged breach of an undertaking); Dr. Kunynetz's family physician; and, the photographers who had provided images that were marked as exhibits.

1) Evidence related to the Complainants

Patient A

The Committee heard testimony from Patient A, who was seen by Dr. Kunynetz in September 1999 at Alliston Hospital as an out-patient. She was anxious to have a mole on her left arm looked at. She testified that she was not offered a drape or any form of coverage and received no instructions to remove her clothing. She testified that after examining the mole, Dr. Kunynetz asked her to turn around; he then lifted her dress while she was standing saying something to the effect of "we might as well look at the rest of you". He raised the dress up and she raised her arms to allow this to happen. She testified that she was left standing in her underwear wearing shoes with heels. This made her feel extremely embarrassed and she described it as being totally unexpected and as being a

violation. Patient A specifically remembers her face becoming bright red. Patient A testified that after he had looked at her skin, Dr. Kunynetz pulled out her bra cups and pulled out her panties and viewed the skin beneath the two garments. Patient A did not remember receiving any explanation or request for this to be done.

Dr. Kunynetz told Patient A that the mole was not malignant and that it could be removed if she wished, but this would not be covered by OHIP. Patient A testified that she left the appointment without making any further arrangements to be seen. She phoned the College, shortly after returning home, in order to complain and she mentioned the experience to her family physician. She did not follow up with a formal written complaint.

The College retained a record of her telephone call and contacted her after receiving later complaints from other patients.

Patient A was vague about some details. She could not remember which hospital she had attended and was uncertain of the date, although she believed it to have been about two months after a significant event in 1999. She denied that she was confused as a result of sleep deprivation. She was unable to remember details of the room and could not remember the exact words used by Dr. Kunynetz prior to his lifting of her dress. However, she was quite definite that Dr. Kunynetz did not offer her any gown or drape of any sort. She was also definite that the examination of her skin after the removal of her dress took place while she was standing in bra and panties only and she was quite definite about her feelings of embarrassment during this procedure. She said that Dr. Kunynetz did not make any form of sexualized comment, or unusual noises.

Patient A was contacted by a College investigator following receipt by the College of complaints by Patients C and D. Patient A was therefore aware that there had been other complaints, but stated that she remained unaware of details, or the precise nature of the complaints.

Dr. Kunynetz

Dr. Kunynetz testified that he had no specific memory of the appointment with Patient A and was dependent on what he stated would have been his normal practice. He stated that the hospital did not provide any form of gown or drape, and he had not made any attempt to request these. He believed that he would have said that he needed to examine other "sun-exposed areas" and he would have taken the patient's lifting her arms for the removal of her dress to be implicit consent. He would commonly have moved a patient's bra straps to look at the skin beneath. He also stated that the skin underneath the bra cups and underneath the panties would not usually be considered to be sun-exposed areas. Dr. Kunynetz adamantly denied (as he did for all allegations of sexual abuse) that he had sexual intent in any part of the examination, and gained no sexual satisfaction from any part of the examination.

Patient B

Patient B was seen by Dr. Kunynetz in August 2008. Patient B was referred by her family physician for facial lesions and for an update on a chronic skin condition called urticaria pigmentosa, which had been diagnosed, after biopsy, by a another dermatologist. She was seen at Dr. Kunynetz office for a 9:30 a.m. appointment. Although the event was eight years earlier, she had refreshed her memory after reading the transcript of her earlier interview at the College.

Patient B testified that she was taken into an examining room by a staff member. She did not remember being given any information about covering such as a gown or draping and saw no notices about this. Her memory of the office layout, including positions of the examination couch, desk and chair was significantly different from that shown in more recent photographs, and as described by Dr. Kunynetz.

Patient B's testimony was that the visit began with a review of her complaints and history, and then Dr. Kunynetz provided her with information about the management and avoidance of her urticaria pigmentosa. He then examined the lesions on her leg, which

were the lesions about which Patient B was most concerned. Patient B testified that in doing so, Dr. Kunynetz stroked the lesions to ascertain if they responded to light friction, a procedure known as Darier's sign. Patient B told him that her lesions had not reacted positively in the past (e.g., at the time of initial diagnosis) and Dr. Kunynetz noted there was no reaction on this occasion.

Patient B testified that Dr. Kunynetz then asked her to remove her blouse, and when asked why, said that it was to examine her trunk. During the removal, Dr. Kunynetz was sitting with his back to the patient. Patient B then said that he wheeled his stool or chair over to her to examine her trunk.

Although he had no specific memory of this visit, Dr. Kunynetz was adamant that he would not have rolled or wheeled a stool over while sitting on it because it would not have moved under his substantial weight.

Patient B's testimony was that Dr. Kunynetz then proceeded to pull her bra straps aside and to place his hands inside her bra, and began to "fondle" her breasts, putting his hands down and under her breasts. During this period, he did not make eye contact, or describe what he was doing, or the rationale for it. Patient B had experience of breast exams for cancer screening, and described the experience as being different from any previous examinations for any cause. She described feeling frightened and "knew it was not right". She described pushing Dr. Kunynetz away and feeling that she could not get out fast enough.

Patient B testified that Dr. Kunynetz was reaching for the liquid nitrogen, in order to treat the lesions on her face; however, she declined the treatment saying she would come back at a later time. Her account was that this prompted a response from Dr. Kunynetz to the effect that "You women are so fickle, you think you can come back at any time".

Patient B had no memory of Dr. Kunynetz examining her back, although the patient chart refers to lesions in her lumbar area.

Patient B testified that she met her husband in the car afterwards, and said that he knew something was wrong and that she was upset; however she testified that she did not tell him about the event immediately.

Patient B filed a complaint with the College about a month later. She was unaware of any other complaints at that time. She was interviewed by two College investigators, and learned from them, subsequently, that the investigators had visited Dr. Kunynetz, who had denied that any improper examination had taken place. She was aware that Dr. Kunynetz had been given advice about his communication style, about issues such as draping and the presence of third parties. Patient B testified that she was not entirely satisfied with the outcome, but felt that there was nothing further that she should, or could, do. She knew that the file would remain open and could be taken into consideration if there was a further complaint.

In addition to the disagreement between Patient B and Dr. Kunynetz about the examination room and the examination itself, there were other points of disagreement. Patient B recalled that there were posters on the wall of the examination room which were critical of the Government and of the College. The Committee saw photographs of newspaper cuttings posted on the examining room wall that were critical of the shortage of dermatologists but not specifically alleging blame on the Government or the College.

Patient B's testimony differed in some respects between her interview in 2008 and her testimony at the hearing as to whether Dr. Kunynetz stood up to examine her breasts or did the examination while leaning forward from his seat.

Dr. Kunynetz

In his reply to Patient B's complaint in 2008, Dr. Kunynetz denied that he placed his hands inside Patient B's bra, only indicating that he might have shifted the bra straps in order to look beneath them. or that he might have asked her to lift her breasts. He

repeated this account in his affidavit for judicial review in October 2015. In neither document did he mention stroking the breasts to elicit Darier's sign. However in his testimony, he stated that he would have placed his hands under the bra and stroked the breasts in order to elicit the reaction, although he did not state why it would be necessary to do this when he had already attempted to elicit the response while examining the patient's legs, or why it was necessary to do it on the breasts rather than another portion of the torso.

Patient C

Patient C was referred to Dr. Kunynetz by her family doctor in June 2011, with a lesion on the side of her head. Patient C was uncertain whether she had seen Dr. Kunynetz on two occasions or three, and on which occasions she was accompanied by her friend, Ms. L. Patient C's chart records three visits, the first being a consultation (August), the second a biopsy of the lesion (October) and the third cautery of the lesion (November). In her initial complaint to the College, she had recalled only two visits, believing that the initial visit combined a consultation and a biopsy. However after having reviewed her clinical record, she recognized that there were three visits, and was clear that the event about which she complained was one in which a procedure was performed and at which Ms. L was present. In her own testimony, Ms. L said that she believed that she accompanied Patient C to the October appointment, which was for a biopsy.

Patient C's account was that during the procedure, Dr. Kunynetz pressed his penis against the side of her leg, as she was sitting on the side of the examination table. She testified that she felt he was starting to get an erection and she "could not wait until the appointment was over." She felt it was "disgusting and degrading." After the appointment, she asked Ms. L if she had seen anything, to which Ms. L said, "No", although Ms. L testified that Patient C appeared to be quiet and concluded she was embarrassed. Patient C then told Ms. L what she had felt.

Patient C complained to the College only after receiving a telephone call from the mother-in law of Patient D, and having spoken to Ms. L about Patient D's intention to make a complaint to the College. Both Patient C and Ms. L denied that they knew the specific behaviour about which Patient D was concerned.

During her testimony, Patient C admitted that the information that she originally gave to the College, that she had only two visits, was incorrect. She also changed her account of her position at the time of the event, having said initially to College investigators that the pressure from Dr. Kunynetz's penis occurred while she was sitting in a chair, but in her testimony, that it occurred while she was sitting on the side of the examination table.

Patient C had no memory of local anesthesia being used.

At the end of her cross-examination, Patient C was challenged about each individual visit and appeared to respond that contact had not occurred at any of the three visits; this was described by defence counsel as a recantation of her allegations. This however occurred at the end of a relatively long cross-examination when Patient C was clearly tired and irritated by questions that she felt were confusing.

Patient C confirmed on re-examination that she had a clear memory of Dr. Kunynetz pressing his penis against her leg, that it occurred while sitting on the examination table and that the duration was brief - "a few minutes".

Dr. Kunynetz

Dr. Kunynetz had no specific memory of the visit(s), but said that both the biopsy and the cautery, which were done at the second and third visits respectively, would have been performed with the patient sitting on the side of the examination table, and that the biopsy would have been preceded by local anesthesia given by injection. He believed that Ms. L was present for the biopsy. He also stated that his colleague, a dermatologist, advised patients to have a second person accompany them to the appointment, and gave out an

information sheet, stating this, and that it was possible that Patient C had seen such a sheet.

Dr. Kunynetz categorically denied pushing against Patient C, although he said that it was possible that the patient would have felt his abdomen during the procedure. He also stated that his genitalia were "nowhere near her knees."

Patient D

Patient D saw Dr. Kunynetz in December 2013 with lesions on her hand, foot and upper right thigh after being referred by her family doctor. She was worried that the lesions might be cancer.

Patient D described being shown into an examination room by a male receptionist, and being told to undress to expose the lesions she was concerned about, and to put on a gown from the chair. She testified that she objected that the "gown" was actually a wrap, and asked for a gown, but was told to use the wrap. She took off her shoes, socks and track pants, but retained her tank top, and used the wrap to cover her waist to her knees.

Patient D testified that Dr. Kunynetz entered the room about five minutes later. He examined her foot while she was still sitting in the chair. Dr. Kunynetz then asked her to sit on the examination couch. While she was sitting on the bed, Dr. Kunynetz took hold of her left hand from her right side and drew it towards him. Patient D testified that he then pushed his hips against her thigh and in doing so, she felt his penis against her thigh some inches above her knee. It was her perception that his penis was semi-erect. She testified "it was very forceful and could not have been accidental". Patient D also described the movement of his pelvis as "gyrating" but also said that his abdomen and upper body did not move while this happened.

Patient D was insistent that it was not Dr. Kunynetz's abdomen and that it made her feel embarrassed and shocked. As a result of this event, she decided not to show Dr. Kunynetz

the spot on her thigh (her chart contains no comment from Dr. Kunynetz about a lesion on her leg or thigh, although the registration form includes a notation of lesions on the hand, leg, foot and face).

Patient D testified that Dr. Kunynetz then stood up to get equipment to cauterize the hand lesion. After the cautery, she stood up. Patient D testified that at this point, Dr. Kunynetz pulled up her shirt as far as her bra strap without providing a reason, or asking her to do so.

Patient D's description in examination in chief differed somewhat from her statements on cross-examination; in the latter, she said that Dr. Kunynetz said "pull it up, pull it up" while she replied "it won't pull up." She also said in cross examination that Dr. Kunynetz said "I want to see your back" while he was pulling the shirt up.

Patient D testified that she made a follow-up appointment on leaving the office, although she had no intention of keeping it. She did not mention this to College investigators, because she felt it would cast doubt on her story.

Patient D testified that the waiting room was relatively empty, with only two or three other patients present. This was in contrast to other witnesses who described the waiting room at the time of their visits as being crowded. However, Patient D was seen for an 11.45 pm appointment whereas other patients were seen earlier in the day when a larger number of people might have been expected to be waiting.

Patient D was uncertain about the identity of the examination room when shown photographs of Dr. Kunynetz's examination rooms, saying that she thought it was larger than those shown.

Patient D did not remember Dr. Kunynetz taking a medical or family history, although on prompting, she agreed that he had asked about her family history of skin cancer.

Patient D initially denied having an initial poor impression of Dr. Kunynetz, although she conceded that she had thought he looked unprofessional and disheveled; she first denied, but later admitted that she had described him as looking dirty, and having grey-coloured skin.

Patient D was not able to describe all the individual elements of the encounter, such as where she was looking at the time of his examination of her left hand, although she was not looking at Dr. Kunynetz's abdomen, legs or groin, and she did not see his penis or a bulge in his pants. Despite these uncertainties and changes in her testimony, she remained adamant throughout her lengthy testimony that she had felt his penis rubbing against her leg.

Dr. Kunynetz

Dr. Kunynetz had no specific recollection of Patient D or her visit, and could say only what he would have done, given the information in her chart. He described that he would have done a comprehensive head-to toe examination, which he subsequently said would have been a "modified" examination. He denied having lifted Patient D's shirt without warning, although he did not contradict her testimony that her shirt was never actually removed. He said that it would not have made sense for him to have examined her left hand from the right side. He also said that it made no sense that he would examine the patient's back after having performed the cautery.

Patient D's husband, Mr. M, was called to rebut any allegation of recent fabrication, and testified that Patient D told him, either on the evening of the appointment or on the following day, that Dr. Kunynetz had rubbed his penis against her leg and that he had tried to lift her shirt up. The couple had discussions about making a complaint to the College. Mr. M subsequently drove his wife to the College for her to testify at the hearing, but they had not discussed the details of her testimony on these occasions. Mr. M was also aware that his wife had told her mother and Ms. L, but was not present for these discussions, and knew no details of the conversations. Mr. M also confirmed that she had

made a follow-up appointment, which she did not keep. He stated that his wife was upset when telling him of the event, and that she was crying, which was unusual for her.

2) Similar Fact Witnesses

The College called three similar fact witnesses.

Patient SA

Patient SA attended Dr. Kunynetz's office in October 2011, when she was referred by her family doctor with a sun spot on her left wrist. She testified that, after a three hour wait in a very crowded and busy waiting area, she was shown into an examination room. She did not receive any information about undressing or gowning.

Patient SA testified that Dr. Kunynetz sat on a stool with castors and rolled towards her to examine her face and her hand. She had her legs together. When Dr. Kunynetz approached, his legs were apart so that the area between his upper legs was in contact with her. Patient SA testified that in doing this, Dr. Kunynetz pressed his testicles against her. Patient SA testified that she felt stunned and intimidated and unable to respond or object. During this time, Dr. Kunynetz was explaining the significance of the spots on her face as being sun-spots -"in men we call them old-fart marks, in women, beauty marks".

Patient SA testified that following this, Dr. Kunynetz asked her to stand. He then "yanked the shirt out of my pants" saying "well, I can't see through your shirt". Patient SA pulled her shirt over her head to allow him to inspect her front and back. Neither she nor Dr. Kunynetz removed her bra. Other than recommending sun-screen, Dr. Kunynetz provided no further treatment.

Patient SA testified that she initially considered the incident to have been accidental, but rude and very bad manners. However after hearing from a friend and from her husband

that Dr. Kunynetz was the subject of criminal charges, she reviewed an article in the local newspaper, re-considered the matter and complained to the College. She did not recall details of what she read, but understood that the allegations were of behaviour similar to that of which she complained.

Patient SA's daughter (Ms. N) gave evidence that she was staying with her mother during the week of the appointment. Patient SA told her daughter on either the same evening of the appointment, or the following evening, that Dr. Kunynetz had pressed his testicles against her leg. The daughter said that her mother had expressed shock and disbelief, and that her account had remained consistent from that time onwards.

Dr. Kunynetz

Dr. Kunynetz adamantly denied that his testicles could have come into contact with Patient SA. Although he had no specific recollection of the visit, he agreed that he would have examined her face while she was sitting on a chair, and that he would have been on a stool with his legs spread apart. However, he said that as he leaned forward, his abdomen, and in particular, his panniculus (abdominal fat pad) would have fallen in front of his scrotum forward and downward, so that if any part came in contact with the patient, it would have been his abdomen only. Moreover, he stated that to have pressed his testicles into a patient's legs would have been "intensely painful." He agreed that he would have asked her to stand and that he would have "shifted" the clothing of her upper body, but only after explaining why he would do so, and that it was purely for the purpose of looking for additional lesions.

Patient SB

Patient SB had two appointments with Dr. Kunynetz, although she had a memory of only one, both at the time that she complained to the College and at the time she testified at the hearing. Both appointments were at Dr. Kunynetz 's Barrie office, and occurred in September and October 2013.

Patient SB testified that she was escorted into the examination room from what she described as a very crowded waiting room, by a male receptionist, who asked if she required a gown; she declined saying that her lesion was only on her face.

Patient SB testified that she was uncertain what Dr. Kunynetz said, but remembers being asked to sit sideways on the examination couch. As Dr. Kunynetz, who was standing to her right side, leaned over to view her left-sided facial lesion, she felt his penis against the side of her right leg. She described her reaction as being shocked and "what is it that I can feel?" She stated that she was certain it was the size and shape of a penis, and that Dr. Kunynetz was pushing against her for five to ten seconds. The patient did not feel that his penis was erect.

In addition to feeling his penis, Patient SB also testified that she felt grooves on either side of his groin.

Patient SB testified that subsequently, Dr. Kunynetz lifted her blouse saying "are there any more spots?" This was done without warning and with limited explanation. He did not touch or move her bra.

Patient SB said that she considered complaining to the College, but decided against doing so, partly because the process which she reviewed on the College website, appeared complicated, and partly because she felt that it would not be very effective. Patient SB did however tell her friend, Ms. P, of her concerns. Ms. P testified that Patient SB told her on the evening of the appointment that Dr. Kunynetz had rubbed his penis against her leg and had tried to lift her blouse. Patient SB did not complain to the College until after being told by a friend about an article in the Barrie newspaper, referring to complaints about Dr. Kunynetz.

Patient SB remained uncertain about whether she attended for a second appointment, and at which appointment the behaviour that she had complained about occurred. She also

had no memory of cautery being performed. Her chart from Dr. Kunynetz office has entries for September 2013, when cautery was performed, and for October 2013, when she was prescribed ointment for cold sores, but no procedures were performed.

Dr. Kunynetz

Dr. Kunynetz explained what he would have done at each of the two appointments, including the fact that the second appointment would have involved only looking at the patient's face to check the results of cautery, and prescribing medication for cold sores. He denied that his penis could have come into contact with the patient; he also stated that his inguinal folds or creases would have been impalpable, being behind the abdominal fat pad that formed a “pannus”.

Patient SC

Patient SC was referred by her family physician to Dr. Kunynetz in December 2010. She was seen on three occasions although in her initial complaint to the College, she had mentioned only two, which were determined to be the first and third visits, since she described procedures being performed at the two visits of which she had a clear memory, and the second visit was agreed to have been a follow-up check, with no procedure taking place. Patient SC described being referred by one family physician, although it was subsequently determined to have been a different physician. By the patient's account, she was referred primarily because of a recent history of bleeding from a lesion on the right side of her nose. However her family doctor's referral letter, and her registration form, completed prior to seeing Dr. Kunynetz, both refer to only a recently changing brown lesion that in the doctor's letter is said to be on the left cheek. Dr. Kunynetz's notes describe both lesions, with the lesion on the right side being suspicious of a basal cell cancer, and being the subject of removal by excision for biopsy. Patient SC had no recollection of the brown lesion on her left cheek.

At the first visit, Patient SC described waiting for about three hours in a very crowded waiting area. The wait was long enough that the Red Cross driver who had taken her to the appointment came in to enquire about the delay. Patient SC described being asked to sit on the side of the examining table, with her legs hanging down. Patient SC testified that Dr. Kunynetz said that the bleeding lesion would need removing, and while performing this procedure, Patient SC stated that he was pushing his penis against her knees and rubbing sideways.

When asked how she knew it was a penis, Patient SC said "I'm a woman of almost 70 years; I know what a penis is and what it feels like. I have no doubt at all that it was a penis." She also agreed that his belly may have touched her, but this did not disturb her. She stated that she thought "Am I imagining this. This can't be so, he's a doctor." She was unable to say how long the episode took, and had no specific memory of whether a local anesthetic had been used.

Patient SC testified that Dr. Kunynetz then asked her to undress, so that he could examine her for other possible lesions. Patient SC took off her top, bra and jeans while Dr. Kunynetz remained in the room. She was not offered any form of covering by the doctor, who completed the examination, after which she redressed. Patient SC testified that she did not find the fact that Dr. Kunynetz remained in the room, and that she had no covering, objectionable, and had no concerns about the examination itself.

In her initial complaint to the College, Patient SC said that she was so distressed by the events, she did not return for a follow-up appointment for the results of tests done on the lesion that had been removed. However in testimony she said that, after having been interviewed by College investigators, she now had a recollection of a second visit which was relatively brief and was a follow-up, in June 2011, to the December removal of her nasal lesion. At this visit, she mentioned a new lump on the right side of her neck. An appointment was made for her third visit in July 2011 for the lump to be excised by cautery for biopsy. Patient SC was driven to both her second and third visits by her

husband. On both occasions, she had a three hour wait and, at least on the second occasion, remembered feeling angry at the wait.

Regarding the third appointment, Patient SC described events that were very similar to those of the first appointment with Dr. Kunynetz. She described being in the same position as at the first visit, and Dr. Kunynetz pushing his penis against her knee, during the procedure. She described her reactions as "feeling sick - not again." As at the first appointment, she was then asked to remove her upper garments, although not her bra, while Dr. Kunynetz remained in the room, and without being provided with any covering.

Patient SC testified that she told her husband of the events while he drove her home, and determined not to return to see Dr. Kunynetz. She has since been referred to another dermatologist. She did not, however, consider making any complaint until after seeing a television news account in November 2015 of Dr. Kunynetz's judicial review of his practice restrictions and suspension.

Patient SC also admitted that she had overheard a conversation at her hairdressers about a male who had alleged that Dr. Kunynetz had rubbed his penis against him, and that this conversation had strengthened her conviction that she had been the subject of inappropriate behaviour by Dr. Kunynetz. She did not, however, consider this to have been sexual assault, until after a conversation with a College investigator (Mr. Steven Wright) who suggested that she should inform the police, which she did.

Patient SC's husband gave evidence that Patient SC told him of her allegations immediately after both her first visit but had no specific recollection of any conversation after the third visit. He also said that they discussed making a complaint, but decided against it because "it would be her word against the doctor's". They were watching television at the time of the news report, at which time they had their first conversation about the events "for several years."

Dr. Kunynetz

Dr. Kunynetz has no independent recollection of Patient SC's visits, but confirmed that he would have performed the procedures at the first and third visits very much as described by the patient, although he did not think that he would have asked her to undress at the third visit. Although he was in very close proximity to the patient, and although it was possible that his abdomen came into contact with her during the procedures, and even possible that she might have felt him moving slightly, he denied that there was any possibility that his penis came into contact with her at any point.

3) Evidence of Urologists and Witnesses who observed Examination - Likelihood or Physical Possibility of Genital Contact

The Committee heard evidence from two urologists regarding their physical examination of Dr. Kunynetz. The second such examination was performed in the presence of two witnesses, who also testified. The Committee also heard testimony from Dr. Kunynetz's family physician.

The Committee received as exhibits a selection of still photographs showing Dr. Kunynetz's bodily habitus, particularly his abdomen, including his abdominal panniculus (a panniculus, often incorrectly referred to as a "pannus", is a layer of dense fatty tissue on the front, lower abdomen; it may hang down like an apron covering the pubis and part or all of the genitalia; the Committee uses the term panniculus because pannus has an alternative meaning). The photographs also showed the position of a simulated patient sitting sideways on the examining table with Dr. Kunynetz in various positions representing those which he would adopt to examine a patient. In addition, there were photographs indicating the height and other dimensions of the examining table and furniture in the examining rooms.

Dr. Rodomski

Dr. Sidney Rodomski was retained by defence counsel to conduct an examination of Dr. Kunynetz, and to assess whether it was physically possible or probable that the contact described by Patients C and D could have occurred. Dr. Rodomski is a Professor of Surgery at University of Toronto, head of Urology at Toronto Western Hospital, and a specialist in voiding and erectile dysfunction. He performed an examination of Dr. Kunynetz, both without and with an erection, the latter being provoked by an injection of "Triple Mixture" (Papaverine, Prostagladin and Phentolamine) a compound commonly used to establish a chemical erection. Dr. Rodomski was qualified as an expert in urology.

Dr. Rodomski described Dr. Kunynetz as having a large abdominal panniculus and a suprapubic fat pad, which together prevented the penis from being seen from the front. After achieving an erection, the penis was no longer retracted into the fat pad and could be seen only when the panniculus was lifted. Dr. Rodomski asked Dr. Kunynetz, wearing his underwear, to conduct a simulated examination with Dr. Rodomski sitting on the side of the examination table. He did this when the penis was flaccid and after the establishment of an erection.

When this was done with Dr. Kunynetz standing, all that Dr. Rodomski could feel was Dr. Kunynetz's panniculus. When it was repeated with Dr. Kunynetz sitting on a stool, only his abdomen could be felt. Dr. Rodomski concluded that it would not have been possible for Dr. Kunynetz to have rubbed his genitalia, flaccid or erect, against the patients.

Dr. Rodomski determined the heights of the stool and examining tables in Dr. Kunynetz office, from defence counsel, after the examination. The table heights in Dr. Kunynetz office ranged from 31 to 35 inches. The examination tables used by Dr. Rodomski were 33 to 34 inches in one office and 31 to 32 inches in the other. Dr. Rodomski did not believe that his conclusions would have differed had the table been at any of these

heights. He did however note in his hand-written notes "if he were tall, maybe penis would touch knee". Dr. Rodomski said that he did not ask Dr. Kunynetz to push his penis into his knee, or to perform any form of "pelvic thrust" or rubbing motion.

Dr. Rodomski stated that he had come to the conclusion that contact was impossible before he had confirmed the relative heights of the examination tables. On cross examination, he admitted that factors that he had not tested, such as how and where Dr. Kunynetz was standing, how his body was positioned and whether he was pushing his groin forward, might have changed his conclusion. He opined that the size and position of the patient could also modify his conclusions, but he felt that the size of the examining table would not modify his conclusions. However, this latter point was made after it had been established that his conclusions had been reached *before* he was made aware of the height of the tables in Dr. Kunynetz's office.

Dr. Brock

Dr. Gerald Brock was called by the College to provide reply evidence. Dr. Brock is a Professor of Surgery at Western University, London, Ontario and has training in, teaches and performs research in neuro-urology and has a practice specializing in fertility and erectile dysfunction. Dr. Brock was qualified as an expert in urology.

Dr. Brock was requested to perform an examination of Dr. Kunynetz to determine whether there was anything that would have prevented the actions described by Patients C and D. He was provided with the transcripts of interviews given by these patients and with the expert report of Dr. Rodomski. He dictated his report immediately after the examination, which took place in London and which was observed by Mr. George Reed, a College investigator, and by Mr. Christopher Hunter, on behalf of defence counsel.

Dr. Brock conducted an examination, after which he gave an injection of Prostaglandin E1 (which he described as being slightly less effective, but safer than the Triple injection employed by Dr. Radomski) to induce an erection. He then conducted a series of

maneuvers, using himself as a patient sitting on the side of his examination couch, and Dr. Kunynetz as the physician. These were conducted at three different table heights - low, and intermediate and high. Dr. Brock did not accurately measure these heights, but estimated them using his inside leg measurement as a guide.

Dr. Brock did not weigh Dr. Kunynetz as part of his examination, but was aware of the weight recorded by Dr. Radomski, and that Dr. Kunynetz had lost about 12 lbs since that time. Dr. Brock felt that knowledge of the actual weight would not have changed his conclusions in any way. He noted the presence of a suprapubic fat pad and a panniculus, and that the shaft of the penis was not visible as a result of being buried in the fat pad. The head of the penis was visible when Dr. Kunynetz was supine. After an erection had been achieved, Dr. Brock was able to observe three inches of penile shaft. He described the erection as being 70% complete, rather less than had been achieved after the injection by Dr. Radomski.

When Dr. Brock sat on the examination table, he was able to feel Dr. Kunynetz 's penis when Dr. Kunynetz was standing and moving forward towards him. He was also able to visualize the penis. Dr. Brock testified that he was able to feel the penis at all three table heights. Dr. Brock asked Dr. Kunynetz to bend forwards and backwards as he would during a patient examination; he testified that the penis was more easily felt when Dr. Kunynetz was bending backwards.

The actions of Dr. Kunynetz when bending forward and backward were described by other witnesses as a "pelvic thrust". Dr. Brock did not feel this was a very accurate description, but he said that the actions were performed as a result of a verbal request made by the College, although no such request was made in the College's letter asking for his opinion. He noted that, since he had already felt the penis when Dr. Kunynetz was standing immediately in front of him, he did not feel the "pelvic thrust" had a significant effect on his opinion. Dr. Brock also said that at the table's highest level, the panniculus was more prominently felt, while at the lowest level, the penis was more easily felt. Dr. Brock did not attempt a simulated examination of the type described above when Dr.

Kunynetz's penis was flaccid. He was of the opinion that a flaccid penis would not have been palpable unless his knee had been under the panniculus.

Witnesses who Observed Dr. Brock's Examination

Mr. George Reed is a College investigator with a background in nursing, who was asked to attend Dr. Brock's examination; he had no prior involvement with the College's investigation. He, and the observer from Dr. Kunynetz 's legal firm, stood at the foot of the examination table during the procedure. Mr. Reed's role was that of a passive observer; he made no comments and took no measurements.

Prior to the establishment of an erection, Mr. Reed was able to observe the head and shaft of the penis, and the scrotum, from his position at the foot of the bed, with Dr. Kunynetz in a supine position. After the establishment of an erection, Mr. Reed observed that the penis was at a 45 degree angle upwards and that, although the panniculus made contact with the shaft of the penis, it did not cover the head of the penis.

Mr. Reed testified that when Dr. Kunynetz was making movements back and forth by bending at the waist, the head of his penis was clearly visible when "thrusting forward." He also testified that he could observe tenting of Dr. Kunynetz's trousers when he replaced them at the end of the examination. Mr. Reed concluded that there was nothing which could prevent Dr. Kunynetz's penis from making contact with the knees of Dr. Brock when Dr. Kunynetz was performing the mock examination.

The second observer at Dr. Brock's examination was Mr. Christopher Hunter, a lawyer from Dr. Kunynetz's defence firm. Mr. Hunter's only involvement in the case was as an observer of the examination, and as the photographer who took photographs of Dr. Kunynetz standing unclothed in his examination rooms in front of his examination tables. He had not participated in the defence case in any other capacity. Mr. Hunter corroborated Dr. Brock's and Mr. Reed's account of the examination before an erection was achieved, the induction of an erection, the performance of simulated patient

examinations by Dr. Kunynetz, and their relative positions in the room during both pre- and post-erection components of the examination room.

Mr. Hunter noted that no foot-stool was used or present in the room, that he could visualize the penis from his position lateral to Dr. Kunynetz after an erection had been induced. Mr. Hunter stated that the simulated examinations were done with the examination couch at only its lowest and highest levels, rather than the three heights that were described by Dr. Brock and also by Mr. Reed. Mr. Hunter also said that he could see only Dr. Kunynetz's "pannus" adjacent to (and making contact with) Dr. Brock's knees at the table's lower height. He did not observe the penis making contact. He observed that it was the lower edge of the "pannus" that was in contact with Dr. Brock's knees, when the examination table was at the lower height.

Photographic Evidence

In addition to the evidence of the simulated examinations performed by the two experts, the Committee received from the defence, several briefs of photographs, as well as individual photographs. These included:

1. A brief of photographs of each of Dr. Kunynetz's examination rooms and furnishings (examination tables, chairs, cabinets, stools and footstools) together with measurements of the furnishings.
2. A brief of photographs of Dr. Kunynetz's performing a simulated examination of a patient; the patient is sitting sideways on the examination couch in each of the examination rooms, with Dr. Kunynetz's standing directly in front of and looking at the patient, and also in a closer position, to one side of the patient, palpating the scalp on either side of the patients head.

3. A series of photographs of the waiting room, and notices in both the waiting room and the examination room, containing information for patients about undressing and draping.

The above photographs were taken by Ms. Jessica Roher, an articling student with the defence firm, in November, 2015. Ms. Roher testified as to the circumstances of the photographs. Dr. Kunynetz was not present for photographs of the rooms and furnishings, but was present for and participated in the simulations. The College argued that the photographs of the simulations should not be accepted as evidence, on grounds that the complainants had testified that they did not accurately represent the circumstances of their examinations, and on grounds of lack of relevance. The Committee accepted the photographs, recognizing that they had been accepted earlier for the purposes of the *voir dire* of the similar fact witnesses, and on the grounds that appropriate weight could be given by the Committee as to their probative value.

4. A series of photographs of Dr. Kunynetz in a state of undress, standing before the examination couch in each of his examination rooms. These photographs were taken by Mr. Hunter, the lawyer who had attended the examination by Dr. Brock. Mr. Hunter confirmed this in his testimony and confirmed that there was no attempt to replicate the simulated examination photographs taken by Ms. Roher. All the photographs were of a lateral view of Dr. Kunynetz, demonstrating his “pannus” and abdominal habitus. Mr. Hunter freely admitted that he was not an expert photographer, and did not know details such as exposure or shutter speed. No additional lighting was used. Although the area of the “pannus” and the area below is in shadow and poorly demonstrated, the photographs do show that the genitalia extend below the “pannus”, although it appears that what is shown in shadow is the scrotum; the penis cannot be clearly demarcated.

Other Evidence regarding Dr. Kunynetz's Weight and Bodily Habitus

Dr. Geoffrey Bond, testified that he had been Dr. Kunynetz's family physician since 1992. He testified with his patient chart for Dr. Kunynetz; the latter was allowed as evidence after the Committee had heard argument as to its production and admissibility.

Dr. Bond testified that Dr. Kunynetz had a problem with obesity from the time that Dr. Bond had first seen him. Dr. Kunynetz's weight varied from 275 to 305 lbs over this period despite attempts at weight reduction. Dr. Bond had noted in the patient chart that Dr. Kunynetz carried his weight around his middle, which Dr. Bond pointed out was typical of overweight males. Dr. Bond did not make specific note of the presence of a "pannus", and did not record any problems or concerns arising from the presence of a "pannus", such as interference with intercourse or urination.

Dr. Bond also testified that, while he had provided Dr. Kunynetz with advice on managing his memory (such as using lists), he had not made a specific diagnosis of any condition causing impairment of Dr. Kunynetz's memory.

Evidence of Dr. Kunynetz's Patients (unrelated to the subject of the alleged breach of an undertaking to the College)

The Committee heard evidence from six patients of Dr. Kunynetz, four of whom were female and two male. With one exception (Ms. Q), all had volunteered to speak on behalf of, or to support, Dr. Kunynetz when they heard that allegations of unprofessional behaviour had been made against him. To a varying extent they were generally unaware of the details of the alleged behaviour, but understood that the alleged misbehavior was of a sexual nature. All were long-term patients of Dr. Kunynetz for periods of between 8 and 25 years, and had been seen regularly, usually every 6 months during those times. Three patients had generalized psoriasis, and three, including one with psoriasis had been treated for a skin cancer. Only one of the six had a relatively benign lesion, actinic keratosis.

All described the waiting area as being very busy, and usually as having prolonged waits of between one and three hours before being seen. Only two of these witnesses (Ms. R and Mr. S) remembered seeing the sign about the availability of draping in the waiting room. However, all said that they had been offered draping, in four instances by the office receptionist and in two cases (Ms. T and Ms. Q), by the clinical trial nurse (Dr. Kunynetz had testified that patients who were enrolled in clinical trials were seen in identified clinical trials examination rooms, and were initially examined by one of two clinical trials nurses).

All six patients identified Dr. Kunynetz as being a large or rotund man with a big stomach or belly. All described occasions when Dr. Kunynetz's "belly" or "stomach" came into contact with their knees when he was examining or performing a procedure on their scalp or face; in each case, the contact was for a matter of seconds. All six witnesses stated that they were certain that it was not the penis which made contact. The four women (and also Mr. U) were quite certain that they would have been able to identify a penis if it was indeed making contact.

Evidence regarding the Alleged Breach of an Undertaking

On August 11, 2015, the Inquiries, Complaints and Reports Committee of the College gave notice to Dr. Kunynetz of its intent to make an interim order under section 37 of the Health Professions Procedural Code to direct the Registrar to impose terms, conditions and limitations on Dr. Kunynetz's certificate of registration. These required Dr. Kunynetz to refrain from patient encounters with a female of any age, unless the encounter took place in the presence of a female member of a regulated health profession (a Practice Monitor).

The Practice Monitor was required to remain in the room throughout the encounter, and to carefully observe all physical examinations. The Monitor had to maintain a log of all such encounters, to initial the patient record and to report to the College on a monthly

basis. Dr. Kunynetz also had to post a sign in the waiting room and all examination rooms stating that he could not be alone with a female patient.

The order took effect on August 13, 2015, and Dr. Kunynetz employed two registered nurses, Ms. Jan Thompson and Ms. Carol Morris, who were approved by the College. He posted the signs as required and he withdrew from his limited practices in hospitals in Toronto and Midland because of the impracticality of adhering to the undertaking in those sites.

Dr. Kunynetz instituted a practice of having his office staff place a blank sheet of paper in a box on the front of the door to each examination room so that he had warning of the presence of a female patient before entering the room. Dr. Kunynetz testified that the restrictions had a significant negative impact on his practice, in part because of media coverage and in part because hospitals informed their medical staffs of the College's requirements resulting in a decline in referrals. He also found that some patients were unwilling to continue to see him, which he attributed to either the publicity or the requirement for a third party to be present.

Dr. Kunynetz informed the College that on two occasions, he breached his undertaking, by seeing female patients in the absence of a monitor. On September 3, 2015, a female patient was shown into an examination room by a part-time secretary; no blank sheet of paper was placed in the box on the door. Dr. Kunynetz walked into the examination room to find that the patient was upset as a result of the recurrence of a basal cell carcinoma, which he had previously treated. Dr. Kunynetz went ahead, examined the lesion and performed a curettage biopsy without requesting a monitor to be present. Dr. Kunynetz explained that he was so focused on the patient's distress and the performance of the biopsy that he forgot about the College's restriction. After the incident, Dr. Kunynetz recognized the breach. He informed the monitors in his office, and informed the College in a letter from his counsel to the College dated September 16.

The second breach occurred on September 17, 2015, when a patient named Ms. V, who gave evidence at the hearing, had been seen by one of the clinical trial nurses; the nurse was responsible for performing the initial assessment prior to entry to a clinical trial of a new and expensive drug for the debilitating skin condition suffered by Ms. V. The condition had been unsuccessfully treated for 18 years. The nurse identified that Ms. V had symptoms that were a contra-indication to her entry to the trial. On learning that she was not eligible for the study, she was very upset; not only was she not eligible, but she had stopped her usual medications which had provided some mild relief of symptoms medications in order to prepare for entry into the trial. The clinical trial nurse informed Dr. Kunynetz, who asked her to contact the drug manufacturer to ascertain if there was any possibility of obtaining compassionate access to the drug outside the trial.

In the meantime, Dr. Kunynetz went into the examination room to explain this to Ms. V and remained with her without a monitor being present. Ms. V confirmed that he did not perform a physical examination, and that the door remained open. Dr. Kunynetz remained in the room with her for about five minutes, gave her advice about restarting her conventional medications (at a higher dose) and made a notation in her chart. Ms. V stated that she had been unaware of the restrictions on Dr. Kunynetz 's practice, and had not seen any of the signs about the restrictions.

Dr. Kunynetz testified that he was “hyper focused” on the patient's problem, and only recognized that his actions constituted a breach, after the patient had left, when a research assistant in his office asked him if there had been a nurse present at the encounter. He told the nurse monitor of the event and advised her to report it to the College.

On cross examination, Dr. Kunynetz was unclear when he had implemented further precautions after the first breach on September 3. He considered the College's actions in placing this restriction on his practice to be unnecessary and unfair. Dr. Kunynetz became somewhat discursive when pressed on whether or not he recognized the patient at the first breach to be female, saying that he did recognize her as female but that it "did not register." He also said that he had not read his counsel's letter to the College with

sufficient care and had not appreciated the need to provide a detailed explanation as to how the breach occurred. His expectation was that it would be easily recognized as having been unintentional. He pointed out that he had seen some 770 female patients with a monitor present and felt that the two breaches occurred under unusual circumstances, and were not representative of his attempts to comply with the College's requirements. He described them as cognitive lapses which were not an attempt to circumvent the College's Order.

The consequence of Dr. Kunynetz's breaches was that the ICRC imposed an order directing the Registrar to suspend his certificate of registration effective October 1, 2015. Dr. Kunynetz subsequently sought judicial review of this decision. The review was not successful.

FINDINGS

The burden of proving the allegations in a disciplinary hearing rests on the College. The standard of proof required, and accepted by the Committee, is that established by the Supreme Court in *F.H. v McDougall*; the allegations must be proved on the balance of probabilities, by evidence that is clear, cogent and convincing.

The allegations in this case are threefold: 1. that Dr. Kunynetz sexually abused patients A, B, C and D; 2. that Dr. Kunynetz engaged in disgraceful, dishonourable or unprofessional conduct with these same patients; and, 3. that Dr. Kunynetz contravened a term, condition or limitation placed on his certificate of registration.

Allegation 3 is considered separately from the other two allegations.

Allegations 1 and 2 are closely related; they are however made somewhat more complex by the fact that the alleged misconduct is of a different nature with each patient viz:

- regarding Patient A, the alleged misconduct consisted of failing to provide proper covering or privacy and of removing her clothing, including her undergarments, without proper warning or consent
- regarding Patient B, the alleged misconduct consisted of failing to provide proper covering or privacy and of touching the patient's breasts in an inappropriate and sexual manner.
- regarding Patients C and D, the alleged misconduct consisted of rubbing or pressing his genitals against their legs; for Patient D the misconduct also included failing to provide proper covering or privacy, and removing her clothing without proper warning or consent.

The Committee identified three questions to be applied to each form of misconduct, and each allegation:

- Did the act of misconduct occur?
- If so, did the act constitute sexual abuse?
- And / or did the act constitute conduct that would be regarded as disgraceful, dishonourable or unprofessional?

Failure to provide proper privacy

Three of the four complainants stated that they were seen by Dr. Kunynetz without being offered a gown or draping of any sort, and that Dr. Kunynetz did not leave the room while they were removing outer garments.

Dr. Kunynetz did not contest this, although it was his position that it was the responsibility of the receptionist staff to make patients aware of draping. He also pointed out the notices in the waiting room and examination rooms, which the patients did not remember having seen. Dr. Kunynetz also stated that it was his practice to leave the room only if patients were undressing in order for a genital examination to be done. He said that he saw little value in leaving the room while patients undressed other areas of the

body, since he was going to come back into the room only to remove the covering immediately in order to examine the skin.

After he had been advised by the College investigator at her visit to him in January 2009, and had read the material that she provided for him, Dr. Kunynetz had modified his practices for a few weeks. He contacted colleagues and came to the conclusion that his previous practices had been consistent with those of others so he did not maintain the changes. His reaction to the reading material provided by the College was that it was heavily oriented towards the avoidance of sexual relationships, and did not address specifics such as remaining in the room while patients were undressing, other than for intimate examinations.

The Committee did not receive any information about the practices of other physicians or of dermatologists in particular.

The Committee reviewed the information that had been provided to Dr. Kunynetz and agreed that the guidelines provided did give some degree of latitude for interpretation. For example, the College policy statement on "Maintaining Appropriate Boundaries and Preventing Sexual abuse" (2008), states that "physicians should avoid *watching* a patient undress or dress and provide *appropriate* covers and gowns" (italics from the Committee). Dr. Kunynetz, in effect, took this to mean that as long as he turned his back on the patient while undressing, and as long as the patient was not removing their underwear, he was providing appropriate privacy.

Sexual abuse of a patient is defined in subsection 1(3) of the Health Professions Procedural Code as follows:

"sexual abuse" of a patient by a member means,

- a) sexual intercourse or other forms of physical sexual relations between the member and the patient.

- b) touching of a sexual nature, of the patient by the member, or
- c) behaviour or remarks of a sexual nature by the member towards the patient.

Subsection 1(4) of the Code states that for the purposes of subsection 1(3) "sexual nature" does not include touching, behaviour or remarks of a clinical nature appropriate to the services provided.

The Committee determines on the evidence before it that a physician who remains in the room, with his back turned while a patient undresses, is not engaging in behaviour of a sexual nature and therefore, did not make a finding of sexual abuse with respect to this aspect of Dr. Kunynetz's behaviour.

Furthermore, although many would consider that Dr. Kunynetz's preference for the opinions of his colleagues in the profession over the recommendations of a representative of the College to be unwise, the Committee finds that there was insufficient evidence to make a finding that this behaviour, in the context of this case, represents what members would reasonably consider to be disgraceful, dishonourable or unprofessional conduct. The Committee therefore did not make a finding of professional misconduct with respect to Dr. Kunynetz's practices regarding draping and/or leaving the room while a patient was undressing.

Removal of clothing without due warning or consent

As with many of the issues before this Committee, we were faced with discrepancies between the testimony of the patients and the testimony of Dr. Kunynetz, the former consisting of what was said to have occurred and the latter consisting of what Dr.

Kunynetz said would have been his usual practice in the circumstance. All the complainants were shown to have imperfections or limitations in their memory of some portions of the events that occurred in the examination rooms. However their memories of the events which caused them distress were clear, consistent and persisted in the face of cross-examination.

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.

Not limited to the removal of clothing, the inconsistencies in the witnesses stories occurred around events or details that were expected or otherwise not memorable to the witness. These included:

- the exact date and time of the appointment and details of the size and shape of the room (Patient A);
- the exact position of Dr. Kunynetz and the examination table, whether the signs on the wall of the examination room were "homemade" or copies from a newspaper and whether they were critical of the College or another institution, whether she pushed away or pulled away, and whether she told her husband of the events when in the car driving home, or later that day (Patient B);
- whether there were two or three appointments, and at which appointment the events occurred (Patient C); and
- whether a second appointment was made, and details of the room layout (Patient D).

All patients had problems being exact about the number of seconds for which the actions about which they complained lasted. Witnesses were challenged about whether statements such as "Can this be really happening?" "This must be a mistake" "I don't believe this is happening to me" represented doubt as to whether the events actually occurred as they said they did. The Committee concluded that such inconsistencies and expressions of disbelief did not dispel the certainty with which the patients testified including in respect of the way in which their clothing was moved.

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.

Touching of the breasts (Patient B)

Patient B alleged that Dr. Kunynetz, in addition to pulling her bra straps out, put his hands inside her bra and "fondled" her breasts. He did so after he had examined her legs and had established that she did not have a wheal in response to stroking (a positive Darier's sign), and after she had told him that other physicians had failed to elicit such a finding.

Dr. Kunynetz responded, in 2008, after her initial complaint that he had never put his hands inside her bra, and that he merely would have lifted her bra straps to look at the skin underneath. He also said that he might have asked Patient B to lift her breast herself, in order to examine underneath them. He repeated this at the time of his application for judicial review of his interim suspension in 2015. However in testimony at this hearing, he said that he would have stroked each breast, with one hand under her bra, while stabilizing it from beneath with the other hand. His rationale for doing this, he said, was to attempt to elicit Darier's sign.

Patient B had testified that her previous dermatologist had not performed this sort of breast examination and, while she had experience of breast examinations being performed for screening for breast cancer, they were totally unlike the examination performed by Dr. Kunynetz.

No justification was provided for the examination of the breasts in urticaria pigmentosa and there was no mention of it in the patient's chart. Moreover the Committee noted that there was no mention of Darier's sign in the chart, and indeed the first time that this was mentioned by Dr. Kunynetz occurred only after reference had been made to it by a report from an expert in 2015; the expert did not testify in this hearing.

The change in explanation by Dr. Kunynetz, with no clinical notes at the time to support it, provided the Committee with serious doubts about his credibility on this issue.

The Committee did not have similar doubts about Patient B's credibility. She was an experienced and well educated woman who gave her testimony in a very straightforward fashion. Although a less critical decision had been reached by ICRC in 2009, that occurred without the benefit of oral testimony from either party, and without the change in Dr. Kunynetz's testimony. Patient B was clear that she had only accepted that committee's decision because she felt that she had no alternative but to do so, and had not been satisfied with the outcome at that time.

There was no evidence of Dr. Kunynetz showing signs of sexual arousal or sexual gratification at any time in the examination of Patient B. The Committee understands that it is not necessary to demonstrate sexual intent, arousal or gratification in order to make a finding of sexual abuse. Touching of a sexual nature of the patient constitutes sexual abuse. Touching of a “sexual nature” does not include touching of a clinical nature appropriate to the services provided. The Committee finds there is no clinical justification for the touching by Dr. Kunynetz of Patient B’s breasts in the manner described by Patient B, which the Committee finds did occur. The Committee does not accept as credible Dr. Kunynetz’s rationalization for doing so in the circumstances of this case.

The Committee therefore finds that Dr. Kunynetz engaged in sexual abuse in his touching of the breasts of Patient B.

Pressing or rubbing his genitals against a patient

Two of the complainants (Patients C and D) testified that Dr. Kunynetz pressed himself against their legs in such a way that they could feel his penis pressing against them. Of the three similar fact witnesses, two alleged that they felt Dr. Kunynetz's penis pressing against them, and one could feel his testicles pressing against her legs.

The events described by the patients were, in some respects, similar.

- All occurred to patients on either a first or second visit; Dr. Kunynetz was not known to the patient and vice versa.
- All the patients described contact that was relatively brief, lasting in most cases for a matter of several seconds, unaccompanied by any verbal or facial evidence of sexual arousal or any suggestion of sexually suspect comments.
- All, except Patient SA, were seated on an examination table with their legs hanging over the side of the table. They all described Dr. Kunynetz as being in front and to their right.
- All patients described themselves as being shocked, and used language such as embarrassed , disgusted, overwhelmed or "sick to my stomach," indicative of personal distress.
- In two instances (Patients C and SC), the contact occurred during a procedure on a facial lesion and two (Patients D and SB), while Dr. Kunynetz was examining the left side of their face or left hand, situations that would naturally bring him in close proximity to the patient.
- Four of the patients said repeatedly that they were certain that they felt Dr. Kunynetz's penis, but could not see any visual evidence to support this. They relied on what they felt against their leg.

Dissimilarities existed.

- Most obviously in that Patient SA described contact as being with his testicles, not his penis, and occurring while she was seated on a chair and Dr. Kunynetz was seated on a wheeled stool (which Dr. Kunynetz said he did not use and would not support his weight while moving).

- Although all patients used the word "pushing" to describe the contact, two described it as "rubbing" and only Patient D used the word "gyrating"; this latter testimony was unclear, and was found by the Committee to be unconvincing. The patient described that Dr. Kunynetz's abdomen and upper body did not move, while the pelvic area which she could not see, was "gyrating".
- The greatest variation was with respect to the perceived state of the penis described by the patients. Patient C said that she felt the doctor was beginning to get an erection, Patient D said it was partially, but not fully erect, Patient SB said it was pointing downwards (therefore not erect), and Patient SC did not specify a state of erection. This is relevant not because sexual intent or arousal is necessary to a finding of sexual abuse, but to highlight the different perceptions of the patients to what they thought they felt (but could not see) in the part of Dr. Kunynetz's body that was pushing against them.

The patients were all mature women, who gave testimony about potentially distressing memories in a composed fashion.

As has been described above, there were inconsistencies in their individual testimonies, both between statements made on examination-in-chief and those made in response to cross-examination, and between statements made earlier to College investigators and those made at the hearing. These inconsistencies related to events or descriptions that would reasonably be less consequential to an observer (such as the lay-out and furnishing of the examination rooms, the precise wording used by them or by Dr. Kunynetz, or the exact timing - to the second - of the contact with Dr. Kunynetz). Similarly, memories of the dates of appointments, or the number of appointments with Dr. Kunynetz, and even at which of three appointments the alleged contact occurred, were variable.

What remained consistent even under vigorous cross examination were the details and the certitude with which they expressed their experience of unwanted contact.

Although the three similar fact witnesses (and Patient D) had heard at the time of their complaint that Dr. Kunynetz was under investigation by the College, they denied any knowledge of the details of other complaints. All had spoken with family members or friends soon after the event. Witnesses testified to this, making the probability of recent fabrication, extremely low. In addition, both complainants and similar fact witnesses denied speaking to other complainants, and the Committee found no evidence of collusion.

However, Patient SC had overheard customers at her hairdresser's discussing Dr. Kunynetz and in addition, testified to having been told by a College investigator that she may have been the victim of a sexual assault raising the possibility that her testimony may have been tainted. However, she had contacted the College to complain before either of these events, so any tainting was likely to have been with respect to details of the event, rather than the fact that contact occurred.

Further concern of bias may arise from the observations that all but one of the patients made, of a very crowded waiting room (one patient described it as a "third world appearance"), a prolonged wait to see Dr. Kunynetz, and descriptions of Dr. Kunynetz's dress or appearance that were mildly unflattering - he was described as "abrupt", "slightly unkempt" and "unfriendly." Despite this, the complainants had no negative comments about the quality of care and advice that were provided. Even if they may have been somewhat predisposed to a negative view of Dr. Kunynetz, this was insufficient to account for the nature of their complaints.

Dr. Kunynetz's response to the allegations was two-fold. Firstly, he vehemently denied that he ever had or would deliberately push his genitalia against a female patient, and secondly, that he could not physically do so, even by accident because of his size, and in particular, the presence of a "pannus" or fat apron, which would be interposed between his genitalia and the patients legs, and thus prevent his penis being felt in the way it was described by the complainants.

In support of this defence, Dr. Kunynetz underwent two examinations by experts in urology, and provided several series of still photographs, including photographs of Dr. Kunynetz standing before a simulated patient (a member of his staff) in the position he would usually adopt when examining a patient's face and scalp, and also photographs of himself wearing no clothes. In addition, he provided photographs showing the lay-out of his examination rooms, the height of their furnishings, and the relationship between his body (clothed and unclothed) and the examination tables.

The Committee found the still photographs to be of limited value for the purposes of assessing the validity of the patients' complaints. They are by their nature non-dynamic and show only positions and relationships at a unique moment in time. They cannot be demonstrated to be the positions and relationships of the patients and Dr. Kunynetz at the time of the complaints, especially given that these would vary during the course of the examination and even more so, during the course of a procedure such as curettage of a facial lesion. Moreover, they are photographs that were taken of the defendant and in some instances, an employee, and are therefore at risk of being consciously or unconsciously posed or modified by the positions taken for the photographs.

Some conclusions can still however be drawn from them. Dr. Kunynetz indeed has a panniculus, which is dependent in front of at least part of his genitalia; however, despite the fact that much of the area at the lower edge of the panniculus is in marked shadow (the photographs were taken without additional lighting and by non-professional photographers) part of Dr. Kunynetz's scrotum is not covered by the panniculus and can be clearly seen. His penis, on the other hand, is not clearly visible in any photograph. The lower border of the panniculus is at the level of upper edge of the examination table mattress in some photographs (e.g., photograph #6 taken in examination room 3, and photograph #15 in room 9 in Exhibit 60) and at the lower border of the mattress in others (e.g., photograph #8 in examination room 4, and photograph #3 in room 2). Since neither the complainants nor Dr. Kunynetz were able to establish in which rooms they were seen,

this exemplifies the difficulty in drawing conclusions about the allegations from these photographs.

The two experts who examined Dr. Kunynetz conducted somewhat similar, but not identical, examinations, and initially came to opposite conclusions about the possibility (or impossibility) of the complainants having felt Dr. Kunynetz's penis. They agreed that when the penis was in a flaccid state, it was largely buried in the abdominal fat pad and behind the panniculus, but that the head of the penis was still visible. This was also confirmed by both observers at Dr. Brock's examination. Both examiners were able to achieve a pharmacologically induced erection of Dr. Kunynetz's penis, albeit using slightly different combinations of pharmacologic agents. Dr. Brock stated that he could see the penis after an erection had been achieved, with the Dr. Kunynetz standing, as well as semi-prone. Dr. Radomski clarified in his testimony that when he said he could see the shaft of the penis, it was only after lifting the panniculus. Both observers at the examination by Dr. Brock said they could see the shaft of the penis, but the Committee noted that both were facing sideways on to Dr. Kunynetz and therefore had a different view from that of the experts who were facing Dr. Kunynetz from the front.

The two examinations differed when it came to attempting to re-enact the circumstances of the patients' complaints. Dr. Radomski did a simulated examination with Dr. Kunynetz both clothed and in his underwear; he did not ask Dr. Kunynetz to press or push himself against Dr. Radomski, flex at the waist, or move back and forth. He was unable to feel Dr. Kunynetz's penis throughout this and concluded that it was impossible that the penis could have touched the complainants. However on cross-examination, he admitted that he could draw this conclusion only with respect to the circumstances of his own examination and could not extend the conclusion to situations where factors such as Dr. Kunynetz's position or the patients' positions were different, or if Dr. Kunynetz was pressing his groin forward.

Dr. Brock on the other hand, at the end of simulating the examination, asked Dr. Kunynetz to flex back and forth at the waist. Dr. Brock felt that he was able to feel Dr.

Kunynetz ' penis against his leg both when Dr. Kunynetz was performing this maneuver and when he was not. He therefore concluded that it was possible that his penis could be felt by a patient. Dr. Brock also had Dr. Kunynetz do a simulated examination with the examination table at different heights, although his mode of measuring the actual heights, which he did in retrospect, was not sufficiently accurate to compare with the table heights in Dr. Kunynetz office.

The Committee did not feel that either demonstrated bias either towards or against Dr. Kunynetz; both of them recognized the serious and sensitive nature of what they were asked to do and also the unusual nature of the examination.

The variability in the two examinations highlights the challenge of using a re-enactment to demonstrate an event such as an interaction between two human beings. While re-enactments of events using inanimate objects may fairly represent what has occurred, the multiple conscious and unconscious variables make these examinations limited for the purpose of drawing conclusions. The Committee could conclude only that the *impossibility* of contact between the doctor's penis and a patients skin (through clothing), was not established.

After reviewing the totality of the evidence before it, the Committee finds that the evidence demonstrates, that there had been contact between the patients and that part of Dr. Kunynetz's lower abdomen at the level of his pelvis, and that the patients were distressed by this.

Having found that contact occurred, the Committee accepted that the relevant test to be applied was whether or not the sexual or carnal context of the contact was evident to a reasonable observer. Although this test was established by the courts in the context of a criminal charge of sexual assault, this has not been a reason to negate this test's use in the context of a hearing of professional misconduct. The absence of evidence of demonstrable arousal or intention does not exclude a finding of sexual abuse, but the variable and inconsistent evidence of whether the penis was erect, the fact that the contact

occurred during a necessarily close examination, or during the performance of a procedure that demanded high concentration, the degree of uncertainty about the levels of the examining table and Dr. Kunynetz's genitalia, and the fact that the patients were dependent on their perception of the penis through his clothing, led the Committee to conclude that the evidence did not, on a balance of probability, meet this test. The Committee did not find on the evidence that there was intentional touching of Dr. Kunynetz's genitalia against the body of Patients C and D. Without question such touching, if it occurred, would constitute touching of a sexual nature, and therefore sexual abuse. However, the Committee finds that the allegation of sexual abuse was not proved with respect to contact between Dr. Kunynetz genitalia and the legs of Patients C and D.

However, the Committee remains concerned that there was contact between a portion of Dr. Kunynetz body, in the area of his large abdominal panniculus, or abdominal fat pad, and this contact was not accompanied by any form of warning, apology or excuse. The Committee was of the view that a reasonable physician would make every attempt to ensure that this did not occur, and that failure to make such attempts or to apologize if it occurred accidentally, or incidentally, represented an unacceptable level of insensitivity on the part of Dr. Kunynetz, without care or concern for the patients. The Committee finds that the contact which occurred between Dr. Kunynetz and Patients C and D was conduct that, having regard to all the circumstances, would be reasonably regarded by members as disgraceful, dishonourable or unprofessional.

Contravention of a term, condition or limitation of the certificate of registration

Dr. Kunynetz admitted that he saw and provided advice to two female patients after he had executed an undertaking to only see such patients in the presence of an approved chaperone. While the Committee accepts that this was not a premeditated or deliberate flouting of the College's authority, the Committee finds that Dr. Kunynetz's explanation that his staff neglected to place a blank sheet of paper on the door of the examination room (in one instance) was both an inadequate and ingenuous excuse. Dr. Kunynetz's point that he adhered to the undertaking in some 700 patients was given as mitigation;

however it can equally be viewed as evidence that Dr. Kunynetz was very aware of the conditions expected by the College. The Committee finds that Dr. Kunynetz contravened a term, condition and limitation on his certificate of registration in respect of two breaches of his undertaking to the College to see female patients only in the presence of a chaperone.

The Committee requests that the Hearings Office schedule a penalty hearing pertaining to the findings made at the earliest opportunity.

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 identity of the witnesses and/or patients or any information that could disclose the identity of the witnesses and/or patients under subsection 45(3) of the Health Professions Procedural Code (the Code), which is Schedule 2 to the Regulated Health Professions Act, 1991.

The Committee also made an order to prohibit the publication of the names of the complainants or any information that could identify the complainants under subsection 47(1) of the Code.

The Committee also made an order to prohibit the publication of certain names under ss.45(1) of the Code and that certain evidence be heard in camera under ss.45(2) of the Code.

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,
2018 ONCPSD 5**

**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. P. POLDRE (CHAIR)
MR. P. PIELSTICKER
DR. J. WATTS
MAJOR A. KHALIFA
DR. C. LEVITT**

**COUNSEL FOR THE COLLEGE OF PHYSICIANS AND SURGEONS OF
ONTARIO:**

**MS C. SILVER
MS S. SULEVANI
MS E. WIDNER (For Motion)**

COUNSEL FOR DR. KUNYNETZ:

**MR. M. SAMMON
MR. I. MACLEOD**

INDEPENDENT COUNSEL FOR THE DISCIPLINE COMMITTEE:

MR. R. COSMAN

Penalty Hearing Date: July 11, July 27, August 14 and August 15, 2017
Penalty Decision Date: February 20, 2018

PUBLICATION BAN

PENALTY DECISION AND REASONS FOR DECISION

On March 21, 2017, the Discipline Committee of the College of Physicians and Surgeons of Ontario found that Dr. Rodion Andrew Kunynetz committed an act of professional misconduct in that: he engaged in sexual abuse of a patient; he 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; and, he contravened a term, condition and limitation on his certificate of registration.

On July 11 and 27, August 14 and 15, 2017, the Committee heard evidence and submissions on penalty and costs, and a motion to stay for abuse of process filed by Dr. Kunynetz. Subsequent to the penalty hearing, the Committee received the Decision and Reasons in the case of *CPSO v. Dr. Beairsto*, released on October 5, 2017, and filed by the College, and the written submissions of Dr. Kunynetz, dated, October 27, 2017, regarding the application of that decision in the present case.

POSITION OF THE PARTIES ON PENALTY

The College

The College submitted that revocation is mandatory for the finding of sexual abuse in this case. The College submitted that recent amendments to the Health Professions Procedural Code (the Code), which were enacted by the *Protecting Patients Act, 2017*, came into force on May 30, 2017 (“the Protecting Patients Amendments”). Section 51(5)3 of the Code, as amended, expanded the findings of sexual abuse that result in mandatory revocation to include paragraph vi below.

Orders relating to sexual abuse

51(5) If a panel finds a member has committed an act of professional misconduct by sexually abusing a patient, the panel shall do the following in addition to anything else the panel may do under subsection (2):

1. Reprimand the member.
2. Suspend the member's certificate of registration if the sexual abuse does not consist of or include conduct listed in paragraph 3 and the panel has not otherwise made an order revoking the member's certificate of registration under subsection (2).
3. Revoke the member's certificate of registration if the sexual abuse consisted of, or included, any of the following:
 - i. Sexual intercourse.
 - ii. Genital to genital, genital to anal, oral to genital or oral to anal contact.
 - iii. Masturbation of the member by, or in the presence of, the patient.
 - iv. Masturbation of the patient by the member.
 - v. Encouraging the patient to masturbate in the presence of the member.
 - vi. Touching of a sexual nature of the patient's genitals, anus, breasts or buttocks.**
 - vii. Other conduct of a sexual nature prescribed in regulations made pursuant to clause 43 (1) (u) of the *Regulated Health Professions Act, 1991*.
(emphasis added)

The College submitted that even if revocation were not mandatory, it was seeking revocation of Dr. Kunynetz's certificate of registration as the appropriate penalty in this case, for the fondling of Patient B's breasts during a medical examination and for the other findings.

The College also sought a reprimand, which is mandatory for any finding of sexual abuse, and an order that Dr. Kunynetz reimburse the College for funding provided to Patient B under section 85.7 of the Code by posting an irrevocable letter of credit in the amount of \$16,060.00.

The College further requested an order that Dr. Kunynetz pay hearing costs to the College in the amount of \$189,750.00.

Dr. Kunynetz

Counsel for Dr. Kunynetz submitted that the Protecting Patients Amendments requiring the mandatory penalty of revocation for a finding of sexual abuse of sexual touching of a patient's breasts, i.e. touching of the breast without clinical justification, did not apply in this case as they impacted adversely on vested rights of Dr. Kunynetz.

Counsel for Dr. Kunynetz further submitted that the proceedings with respect to the allegation of sexual abuse of Patient B against Dr. Kunynetz, who the Committee found to have fondled her breasts during a medical examination, should be stayed for abuse of process. The submissions and decision on the motion to stay are dealt with separately in the Decision and Reasons that follow.

With respect to penalty, counsel for Dr. Kunynetz further submitted that there should be no suspension for the findings of professional misconduct made, given the period of suspension served by Dr. Kunynetz. The Inquiries, Complaints and Reports Committee (the ICRC) imposed an interim suspension effective October 1, 2015, as a result of Dr. Kunynetz's breaches of an interim order, earlier misdescribed as an undertaking, imposing terms, conditions and limitations on his certificate of registration.

On the matter of costs, counsel for Dr. Kunynetz submitted that there should be no order of costs against Dr. Kunynetz or, in the alternative, that costs should be no more than \$20,760.00, due to the fact that all allegations brought against the member were not sustained and the hearing days associated with those not sustained should not be charged to the member.

EVIDENCE ON PENALTY

In addition to its findings of fact in the hearing on liability, the Committee had additional information before it for the hearing on penalty, the motion, and costs.

The Committee heard the testimony of Mr. Steve Wright, College investigator, particularly in relation to the motion and costs, and the testimony of Ms Valentina Kunynetz, the wife of Dr. Kunynetz, on the matter of penalty.

The Committee also received and considered with respect to penalty, as required under the Code, the Victim Impact Statement of Patient B, which was read into the record at the hearing.

Victim Impact Statement - Patient B

Patient B described her original reaction of fear and described how horrendous the sexual incident was for her when Dr. Kunynetz touched her breasts inappropriately. She described how she ran a gamut of emotion after the incident, including being quick to anger at men, which damaged her relationship with her husband for a period of time.

Patient B stated that her faith in physicians had been shattered by what happened and she felt betrayed. She asked herself how could a doctor breach the oath of his profession to do no harm, and she said she lost trust in the medical profession.

Patient B said she suffered harm to her health as a result of Dr. Kunynetz's conduct, and she said that she went through a period of depression as a result of this conduct.

Patient B found the hearing process to be difficult, stressful, and upsetting.

The Committee recognizes that a victim impact statement is not the subject of cross-examination. However, the Committee is aware that impacts of sexual abuse, such as those described by Patient B, are commonly described by victims of sexual abuse. In the view of the Committee, the impact of sexual abuse on patients is real and serious.

Ms Valentina Kunynetz

Dr. Kunynetz did not testify at the penalty hearing, but his wife did. Ms Kunynetz testified that they married in 1980, after she had qualified as a lawyer and had been called to the bar. She had practised part-time as a lawyer in the early years of their marriage, but since 1985, she had been involved in her husband's practice as an administrator, responsible for organizing billing, maintaining accounts and ordering supplies. She described her husband as devoted to his practice, working long hours.

Ms Kunynetz described her husband's embarrassment and humiliation after the College's allegations were publicized in the local and the Toronto press, in particular at the time of his application for judicial review after his certificate of registration had been suspended, and again, during the discipline hearing.

Ms Kunynetz described the press reports, especially those that focused on Dr. Kunynetz's abdominal and penile size, as salacious, demeaning and a "constant bombardment of ugliness." Ms Kunynetz described their children's embarrassment, and the problems of being unable to socialize with peers. She described Dr. Kunynetz's practice as being destroyed. The Committee noted that there was no quantitative evidence before it with respect to the financial position of Dr. Kunynetz or the financial consequences of the discipline hearing.

PENALTY AND REASONS FOR PENALTY

A) Application of the Protecting Patients Amendments to this proceeding

The Committee noted the penalty decision of another Committee panel in the case of *CPSO v. Dr. Beirsto* dated October 5, 2017. However, the Committee conducted its own independent analysis of the law and the evidence in deciding whether the Ontario Legislature intended the Protecting Patients Amendments to have retrospective effect in the circumstances of this case.

The College submitted that the Protecting Patients Amendments added "touching of sexual nature of the patient's genitals, anus, breasts, or buttocks" to those kinds of sexual abuse which required mandatory revocation. Prior to the passing of this legislation, such touching did not result in mandatory revocation; however, revocation was within the range of penalties which could be ordered by the Committee for a finding of sexual abuse.

The College took the position that revocation would be the appropriate penalty for the finding of sexual abuse in this case, even if the changes to the *RHPA* had not been made. However, the College also took the position that the changes made, adding paragraph 51(5)3.vi to the Code, should be applied retrospectively. The Protecting Patients Amendments came into force after the misconduct had occurred and after the Committee made the finding of sexual abuse by Dr. Kunynetz touching Patient B's breasts during a medical examination, when the touching was not clinically justified.

It is the retrospective application of the Protecting Patients Amendments that is here in issue.

The Committee considered the difference between retroactivity and retrospectivity of legislation - E.A Driedger in "*Statutes: Retroactive Retrospective Reflections*", (1978) 56 Can. Bar Rev. 264:

"A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute operates forwards, but it looks backwards in that it attaches new consequences for the future to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event."

The Supreme Court of Canada in *Brosseau v. Alberta Securities Commission*, [1989] 1 SCR 301 (*Brosseau*) quotes Dickson J, from an earlier case, at p.318:

"The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act."

Regarding retrospectivity, there is a general presumption that legislation should not be applied in a retrospective manner to conduct which pre-dates the legislative change. However, this presumption is capable of rebuttal if the primary purpose of the legislation is public protection. In such cases, the legislation may be applied in a retrospective manner.

In *Brosseau* the Supreme Court of Canada also quoted E.A Driedger "Statutes: Retroactive, Retrospective Reflections" (1978), 56 *Can. Bar Rev.* 264, at p. 275:

"In the end, resort must be had to the object of the statute. If the intent is to punish or penalize a person for having done what he did, the presumption applies, because a new consequence is attached to a prior event. But *if the new punishment or penalty is intended to protect the public, the presumption does not apply*" (emphasis added)

The title of the Act, "*The Protecting Patients Act, 2017*," which added sexual touching of the breasts to the acts requiring mandatory revocation, makes it clear that it is intended to protect the public. In introducing the Act in the Legislature, the Minister, the Honourable Eric Hoskins, stated:

"This is a bill to fulfill one of the most basic obligations which we have as a government, which is to protect people, keep them healthy and keep them safe".

The majority of the Committee were in agreement that the Protecting Patients Amendments were made for the purpose of protecting the public. The changes made were not in the nature of penal sanctions. There are no penal consequences in a discipline hearing. The Committee accepted that retrospective imposition of the penalty of mandatory revocation was not subject to the general rule against retrospective application. There was a minority view that is expressed in a dissenting opinion.

Retrospective application of mandatory revocation is most clearly appropriate when the professional misconduct in question pre-dates the change in legislation on penalty and when a hearing occurs after the legislative change has been made.

The Committee further considered whether the new legislation applied in the circumstances when the amendments come into force after a finding has been made, but before a penalty hearing has commenced. Counsel for Dr. Kunynetz submitted that retrospective application of mandatory revocation under these circumstances constituted a violation of Dr. Kunynetz's vested rights.

None of the authorities and precedent cases supported such a proposition in a disciplinary context, where public protection is the objective. The Committee finds that there are no vested rights that are affected in this case.

In *Dikranian v. Quebec (Attorney General)*, 2005 SCC 73 (*Dikranian*), the Supreme Court of Canada agreed that in order to be found as a vested right: first, the individual's legal (juridical) situation must be tangible and concrete rather than general and abstract, and second, the legal situation must have been sufficiently constituted at the time of the new statute's commencement (see Côté, Pierre-André, "*The Interpretation of Legislation in Canada*", 3rd ed. Scarborough, Ont.: Carswell, 2000). In *Dikranian*, the vested right accrued with the signing of a contract for a student loan. The court held that such a contract constituted a tangible and concrete example of such a right. The Committee interpreted *Dikranian* as asserting that vested rights referred to property rights, and would not be extended to a regulatory statute amended for the purpose of public protection.

In considering whether Dr. Kunynetz holds a vested right with respect to his ability to argue for a lesser penalty than revocation for the misconduct in question, the Committee notes that the legislation prior to May 30, 2017, allowed for either revocation or a lesser penalty. Although Dr. Kunynetz would have had the right to argue for a lesser penalty, he did not have the right to expect that a particular penalty would, or would not, be imposed. The Committee did not accept that his right to make an argument could be reasonably considered as a tangible and concrete right. It stands in contrast to a property right in the terms of a loan contract, such as interest rates and maturity dates, that were the rights involved in *Dikranian*.

The majority of the Committee therefore determined that retrospective application of the Protecting Patients Amendments promulgated on May 30, 2017, should be accepted under the public protection exception, and that revocation of Dr. Kunynetz's certificate of registration is mandatory for the findings of sexual abuse in this case.

B) Penalty Decision and Reasons

The Committee carefully considered the oral submissions of both parties, as well as the written submissions and supporting materials and authorities brought before the Committee.

The Committee accepts that the guiding principles in determining the appropriate penalty include: the protection of the public; proportionality; specific and general deterrence; maintaining public confidence in the ability of the College to regulate the profession in the public interest; and where appropriate and possible, rehabilitation of the member. Furthermore, the penalty should express the profession's denunciation of the misconduct and uphold the profession's honour and reputation.

The Committee must also consider any aggravating or mitigating factors, and may look for guidance to prior decisions of the Committee in similar cases. Guidance of this nature

is limited by the fact that conduct is rarely identical in each case, as well as the fact that public and professional values may change over time.

The Committee found that Dr. Kunynetz committed multiple acts of professional misconduct. Dr. Kunynetz was found to have engaged in sexual abuse of a patient by fondling the breasts of Patient B during a medical examination, and that touching of the patient's breasts was not clinically indicated. He was found to have engaged in conduct that would be reasonably regarded by members as disgraceful, dishonourable or unprofessional with respect to both his abrupt removal of patients' clothing without adequate warning or explanation, and with respect to the physical contact of patients by areas of his body adjacent to his pelvis and thigh and his abdominal fat pad (panniculus). The Committee also found that Dr. Kunynetz contravened a term, condition or limitation on his certificate of registration by seeing two female patients without having a chaperone present.

Having found that Dr. Kunynetz engaged in sexual abuse, and having found that the Protecting Patients Amendments are applicable, the Committee finds that a penalty of revocation is mandatory in the circumstances of this case.

Revocation of a physician's certificate of registration is a severe penalty. Even though its earlier characterizations as "a professional death sentence" have been found to be inaccurate, in part because of a right to apply for reinstatement (see *CPSO v. Minnes* (2015)), and even though it is not necessarily reserved "only for the most serious cases (*CPSO v. McIntyre* (2016)), it remains a penalty with very serious consequences to Dr. Kunynetz. It is to be imposed on a finding of professional misconduct when appropriate in the public interest. It is also to be imposed when mandatory under applicable legislation.

The Committee gave careful consideration to the proportionality of this penalty to the findings of professional misconduct against Dr. Kunynetz, even while recognizing that the Committee accepted that it is mandatory under the applicable legislation.

The Committee is in agreement with the reasoning of the Alberta Court of Appeal in *Adams v. Law Society (Alberta)* and repeated in *McIntyre* (2016):

"Professional bodies are those to whom the government has seen fit to grant monopoly status. With this monopolistic right come certain responsibilities and obligations. Chief among these is self-regulation. Self-regulation is based on the legitimate expectation that those members of a profession who are found guilty of conduct deserving of sanction will be regulated - and disciplined - on an administrative law basis by the profession's statutorily prescribed regulatory bodies"

In that case, Mr. Adams argued that the penalty of disbarment (equivalent to revocation) is much more severe than penalties that have been imposed in similar cases, and that disbarment is manifestly unreasonable. The Committee acknowledges that considering the dispositions of disciplinary matters in other cases and in other jurisdictions can be helpful. But this assessment must be undertaken with due respect for contemporary values in Canadian society. In this regard, the Committee notes that in the past, there had been a tendency by some to minimize misconduct of a sexual nature between members of some professions and their clients or patients. Because the relevant facts vary greatly from case to case, care must be taken to consider each case in the context of its particular circumstances. As stated earlier, the Committee does not accept the proposition often still invoked in a constitutional context in criminal cases, that the most serious sanction should be reserved for the most serious misconduct by the most serious offender.

In determining the appropriate penalty in this case, the Committee is well aware of the evolving, current values of Canadian society. These values are evident in the changes made by the legislature in bringing sexual touching of the breasts into the list of acts subject to mandatory revocation. Even if the Committee had determined that the Protecting Patients Amendments did not apply retrospectively, the Committee would still have taken into consideration the evolution in societal values that the *Act* represents.

The Victim Impact Statement of Patient B describes the prolonged adverse consequences of an action which might have been considered by some at one time to be at the “lower end of the spectrum of sexual abuse.” The Statement supports the Committee’s view that a concept such as a spectrum of severity of sexual abuse no longer has currency when the abuse is viewed from the perspective of victims. It is apparent to the Committee that the public, whose interests and safety as patients are paramount in the responsibility of the College and its members in professional regulation, shares this perspective. In particular, Patient B’s description of her loss of trust, not only in one individual physician but in all physicians and in men in general, including even her husband, supports the Committee’s view that acts such as those of Dr. Kunynetz’s are very serious and are viewed by the Committee with abhorrence.

In determining the appropriate penalty, the Committee’s finding of sexual abuse must be viewed in conjunction with the other findings of professional misconduct made by the Committee. The finding of disgraceful, dishonourable or unprofessional behaviour related to both Dr. Kunynetz allowing his lower abdomen to press into the thighs of female patients and to his abruptly and without explanation or apology removing clothing covering sensitive areas of the patient’s body. Dr. Kunynetz demonstrated little, if any, understanding of, or insight into, the effect of this conduct on patients; nor did he show any willingness to admit that his behaviour could have been considered harmful, unwanted or preventable. In the instances which formed the basis for the Committee's finding, the patients described in their testimony that Dr. Kunynetz's actions had devastating adverse consequences, including shock, feelings of misbelief, disgust and degradation.

The cumulative effect of Dr. Kunynetz's misconduct, including both sexual abuse and disgraceful, dishonourable and unprofessional conduct, is to undermine public trust in the integrity of the profession of medicine.

When the Committee viewed Dr. Kunynetz's misconduct in light of changes in public and professional values, the multiplicity of findings and Dr. Kunynetz's lack of

acknowledgement of the consequences of his actions, the Committee concluded that the penalty of revocation was appropriate and necessary, and would have been so even if the Committee had found that mandatory revocation was not retrospectively applicable. In the Committee's view, revocation is the only penalty which meets the objectives of public protection and maintaining public confidence in the College's ability to govern the profession in the public interest in the circumstances of this case, and it is so ordered.

The only evidence presented to the Committee of potential remediation or rehabilitation was a certificate that Dr. Kunynetz had completed a College approved course on boundaries. This provides no reassurance to the Committee that Dr. Kunynetz's fundamental behavioural characteristics have changed or that he is not at risk of future misconduct. The finding of breaches of interim terms, conditions or limitations on his certificate of registration, also provides the Committee with reason to doubt Dr. Kunynetz's rehabilitative potential, particularly given that the breaches occurred while he was under exceptional scrutiny, and the second breach occurred on the day after he reassured the College that there would be no recurrence. Dr. Kunynetz admitted the breaches, but denied that they constituted professional misconduct, describing them as "unintentional and not a deliberate lapse." He appeared to blame the College for failing to provide him with sufficient guidance or advice on how to comply with the requirement to have a College approved chaperone present at all encounters with female patients. While denial of this or any other component of the allegations is his right and does not constitute an aggravating factor when determining penalty, Dr. Kunynetz's attitude to the breaches casts doubt on his rehabilitative potential.

Finally, at the time of Patient B's original complaint, Dr. Kunynetz was provided with advice from the College regarding patient boundaries. In his testimony, he said that although he changed his practices in this respect for a short period of weeks, he returned to his original practices after discussing the same practices with his colleagues. Such disregard of College advice does not engender confidence that he would respond appropriately to a penalty that would allow him to continue to practice, such as that proposed in the penalty submissions made on his behalf.

The Committee recognizes that Dr. Kunynetz has been suspended for two years and has suffered significant distressing publicity. He has undergone three personally invasive urological examinations. However, none of these factors are considered by the Committee as mitigating in the circumstances of this case. The suspension of his certificate of registration is a consequence of his breaches of practice restrictions on his certificate of registration; two of three urological investigations were performed by experts of his own choosing; and the publicity was in large part a consequence of the nature of his defences, as well as ongoing criminal proceedings.

The Committee heard evidence of good character, in terms of professional excellence and devotion to patients, from patients (including positive comments from patients who had complained of his actions), from a physician and from his family practitioner. However, character evidence of this nature is of extremely limited value, given the nature of the Committee's findings of sexual abuse and failure to maintain appropriate spatial boundaries, which occurred in private and unobserved, other than by the patients themselves. Excellence in diagnosis and therapy and devotion to some patients does not lessen the seriousness of the misconduct found to have occurred; nor are they appropriately regarded as mitigating factors.

All the complainants, including Patient B, acknowledged that the unwanted contact was brief. Despite this, the complainants were sufficiently distressed to make a complaint, and the contact was sufficient to induce their adverse feelings. Brevity of the conduct in and of itself is an insufficient reason for the Committee to regard it as a mitigating factor.

Both parties put before the Committee previous decisions of the Discipline Committee.

Dr. Kunynetz referred to the following cases as examples of more egregious sexual conduct that did not result in revocation:

- In *CPSO v. Lee* (2010), the physician made kissing sounds while placing his mouth on the patient's nipple, which resulted in a six-month suspension of the physician's certificate of registration.
- In *CPSO v. Noriega* (2004), the physician touched both the breasts and clitoris and vaginal areas of a 17 year old patient in an inappropriate manner, which resulted in an 18 month suspension.
- In *CPSO v. Henderson* (2005), the physician engaged in both kissing and hugging a patient; his certificate of registration was suspended for nine months.
- In *CPSO v. Gorman* (2007), the physician engaged in pelvic grinding and kissed the breasts of a patient; the penalty included a two-year suspension of the physician's certificate of registration.

The Committee acknowledges that these earlier cases resulted in penalties that fell short of revocation. However, the Committee was not persuaded by these cases that the penalty of revocation is not appropriate in Dr. Kunynetz's case, in light of current societal values and given the multiple findings of professional misconduct made in this case.

MOTION TO STAY PROCEEDINGS RELATED TO PATIENT B AS AN ABUSE OF PROCESS

Dr. Kunynetz brought a motion to quash Patient B's complaint and to stay the proceedings against Dr. Kunynetz with respect to her complaint as an abuse of process.

The Committee notes that on November 10, 2015, prior to commencement of the hearing of the allegations, Dr. Kunynetz had brought a similar motion which was heard by a different panel of the Discipline Committee (the Motion Panel). The Committee heard and decided this motion on the evidence before it, as a fresh motion.

The chronology of relevant events is described below:

- September 15, 2008 - Patient B filed a complaint with the College.

- December 19, 2008 - College notified Dr. Kunynetz of Patient B's complaint.
- January 19, 2009 - College investigators visited Dr. Kunynetz in his office, and provided advice to Dr. Kunynetz.
- April 1, 2009 - Patient B informed the College that her concerns had been addressed and was informed that no further action would be taken.
- July 8, 2014 – Patient B's file was re-opened by the College, following receipt of a written request from Patient B.
- July 8, 2015 - Notice of Hearing issued by the College and served on Dr. Kunynetz.
- October 1, 2015 - Dr. Kunynetz's certificate of registration suspended following breaches of practice restrictions imposed by order of the ICRC.
- October 14, 2015 - Hearing dates scheduled at a pre-hearing conference; the hearing is set to commence on November 24, 2015.
- November 10, 2015 - Dr. Kunynetz's motion for stay of the proceeding on the grounds of delay and abuse of process heard by the Committee.
- November 13, 2015 - The Motion for Stay dismissed.
- November 20, 2015 – The College brought a motion to adjourn the hearing in order to obtain an expert report in response to a defence expert report delivered 10 days before the hearing.
- January 6, 2016 - Hearing commenced.
- July 17, 2016 - Hearing ended.
- March 21, 2017 - The Committee released its Decision and Reasons on finding.
- May 30, 2017 - The Protecting Patients Amendments to the RHPA come into force.
- July 10 - August 15, 2017 - Penalty hearing.
- July 11, 2017 – Further Motion to Stay for Abuse of Process delivered by Dr. Kunynetz.
- October 5, 2017 – The penalty decision in *CPSO v. Dr. Beirsto* is released and the College sought to file it with the Committee.

- October 27, 2017 – Dr. Kunynetz filed his submissions regarding the *Beairsto* penalty decision.

Counsel for Dr. Kunynetz submitted that the initial College investigation and actions were flawed, because the closure of Patient B's complaint file in April 2009 occurred without the complaint being considered and disposed of by the Complaints Committee, as was required by section 25(1) of the Code at the time.

The test to be applied in a motion for a stay of the proceeding is set out in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 (*Blencoe*). This test was applied by the Motion Panel, which heard and decided Dr. Kunynetz's earlier motion for a stay in November 2015. The Committee applied the same test on the motion to stay argued at the end of the hearing.

According to *Blencoe*, a stay may be granted if a party can demonstrate:

- (a) an inordinate delay;
- (b) that the delay causes significant prejudice; and
- (c) that this either affects the fairness of the hearing or is sufficient to bring the administration of justice into disrepute.

Blencoe confirms that these principles are applicable in administrative law where "there must be proof of significant prejudice which results from unacceptable delay" (see *Blencoe*, paras 100, 102). In *Blencoe*, Bastarache J states:

"in order to find an abuse of process, the court must be satisfied that" the damage to the public interest in the fairness of the administrative proceedings... would exceed the harm to the public interest if the proceedings were halted

...abuse of process has been characterized in the jurisprudence as a process tainted to such a degree that it amounts to one of the clearest of cases"

In *R v. Power*, [1994] 1 SCR 601, L'Heureux Dubé J. states at p. 610:

"...the abuse of process has been characterized by the jurisprudence, requires overwhelming evidence that the proceedings under scrutiny are unfair to the point that they are contrary to the interest of justice. ...Cases of this nature will be extremely rare"

The Committee notes that the delay following the investigation of Patient B's complaint in 2008/2009 was certainly a long delay but, in the Committee's view, it does not in itself constitute inordinate delay. The re-opening of the complaint was a consequence of the College having received new information in the form of other similar complaints, which the investigating team considered to be relevant to the earlier complaint of Patient B. Mr. Wright testified that the College response was a necessary consequence of its primary responsibility to the safety and well-being of the public. There is no evidence that improper pressure was placed by Mr. Wright on Patient B to request that the complaint be re-opened. The Committee notes that Patient B had stated in her evidence that she had not felt satisfied with the initial outcome in 2009, and appeared grateful for the re-opening of her complaint.

The Committee found that the re-opening was within the College's normal sphere of responsibility, and that the College was open to criticism if it failed to take into account the earlier complaint and re-open that file. There was no evidence that the re-opening, in and of itself, was prejudicial to Dr. Kunynetz. On both, the earlier occasion in 2009, and in this hearing, Dr. Kunynetz relied on his charts to provide him with information (as was the case of all other patient complaints) having had no independent memory of the patient encounter in 2009, or at the hearing. The stress of the hearing in 2016 was undoubtedly greater than it was at the time of the events in 2009, but the Committee finds that this was

a consequence of multiple complaints made against him, the number of allegations to answer, the nature of the allegations, the specific defence he advanced, the attendant publicity of his Divisional Court case, ongoing criminal proceedings, as well as the discipline hearing. The Committee finds this stress was not a consequence of the delay.

Similarly, the embarrassment of being alleged to have committed sexual abuse, and Ms Kunynetz testimony about changes in relationships with friends, colleagues and family, were all consequences that were independent of the time delay. The heavy press publicity, which the Committee agrees can be described as being extremely unpleasant, stressful and even salacious, was a consequence of the allegations and the nature of Dr. Kunynetz's defence, and was in no way a consequence of the time delay between 2009 and the hearing.

Finally, there is no question that Dr. Kunynetz suffered financial consequences as a result of the suspension of his certificate of registration. The Committee notes that this did not result from the delay, but from his breaches of interim restrictions on his certificate of registration not to practise without a chaperone. Dr. Kunynetz did not testify as to the psychological impact on him of the proceedings. In respect of the financial impact, the Committee heard from his wife, but notes there was no quantitative evidence put before the Committee at the hearing.

The Committee had questions regarding the process that was followed by the College in investigating and disposing of Patient B's complaint in 2008/2009. However, there was no evidence that the process contributed to the subsequent delay, or that it caused prejudice to Dr. Kunynetz's ability to mount a defence at this hearing.

Dr. Kunynetz asserted that in addition to the delay incurred between Patient B's original complaint and this hearing, further delays occurred, both prior to the hearing, during the hearing itself, and after the hearing. The Committee is of the view that the multiplicity of complaints and the complexity of the investigations that resulted reasonably account for the one-year time period between Patient B's complaint and the service of the Notice of

Hearing. A pre-hearing conference took place within a reasonable time and a hearing scheduled some six weeks later. This was delayed by a motion to stay brought by the defence, a motion to adjourn brought by the College (to recruit an expert witness to respond to the evidence of the defence expert filed just 10 days before the hearing) and Dr. Kunynetz's appeal to the Divisional Court of the ICRC's decision to suspend his certificate of registration. The hearing itself took six months to complete and the Committee's Decision and Reasons were published eight months after completion of the hearing. This experienced Committee regarded the hearing as being one of the most complex that the Committee had heard; it incorporated many witnesses and numerous motions, including Similar Fact Motion, Motion for Directed Verdict or Non-Suit, Motion for In-Camera Evidence, Motion for Production of Third Party records, Motion for Foundational Material for Expert Reports and Motion to Re-open the College's case. These motions were brought by both parties and were argued in full. The Committee did not regard the time that was required as being inordinate and found that no prejudice resulted to Dr. Kunynetz.

The Committee finds that the delay was not of such severity or nature that it can be regarded as inordinate. Regardless of having been described as such, it did not result in significant prejudice to Dr. Kunynetz and, thus, clearly did not outweigh the public interest in allowing the proceedings to stand.

Accordingly, the Committee dismisses the motion to stay on the ground that an abuse of process was not established.

COSTS

The College requested that Dr. Kunynetz pay costs to the College on a tariff basis for 28.5 days of the 38-day hearing, in the amount of \$156,750.00, costs for a one day pre-hearing motion in the amount of \$5,500.00, and costs for five of the six-and-a half-day penalty hearing, in the amount of \$27,500.00, for a total of \$189,750.00.

The tariff in the Committee's Rules of Procedure is \$5,500.00 per day for the prehearing motion in 2015, the hearing in 2016, and the penalty hearing in 2017. The calculation of 28.5 days of the hearing was the equivalent of 75% of the hearing days and resulted from the College's having ascribed half days to days of testimony from complainants (other than Patient B) and similar fact witnesses.

Counsel for Dr Kunynetz-submitted that no costs order be made against Dr. Kunynetz. In the alternative, counsel for Dr. Kunynetz submitted that Dr. Kunynetz be ordered to pay costs in the amount of \$20,760.00, which it was submitted reflects the amount of time that would have been spent for a hearing based on the findings made by the Committee in the case.

Counsel for Dr. Kunynetz's submitted that a contested hearing was entirely due to the College's attempt to portray him as a sexual predator, alleging multiple episodes of sexual abuse, only one of which the Committee found to have been proven.

The imposition of costs is a discretionary power of the Committee established by legislation. The Committee recognizes that the amount of costs proposed by the College includes hearing costs only, and does not include the costs of investigation, or any other costs incurred by the College prior to the hearing (other than the pre-hearing motion to stay on November 2015). Furthermore, the College tariff of \$5,500.00 per day of hearing is an abridged amount set by the College and does not represent the actual entire amount of legal costs incurred by the College for a day of hearing.

The Committee did not accept the submission of defence counsel that Dr. Kunynetz should not be ordered to pay any costs to the College. The Committee recognizes that Dr. Kunynetz has the right to make full answer and defence to the allegations made against him. The College, on the other hand, has the responsibility of presenting the case fairly and ensuring that complainants' views are addressed. Counsel for Dr. Kunynetz submitted that the defence was largely successful and that the costs requested by the College were not warranted in the circumstances of this case.

The Committee recognizes that an award of costs should not be punitive or viewed as punitive. The Committee notes the amount of costs requested by the College is calculated based on the actual number of hearing days and the tariff per diem amount. The College provided a discount of 25% which, the College submits, accounts for some early delays and incomplete hearing days that were due to weather conditions and the distance that witnesses had to travel to testify at the hearing. The application of a reduction in the costs of days when complainant witnesses testified appears to recognize the fact that allegations of sexual abuse were not proven with respect to several witnesses; it also recognizes that one allegation of sexual abuse was proven, as well as the fact that in those complainants where sexual abuse was not established, Dr. Kunynetz's conduct was found to be disgraceful, dishonourable and unprofessional.

The Committee recognizes that this was a lengthy hearing. However, the Committee does not accept that the delays were entirely the responsibility of the College as submitted by counsel for Dr. Kunynetz. The Committee does not intend by this to be critical of counsel in any way. The approach of both the College and Dr. Kunynetz's counsel was accepted as a proper, but vigorous and aggressive prosecution and defence. None of the delays emanating from either counsel's actions was considered to be vexatious and there was no reason for modifying the award of costs in the conduct of counsel.

The Committee rejected Dr. Kunynetz's counsel's submission that the costs amount should be based on a hypothetical duration of a contested hearing, based on the assumption that the findings of the Committee were in some way predictable.

The Committee agrees that costs may be properly awarded based on the actual utilization of College resources, that is based on the amount of time required to complete the hearing. However the use of a single tariff, when the agreed College daily tariff differed in the 3 years during which hearings occurred, should be taken into account. The College's tariff for a day of hearing in 2015 was \$4,460.00; in 2016, it was \$5,000.00; and in 2017, it was \$5,500.00. In addition, one day of hearing (March 29, 2016) was held

before the chair only; consequently, the tariff on that date should be reduced ($0.2 \times \$5,000.00 = 2,500.00$).

The College reduced the amount of costs requested for the hearing days when the complainants and similar fact witnesses testified. Given that the Committee made a finding of sexual abuse with respect to one of the complainants, but a lesser (but still serious) finding of misconduct was also found, it is the Committee's opinion that this discount of 50% should also apply to the days occupied by the rebuttal testimony of Dr. Kunynetz, and by the expert testimony of Dr. Brock and Dr. Radomski. This would yield the following amounts:

- 1 of 2 days of pre-hearing motion, 2015 at the College's tariff of \$4,460.00 = \$4,460.00
- 22.7 of 38 days of Discipline Hearing, 2016, at the College's tariff of \$5,000.00 = \$113,500.00
- 5 of 6.5 days of Penalty Hearing, 2017 at the College's tariff of \$5,500.00 = \$27,500.00

Accordingly, the Committee orders Dr. Kunynetz to pay to the College costs in the amount of \$145,460.00

ORDER

Therefore, the Committee ordered and directed that:

1. the Registrar revoke Dr. Kunynetz's certificate of registration, effective immediately.
2. Dr. Kunynetz appear before the panel to be reprimanded within thirty (30) days of this Order becoming final.

3. Dr. Kunynetz reimburse the College for funding provided to patients under the program required under Section 85.7 of the Code, and to post an irrevocable letter of credit or other security acceptable to the College to guarantee payments of such amounts within thirty (30) days of the date this order becomes final, in the amount of \$16,060.00.
4. Dr. Kunynetz pay to the College costs of the hearing in the amount of \$145,460.00, within six (6) months of this Order becoming final.

REASONS FOR DISSENT ON RETROSPECTIVITY – Mr. P. Pielsticker

I dissent from the decision of the majority of the panel on the very narrow issue of the application to this case of recent amendments to the Health Professions Procedural Code (the Code) under section 51(5), which came into effect May 30, 2017.

The amendments in question expanded on the acts of sexual abuse that would result in mandatory revocation to include “touching of a sexual nature of the patient’s genitals, anus, breasts or buttocks”, which in this instance related to the decision of the panel, rendered on March 21, 2017, with respect to the sexual touching of Patient B. Subsection 51(5)3.vi, as amended, makes it mandatory for the panel to revoke the member’s certificate of registration if the above-noted type of sexual abuse is found to have occurred.

The Committee considered whether the newly amended provisions of the Code should be applied to the penalty associated with the decision on liability rendered on March 21, 2017.

The Committee noted that the *Protecting Patients Act* of May 30, 2017 is silent on whether the amendments can be applied retrospectively.

The guiding principle is that changes in the law are to be applied prospectively and not retroactively nor retrospectively. Cases for retrospective application must be exceptional as retrospectivity is undesirable.

The framework within which the temporal operation of a statute must be considered was set out by Robins J.A. in *R. v. Bickford*, [1989] O.J. No. 835, 34 O.A.C. 34 (C.A.), at para. 11:

“As a matter of fundamental principle, a statute is not to be construed as having a retrospective operation unless such a construction is made evident by its terms or arises by necessary implication. However, the presumption against retrospective

construction has no application to enactments which relate only to procedural or evidentiary matters. Speaking generally, no person can be said to have a vested right in procedure or a right in the manner of proof that may be used against him”

There are three rules to be applied in consideration of retrospectivity, as follows:

1. enactments which affect only procedure and practice are presumed to have retrospective effect;
2. rules of procedure do not normally affect the content or existence of a defence; and
3. an enactment that impinges upon a vested right, which in my view includes a defence, is not exclusively procedural and so will not have retrospective effect.

To the extent that the amendments provide for a conclusive presumption then they are substantive law and not exclusively procedural. In accordance with well-established principles, the provincial legislature must, therefore, have intended that the amendments have prospective effect only.

Accordingly, for the amendments to the Code to be applicable to this penalty proceeding, the amendments would need to be applied retrospectively. The only basis for retrospective application is for the Committee to make a determination that the amendments were needed for the protection of the public. Further, the need to protect the public must override the vested rights of the individual.

A vested right is one that is tangible, concrete and sufficiently constituted at the time of the enactment of the new provision. I concur that public protection is of paramount importance but am of the opinion there would not be any miscarriage of justice if the vested rights of the member were to be upheld. Fairness and equity to the rights of the physician also have significant consequence in the rule of law and must be balanced.

In my view, the defence strategy had been premised on the legislation in existence at the time of the hearing and the panel had decided that there was sexual abuse based on the legislation in existence at the time of the decision. Importantly, given the status of the proceedings when the legislation was effective on May 30, 2017, i.e., the decision of sexual abuse had been rendered, the legislation should not now be applied retrospectively thereby interfering with the member's vested right of equity and fairness.

In *Kalin v. Ontario College of Teachers* (2005), 75 O.R. (3d) 523, it was stated by the Divisional Court:

“Certainly the College has jurisdiction to proceed with complaints against those who are alleged to have been guilty of misconduct prior to 1996, but the College cannot judge that conduct based on 1997 standards. The conduct must be judged in light of what was prohibited conduct at the time. Further, if it is to be punished, the punishment cannot be more severe than the potential punishment to which the perpetrator was liable at the time of the misconduct.”

In this instance, to apply the penalty retrospectively is more severe than what was applicable at the time of the misconduct.

Given the seriousness of the sexual abuse finding, I am of the view for the reasons expressed by the majority that the appropriate penalty in this case is revocation of the member's certificate of registration, even though I do not find revocation to be mandatory. I am in agreement with the decision and reasons of the majority of the panel in all respects except for the retrospectivity of the statutory amendments to the Code that came into force on May 30, 2017.