

**DISCIPLINE COMMITTEE
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
which is Schedule 2 of the *Regulated Health Professions Act, 1991*,
S.O. 1991, c. 18, as amended.**

B E T W E E N:

COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO

- and -

DR. ESSAM SAMY NAGUIB MICHAEL

PANEL MEMBERS:

**DR. MELINDA DAVIE
MR. MEHDI KANJI
DR. MICHAEL FRANKLYN
MS LINDA ROBBINS
DR. STEPHEN HUCKER**

COUNSEL FOR THE COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO:

MR. KIRK MAIJALA

COUNSEL FOR DR. MICHAEL:

**MR. BRIAN GREENSPAN
MS NAOMI LUTES**

INDEPENDENT COUNSEL FOR THE DISCIPLINE COMMITTEE:

MR. JESSE HARPER

**Hearing Date and Decision Date: September 8, 2020
Release of Reasons Date: November 18, 2020**

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 September 8, 2020. At the conclusion of the hearing, the Committee released a written order stating its finding that the member committed an act of professional misconduct and setting out its penalty and costs order with written reasons to follow. These are the Committee’s reasons for decision.

THE ALLEGATIONS

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

1. 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 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
2. under clause 51(1)(a) of the Health Professions Procedural Code (the “Code”), Schedule 2 to the *Regulated Health Professions Act, 1991*, S.O. 1991, c.18 in that he has been found guilty of an offence that is relevant to his suitability to practise.

RESPONSE TO THE ALLEGATIONS

Dr. Michael admitted the second allegation in the Notice of Hearing, that he has been found guilty of an offence that is relevant to his suitability to practice. Counsel for the College withdrew the first allegation in the Notice of Hearing, that Dr. Michael has 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 FACTS

The following facts were set out in an Agreed Statement of Facts and Admission which was filed as an exhibit and presented to the Committee:

Background

1. Dr. Essam Samy Naguib Michael ("Dr. Michael") is a 61-year-old obstetrician and gynecologist practicing in the Greater Toronto Area. He received his certificate authorizing independent practice from the College of Physicians and Surgeons of Ontario (the "College") in 1994.
2. At the relevant time, Dr. Michael operated four fertility clinics in the Greater Toronto Area. His primary clinic was located in Mississauga, with other offices in Brampton, Bolton, and Milton.

Provincial Offence Proceeding and Conviction

3. On November 14, 2018, Dr. Michael pleaded guilty to contravening s. 15 of the *Health Insurance Act* by submitting billings to the Ontario Health Insurance Plan ("OHIP"), in the amount of \$545,000, which did not comply with the requirements of the Schedule of Benefits, thereby committing an offence under the *Health Insurance Act*. The overbilling occurred over the period between January 1, 2007 and May 21, 2013.
4. The proceeding took place at the Superior Court of Justice before Justice Dawson. The parties presented an Agreed Statement of Fact, which was read into the record and is attached (as read) at Tab 1 to the Agreed Statement of

Facts and Admission. This forms part of this Agreed Statement of Facts and Admission. The Agreed Statement of Fact can be summarized as follows:

- Billing code A935 requires that the physician spend a minimum of 50 minutes in direct contact with the patient;
 - Between January 1, 2007 and May 21, 2013, Dr. Michael improperly billed OHIP for numerous units of code A935 as he did not spend the requisite 50 minutes in direct contact with the patient;
 - There is no dispute that Dr. Michael saw the patients for whom A935 was billed. Rather than billing A935, he ought to have billed A205;
 - The amount of the overpayment is the difference between the two codes, which is \$545,000.
5. A205 is the code for an Obstetrics and Gynaecology Consultation. A205 does not have a time requirement. A935 is a Special Surgical Consultation code. It can be billed by a surgeon who provides all the appropriate elements of a regular consultation and devotes at least fifty minutes exclusively to the consultation with the patient.
6. Dr. Michael admitted that he had submitted billings to OHIP in the amount of \$545,000 that did not comply with the requirements of the Schedule of Benefits and was therefore guilty of committing an offence under the *Health Insurance Act*, contrary to section 44(1)(a). A certified copy of the transcript of the guilty plea and sentencing proceedings held on November 14, 2018 is attached as Tab 2 to the Agreed Statement of Facts and Admission.
7. At the proceeding on November 14, 2018, Dr. Michael undertook through counsel to repay the \$545,000 to the Minister of Finance. A cheque from Dr.

Michael's counsel to the Minister of Finance, dated November 21, 2018 and confirming restitution in the amount of \$545,000, is attached as Tab 3 to the Agreed Statement of Facts and Admission.

8. The Crown and defence presented a joint submission on sentence, asking that the minimum fine of \$5000 be imposed. Justice Dawson accepted the joint submission and ordered a fine of \$5,000. Attached as Tab 4 to the Agreed Statement of Facts and Admission is the Fine Order made by Justice Dawson.

Circumstances of Overbilling

9. Dr. Michael delegated the responsibility of his OHIP billings to his staff.
10. Dr. Michael had inherited a billing system that allowed staff to enter shortcut keys related to the type of patient visit, rather than directly entering the OHIP code. The billing system then automatically populated billing codes based on the shortcut keys. A forensic examination of Dr. Michael's billing software demonstrated that the billing codes associated with the shortcut keys were not always appropriate to the type of patient visit.
11. One of the shortcuts used by staff was for "new patient". This shortcut was entered by staff when the visit pertained to a new fertility patient. The billing software automatically populated the A935 code when this shortcut was entered, whether or not Dr. Michael had spent the requisite 50 minutes with the patient as required by the Schedule of Benefits.
12. Dr. Michael was unaware of this issue and its effect on his OHIP billing. Dr. Michael nonetheless accepts responsibility for the improper billings submitted to OHIP.

PART II – ADMISSION

13. Dr. Michael admits the facts set out above and admits that he has been found guilty of an offence that is relevant to his suitability to practise.

14. Dr. Michael admits that this constitutes professional misconduct under clause 51(1)(a) of the Health Professions Procedural Code, which is Schedule 2 to the *Regulated Health Professions Act, 1991*.

FINDING

The Committee accepted as correct all of the facts set out in the Agreed Statement of Facts and Admission. Having regard to these facts, the Committee accepted Dr. Michael's admission and found that he committed an act of professional misconduct in that he that he has been found guilty of an offence that is relevant to his suitability to practise.

PENALTY AND REASONS FOR PENALTY

FACTS ON PENALTY

The following facts were set out in an Agreed Statement of Facts Regarding Penalty which was filed as an exhibit and presented to the Committee:

1. In March 2020, the William Osler Health System ("William Osler") reduced the availability of operating rooms for elective surgeries as a result of the COVID-19 pandemic. Following this reduction in capacity, only two days per month were available for OB/GYN surgeries. It is anticipated that William Osler will increase its capacity for OB/GYN surgeries to one day per week beginning in September 2020.

2. As a result of the reduction in operating room capacity between March and September 2020, Dr. Michael has a backlog of 88 hospital-based surgeries he is scheduled to perform. These include surgeries for patients with gynecological conditions including infertility; significant pelvic pain secondary to endometriosis or large fibroids; and irregular and heavy periods related to conditions such as adenomyosis and submucosal fibroids.

SUBMISSIONS ON PENALTY

Counsel for the College and counsel for Dr. Michael made a joint submission as to an appropriate penalty and costs order, which would include,

- A reprimand;
- A one-month suspension commencing November 15, 2020 at 12:01 am;
- Terms, conditions and limitations be placed on Dr. Michael's Certificate of Registration regarding a practice monitor being put in place to monitor Dr. Michael's OHIP billings; and
- Costs payable to the College in the amount of \$6,000, payable within 30 days of the Order.

Although the Committee has discretion to accept or reject a joint submission on penalty, the law provides that the Committee should not depart from a joint submission unless the proposed penalty would bring the administration of justice into disrepute, or is otherwise not in the public interest (*R. v. Anthony-Cook*, 2016 SCC 43).

The Committee is also obliged to impose a penalty that expresses well-recognized guiding principles. Protection of the public is the principal concern. The penalty imposed should also express the Committee's denunciation of the misconduct, be proportionate to the misconduct, and serve as a deterrent both to the individual member and to the membership as a whole. As well, the penalty should serve to maintain the integrity of the profession and public confidence in the College's ability to regulate the profession in

the public interest. To the extent possible, the penalty should also address the rehabilitative needs of the member.

In deciding whether to accept the penalty jointly proposed by the parties, the Committee carefully considered the nature of the misconduct as set out in the Agreed Statement of Facts and Admission, the facts set out in the Agreed Statement of Facts on Penalty, the penalty principles referred to above, the aggravating and mitigating factors discussed below, and prior cases of this Committee which present similarities to Dr. Michael's case, in addition to the law relating to joint submissions set out above.

Aggravating Factors

In the Committee's view, the nature of Dr. Michael's misconduct is very serious. Dr. Michael delegated the responsibility of his OHIP billings to his staff. However, it remained Dr. Michael's responsibility to ensure that the billing codes applied were accurate and appropriate. This was not a one-time oversight. Rather, it was a long-term practice of billing higher fee codes for standard services. The large sum of restitution paid to the Ministry of Finance is illustrative of the seriousness of Dr. Michael's misconduct. The Committee views this as an aggravating factor.

Mitigating Factors

The Committee accepts as a mitigating factor that Dr. Michael admitted to his misconduct, thus taking responsibility for his actions and recognizing that his conduct was unacceptable. Also, by so doing, Dr. Michael reduced the duration and cost of the hearing, and saved the College from requiring witnesses to attend and testify. He made admissions of his behaviour and recognized the deficiencies in his billing practice. He also made the same admission in the *Health Insurance Act* proceeding and repaid the overbilling amount at the end of the court hearing. Dr. Michael has no prior disciplinary history with the College and this too is considered a mitigating factor.

Prior Cases

Although prior Committee decisions are not binding as precedent, the Committee accepts as a principle of fairness that generally like cases should be treated alike. Two cases were jointly submitted by the parties for the Committee's consideration.

In the case of *CPSO v. Connolly*, 2011 ONCPSD 34, Dr. Connolly, a family physician, was unaware that the owner of the clinic where he worked was overbilling on his behalf. Dr. Connolly was charged under the *Health Insurance Act* for submitting overbillings to the Ontario Health Insurance Plan in the amount of \$114,146.92 that did not comply with the Schedule of Benefits. Dr. Connolly was found guilty under the *Health Insurance Act* and ordered to pay a fine of \$5000 and restitution of the full amount that he overbilled.

In the College proceeding, Dr. Connolly admitted that he had engaged in professional misconduct having been found guilty of an offence relevant to his suitability to practice. He admitted that he failed to exercise due diligence by not taking all reasonable steps to ensure the clinic owner was not overbilling. The Committee accepted the joint submission on penalty. Dr. Connolly was ordered to appear before the panel to be reprimanded and to pay the costs of the proceeding.

The *Connolly* case is similar to the case at hand, particularly given the nature of the misconduct underlying the *Health Insurance Act* offense. Neither Dr. Connolly nor Dr. Michael submitted their own OHIP billings, however, the accuracy of those billings remained their responsibility. As with Dr. Connolly, Dr. Michael did not exercise due diligence in this regard.

A differentiating factor between the *Connolly* case and the current matter is the amount overbilled. The amount overbilled in the current matter is more than half a million dollars over six years, which far exceeds the amount overbilled by Dr. Connolly. This provides justification for the more significant penalty proposed in the matter at hand.

In *CPSO v. Makerewich*, 2013 ONCPSD 13, Dr. Makerewich was found guilty under the *Health Insurance Act* for knowingly receiving payment for insured services that he was not entitled to receive. Dr. Makerewich admitted to submitting billings to OHIP in respect of seven visits for two different patients that did not comply with the Schedule of Benefits. Specifically, the billing Code that was used (A935A) required that Dr. Makerewich spend fifty or more minutes with a patient. Rather than doing so, Dr. Makerewich delegated a portion of these patient visits to his non-physician colleague, Mr. X, PhD. Further, Dr. Makerewich told the Court that he had stopped inappropriately billing the A935A code shortly after charges were laid in June 2009. In actuality, Dr. Makerewich continued the inappropriate billing practice until May 2010.

Dr. Makerewich pled guilty to *the Health Insurance Act* charge and paid a \$10,000 fine for receiving payment of \$435.25 for insured services he was not entitled to receive.

In the College proceeding, Dr. Makerewich admitted that he committed an act of professional misconduct, in that he was found guilty of an offence relevant to his suitability to practice and engaged in disgraceful, dishonourable or unprofessional conduct. The Committee accepted the joint penalty proposed, noting that College members have a responsibility to know, understand, and adhere to the Ontario Schedule of Benefits when billing for services. Further, the Committee considered it an aggravating factor that Dr. Makerewich provided inaccurate information to the Court as to when he ceased his inappropriate billing practices.

The Committee Ordered and directed that the Registrar suspend Dr. Makerewich's certificate of registration for two months, that he appear before the panel to be reprimanded, complete ethics training, and pay costs to the College in the amount of \$3,650.00.

The two-month suspension Ordered in the *Makerewich* case is more significant than that sought in the case at hand. In the Committee's view, the nature of the misconduct in *Makerewich* is distinguishable as he admitted to also engaging in disgraceful, dishonourable or unprofessional conduct, an allegation that was withdrawn by the College in the current matter. Further, he had also mislead the Court in the course of the *Health Insurance Act* proceedings. However, the amount inappropriately billed in the *Makerewich* case was approximately \$436.00, substantially lower than the \$545,000 overbilled by Dr. Michael. The proposed terms, conditions and limitations on Dr. Michael's certificate of registration, specifically that he retain a practice monitor to review his OHIP billings, are warranted in light of this large sum of overbillings.

Conclusion

The Committee is satisfied that the jointly proposed penalty is appropriate, proportionate, and consistent with the range of penalties imposed in previous similar decisions.

The one-month suspension is a significant sanction which, together with the reprimand, will serve as a specific deterrent to the member. The penalty signals to the profession that the panel takes Dr. Michael's behaviour – inappropriate billing - very seriously, whether intentional or not, and that such misconduct is unacceptable and will not be tolerated. The reprimand and suspension should reassure the public of the College's ability to regulate the profession in the public interest and maintain public confidence in the integrity of the profession.

Effective rehabilitation of a physician is in the public's interest. The Committee accepts that monitoring Dr. Michael's billing practices serves a rehabilitative purpose. It will also emphasize how seriously the Committee views Dr. Michael's failure to clearly instruct and supervise those submitting OHIP billings on his behalf. Further, it will help ensure that going forward, Dr. Michael meets the standard of professionalism expected of all members of the College.

The parties jointly submitted, and the Committee accepts, that Dr. Michael's suspension should begin on November 15th 2020, in order to permit the William Osler Health System to increase its capacity for OB/GYN surgeries delayed due to the COVID 19 pandemic.

COSTS

The Committee finds that this is an appropriate case in which to award costs. The Committee accepts the parties' submission that Dr. Michael pay costs to the College, at the tariff rate, in the amount of \$6,000.00.

ORDER

The Committee stated its findings in paragraph 1 of its written order dated September 8, 2020. In that order, the Committee ordered and directed as follows on the matter of penalty and costs, that:

2. Dr. Michael attend before the panel to be reprimanded.
3. the Registrar suspend Dr. Michael's certificate of registration for a period of one (1) month, commencing from November 15, 2020 at 12:01 a.m.

4. the Registrar place the following terms, conditions and limitations on Dr. Michael's certificate of registration effective immediately.
 - i. Dr. Michael will, at his own expense, retain an obstetrician/gynecologist practice monitor approved by the College to review Dr. Michael's Ontario Health Insurance Plan ("OHIP") billings and the corresponding patient charts to ensure his compliance with the *Health Insurance Act* and who will sign an undertaking in the form attached to the Order as Schedule "A" (the "Practice Monitor");
 - ii. The Practice Monitor will review twenty-five (25) of Dr. Michael's patient charts for which he has billed OHIP once every three (3) months for a minimum of two (2) years ("OHIP Monitoring"). If Dr. Michael bills OHIP for fewer than twenty-five (25) patients in any given three-month period, the Practice Monitor will review all of the patient charts for which Dr. Michael billed OHIP. In the event that Dr. Michael has billed OHIP for fewer than 200 patients during the two-year period of monitoring, the monitoring will continue until 200 charts have been reviewed;
 - iii. If a Practice Monitor who has given an undertaking in Schedule "A" to this Order is unable or unwilling to continue to fulfill its terms, Dr. Michael shall, within twenty (20) days of receiving notice of same, obtain an executed undertaking in the same form from a similarly qualified person who is acceptable to the College and ensure that it is delivered to the College within that time;
 - iv. If Dr. Michael is unable to obtain a Practice Monitor in accordance with paragraphs 4(i), 4(ii) and 4(iii) of this Order, he shall cease to submit bills to OHIP until such time as he has done so;

- v. Dr. Michael shall consent to the disclosure by his Practice Monitor to the College, and by the College to his Practice Monitor, of all information the Practice Monitor or the College deems necessary or desirable in order to fulfill the Practice Monitor's undertaking and to monitor Dr. Michael's compliance with this Order;
 - vi. During the period the OHIP Monitoring remains in effect, Dr. Michael shall inform the College of each and every location where he practises including, but not limited to hospitals, clinics, and offices, in any jurisdiction (collectively, his "Practice Location(s)"), within fifteen (15) days of this Order, and shall inform the College of any and all new Practice Locations within 15 days of commencing practice at that location, for the purposes of monitoring his compliance with this Order;
 - vii. During the period the OHIP Monitoring remains in effect, Dr. Michael shall submit to, and not interfere with, unannounced inspections of his Practice Location(s) and patient records by a College representative for the purposes of monitoring his compliance with this Order;
 - viii. Dr. Michael shall consent to the monitoring of his OHIP billings and cooperate with inspections of his practice and patient charts by his Practice Monitor and College representatives for the purpose of monitoring and enforcing his compliance with the terms of this Order; and
 - ix. Dr. Michael shall be responsible for any and all costs associated with implementing the terms of this Order.
5. Dr. Michael to pay costs to the College in the amount of \$6,000 within 30 days of the date of this Order.

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