NOTICE OF PUBLICATION BAN

In the College of Physicians and Surgeons of Ontario and Dr. Neilank Kumar Jha, this is notice that the Discipline Committee ordered that no person shall publish or broadcast the name of the complainant, under subsection 45(3) of the Health Professions Procedural Code (the "Code"), which is Schedule 2 to the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18, as amended.

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

> Every person who contravenes an order made under … section 45 or 47… is guilty of an offence and on conviction is liable,
>
> > (a) in the case of an individual to a fine of not more than $25,000 for a first offence and not more than $50,000 for a second or subsequent offence; or
> >
> > (b) in the case of a corporation to a fine of not more than $50,000 for a first offence and not more than $200,000 for a second or subsequent offence.

Indexed as: Ontario (College of Physicians and Surgeons of Ontario) v. Dr. Neilank Kumar Jha, 2020 ONCPSD 36

DISCIPLINE COMMITTEE
COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO

B E T W E E N:

COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO

-and-

DR. NEILANK KUMAR JHA

PANEL MEMBERS:	**DR. I. ACKERMAN (CHAIR)** **DR. M. DAVIE** **MR. P. GIROUX** **MR. M. KANJI** **DR. P. POLDRE**
COUNSEL FOR THE COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO:	**MS AMY BLOCK** **MR. KIRK MAIJALA**
COUNSEL FOR DR. JHA:	**MR. JAAN LILLES** **MR. ROBERT TRENKER**
INDEPENDENT COUNSEL FOR THE DISCIPLINE COMMITTEE:	**MS JENNIFER McALEER**
Hearing Dates:	**May 26, 2020 and June 1, 2020**
Decision Date:	**August 27, 2020**
Release of Reasons Date:	**September 2, 2020**
	PUBLICATION BAN

DECISION AND REASONS FOR DECISION

The Discipline Committee (the "Committee") of the College of Physicians and Surgeons of Ontario ("the College") heard this matter via videoconference on May 26 and June 1, 2020. At the conclusion of the hearing, the Committee reserved its decision.

THE ALLEGATION

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

1. under subsection 51(1)(a) of the Health Professions Procedural Code, which is schedule 2 to the *Regulated Health Professions Act, 1991* (the "Code"), in that he has been found guilty of an offence that is relevant to his suitability to practise.

RESPONSE TO ALLEGATION

Dr. Jha denied the allegation in the Notice of Hearing.

BACKGROUND

On December 17, 2015, Dr. Jha pleaded guilty to one count of assault and one count of mischief under $5,000 contrary to sections 266 and 430(4) of the *Criminal Code*, respectively (collectively, the "Criminal Charges").

On July 15, 2016, Dr. Jha was granted an absolute discharge pursuant to section 730(1) of the *Criminal Code* in respect of the Criminal Charges.

On February 6, 2019, the College issued the Notice of Hearing alleging that Dr. Jha had committed an act professional misconduct under subsection 51(1)(a) of the Health

Professions Procedural Code, which is schedule 2 to the *Regulated Health Professions Act, 1991* (the "Code"), in that he has been found guilty of an offence that is relevant to his suitability to practise.

On October 9, 2019, Dr. Jha brought a motion to quash the Notice of Hearing on the basis that section 51(1)(a) of the *Health Professions Procedural Code* is unconstitutional to the extent that it conflicts with sections 730 of the *Criminal Code* and 6.1(1)(a) of the *Criminal Records Act* ("CRA"). The motion was dismissed.

The only evidence the College seeks to admit into evidence to prove the allegations against Dr. Jha is:

> (a) an exemplified copy of the Criminal Information dated August 24, 2016 (the "Criminal Information") recording the Court's criminal findings of assault and mischief; and,
> (b) a certified copy of the transcript of Dr. Jha's criminal plea proceedings on June 20, 2016 (the "Transcript") including his admissions and the Court's findings of guilt.

THE VOIR DIRE

At the outset of the video conference hearing on May 26, 2020, the Discipline Committee held a *voir dire* on a motion brought by Dr. Jha seeking an Order to exclude the evidence that the College seeks to rely upon, namely the Criminal Information and the Transcript from the Discipline hearing:

The Committee issued its Order on the *voir dire* on May 27, 2020 (corrected orally on June 1, 2020) stating:

1. Dr. Jha's motion to exclude the Transcript and the Information is dismissed; except as noted below:

2. The Criminal Information and Transcript shall be redacted to remove any reference to counts (2) and (3) on the Criminal Information, which were ultimately withdrawn.

The reasons for this decision on the *voir dire* are as follows.

POSITIONS OF THE PARTIES ON THE *VOIR DIRE*:

The College submits that the Criminal Information and Transcript are admissible under the common law doctrine of exemplification. The College also asserts that the Transcript is admissible under section 5(2) of the *Evidence Act*, R.S.O. 1990. C. E.23 (the "*Ontario Evidence Act*").

It is Dr. Jha's position that section 6.1(1)(a) of the *Criminal Records Act,* R.S.C. 1985, c. C-47 (the "CRA") renders documents relevant to a discharge inadmissible, and neither the *Ontario Evidence Act* nor the doctrine of exemplification permit the admission of otherwise inadmissible evidence. Accordingly, the Transcripts and the Criminal Information must be excluded from the discipline proceedings against Dr. Jha.

In support of his position, Dr. Jha relies on the recent Court of Appeal decision *R. v. Montesano*, 2019 ONCA 194 ("*Montesano*") as well as a network of legislation, policy, and jurisprudence to argue that documents pertaining to a finding of guilt that has resulted in an absolute discharge cannot be disclosed or relied upon for any purpose and are therefore inadmissible before courts and tribunals.

In response, the College submits that the Discipline Committee has already decided in response to the motion brought by Dr. Jha to quash the Notice of Hearing that the CRA

and the *Montesano* case do not apply to College proceedings. The College submits the doctrine of issue estoppel applies to preclude Dr. Jha from re-litigating these issues.

Issues on the *Voir Dire*

On this *voir dire*, the Committee had to determine the following issues:

(a) Is the Criminal Information or Transcript admissible (absent any argument with respect to the effect of the *Criminal Records Act* or the Court of Appeal decision in *Montesano*)?

(b) Does the doctrine of issue estoppel apply? In other words, is Dr. Jha estopped from arguing that the Criminal Information and Transcript are not admissible on the basis of the *Criminal Records Act* or the Court of Appeal decision in *Montesano* because that issue has already been decided?

(c) If the doctrine of issue estoppel does not apply, does section 6.1(1)(a) of the *Criminal Records Act* and / or the Court of Appeal's decision in *Montesano* preclude the admission of the Information or the Transcript?

(d) Should the Criminal Information or Transcript not be admitted on the basis that it is overly prejudicial, or should they be redacted to some degree to address prejudice?

(e) Is the Criminal Information or Transcript admissible (absent any argument with respect to the effect of the Criminal Records Act or the Court of Appeal decision in Montesano)?

The College submits that the Criminal Information is admissible in evidence in the discipline proceeding for the truth of its contents under the common law doctrine of exemplification. An exemplification is a certified true copy of a court document under seal of the court from which it emanates (*R. v. John*, 2015 ONSC 2040, at para. 24). This doctrine provides for the admissibility of court documents under seal of the court to which the record belongs, without further authentication or notice (*R. v. Tatomir*, 1989 ABCA 233, at paras. 21-22; *R. v. John*, *supra*, at paras. 25-26).

The doctrine of exemplification has been relied on by courts, tribunals and the Discipline Committee to receive in evidence Criminal Informations establishing that the subject of the Criminal Information was found guilty of an offence. (*R. v. Caesar*, 2016 ONCA 599, at para. 52; *R. v. Soto*, 2016 ONCJ 182, at paras. 3-6; *Law Society of Upper Canada v. Fanick*, 2012 ONLSHP 95, at para. 21; *College of Nurses of Ontario v. Caron*, 2013 CanLII 93852 (ON CNO), at p. 4; *Ontario (College of Physicians and Surgeons) v. Marcin*, 2019 ONCPSD 4 at pp. 32-33)

Whether a judicial document is admissible for the truth of its contents depends on whether it is within the scope of the recorder's duty to confirm the truth of what is recorded. (*R v. Caesar*, at para 34)

The Court of Appeal has determined that an exemplified indictment is admissible in evidence for the truth of its contents to prove a guilty plea and conviction. Similarly, informations, indictments, bail orders and probation orders are proven through exemplified copies as exceptions to the hearsay rule, for the truth of what they record. (*R. v. Caesar*, at paras. 34, 48, 52-53, 62, 82; *R. v. Soto*, at paras. 3-6).

The Committee finds that the certified copy of the Criminal Information under seal of the Ontario Court of Justice is admissible in evidence to establish a finding of guilt under the common law doctrine of exemplification.

We also note that section 22.1 of the *Ontario Evidence Act* provides that proof of a discharge is proof the crime was committed, absent evidence to the contrary. (*Catholic Children's Aid Society of Toronto v. B(S)*, 2004 ONCJ 444, at para. 9; *College of Massage Therapists of Ontario v. Ling*, 2018 ONCMTO 16, at p. 4).

The College also seeks to tender the Transcript under the doctrine of exemplification and under section 5(2) of the *Ontario Evidence Act* as the best evidence of what was said and what occurred in the court proceeding on June 20, 2016.

Section 5(2) of the *Ontario Evidence Act* provides:

> Admissibility of transcripts
> (2) Despite any Act or regulation or the rules of court, a transcript of the whole or a part of any evidence that has or proceedings that have been recorded in accordance with subsection (1) and that has or have been certified in accordance with the Act, regulation or rule of court, if any, applicable thereto and that is otherwise admissible by law is admissible in evidence whether or not the witness or any of the parties to the action or proceeding has approved the method used to record the evidence and the proceedings and whether or not he or she has read or signed the transcript.

The admissibility of the Transcript is also defined by the scope of the recorder's duty to accurately record what happened in court, including the fact that Dr. Jha confirmed his plea and was found guilty. The Transcript therefore is admissible to confirm that a plea was entered and a finding of guilt was made, in addition to what happened on the day of the hearing. (*College of Nurses of Ontario v. Guilbeau*, supra, at p. 10; *College of Massage Therapists of Ontario v. Ling*, 2018 ONCMTO 17, at p. 5; *Patel v College of*

Pharmacists of Ontario, 1999 CarswellOnt 4570, at para. 8; *Woodbury (Litigation Guardian of) v. Woodbury*, 2012 ONSC 4817, at para. 9)

The Transcript, however, is not admissible for the truth of any statements made on the record, as the Court Reporter simply transcribes what is said, whether the statement is true or false. It is an accurate account of what was said in Court, not whether what was said was true. To the extent, however, that the Transcript records admissions, the admissions are admissible for the truth of their contents as an exception to the hearsay rule. These admissions would include statements made by Dr. Jha regarding the facts of the case.

The Committee finds that the Transcript is admissible in evidence pursuant to section 5(2) of the *Ontario Evidence Act* and the doctrine of exemplification. Further, any admissions by Dr. Jha recorded in the Transcript are admissible for the truth of their contents as admissions, an exception to the hearsay rule.

Dr. Jha takes the position that section 5(2) of the *Ontario Evidence Act* does not assist the College because of the condition that the transcripts have to be otherwise "admissible at law". His position is that the Transcript is not admissible based on the arguments he advances on the application of the *Criminal Records Act*, which will be addressed below. He makes the same argument with respect to the application of the doctrine of exemplification. Dr Jha's position is that if the Criminal Information and Transcript are not admissible pursuant to the application of the *Criminal Records Act* or the Court of Appeal decision in *Montesano,* then they cannot be admissible under the *Ontario Evidence Act* or the common law. For the reasons below, the Committee is of the view that the *Criminal Records Act* does not preclude the admission of either the Criminal Information or the Transcript into evidence at Discipline Committee proceedings.

(b) Does the doctrine of issue estoppel apply? Is Dr. Jha estopped from arguing that the Criminal Information and Transcript are not admissible on the basis of the *Criminal Records Act* or the Court of Appeal decision in Montesano because those issues have already been decided?

In *Danyluk v. Ainsworth Technologies,* 2001 SCC 44 ("Danyluk") at para 18, Justice Binnie sets out the principles behind the doctrine of issue estoppel:

> "The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. […] An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided."

In *Danyluk*, the SCC at para 25, adopted the preconditions to the operation of issue estoppel that had been set out by Dickson J. in *Angle v. Minister of National Revenue*, [1975], 2 S.C.R. 248 at p. 254:

> (1) that the same question has been decided;
> (2) that the judicial decision which is said to create the estoppel was final; and,
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is or their privies

The estoppel extends to the issues of fact, law, and mixed fact and law that are not only directly in issue, but also, in the words of the Supreme Court, those issues that "are necessarily bound up" with the determinations made in the prior proceeding (*Danyluk*, at para. 54)

The SCC also states that the rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case. The first step is to determine whether the moving party has established the preconditions to the operation of issue estoppel. If successful, the court must still determine whether, as a matter of discretion, issue estoppel ought to be applied (*Danyluk,* at para 33).

Issue estoppel may arise in the context of the same proceeding, notwithstanding an appeal does not lie until the conclusion of the proceeding (*Trustees of the Millwright Regional Council of Ontario Pension Trust Fund v. Celestica Inc*., 2016 ONSC 3235, at paras. 5, 39-40; *Ontario v. Rothmans et al,* 2011 ONSC 6715, at paras. 10, 24, 26.)

On February 24, 2020, a different Panel of this Committee released its decision on Dr Jha's Motion to Quash the Notice of Hearing (the "Constitutional Motion"). The Committee dismissed the motion on the basis that s. 51(1)(a) of the Code does not operate in conflict with s. 6.1(1)(a) of the CRA. Further, the Committee concluded that there is no legal basis to support a finding that the purpose of either section 730 of the Criminal Code or section 6.1(1) of the CRA is frustrated by the operation of section 51(1)(a) of the Code.

This Panel has reviewed the Committee's finding on the Constitutional Motion very closely.

On the Constitutional Motion, Dr. Jha asserted that, to the extent that section 51(1)(a) of the Code requires the Discipline Committee to find that a member of the College has committed an act of professional misconduct on the basis of a finding of guilt for which the member has received an absolute discharge, section 51(1)(a) of the Code conflicts operationally with 6.1(1)(a) of the CRA and/or frustrates the purpose of section 730(1) of the *Criminal Code* and/or section 6.1(1)(a) of the CRA, and is inoperative to the extent

of the conflict. The relief sought was an order to quash to Notice of Hearing and to declare section 51(1)(a) of the Code unconstitutional.

The Committee in determining the Constitutional Motion had to first consider the effect and operation of section 51(1)(a) of the Code, and section 6.1(1)(a) of the CRA. They found no operational conflict between section 51(1)(a) of the Code and section 6.1(1)(a) of the CRA. In coming to this decision, the Committee accepted that the finding of guilt is not removed by the granting of a discharge; criminal proceedings and professional regulation are fundamentally different with distinct legislation and goals; and the CRA does not apply to the College and does not prohibit the College from using the information in its investigative files, including any information regarding a finding of guilt, from prosecuting an allegation under section 51(1)(a) of the Code. In reaching this decision, the Committee specifically considered the application of the Court of Appeal's decision in *Montesano*. The Committee found as follows:

> *Montesano* states in reference to section 6.1(1)(a) of the CRA, that "the prohibition on disclosure of discharge is complete". As to the definition of who has custody of the criminal record or record of discharge, 6.1(1) (a) of the CRA specifies the Commissioner or any department or agency of the Government of Canada. Montesano appears to extend this definition beyond the express language of the CRA section to include records in possession of provincial crown attorneys, police services, or provincial courts. We interpret the Court in *Montesano* to mean that court documents stored in provincial courthouses or the files of provincial crown attorneys that relate to prosecution under the Criminal Code (a federal statute) are subject to s. 6.1(1)(a) of the CRA. This is an interpretation which makes sense and reflects how the legal system operates. Clearly, copies of court documents or records may come to be in the possession of others, such as the media or provincial regulators. The CRA does not purport to control the use of all such data. There is no claw back with respect to information previously disclosed publicly. We do not interpret the Court of

> Appeal to say that this prohibition on disclosure applies to all provincial authorities, in particular provincial regulators. It is one thing to say that a prior discharge cannot be used by the Crown Attorney in a subsequent criminal prosecution and quite another to say that a regulator cannot rely on a finding of guilt for which there has been a discharge in a subsequent regulatory proceeding (at pages 21-22).

The Committee concluded, "The Committee, having considered *Montesano*, finds no support for Dr. Jha's position that a discharge prohibits the use of a finding of guilt as the basis of a prosecution under section 51(1)(a) of the Code"(p. 23).

The Committee finds that the test for issue estoppel has been satisfied. The conditions of estoppel have been met. The issues that Dr. Jha advances on this *voir dire* are clearly the same arguments that were advanced before the Committee on the Constitutional Motion. These issues were clearly decided by the Discipline Committee on the Constitutional Motion. Further, we find that the proper exercise of our discretion supports the application of the doctrine of issue estoppel. This matter was considered at length on the previous motion, and the Committee is not aware of any change in circumstances or new evidence since the Constitutional Motion was decided.
On the basis of the doctrine of issue estoppel, we would dismiss the objection on the *voir dire* and admit the Criminal Information and the Transcript, subject to our comments below regarding redactions.

(c) If the doctrine of issue estoppel does not apply, does section 6.1(1)(a) of the Criminal Records Act and / or the Court of Appeal's decision in Montesano preclude the admission of the Information or the Transcript?

The Committee finds that the doctrine of issue estoppel applies. In the event we are incorrect on this point, however, the Committee considered the question above.

(i) Legislative Framework

The *Criminal Code,* as amended, states:

Conditional and absolute discharge

> **730 (1)** Where an accused, other than an organization, pleads guilty to or is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for fourteen years or for life, the court before which the accused appears may, if it considers it to be in the best interests of the accused and not contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged absolutely or on the conditions prescribed in a probation order made under subsection 731(2).
> (…)

Effect of discharge

> **(3)** Where a court directs under subsection (1) that an offender be discharged of an offence, the offender shall be deemed not to have been convicted of the offence except that[…]

The exceptions are not relevant in this case.

The CRA was enacted in 1985 by Parliament, and addressed conditions for pardons (now known as record suspensions). In 1992, the CRA was amended to include section 6.1(1) which currently states:

Discharges

> **6.1 (1)** No record of a discharge under section 730 of the *Criminal Code* that is in the custody of the Commissioner or of any department or agency of the Government of Canada shall be disclosed to any person, nor shall the existence of the record or the fact of the discharge be disclosed to any person, without the prior approval of the Minister, if
>
> **(a)** more than one year has elapsed since the offender was discharged absolutely; or
>
> **(b)** more than three years have elapsed since the day on which the offender was ordered discharged on the conditions prescribed in a probation order.

(ii) Does. 6.1(1)(a) of the Criminal Records Act preclude the admission into evidence the Criminal Information or the Transcript in discipline proceedings?

Dr. Jha submits that section 6.1(1)(a) of the *Criminal Records Act* prevents the College from relying on the Criminal Information or Transcript in its prosecution on the allegations.

Section 6.1(1) of the *Criminal Records Act* specifically refers to records "in the custody of the Commissioner or of any department or agency of the Government of Canada." The express wording of section 6.1(1) of the *Criminal Records Act* is directed towards records held under federal jurisdiction. We see nothing in the language chosen by Parliament to suggest that the scope of section 6.1(a) should preclude provincial regulators from using documents in their possession in regulatory proceedings.

We agree with the findings of the Committee on the Constitutional Motion that:

> "Information regarding criminal prosecutions is available to the public. Members of the public, including the media, can, subject to publication bans, acquire copies of indictments, certificates of conviction, exhibits or transcripts of proceedings. This is the type of information which is sometimes obtained by the College and retained in its investigative files to be used in regulating the profession. The CRA does not purport to restrict the use of this information by the media or provincial regulators in the event of a discharge."

Further, a discharge does not nullify a finding of guilt (C*ity of Montreal v. Quebec* [2008] 2 S.C.R. 698 at para 20). The fact of a discharge does not allow a person to deny that he or she was found guilty of an offence.

This is an important principle and one which was not addressed or altered by the Court of Appeal's decision in *Montesano*.

We have considered and agree with the findings made by the Committee on the Constitutional Motion at page 22:

> "We do not interpret the Court of Appeal [in *Montesano]* to say that the prohibition on disclosure applies to all provincial authorities, in particular provincial regulators. It is one thing to say that a prior discharge cannot be used by the Crown Attorney in a subsequent criminal prosecution and quite another to say that a regulator cannot rely on a finding of guilt for which there has been a discharge, in a subsequent regulatory proceeding."

We also considered and agree with the analysis by the Court in *Kripp v. Standard Life Assurance Company*, 2004 MBQB 51, para 66:

> "Section 6 of the Act requires that the record which is in the custody of the Commissioner or any department or agency of the Government of Canada shall

> be kept separate and apart from other criminal records and not disclosed without the prior approval of the Minister. However, it does not purport to restrict disclosure where the information is in the custody or possession of a member of the public. It does not apply to information already in the public domain. Once information has been made public, it is not in the custody of a federal government department and is not subject to the controls specified in the Criminal Records Act."

In *City of Montreal*, an application for employment with the police had been denied due to a conditional discharge the applicant had received for shoplifting many years prior. The court relies on *Therrien* (Re), [2001] 2 S.C.R. 3, 2001 SCC 35 *("Therrien")* as follows:

> As Gonthier J. noted in *Therrien*, the use of the conditional in section 5(a)(ii) is significant. A pardon does not have an absolute effect and does not erase the past. Neither a discharge nor a pardon allows a person to deny that he or she was found guilty of an offence. The facts surrounding the offence did occur, but the pardon helps obliterate the stigma attached to the finding of guilt. Consequently, when the time period provided for in the CRA elapses or a pardon is granted, the opprobrium that results from prejudice and is attached solely to the finding of guilt must be resisted, and the finding of guilt should no longer reflect adversely on the pardoned person's character. It must be presumed that the person has completely recovered his or her moral integrity.

In *Therrien* at para 116, the SCC stated:

> Section 5(a)(ii) *C.R.A.* provides that the pardon is evidence that "the conviction in respect of which the pardon is granted or issued should no longer reflect adversely on the applicant's character", implying that it still exists and could so reflect. Second, the effects of the pardon are limited to the legal **disqualifications created by federal statutes or the regulations thereunder and therefore exclude**

> **all the post-sentence consequences provided in provincial legislation, which also suggests that the pardon has only limited effect**. [emphasis added]

An absolute discharge is a mechanism which seeks to minimize the stigma and consequences of a criminal conviction, after the passage of time, but it does not erase the finding of guilt. Section 51(1)(a) of the Code is not about Dr. Jha's moral integrity but about whether or not there is a finding of guilt for an offence that is relevant to his suitability to practice medicine.

Dr. Jha submits that information regarding his absolute discharge cannot be disclosed as the one year has passed, citing *Montesano* at para 11:

> "The prohibition on disclosure of discharges is complete. Section 6.1(1)(a) of the CRA precludes disclosure not to selected persons but to *any person*. It is of no moment whether the record remains in provincial record bases; it cannot be disclosed without the Minister's prior approval, and that approval was not obtained in this case prior to sentencing by the trial judge."

However the Court of Appeal goes on to say:

> "The appeal judge properly concluded that the trial judge erred in considering the respondent's absolute discharge, **although the Crown was entitled to put before the court "the factual reality that the incident on which there has been a plea is not the first incident**".[emphasis added]

The reasons of the Court of Appeal do not explain in precise detail how this would be done. We note, however, that in this case the College seeks to put before this Committee the finding of guilt of Dr. Jha. It does not seek to admit the disposition of an absolute discharge. Once the finding of guilt is proved, it will be for the College to prove

that the offence for which Dr. Jha was found guilty is relevant to his suitability to practise.

The Committee understands that an absolute discharge means there is no record of conviction, which may result in the offender not facing the ramifications of a conviction, however this does not exclude the potential ramifications that one may face by his or her regulator.

The Discipline Committee decision on the Constitutional Motion made note of the following at page 10:

> "An early draft of the 1991 legislation which became the Code created a head of misconduct for having been "convicted" of an offence relevant to suitability to practice. However, the provision was amended by the legislative Standing Committee which deleted the word "convicted" and replaced it with "found guilty". In proposing the amendment, MPP Wessenger, Parliamentary Assistant to the Minister of Health, made clear its purpose: "to include the situation where a member has been found guilty of an offence but has been granted a conditional or absolute discharge by the court". *Ontario, Legislative Assembly, Standing Committee on Social Development,* Transcript, 35th Leg. (Sept 1991)."

When section 51(1) of the Code was enacted in 1991, two significant changes were made:

> (a) A finding of professional misconduct was rendered mandatory, rather than discretionary as it had been under the pre-existing legislation; and
>
> (b) A finding of professional misconduct no longer depended on a *conviction* of a criminal offence; rather, it was tied to a *finding of guilt*.

Dr. Jha noted that the College's public register will remove postings after a year when an absolute discharge has been granted, suggesting that in so doing the College effectively recognized that they could no longer post this information because of the operation of section 6.1(1) CRA. The College submits, and the Committee agreed, that the removal from the public register is specifically mandated of O. Reg 261/18 which states a finding of guilt will be contained in the College's register unless a pardon has been obtained. If section 6.1(1) of the CRA had the application urged upon us by Dr. Jha, the direction in O. Reg 261/18 would not be necessary.

Dr. Jha also submitted that the College is a regulator with extraordinary powers of investigation and therefore meets the definition of a law enforcement agency and is subject to the CRA. The Committee disagrees as the College is engaged in the business of professional regulation and is not a law enforcement agency in the sense in which that term is commonly used.

The Committee does not find that section 6.1(1) of the CRA prevents the College from using either the Criminal Information or the Transcript as evidence against Dr. Jha in regulatory proceedings.

(d) Should the Transcript not be admitted on the basis that it is overly prejudicial? Should the Transcript or the Criminal Information be redacted to address any concern that failing to do so would result in prejudice to Dr. Jha.

The Committee found that the Criminal Information and the Transcript should be redacted to remove any reference to charges that were initially laid but subsequently withdrawn. These other charges are not relevant to the findings of guilt that were made and could potentially cause some prejudice to Dr. Jha. The Committee orders the Criminal Information be redacted to remove the information pertaining to charges 2 and 3 which were withdrawn. The Committee did not specify the manner in which the Transcript should be redacted as the parties reached an agreement in that regard.

ISSUES ON THE HEARING

The only issue on the hearing relates to whether Dr. Jha has been found guilty of an offence that is relevant to his suitability to practice.

THE EVIDENCE ON THE HEARING

(i) The Criminal Information

The Criminal Information indicates that Dr. Jha pleaded guilty to one count of assault and one count of mischief under $5,000 contrary to sections 266 and 430(4) of the Criminal Code, respectively, and was found guilty of these offence by Justice McLeod on June 20, 2016.

(ii) The Transcript

The admissions made by Dr. Jha as reflected in the Transcript are admissible in evidence for the truth of their contents. The admissions constitute the factual foundation for the criminal findings of guilt, including the following facts:

- Dr. Jha knew Ms X through his family. Around March 2013, they started dating. They became engaged, and she spent most of her nights at his apartment. There was one domestic incident on file with the police but there were no charges;

- On August 27, 2013, at about four in the morning, Dr. Jha and Ms X (his then fiancée), were in Dr. Jha's apartment talking;

- An argument ensued over Dr. Jha's being jealous that Ms X's ex-boyfriend had been emailing her;

- Dr. Jha demanded to see Ms X's email account. The argument escalated and he grabbed Ms X by the arms pulling her to the bed;

- Dr. Jha then pulled Ms X onto the floor and began to kick her in the buttocks, the ribs, and the back several times. She showed him her emails and went to bed;

- On August 29, 2013, Ms X was talking to her mother on the telephone and was leaving. Dr. Jha took Ms X's cell phone and threw it against a brick wall, damaging it. Ms X took her phone pieces and left.

- Ms X sustained numerous injuries to her arms, neck, lower back, ribs and knees.

- The damage to the phone was $500.

On the basis of this evidence, the College alleges that Dr. Jha has engaged in professional misconduct under section 51(1)(a) of the Code in that he "has been found guilty of an offence that is relevant to [his] suitability to practise".

The onus is on the College to prove the allegation on a balance of probabilities.

DECISION & ANALYSIS

That Dr. Jha physically assaulted and injured his then-intimate partner and smashed her phone to pieces two days later is not in dispute. That Dr. Jha was found guilty of assault and mischief on the basis of these actions is not in dispute. The sole matter for determination by the Discipline Committee is whether this constitutes professional misconduct: specifically, whether Dr. Jha has been found guilty of an offence that is relevant to his suitability to practise.

We must decide:

1. Is the offence relevant to the practise of medicine?

2. Is the offence relevant to Dr. Jha's suitability to practice notwithstanding the discharge?

1. IS THE OFFENCE RELEVANT TO THE PRACTISE OF MEDICINE?

Dr. Jha has been found guilty of an offence, specifically assault. Not all criminal offences will be relevant to the practice of medicine. Dr. Jha submits that the conduct did not occur with a patient or in a patient setting and therefore is a private matter. He submits the Discipline Committee cannot make a finding of professional misconduct even in the face of the finding of guilt of a criminal offence, because the offence does not relate to Dr. Jha's suitability to practise medicine. The Committee does not agree. A finding of assault *is* relevant to the practice of medicine. Physicians must be able to control their anger and emotions. Physicians are expected to be able to maintain calm and be effective in situations of extreme stress. It is unacceptable to resort to violence. Physical violence is antithetical to the role of a physician.

Dr. Jha kicked his intimate partner in a jealous rage repeatedly and only relented when she showed him her phone. He again, two days later, became angry enough this time to violently damage her property. A physician may very well be called upon to treat a patient subjected to domestic violence and must be able to be sympathetic to their concerns in addition to treating the potential physical injuries sustained in an assault. When presented with patients with injuries a physician must be attuned to the possibility of domestic violence, be sensitive to such issues, and be approachable and open to disclosure from victims of abuse. One can certainly envision that a patient may be reluctant to disclose abuse to her doctor if she knew he had been found guilty of assaulting his common law partner.

Physicians are leaders in the community and must be seen to be leaders. They are held to a high standard, as people in a position of trust and power, to uphold the law and not assault people, especially their domestic partners. They must uphold the basic tenets of the profession and be seen to uphold them, especially to do no harm. Physicians are teachers, imparting knowledge to patients at all times, and leading by example. One's private behaviour may influence the way in which one and the whole profession is perceived by the public. Assault in any setting will have an impact on the reputation of the physician and the profession as a whole.

As noted by the Court of Appeal in *Sazant* v. *College of Physicians and Surgeons of Ontario,* 2012 ONCA 727 (CanLII), at paras 175 and 176*,* practising a profession such as medicine is not a right; rather, it is a privilege conferred by statute where a person possesses the necessary qualifications and undertakes to abide by the governing regulatory regime.

This Committee is not bound by its prior decisions. All cases are unique and must be decided on their own facts. The College, however, provided the Committee with many cases in which the Committee made a finding under section 51(1)(a), after members had received conditional or absolute discharges (*CPSO v. Mukherjee, CPSO v. Ganapthy, CPSO v. Khan, CPSO v. Lian, CPSO v. Wu, CMTO v Enns, CNO v. Soriano, CNO v. Kent, OCP v. Hellier*), for events that occurred several years earlier (*CPSO v. Mukherjee, CPSO v. Ganapthy, CPSO v, Khan, CPSO v. Cowan, CPSO v. Wu*) and for domestic violence or violence outside of the practice setting (*CPSO v. Lian, CPSO v. Prebtani, CPSO v. Sidu, CNO v Soriano*). Many of these cases proceeded by way of agreed statements of facts and joint submission on penalty. Agreement among the parties, however, does not detract from the seriousness of the findings made by the Discipline Committee in these cases. Agreements, streamline the proceedings, spare complainants from testifying, and may save resources but nonetheless serious findings are made and appropriate orders imposed. The Committee does not accept joint submissions if they are contrary to the public interest or would bring the administration of justice into disrepute. (*R v.*

Anthony-Cook). Just because these cases come before the Committee as joint submissions and there is a high threshold to refuse to accept a joint submission, does not mean that these cases are not of assistance to subsequent panels of the Discipline Committee.

Based on our analysis, we find that the findings of guilt - in particular the finding of assault - is relevant to the practice of medicine, generally, and to Dr. Jha's suitability to practice, specifically.

2. IS THE OFFENCE RELEVANT TO DR. JHA'S SUITABILITY TO PRACTICE NOTWITHSTANDING THE DISCHARGE?

Dr. Jha submits that 51(1)(a) of the Code should be read such that the offence is currently, i.e. present tense, relevant to the member's suitability to practice, similar to section 52 of the Code and the requirement for a current lack of knowledge, skill or judgement to make a finding of incompetence. He submits that the effects of the absolute discharge are such that the finding of guilt is no longer relevant to the member's suitability to practice following the passage of time (one year for absolute discharge; three years for conditional discharge). The Committee does not agree. The wording of provision 51(1)(a) refers to the type of offence in general being of a nature that is relevant to the member's suitability to practice. This is a matter for the Committee to decide based on the nature of and circumstances surrounding the offence for which there has been a finding of guilt. The nature of the disposition made by the criminal court should not be a factor. The Discipline Committee is the Tribunal with expertise on the regulation of the profession, not the criminal court which serves a very different function.

The question for this Committee, notwithstanding that the criminal court granted a lenient sentence in the form of absolute discharge, is whether the offence is relevant to Dr. Jha's suitability to practice. That matter was not before the criminal court.

Dr. Jha submits the absolute discharge eliminates the negative implication on his moral character. He points to cases where the discharge has been given with the intent to avoid the damaging consequences of a criminal record on employment or career opportunities (*R. v. Webb, R. v. Menses, Quebec v. Montreal Police Services*). These cases do note that imposing a discharge may serve to minimize some of the stigma of a criminal record. However, as outlined above in our analysis of the admissibility of the Criminal Information and Transcript, the discharge does not expunge the finding of guilt. It is the finding of guilt, not Dr. Jha's moral character, which we must consider.

Dr. Jha submits that the events leading to the finding of guilt occurred almost seven years ago and the passage of time should be taken into account regarding Dr. Jha's suitability to practice. The Committee does not accept that the passage of time impacts whether or not a finding of guilt for a particular offence, in this case the assault of a domestic partner, is relevant to the member's suitability to practice. It may be that the passage of time, along with other factors, may be relevant to a penalty disposition but not to finding on liability.

Discipline proceedings serve a different purpose than criminal sentencing (*R. v. Wigglesworth*, [1987] 2 S.C.R. 541). Dr. Jha must be held accountable to his professional regulating body for his actions. Discipline proceedings serve to maintain the profession's integrity and professional standards.

Violent assault especially in the context of an intimate partner relationship is very concerning to the Committee. We must consider suitability in the broad sense of the word to ensure protection of the public. It is essential that members uphold the core values of the profession both in professional and private settings with conduct that does not betray the values the public and the profession expects of physician: respect, compassion, integrity, humility and professionalism.

Courts have long recognized that domestic violence is a serious social problem in Canadian society, the gravity of which cannot be overstated. The Discipline Committee too recognizes the seriousness of this violent crime and has repeatedly sanctioned physicians who have been found guilty of criminal offences for such conduct. Indeed, the Discipline Committee had a stark reminder of the tragedy of domestic violence, having recently revoked a member for a domestic homicide in the context of a history of verbal and physical abuse. Physicians are expected to be responsible members of society; to be leaders who may be called upon to treat victims of domestic abuse. Domestic assault undermines public respect for and trust in the profession. The Discipline Committee has found that crimes of this nature are, without question, relevant to the member's suitability to practise, and Dr. Jha is no exception.

FINDING

The Committee finds that Dr. Jha committed an act of professional misconduct in that he has been found guilty of an offence relevant to his suitability to practise.

PENALTY HEARING

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. Neilank Kumar Jha, this is notice that the Discipline Committee ordered that no person shall publish or broadcast the name of the complainant, under subsection 45(3) of the Health Professions Procedural Code (the "Code"), which is Schedule 2 to the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18, as amended.

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

> Every person who contravenes an order made under … section 45 or 47… is guilty of an offence and on conviction is liable,
>
> (a) in the case of an individual to a fine of not more than $25,000 for a first offence and not more than $50,000 for a second or subsequent offence; or
>
> (b) in the case of a corporation to a fine of not more than $50,000 for a first offence and not more than $200,000 for a second or subsequent offence.

DISCIPLINE COMMITTEE
COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO

Citation: *College of Physicians and Surgeons of Ontario v. Jha*, 2021 ONCPSD 18
Date: April 16, 2021

BETWEEN:

College of Physicians and Surgeons of Ontario

- and -

Dr. Neilank Kumar Jha

PENALTY ORDER AND REASONS

Heard: January 7, 2021, by videoconference

Panel:
Dr. Peeter Poldre (chair)
Dr. Melinda Davie
Mr. Pierre Giroux
Mr. Mehdi Kanji

Appearances:

Ms. Sayran Sulevani, for the College
Mr. Jaan Lilles and Mr. Robert Trenker, for Dr. Neilank Kumar Jha
Ms. Jennifer McAleer, Independent Legal Counsel to the Discipline Committee

Introduction

[1] On August 27, 2020, the Discipline Committee found that Dr. Jha, a neurosurgeon, committed an act of professional misconduct, in that he has been found guilty of an offence relevant to his suitability to practise. Reasons for our decision were released September 2, 2020 (*Ontario (College of Physicians and Surgeons of Ontario) v. Jha*, 2020 ONCPSD 36).

[2] Dr. Jha had physically assaulted and injured Ms. X, his then fiancée, and smashed her phone to pieces two days later. That Dr. Jha was found guilty of assault and mischief on the basis of these actions was not in dispute. The sole matter for determination by the Committee was whether this conduct constituted professional misconduct: specifically, whether Dr. Jha had been found guilty of an offence that is relevant to his suitability to practise. The Committee found that the offence was relevant to the practice of medicine and to Dr. Jha's suitability to practise medicine despite the fact he had been granted an absolute discharge in the criminal proceedings.

[3] On January 7, 2021, the Committee heard evidence and submissions on penalty and costs. For the reasons set out below, the Committee orders Dr. Jha to appear before the Committee to be reprimanded and directs that his certificate of registration be suspended for three months, to commence 60 days from the date of this order. The Committee also orders Dr. Jha to pay the College costs of $51,850.

Submissions on penalty and costs

[4] Counsel for the College submitted that the appropriate penalty would include:

1. A reprimand.
2. Suspension of Dr. Jha's Certificate of Registration for four months.
3. Costs for five days of hearing time, at the Tariff rate, totalling $51,850.

[5] Counsel for Dr. Jha agreed that a reprimand is appropriate. He submitted, however, that no suspension is warranted, primarily given the length of time that has passed since the time of the offence, Dr. Jha's good conduct since 2015, his references of good character and the favourable expert report of Dr. Glancy.

[6] The College sought costs including the costs of two motions brought by Dr. Jha, heard over two days. Dr. Jha was not successful on either motion. The College sought recovery of costs for the motions at the tariff rate of $10,370 per day. Dr. Jha submitted that costs, if awarded, should cover only the two days for the hearing on finding and one day for the penalty hearing. Dr. Jha submitted that we have no jurisdiction to award the costs of preliminary motions heard by a different panel of this Committee. He further submitted that the preliminary motions were on a broad, novel constitutional issue, and therefore costs should not be awarded, despite the outcome.

Evidence on penalty

[7] Dr. Jha's evidence on penalty included the Reasons for Judgment of the Honourable Justice M. McLeod from Dr. Jha's criminal sentencing, the 2015 report of registered social worker Yukimi Henry, the 2020 report of expert forensic psychiatrist Dr. Graham Glancy and six character reference letters from colleagues, patients and peers of Dr. Jha.

[8] The College did not call any additional evidence on penalty.

Penalty and reasons for penalty

[9] In his Reasons for Judgment on sentencing, Justice McLeod stated at page 5:

> It should also be noted that Dr. Jha is a member of the College of Physicians and Surgeons, and subject to their oversight and discipline. The College takes an interest in incidents of this kind, particularly where findings of guilt are made. The College is aware of the present situation and that, in and of itself, casts a cloud over Dr. Jha and sets him up for the possibility of further punitive sanctions.

[10] The purpose of Discipline Committee proceedings is very different from that of criminal proceedings. When crafting an appropriate order under s. 51(2) of the Health Professions Procedural Code, which is Schedule 2 to the *Regulated Health Professions Act*, 1991, SO 1991, c. 18, we must have regard to the following well-recognized principles: public protection, maintaining the integrity of the profession and public confidence in the College's ability to regulate the profession in the public interest, specific deterrence, general deterrence and, where applicable or

appropriate, rehabilitation. Other principles to consider include denunciation of the misconduct and proportionality.

[11] Protection of the public is often the paramount penalty principle. In this case, however, protection of the public is not the only important consideration. Dr. Jha was found guilty of an offence that relates to his suitability to practise, the very serious offence of assaulting his domestic partner. Strong denunciation of all acts of domestic violence is vital to adequate regulation of the profession, including maintaining the integrity of the profession and public confidence in the College's ability to regulate the profession in the public interest. It is also vitally important to send a message to other members of this profession that domestic violence will not be tolerated in the profession.

[12] In considering public protection, evidence of insight or rehabilitation is important. Of note, Dr. Jha did not testify at the penalty hearing, so this Committee has not had the benefit of hearing from him directly about any acceptance of responsibility or insight. There was, however, evidence of rehabilitation.

[13] Dr. Jha retained Dr. Glancy to perform a full psychiatric and psychological assessment of him with a view to assessing any issue relevant to penalty. Dr. Glancy interviewed Dr. Jha for three-and-a-half hours, and had a colleague administer several psychological tests to Dr. Jha. Dr. Glancy also reviewed our decision and reasons of August 27, 2020, the September 21, 2015 report of Yukimi Henry, and reference letters prepared for the penalty hearing. He also interviewed Dr. Jha's wife and father. Dr. Glancy concluded:

> The totality of the assessment, including interviews, psychological testing, the use of collateral information, an actuarial test specifically designed for the prediction of domestic violence, and a structured professional judgment instrument, all point to a low probability of recurrence of domestic violence or any kind of violence.

[14] We were somewhat concerned by the fact that the account of events as recounted to Dr. Glancy was inconsistent with the facts as we found them to be in this case. Dr. Jha did not testify and therefore could not be cross-examined on the account in Dr. Glancy's report. This account, to a certain degree, undermines Dr. Glancy's assertion that Dr. Jha has taken responsibility for his misconduct in that it differs

from the admissions made at the criminal proceedings which formed the basis of the findings we made. The transcript from the criminal proceedings contains the admissions that in August 2013, while Dr. Jha and Ms. X were talking, an argument ensued and Dr. Jha demanded to see Ms. X's email account. The argument escalated and he grabbed Ms. X by the arms, pulled her onto the floor and began to kick her in the buttocks, the ribs, and the back several times. Ms. X sustained numerous injuries to her arms, neck, lower back, ribs and knees. The version of events recounted to Dr. Glancy (as reflected in his report) was that at the time of the incident, Dr. Jha was trying to leave to go to the gym and she hung on to him "and he kicked her." The account provided to Dr. Glancy is certainly less violent and shifts the blame somewhat to Ms. X by suggesting that she was trying to prevent Dr. Jha from leaving. Dr. Glancy's opinion is based in part on Dr. Jha's professed acceptance of responsibility, but the version of events recounted to Dr. Glancy differs from the facts as found in both the criminal proceedings and these proceedings. This undermines, to an extent, the weight to be given to Dr. Glancy's opinion. We note, however, that Dr. Glancy's opinion was based on a number of other factors, including psychological testing and collateral interviews with family members. Those individuals did not provide evidence at the hearing.

[15] Dr. Jha also relies on the report of Yukimi Henry, a registered social worker, dated September 21, 2015. Ms. Henry met with Dr. Jha 12 times between July 2014 and March 2015 for counselling and assessment. This report was prepared when Dr. Jha's criminal charges were still before the court. Ms. Henry's opinion was that based on Dr. Jha's background, his current functioning and particularly his openness and responsiveness to therapeutic interventions, he did not require further court supervision. Ms. Henry stated:

> While a formal risk assessment was not conducted, on the basis of the psycho-social assessment Dr. Jha does not appear to present any risk to the specific complainant in this matter nor others more generally.

[16] The evidence of positive change reflected in both Dr. Glancy's and Ms. Henry's reports is reassuring, but Dr. Jha's rehabilitation and risk to the public do not address all of the penalty principles that we must consider. This was a serious incident of domestic violence and the Committee must ensure that the appropriate

order in this case also addresses the objectives of general deterrence, maintaining the integrity of the profession and public confidence in the College's ability to regulate in the public interest.

[17] A physician's misconduct reflects not only on himself or herself, but also on the profession as a whole, as noted in *Adams v. Law Society of Alberta*, 2000 ABCA 240 at para 6:

> A professional misconduct hearing involves not only the individual and all the factors that relate to that individual, both favourably and unfavourably, but also the effect of the individual's misconduct on both the individual client and generally on the profession in question. This public dimension is of critical significance to the mandate of professional disciplinary bodies.

[18] Letters of support from Dr. Jha's colleagues and patients are glowing. We do not, however, attach much weight to the reference letters as it is not clear the writers had a full understanding of the nature of the misconduct, which took place in private during an argument between intimate partners. As stated in *College of Physicians and Surgeons of Ontario v. Lee*, 2020 ONCPSD 21:

> …evidence of a physician's good character and reputation ought to be accorded little weight in circumstances in which there have been findings of sexual abuse. Such conduct occurs primarily in private and is often inconsistent with the external persona of the abuser (*CPSO v. Margaliot*, 2016 ONCPSD 53).

[19] Although these comments were made in the context of sexual abuse, we note that domestic abuse also occurs primarily in private and may also be inconsistent with the external persona of the abuser.

Aggravating Factors

[20] We find the nature of the conduct particularly aggravating: gender-based violence against a woman who trusted Dr. Jha is shocking and wholly unacceptable. We find the fact that Dr. Jha engaged in outbursts on two separate occasions to be aggravating, especially since the second was after he had already injured Ms. X. Physicians need to be able to control their emotions in stressful situations. Dr. Jha is a neurosurgeon specializing in concussions and may be called upon to evaluate victims of domestic assault. It is vital that he be attuned to this possibility when

evaluating a trauma patient and that he is approachable for vulnerable patients to reveal details to him.

Mitigating Factors

[21] The favourable 2015 counselling reports of Yukimi Henry are mitigating. Dr. Jha's participation in the Partner Assault Response program, a psycho-educational course on domestic abuse, is mitigating. As well, the favourable psychiatric assessment of Dr. Glancy along with the steps Dr. Jha has taken to minimize the chance of repeated violence are mitigating factors and relevant to our concerns about public protection, specific deterrence and rehabilitation.

[22] With respect to the length of time that has passed since the misconduct, it is well established that the passage of time does not diminish the gravity of the conduct. The Committee rejected the passage of time as a mitigating factor in *College of Physicians and Surgeons of Ontario v. Taylor*, 2017 ONCPSD 17:

> In *R v. S (H)*, 2014 ONCA 323, the Court of Appeal considered a similar argument with respect to the passage of time. The Ontario Court of Appeal quoted with approval the decision of the Alberta Court of Appeal in *R. v. S.S.* 1992 ABCA 352 which stated: "The only sentencing principles which may be affected by the lapse of time are those of individual deterrence and rehabilitation."

[23] Seven years have passed since the conduct that led to his finding of guilt; however, such egregious misconduct is deserving of serious sanction. An order consisting solely of a reprimand, as submitted by Dr. Jha, would be wholly inadequate to express the Committee's abhorrence of the behaviour. The passage of time has allowed Dr. Jha to focus on rehabilitation and he seems to have been successful in that regard given there have been no intervening reports of misconduct of this sort. The Committee, however, did not hear any direct evidence of remorse or insight.

[24] In *R. v. Spence*, 1992 ABCA 352, at para. 14 the Court stated:

> …if, despite having led an exemplary life, the offender lacks remorse, any potential discount must be less than it otherwise would have been.

[25] We are concerned that Dr. Jha may in fact lack insight into the actions that led him to this juncture, based on the fact that the version of events he provided to Dr.

Glancy varies from the admissions provided during the criminal proceedings. Dr. Jha also did not admit the allegations in this hearing. Certainly Dr. Jha is entitled to defend himself and the fact that he did not admit the allegation is not an aggravating factor. Further, the absence of direct evidence of insight and remorse is not an aggravating factor, but it does distinguish his case from others in which insight and remorse were considered mitigating factors.

Prior Cases

[26] Although prior Committee decisions are not binding on us, the Committee has accepted as a principle of fairness that, generally, like cases should be treated alike. The case law provided to us demonstrates that when criminal courts have found physicians guilty of offences related to domestic violence or to have engaged in conduct involving domestic violence, the orders made by this Committee vary considerably. We note that most cases provided to us have proceeded by way of agreed statement of facts and admission, with a negotiated disposition on penalty. Such agreements often show the insight and remorse of the physician regarding the misconduct.

[27] That is not the case with Dr. Jha. In fact, Dr. Jha brought novel motions to quash the notice of hearing, to exclude evidence and argued the criminal absolute discharge issued by Justice McLeod should be interpreted as absolution of Dr. Jha's professional misconduct, submitting that we should have made no finding, and should now order no suspension. The Committee does not agree. We are not suggesting that Dr. Jha was not entitled to mount a vigorous defence or that the fact that he did so is an aggravating factor. It does, however, distinguish his case from those in which the Committee found that the physician's admissions, insight and remorse were mitigating factors.

[28] In *College of Physicians and Surgeons of Ontario v. Alcock*, 2010 ONCPSD 13, a dispute arose over Dr. Alcock's common law wife smoking a cigarette inside the house. Dr. Alcock attempted to physically remove her from the couch against her will. He was arrested and charged with assault. He pled guilty and was convicted in criminal court. He received a suspended sentence and six months probation. There was also a second criminal conviction related to the theft of groceries for which he received a suspended sentence and one year probation. The College alleged that

Dr. Alcock had been found guilty of an offence that is relevant to his suitability to practise and had engaged in conduct unbecoming a physician. At the hearing, Dr. Alcock admitted that he had engaged in conduct unbecoming a physician and the College only proceeded on that allegation. There was a joint submission on penalty, which the Committee accepted, ordering Dr. Alcock to appear for a reprimand and to pay costs to the College. The Committee noted that Dr. Alcock had admitted the allegation, had expressed remorse for his behaviour and pursued therapy. The domestic assault in this case was less severe than in Dr. Jha's case.

[29] In *College of Physicians and Surgeons of Ontario v. Mukherjee*, 2019 ONCPSD 16, Dr. Mukherjee, an obstetrician/gynecologist, engaged in an extramarital affair with a colleague, Ms. B. Dr. Mukherjee made three threats by text message to kill her. Dr. Mukherjee was found guilty of two counts of mischief and uttering threats to cause death or bodily harm. The first mischief offence occurred when Dr. Mukherjee broke into the door of Ms. B's house when she was not home, damaging the door. Dr. Mukherjee was enraged and wanted to confront Ms. B. The second mischief incident occurred when Dr. Mukherjee deliberately drove his car into Ms. B's car, thereby damaging it. After driving into her car once, Dr. Mukherjee reversed his car and drove into Ms. B's car again. Dr. Mukherjee was sentenced to a conditional discharge and twelve months' probation. Dr. Mukherjee admitted that he had been found guilty of an offence relevant to his suitability to practise, and had engaged in an act or omission relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional. The parties made a joint submission on penalty, which the Committee accepted, ordering Dr. Mukherjee to appear before the panel to be reprimanded, directing his certificate of registration to be suspended for six months and ordering him to complete a course in anger management. He was also ordered to pay costs to the College. Dr. Mukherjee's conduct was in some regard more egregious than that of Dr. Jha, in that he made death threats and caused significant damage to property, but he did not physically harm his partner, unlike Dr. Jha. Dr. Mukherjee's admission indicated some sense of responsibility for his outrageous actions and he had undergone therapy and remediation, including psychotherapy sessions.

[30] In *College of Physicians and Surgeons of Ontario v. Dhanoa*, 2020 ONCPSD 28, Dr. Dhanoa, a family physician, had been charged with several criminal offences in 2016 and 2017 which he had failed to report to the College in a timely manner on his annual registration renewals. He had also failed to report the disposition of those charges to the College in a timely manner. The offences included a finding of assault with respect to a family member. There had been a heated verbal exchange and the family member had refused to drive Dr. Dhanoa to the LCBO. Dr. Dhanoa had a substantial alcohol addiction issue. Dr. Dhanoa charged at the family member, chasing her into the living room. Once there, he proceeded to strike her in the head with a closed fist several times. She fell to the ground and suffered a bloody nose. In respect of that offence, Dr. Dhanoa was given a conditional discharge, placed on probation for three years, ordered to submit his DNA and had to pay a $100 victim surcharge. Dr. Dhanoa admitted that he engaged in professional misconduct in that he had been found guilty of an offence relevant to his suitability to practise and had engaged in disgraceful, dishonourable or unprofessional conduct. The parties made a joint submission on penalty which the Committee accepted. The Committee ordered Dr. Dhanoa to appear for a reprimand and directed his certificate of registration to be suspended for five months. He was also ordered to complete the PROBE course and to pay costs to the College. The Committee noted that his criminal offences were tied to his alcohol dependency and Dr. Dhanoa has demonstrated insight as well as willingness to approach his rehabilitation seriously. He ceased practising while he completed intensive rehabilitation. He registered for the Physician Health Program and had ongoing monitoring and support that resulted in positive reports of his progress. As for the aggravating factors, the Committee noted that the fact that this was male violence against a female increased the egregious nature of the misconduct. The Committee also noted that as a physician, Dr. Dhanoa could be called upon to treat patients who have been subjected to domestic assault and a conviction of this sort did not inspire confidence that he would fulfill his duty to be approachable and open in that regard. While the conduct in this case, including the history of failing to report the charges and findings of guilt to the College, is more serious than the conduct involving Dr. Jha, the Committee is similarly concerned about the message that this incident of domestic assault sends to the public and

the impact of this type of behaviour on Dr. Jha's ability to service a vulnerable patient population, namely those dealing with issues of domestic abuse.

[31] In *College of Physicians and Surgeons of Ontario v. Lian*, 2013 ONCPSD 1, Dr. Lian, a family physician practising emergency medicine, was found guilty of assaulting his wife. During a dispute, he had pulled her off the bed and punched her on her chest, back and leg. Dr. Lian had previously pleaded guilty to assault in relation to an assault on his wife in 2002, for which he received an absolute discharge. On the later assault, he received a conditional discharge, contingent upon 18 months' probation. Dr. Lian admitted that he had been found guilty of an offence relevant to his suitability to practise and thereby had committed professional misconduct. The parties made a joint submission on penalty which the Committee accepted. The Committee ordered a reprimand and that he complete a course in ethics. He was also required to pay costs to the College. There was no suspension of his certificate of registration. The Committee noted that it was an aggravating factor that this was Dr. Lian's second finding of guilt for assaulting his wife. As far as mitigating factors, Dr. Lian had reported the conduct to the College and had cooperated. He was still in counselling with his wife. With respect to the nature of the misconduct, the Committee made the following statement, which we endorse as equally applicable to Dr. Jha's circumstances:

> The offence for which Dr. Lian was found guilty is relevant to his suitability to practise. As an emergency room physician, Dr. Lian may very well be called upon to diagnose and treat victims of violence and of domestic abuse. It is important that a treating physician who is presented with patients with injuries be attuned to the possibility of domestic violence, be sensitive to such issues, and be approachable and open to disclosure from victims of abuse.

[32] In *College of Physicians and Surgeons of Ontario v. Freeman*, 2008 ONCPSD 5, Dr. Freeman pleaded guilty to a charge of assault arising from a traffic incident in which he delivered several blows to another motorist. As in Dr. Jha's case, Dr. Freeman received an absolute discharge from the criminal charge. Dr. Freeman admitted that he had committed an act of professional misconduct in that he engaged in conduct unbecoming a physician. The Committee accepted the joint submission on penalty and ordered a reprimand and costs, noting that the penalty was an appropriate measure of censure and consistent with the authorities

submitted. We note that the facts of this case are quite different from the facts in Dr. Jha's case. This was an incident among strangers arising as a result of a driving altercation. Although violent in nature, it does not raise the same concerns as those at issue in domestic abuse.

[33] Dr. Jha submitted that his case was on all fours with the Committee's decision in *College of Physicians and Surgeons of Ontario v. Khan*, 2020 ONCPSD 24. Dr. Khan had pled guilty to sexual assault of a 16-year-old boy and received an absolute discharge. Following a complex and lengthy procedural history, Dr. Khan admitted that he had engaged in professional misconduct in that he had been found guilty of an offence relevant to his suitability to practise and the parties made a joint submission on penalty which included a twelve-month suspension of his certificate of registration. The Committee rejected the joint submission and ordered that there should be no suspension. Two of the Committee members dissented and would have accepted the joint submission.

[34] The facts and circumstances in the *Khan* case were unique and quite different from the facts in this case. We do not find that the *Khan* case is instructive as to the appropriate length of suspension, given the very different facts. The assault at issue was of a completely different nature.

Conclusion on Penalty

[35] Taking into account the range of orders in prior cases, the specific circumstances of Dr. Jha's abhorrent misconduct and Dr. Jha's rehabilitative efforts, the Committee finds that a significant suspension of three months is warranted. This will send a clear message to the profession and the public that domestic violence is wholly unacceptable, regardless of the passage of time.

[36] With respect to the commencement of the suspension, we are aware of the difficulties with scheduling surgeries in these unusual times, and order the suspension to commence 60 days from the date of this order to allow time for Dr. Jha to reschedule and refer his neurosurgical patients. This order is made in the interest of Dr. Jha's patients and colleagues. A reprimand will serve to denounce the misconduct publicly and act as a specific deterrent for Dr. Jha while clearly

expressing our point of view that domestic violence is untenable, especially for a physician who is trusted by the profession and the public to do no harm.

Costs

[37] Dr. Jha agrees that the College is entitled to its costs for the hearings days in this proceeding, but not for the costs of the two preliminary motions that were heard by a different panel of this Committee. These motions were brought, unsuccessfully, by Dr. Jha.

[38] In considering Dr. Jha's submission that preliminary motions (which we consider integral to the hearing process) are not subject to a costs order, we considered s. 53.1 of the Code, which states:

> 53.1 In an appropriate case, a panel may make an order requiring a member who the panel finds has committed an act of professional misconduct or finds to be incompetent to pay all or part of the following costs and expenses
>
> 1. The College's legal costs and expenses.
>
> 2. The College's costs and expenses incurred in investigating the matter.
>
> 3. The College's costs and expenses incurred in conducting the hearing…

[39] The Code provides no further guidance on the issue of costs. The legislation is not very detailed and is open to broad interpretation.

[40] In *Reid v. College of Chiropractors of Ontario*, 2016 ONSC 1041 at para. 219, the Court found:

> That section [53.1] grants to the Panel a broad discretion to order that "in the appropriate case" the College be indemnified for not only its legal costs but for the costs incurred for both the investigation and the hearing. What is an "appropriate case" is a matter of discretion: *Freedman v. Royal College of Dental Surgeons (Ontario)*, [2001] O.J. No 1726 (Div Ct.).

[41] The College's position is that the costs of the preliminary motions fall within our jurisdiction to award costs under s. 53.1(3) – costs and expenses incurred in conducting the hearing.

[42] Dr. Jha's position is that the Discipline Committee has no jurisdiction to order costs in relation to pre-hearing motions heard by a different panel and that do not form part of the hearing. He submitted that the power to order costs is a significant one which must be specifically authorised by statute or rule.

[43] We find that we have the jurisdiction to award costs for preliminary motions, even if those motions are heard before a separate panel of the Committee.

[44] According to s. 53.1, costs can only be ordered once there has been a finding of professional misconduct or incompetence. This means that the panel hearing the preliminary motions could not have made an order for costs at the time the motions were heard. We find that a broad and purposive interpretation of s. 53.1 is to provide for the recovery of costs by the College, in appropriate cases, throughout the proceedings – from investigation to disposition, once a finding of professional misconduct or incompetence has been made. It would not make sense to exclude the costs of preliminary motions from the cost recovery regime established in this section.

[45] Dr. Jha pointed to s. 16(2) of the *Statutory Powers Procedures Act*, RSO 1990, c. S.22 (SPPA), which provides that a tribunal "may impose conditions on an interim decision or order" and asserted that nothing in s. 16 of the SPPA specifies that a tribunal may order costs.

[46] Section 17.1 of the SPPA addresses costs:

> Costs
>
> 17.1 (1) Subject to subsection (2), a tribunal may, in the circumstances set out in rules made under subsection (4), order a party to pay all or part of another party's costs in a proceeding.
>
> Exception
>
> (2) A tribunal shall not make an order to pay costs under this section unless,
>
> (a) the conduct or course of conduct of a party has been unreasonable, frivolous or vexatious or a party has acted in bad faith; and
>
> (b) the tribunal has made rules under subsection (4).

> Amount of Costs
>
> (3) The amount of the costs ordered under this section shall be determined in accordance with the rules made under subsection (4).
>
> Rules
>
> (4) A tribunal may make rules with respect to,
>
> (a) the ordering of costs;
>
> (b) the circumstances in which costs may be ordered; and
>
> (c) the amount of costs or the manner in which the amount of costs is to be determined.
>
> …
>
> Continuance of provisions in other statutes
>
> (6) Despite section 32, nothing in this section shall prevent a tribunal from ordering a party to pay all or part of another party's costs in a proceeding in circumstances other than those set out in, and without complying with, subsections (1) to (3) if the tribunal makes the order in accordance with the provisions of an Act that are in force on February 14, 2000.

[47] The SPPA therefore provides that a tribunal can make an order that one party pay the costs of another (not the costs of the tribunal) only if: (i) its rules provide for costs and the conduct or course of conduct of a party has been unreasonable, frivolous or vexatious or a party has acted in bad faith; or (ii) it has the authority to make a costs order in accordance with the provisions of another Act (i.e., ss. 53 and 53.1 of the Code).

[48] The Rules of Procedure of the Committee (the "Rules") do not specifically address costs of a motion. They do provide, however:

> 14.04(3) Where the request for costs or expenses includes the cost or expense to the College of conducting a day of hearing, no evidence of the cost or expense of a day of hearing is needed if the request is equal to or less than the amount set out in Tariff A.

[49] Tariff A to the Rules, entitled "Costs and Expenses for the College to Conduct a Day of Hearing," provides that "costs and expenses of a day of hearing" are

currently set at $10,370. The Tariff currently does not provide any description of the costs and expenses covered by the Tariff.

[50] The tariff rate would apply to motions heard within the hearing, such as the motion heard on day one of this virtual hearing to exclude evidence. “Hearing” as used in s. 53.1 and Rule 14.04(3) must be given a broad and purposive interpretation. The purpose is to reimburse the College for holding a hearing – that is, hearing evidence and submissions and fulfilling its statutory obligations. Some of that work takes place, on occasion, before the Notice of Hearing is filed at the hearing and the member enters his or her response to the allegations. We find that “hearing” includes preliminary motions heard before the filing of the Notice of Hearing at the hearing and entering of the member’s response to the allegations, not simply the proceedings that take place after that step.

[51] Alternatively, Dr. Jha submitted that no costs of the preliminary motions should be awarded, because the motion at issue raised important, complex constitutional issues with significant implications for the regulation of health professionals as well as the criminal law. In assessing the merits of this argument, we note that the two motions were linked, in that the preliminary motion with respect to the requested publication ban was heard as a first step on the motion to quash the notice of hearing. We note that there have been numerous examples of professional misconduct findings by this Committee, and other regulatory bodies, in the face of an absolute or conditional discharge, but we acknowledge that the arguments raised by Dr. Jha do not appear to have been raised in those cases: *Mukherjee*, *Khan*, *Lian*, *College of Physicians and Surgeons of Ontario v. Ganapathy*, 2009 ONCPSD 6, *College of Physicians and Surgeons of Ontario v. Wu*, 2020 ONCPSD 1; for events that occurred several years earlier: *Mukherjee*, *Ganapathy*, *Khan*, *Wu*, *College of Physicians and Surgeons of Ontario v. Cowan*, 2003 CanLII 74551 (ON CPSD); and for domestic violence or violence outside of the practice setting: *Lian*, *College of Physicians and Surgeons of Ontario v. Prebtani*, 2005 ONCPSD 26, *College of Physicians and Surgeons of Ontario v. Sidu*, 2002 ONCPSD 14.

[52] Although the legal issues on the motion may not have been raised previously, that does not mean that costs should not be awarded to the College. The motions were dismissed. The cases provided by Dr. Jha provide that in sufficiently novel and

complex cases, a court may decline to exercise its discretion to award costs. Although the argument advanced by Dr. Jha was novel, it was dismissed by the Committee. This was not a matter of interpreting a new provision of the Code. As stated above, there had been many prior findings of professional misconduct based on a guilty plea that led to a conditional or absolute discharge.

[53] Therefore, the Committee orders Dr. Jha to pay costs at the tariff rate for the two days of preliminary motions, two days of the hearing and one day of penalty hearing totalling five days of hearing time, or $51,850.

Order

[54] Therefore, the Committee orders and directs:

1. Dr. Jha shall appear before the Committee to be reprimanded and the fact of the reprimand shall be recorded on the Register;

2. The Registrar to suspend Dr. Jha‘s certificate of registration for a period of three months, to commence 60 days from the date of this order.

3. Dr. Jha pay to the College costs in the amount of $51,850 within 60 days of the date of this order.

ONTARIO PHYSICIANS AND SURGEONS DISCIPLINE TRIBUNAL

BETWEEN:

College of Physicians and Surgeons of Ontario

- and -

Dr. Neilank Kumar Jha

The Tribunal delivered the following Reprimand
by videoconference on Wednesday, August 24, 2022.

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

Dr. Jha,

A primary tenet of the medical profession is to do no harm, to anyone, whether a patient or not.

To cause physical harm to an intimate partner, on not one but two separate occasions, is especially disturbing and worsens the misconduct.

Physicians are expected to be able to control their emotions and behave as professionals in stressful situations, both within and outside the clinical setting. Our patients' welfare and lives depend on this personal attribute. We acknowledge your rehabilitative activities, charitable efforts and community support, but we cannot excuse your misconduct.

Irrespective of the passage of time since your offence, and your plea of guilt in the criminal court, your violent behaviour must be sanctioned.

Your misconduct reflects poorly on you and the profession. The public surely deserves better of our members.

Your significant suspension will serve as a specific deterrent against future misconduct, will send a strong message to all physicians and maintain public confidence in the ability of the profession to govern itself in the public interest.