

NOTICE OF PUBLICATION BAN

In the College of Physicians and Surgeons of Ontario and Dr. Farooq Ali Khan, this is notice that the Discipline Committee ordered that no person shall publish or broadcast the name of Witness X, whose identity was made known to the Discipline Committee, 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.

This is also notice that the Discipline Committee ordered a ban on the publication of the identity and any information that could disclose the identity of AB, under subsection 47(1) of the Code.

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

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

- (a) in the case of an individual to a fine of not more than \$25,000 for a first offence and not more than \$50,000 for a second or subsequent offence; or
- (b) in the case of a corporation to a fine of not more than \$50,000 for a first offence and not more than \$200,000 for a second or subsequent offence.

**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 to 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. FAROOQ ALI KHAN

PANEL MEMBERS:

**DR. C. CLAPPERTON (Chair)(Dissenting)
MAJOR A.H. KHALIFA
DR. H. SCHIPPER
MR. P. PIELSTICKER (Dissenting)
DR. D. HELLYER**

COUNSEL FOR THE COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO:

**MS L. BROWNSTONE
MS E. WIDNER**

COUNSEL FOR DR. KHAN:

**MR. E. MOGIL
MR. F. DICKSON**

INDEPENDENT COUNSEL FOR THE DISCIPLINE COMMITTEE:

MS J. McALEER

**Hearing Dates: April 9 to 12, 2018, July 20, 2018, August 20, 2019
Decision Date and Release of Reasons date: May 29, 2020**

PUBLICATION BAN

DECISION AND REASONS FOR DECISION

The Discipline Committee (the “Committee”) of the College of Physicians and Surgeons of Ontario heard this matter at Toronto on April 9 to 12, 2018, July 20, 2018 and August 20, 2019.

THE ALLEGATION

The Notice of Hearing alleged that Dr. Farooq Ali Khan committed an act of professional misconduct:

1. under clause 51(1)(a) of the Health Professions Procedural Code which is 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 ALLEGATION

Dr. Khan admitted the allegation in the Notice of Hearing, that he has been found guilty of an offence that is relevant to his suitability to practise.

PROCEDURAL HISTORY

The Committee initially heard this matter on April 9 to 12, 2018. At that time, the case proceeded on the basis of an Agreed Statement of Facts and Admission to the misconduct, and the matter of penalty was contested.

On April 10, 2018, the Committee stated its finding that Dr. Farooq Ali Khan committed an act of professional misconduct and proceeded to hear evidence and submissions on penalty.

At that time, the College sought a penalty and costs order consisting of revocation of Dr. Khan's certificate of registration, a reprimand and costs of four days of hearing. Counsel for Dr. Khan submitted that the appropriate order would be a suspension of eight to twelve months, and costs for one day. On April 12, 2018, the Committee reserved its decision on penalty and costs.

On April 30, 2018, counsel for the College informed the Committee that new regulations providing for mandatory revocation if a member had been found guilty of certain offences would come into effect the following day.

On May 1, 2018, Ontario Regulation 262/18 ("O. Reg. 262/18") came into force with the effect that a physician found to have committed an act of professional misconduct by having been found guilty of an offence relevant to the member's suitability to practise was now subject to mandatory revocation, if the offence was one prescribed by the regulation. An offence under section 271 of the Criminal Code was one of the prescribed offences.

The College took the position that the mandatory revocation provision applied retrospectively, with the result that for misconduct that was found to have occurred prior to May 1, 2018, and for which a penalty is imposed after May 1, 2018, the Committee must order revocation. Dr. Khan took the position that the amendments to the regulation did not apply retrospectively and there was no mandatory revocation obligation imposed by the amendments.

To address this issue, the hearing resumed on July 20, 2018. The Committee heard submissions from the parties and received advice from independent legal counsel ("ILC") to the Committee regarding whether the recent legislative amendments applied retrospectively. The Committee had also received comprehensive written submissions from the parties and ILC on this issue. On July 20, 2018, the Committee further reserved its decision on penalty to consider the issue of retrospectivity of the new regulation.

On March 12, 2019, the Committee requested further submissions in writing from the parties regarding the legal effect, if any, of the fact that Dr. Khan had received an absolute discharge in the criminal proceedings and the application of s. 51(1)(a) of the Code and the new regulations.

In response, on April 5, 2019, counsel for Dr. Khan served a Notice of Motion to stay the proceedings on the basis of the absolute discharge in the criminal proceedings. The motion was scheduled to be heard on August 20, 2019.

On August 8, 2019, counsel for the College informed the Committee that the Divisional Court had released its decision in *Ontario (College of Physicians and Surgeons of Ontario) v. Kunynetz*, 2019 ONSC 4300 on July 23, 2019, and the Divisional Court had held that the amendments to the RHPA made under the *Protecting Patients Act* should not be treated as retrospective. The College advised that it accepted this finding and, accordingly, no longer took the position that revocation is mandatory in this case.

This meant that the issue of the retrospective application of the mandatory revocation provisions was no longer an issue. This did not, however, address the issues raised by Dr. Khan in his motion to stay the proceedings on the basis of the absolute discharge.

Then on August 20, 2019, the Committee was advised that the parties had reached a resolution and intended to make a joint proposal on penalty. On August 20, 2019, the parties presented a joint submission on penalty and costs to the Committee. College counsel advised the Committee that the parties were in agreement that in the event the Committee did not accept the joint submission on penalty the parties would abandon the joint position and Dr. Khan's motion to stay the proceedings would be adjourned and argued on a later date.

AGREED STATEMENT OF FACTS AND ADMISSION

On April 9, 2018, the following Agreed Statement of Facts and Admission was filed as an exhibit and presented to the Committee:

1. Dr. Khan is an emergency physician who practices at the University Health Network ("UHN") in Toronto, Ontario. Dr. Khan received his certificate of independent practice from the College in June 2014.

Criminal Finding

2. On August 13, 2015, Dr. Khan pled guilty to and was found guilty of sexual assault under s. 271(1)(b) of the *Criminal Code*. A copy of the Information is attached at Tab 1 [to the Agreed Statement of Facts and Admission]. Dr. Khan was granted an absolute discharge on the basis of a joint submission on penalty. A transcript of the criminal proceeding, including the Reasons for Judgment and Reasons for Sentence of the trial judge is attached at Tab 2 [to the Agreed Statement of Facts and Admission].

Facts Underlying the Criminal Finding

3. In August 2009, Dr. Khan slept over at the house of AB. At the time, Dr. Khan was 24 years old, having recently graduated from medical school and started his residency program, and AB was 16 years old. Dr. Khan and AB were sleeping in bunk beds in the same room. Dr. Khan was on the top bunk and AB was on the lower bunk.
4. During the night, Dr. Khan climbed down and fondled AB's penis while he believed AB was sleeping. Dr. Khan masturbated while fondling AB. At one point, AB moved, and Dr. Khan stopped for a few minutes. When AB was still again and Dr. Khan believed him to be still asleep, he started fondling him again, while masturbating. When AB

made a noise, Dr. Khan withdrew his hand and went back to the top bunk. Shortly after that, AB got up, ran out of the room, and told others what had happened.

Finding

5. Dr. Khan admits the facts specified above, and admits that, based on these facts, he engaged in professional misconduct under clause 51(1)(a) of the Health Professions Procedural Code, being 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 practice.

FINDING

On April 10, 2018, the Committee accepted as true all of the facts set out in the Agreed Statement of Facts and Admission. Having regard to these facts, the Committee accepted Dr. Khan's admission and found that he committed an act of professional misconduct in that he has been found guilty of an offence relevant to his suitability to practice.

AGREED STATEMENT OF FACTS ON PENALTY - CHRONOLOGY

On April 10, 2018, the following Agreed Statement of Facts on Penalty-Chronology was filed as an exhibit and presented to the Committee:

2009

1. In September 2009, about three days after the assault, Dr. Khan went to see Dr. Richard Montoro, psychiatrist, at the McGill University Sexual Identity Centre, which he had also attended in 2007. Dr. Montoro's CV is attached at Tab 1 [to the Agreed Statement of Facts on Penalty-Chronology]. The complete records of Dr. Montoro's treatment of Dr. Khan are attached at Tab 2 [to the Agreed Statement of Facts on

Penalty-Chronology]. Tab 2 [to the Agreed Statement of Facts on Penalty-Chronology] comprises both Dr. Montoro's handwritten notes and a transcribed version of those notes prepared by Dr. Montoro.

2. On November 2, 2009, Dr. Khan wrote a note to AB which starts: "This is my apology to you." A copy of the note is attached at Tab 3 [to the Agreed Statement of Facts on Penalty-Chronology].

2014

3. In 2014, Dr. Khan completed his residency in emergency medicine at McGill University. Dr. Khan became a member of this College on June 30, 2014, and commenced work at the University Health Network as an emergency medicine physician in July 2014.
4. In August 2014, Dr. Khan learned that AB was considering going to the police to report the August 2009 sexual assault. Dr. Khan sent two emails to AB , on August 12 and 13, 2014, copies of which are attached at Tabs 4 and 5 [to the Agreed Statement of Facts on Penalty-Chronology].
5. On September 7, 2014, a meeting was held, at which AB explained why he had decided to go to the police. A copy of the document AB prepared and read from at that meeting is attached at Tab 6 [to the Agreed Statement of Facts on Penalty-Chronology].
6. On September 10, 2014, Dr. Montoro sent a letter to Dr. Khan's counsel. A copy of that letter is attached at Tab 7 [to the Agreed Statement of Facts on Penalty-Chronology].
7. In September 2014, Dr. Khan saw Dr. Ron Ruskin, psychiatrist. A copy of Dr. Ruskin's note and clinical records are attached at Tab 8 [to the Agreed Statement of Facts on Penalty-Chronology].

8. Documents related to AB's meetings with the police are attached at Tab 9 [to the Agreed Statement of Facts on Penalty-Chronology].

2015

9. Dr. Khan was criminally charged with sexual assault on March 5, 2015.
10. Shortly thereafter, arrangements were made for Dr. Khan to be assessed by Dr. Graham Glancy.
11. On May 20, 2015, Dr. Khan reported the charge to Dr. Chopra, the Medical Director at UHN. Dr. Chopra reported the charge to the College the same day. Dr. Chopra's e-mail to the College, dated May 20, 2015, is attached at Tab 10 [to the Agreed Statement of Facts on Penalty-Chronology].
12. In April 2015, Dr. Khan began receiving psychotherapy from Dr. Donald Carveth, PhD. Dr. Carveth's CV is attached at Tab 11 [to the Agreed Statement of Facts on Penalty-Chronology]. A complete copy of Dr. Carveth's handwritten notes and records of his treatment of Dr. Khan are attached at Tab 12 [to the Agreed Statement of Facts on Penalty-Chronology]. Dr. Carveth's sight has deteriorated to the point where he cannot read his records. The parties have done their best to prepare a transcription of the records to assist the Committee and this proceeding. The best-efforts transcription is attached at Tab 13 [to the Agreed Statement of Facts on Penalty-Chronology]. These have not been reviewed by Dr. Carveth, and are provided as an aide only. Where the transcript and the handwritten records differ, resort should be had to the handwritten record.
13. The last appointment Dr. Khan attended with Dr. Carveth was September 25, 2015. On November 1, 2015, Dr. Khan sent Dr. Carveth an email, a copy of which is attached at Tab 14 [to the Agreed Statement of Facts on Penalty-Chronology].

14. Dr. Carveth sent a letter to Dr. Chopra dated May 21, 2015, a copy of which is attached at Tab 15 [to the Agreed Statement of Facts on Penalty-Chronology].
15. Dr. Glancy commenced his assessment of Dr. Khan in June 2015.
16. In August 2015, Dr. Khan pled guilty to sexual assault. Upon being found guilty, Dr. Khan was required to donate \$1,000 to a victims of crime fund in Quebec and was granted an absolute discharge on the basis of a joint submission on penalty. The Reasons for Sentence of the trial judge are included in the Reasons for Judgment attached at Tab 2 of the Agreed Statement of Facts on Liability.
17. On sentencing, AB provided an oral victim impact statement in which he described the psychological impact he felt as a result of the assault. The full statement is included at Tab 2 of the Agreed Statement of Facts on Liability.

2016

18. Dr. Khan was referred to Dr. Peter Sheridan, a psychologist, for psychotherapy. Dr. Sheridan's CV is attached at Tab 16 [to the Agreed Statement of Facts on Penalty-Chronology]. The complete records of Dr. Sheridan's treatment of Dr. Khan are attached at Tab 17 [to the Agreed Statement of Facts on Penalty-Chronology]. Tab 17 comprises both Dr. Sheridan's handwritten notes and a transcribed version of those notes prepared by Dr. Sheridan. On July 5, 2016, during the course of his therapy, Dr. Khan sent an email to Dr. Sheridan titled "length of therapy", a copy of which is attached at Tab 18 [to the Agreed Statement of Facts on Penalty-Chronology].

2017

19. Dr. Sheridan sent a letter to Dr. Khan's counsel dated September 15, 2017, for

consideration by the College. A copy of that letter is attached at Tab 19 [to the Agreed Statement of Facts on Penalty-Chronology].

20. Dr. Carveth sent a letter to Dr. Khan's counsel dated September 18, 2017, for consideration by the College. A copy of that letter is attached at Tab 20 [to the Agreed Statement of Facts on Penalty-Chronology].

2018

21. AB provided an email in respect to an updated victim impact statement to the College in March 2018. A copy of that email is attached at Tab 21 [to the Agreed Statement of Facts on Penalty-Chronology].

ORAL EVIDENCE ON PENALTY

In addition to the Agreed Statement of Facts on Penalty-Chronology, the Committee also heard oral evidence in April 2018 from the following witnesses called on behalf of Dr. Khan:

- 1) Dr. Richard Montoro - Dr. Khan's treating psychiatrist;
- 2) Dr. Anil Chopra - The chief of emergency medicine at the University Health Network where Dr. Khan practices;
- 3) Dr. Graham Glancy - a forensic psychiatrist;
- 4) Dr. John Paul Federoff - a forensic psychiatrist;
- 5) Dr. Donald Carveth - Dr. Khan's treating psychotherapist; and
- 6) Dr. Peter Sheridan - Dr. Khan's treating psychologist.

The expert testimony of Drs. Glancy and Federoff, as well as the participant expert testimony of treating specialists Drs. Sheridan, Carveth and Montoro was consistent. Dr. Khan's recidivism risk is considered low. The evidence comes from several sources, including the treating specialists' clinical records, and specific testing along three axes: i) unstructured clinical assessments, ii) actuarial tests, and iii) structured professional judgement. The latter two categories are based on validated and accepted formal tests.

Based on the evidence that it heard, the Committee found as follows:

- a. This was a single offence of the [redacted] type.

Dr. Glancy opined, "The incident involved an apparently sleeping 16-year-old male... to whom he was attracted. This is analogous to [redacted] type situation. It is known that [redacted] type offenses have a low recidivism rate."

- b. The offence is in the remote past – 10 years ago.

There have been no further episodes. Dr. Federoff stated, "Men with scores similar to Dr. Khan on the Static-2002R were observed to sexually re-offend at a rate of 3.6% at 5 years". He also stated that if they do not re-offend in five years, the future risk falls by half. In Dr. Khan's case, [9 years later] Dr. Federoff's view was that Dr. Khan carries the same risk to sexually offend as any man in the general population.

- c. The offence was impulsive.

The assault took place in the context of an intense, confused and repressed sexual identity, when Dr. Khan was a young man. Dr. Carveth's notes indicate, "compartmentalized anger, jealousy, envy + desire separated from conscience...having something not mine." When questioned about what that "something" was, Dr. Carveth answered, "a sex life." In his testimony, Dr. Sheridan, in accord with others, opined that

Dr. Khan did not have a typical sexual development, both because gay men tend to develop more slowly, and because of his family culture.

The Committee considered carefully Dr. Khan's age (24), at the time this event took place. Temporally, it was not a "teenage indiscretion". However, the Committee accepted the expert evidence that Dr. Khan was sexually immature at the time of this assault and this incident is not indicative of how he would behave today.

d. All of the experts testified that Dr. Khan was now comfortable with his sexuality.

Dr. Sheridan indicated that Dr. Khan was in a committed, long term relationship and has a solid social support network. There was careful consideration of the stability of that relationship and the hazard that, should it encounter difficulties or break down, this might lead to a repeat offence. Dr. Sheridan testified, however, that Dr. Khan appears to have a good understanding of possible responses to patients under his care, including physical attraction as well as countertransference reactions.

None of the treating psychiatrists or psychologists predicated Dr. Khan's success at rehabilitation on the stability of this particular relationship. Rather, they testified that his therapy and the skills which ensued would allow him to navigate relationships effectively.

e. Dr. Khan's test results indicated he is at low risk.

Dr. Khan underwent an extensive series of psychological tests, both of a general nature and those designed to explore issues related to sexual deviancy. His test results were in keeping with low risk. He was rated low-moderate rather than low on the Static2002-R test, with a score of three, because he received two points for his young age and one for having a male victim. There was no evidence of paraphilia, sexual dysfunction, gender identity problems, or sexual disorders not adequately classified in the preceding

categories. All physiological measurements were normal. Of note, the expert assessors looked for evidence that Dr. Khan calibrated his answers to better present himself. The experts informed the Committee that, in each examination, specific validated tests were conducted, and in each case, as in the Federoff report: "Dr. Khan did not attempt to present himself in an overly positive light and if anything, tends to exaggerate [his] own and does not minimize his own personal shortcomings."

f. Dr. Khan has demonstrated remorse.

Dr. Khan has expressed remorse from the very outset, and consistently in the ensuing nine years, as demonstrated in his letter to AB in 2009 and in correspondence in 2014. From his letter to AB in 2009:

This is my apology to you. It is not perfect since I do not really know how to put into words how sorry I feel but it is the best that I can do for now. I was hoping to get a chance to do this in person but it seems less and less likely that I will be allowed to at this point, and maybe it is better this way since you will have a chance to read this when you are ready, and on your own terms....I think it would be appropriate if you... were to set the terms of whatever act of contrition you see fit....I pray to God every day to forgive me for this sin. Also for whatever it is worth, I pray you to find peace of mind and strength, and ways to overcome the violence I have inflicted on you.

There was further correspondence from Dr. Khan to AB when AB reported the assault to the police in 2014 (Exhibit 3, tab 4):

I am sorry because I did something that was horribly wrong. I did it knowingly and with disregard for the consequences. I am sorry because the consequences on you, ... and even on me, were disastrous. I am sorry

that I am responsible for creating this nightmare for you from which you have yet to escape and find peace.

He then goes on to say:

If you were to press charges against me I would have no choice but to accept them with no contest. I would probably lose my license to practise medicine and help others, I may even lose my friends and loved ones, and I would certainly lose any reputation I may have in the greater society...I think about what would happen ... if my crime against you became a matter of public record.

And subsequently, August 13, 2014 (Exhibit 3 Tab 5):

I know it is not appropriate for me to ask you mercy considering I did not show you any of these years ago when it counted. I did not spare you the violation, and the shame and disgust you felt after I assaulted you.

The Committee concluded that Dr. Khan's remorse was longstanding, deep and consistent.

g. Dr. Khan continues in active therapy.

Dr. Khan had undergone and continues to participate actively in therapy. This therapy began not later than February 2007, prior to the assault. He sought counselling for a brief period from Dr. Richard Montoro because he was experiencing difficulties with his sexual identity, particularly in his family context. He resumed that counselling, in "crisis" immediately after the event. Having moved to Toronto, he then established a clinical relationship with Dr. Carveth and Dr. Sheridan.

h. Dr. Khan gained a supportive work environment.

Dr. Khan was hired as an emergency physician by UHN in a competitive national process. Since then, he has performed well. He has incurred a small number of minor complaints, which his Departmental Division Director, Dr. Anil Chopra, considered to be in keeping with his role as an emergency physician. Dr. Khan appropriately reported the pending legal action to Dr. Chopra, who reported it to the College. Following a full review within UHN, including psychiatric and forensic assessment, Dr. Khan was permitted to continue in his role, pending resolution of this matter by the College. Dr. Chopra testified that they had “sufficient reassurance at the time”, that Dr. Khan had no restrictions on working independently, and that he was satisfied Dr. Khan could do the job. There was no in-depth analysis of Dr. Khan’s stress arising from the court and College proceedings, but Dr. Chopra knew Dr. Khan was receiving help. Dr. Chopra said his view was shared by others. When asked specifically why Dr. Khan was not terminated, he said he felt such action would be unfair in the midst of a continuing process and reiterated the view that Dr. Khan was safe to practise in “our department”.

AUGUST 20, 2019 JOINT SUBMISSION ON PENALTY

As mentioned above, on August 20, 2019, counsel for the College and counsel for Dr. Khan made a joint submission as to an appropriate penalty and costs order, which consisted of a 12-month suspension, a reprimand and costs in the amount of \$20,550.00.coux

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).

PENALTY PRINCIPLES

In determining whether to accept the jointly proposed penalty as appropriate, the Committee is guided by well-recognized penalty principles , and assesses their relative weight in each instance. These principles are:

- Protection of the public;
- Denunciation of the misconduct;
- Specific and general deterrence;
- Maintenance of the integrity of the medical profession;
- Maintenance of the public's confidence in the College's ability to regulate the profession in the public interest
- Proportionality; and
- Rehabilitation.

The Committee also considered aggravating and mitigating factors.

AGGRAVATING FACTORS

The victim in this case was a vulnerable teenager who was asleep, sharing a room with Dr. Khan who was 8 years older, where and with whom he had the right to feel safe and secure. The age of the victim is an aggravating factor. Dr. Khan's violation of AB's trust and the fact he took advantage of him while he was asleep are also aggravating factors.

The Committee was informed that AB, at the time of the hearing, decided not to make a witness impact statement, not wishing to revisit, again, a painful past. AB's statement from the criminal proceeding, however, was an important consideration for the Committee. AB's impact statement in the Quebec Court proceedings indicates clearly that AB has been hurt, deeply. He believed, as a law student, that he must speak out, as a matter of principle. AB said:

I think more than anything, I felt, I felt the need to come to the police because there's so many people who are sexually assaulted and raped uh (inaudible) across the world and, of course, it's the silent crying. Um whether it's the absolute fallacy that, for example, rape can occur within marriage, or assault can occur within couples, or it can occur between, between two men, um it's something that we just can't confront as society. Um we just can't talk about it. And I really felt quite a stifling sense of silence not being able to say anything for all these years. And knowing that I was, perhaps, letting other victims down and that I was helping perpetuate the sense of silence that befalls a- all of us who find ourselves in this position, I hope my action bringing this forward helps in some measure to, you know, just to be count in some sense. I'm sorry.

And yet, taking all that into account, the statement concludes:

"[Ils ne] veulent pas que [Dr. Khan] perde son emploi ou subisse un gros prejudice" (Ex 3 Tab 9 pg 56), translated, "[They do] not want it to affect his job or cause him gross prejudice."

(Reference: Transcript of Plea and Sentencing of Dr. Khan, Agreed Statement of Facts and Admission, Exhibit 2, Tab 2, pp. 18-21.)

The impact of the assault of AB is an aggravating factor.

MITIGATING FACTORS

By the time the criminal proceedings were underway, Dr. Khan had completed his training in Emergency Medicine and had sought and gained employment in the Department of Emergency Medicine at UHN. He reported developments in the criminal

case to his superiors at UHN. UHN informed the College and undertook its own assessment of Dr. Khan, concluding that pending any decision by the College, Dr. Khan posed no significant risk and could continue in his Emergency Medicine role. The fact that Dr. Khan admitted his wrongdoing to his employer, and has maintained UHN's support is a mitigating factor.

Throughout this period, Dr. Khan continued to attend for psychological and psychiatric therapy of various forms, a practice he had initiated even before the assault, as he struggled with expression of his personal sexual identity. As will be discussed further, Dr. Khan has engaged in very serious and prolonged efforts at remediation. He has displayed insight and remorse, both of which are mitigating factors.

There is another delicate issue to consider. The assault took place when Dr. Khan was a young gay man struggling to express his identity in particularly trying circumstances. It is important to be clear that this is mentioned not to excuse the offence, only to contextualize it. Dr. Khan has been forthright and unwavering in that view, supported by ample expert evidence: nobody "gets off the hook" for a criminal action by virtue of their colour, ethnicity or sexual orientation. However, the Committee gives some recognition to the fact that prejudicial social pressures which, in recent years, our society has made strides in relieving, did play a role here.

COMMITTEE'S CONCLUSIONS

After detailed review of submissions and evidence, the Committee has come to the conclusion that the joint submission on penalty should not be accepted, based on the test in *R. v. Anthony Cook*. The Committee finds that the proposed penalty is so disproportionate to the conduct at issue that it is contrary to the public interest and brings the administration of justice into disrepute.

The Committee holds this view based on two separate but related findings:

1. The penalty is excessive and disproportionate based on precedent cases.
2. It serves none of the penalty principles routinely accepted by the Discipline Committee.

The Committee's analysis follows.

1. The penalty is excessive and disproportionate, based on prior decisions of the Committee

On the joint submission, counsel for the College submitted that the case that was factually the closest to the present case was that of *Ontario (College of Physicians and Surgeons of Ontario) v. Marshall*, 2016 ONCPSD 31 (CanLII) ("*Marshall*"). Dr. Marshall was a pediatrician who was convicted of sexually assaulting a 14 year-old boy. The Committee in that case ordered that Dr. Marshall's certificate of registration be revoked. The College submitted that there were several distinguishing factors in that case. In *Marshall*, Dr. Glancy had recommended several treatment options and Dr. Marshall had not done any of them. The Committee in *Marshall* found this to represent a significant lack of insight. By contrast, Dr. Khan has made a very significant and genuine investment in his rehabilitation, with positive results. Dr. Marshall also used his status as a physician to engage in grooming behaviour with the child; a factor which was not present in Dr. Khan's case. Dr. Marshall's misconduct also spanned approximately four years, whereas Dr. Khan engaged in a single incident. There was no admission by Dr. Marshall (he entered a plea of no contest), whereas Dr. Khan has admitted the assault from the outset. Dr. Marshall also had a subsequent sexual assault conviction in another case following the conduct for which he was being disciplined and that weighed heavily in the Committee's view with respect to his prospects for rehabilitation. By contrast there have been no subsequent allegations of improper conduct of a sexual nature (or at all) with respect to Dr. Khan. *Marshall* is very different from the circumstances surrounding Dr. Khan in every respect, save the age of the victim. The

Committee does not find it to be of any assistance in determining an appropriate penalty in this case.

The Committee considered the range of cases that were presented to the Committee when the matter of penalty was contested. There is no prior decision in which an assault of this nature led to a penalty as onerous as the penalty now proposed by way of joint submission. In all of the precedent cases submitted, there was a pattern of repeated misconduct, multiple offenses, a frequent lack of acceptance of responsibility and / or absence of remorse. None of these factors is present in this case.

In *Ontario (College of Physicians and Surgeons of Ontario) v. Kitakufe*, 2010 ONCPSD 15 (*"Kitakufe"*), a physician had in 1986 been found guilty of racketeering and illegal drug distribution in another country. Upon return to Ontario, and as a result of that conviction and his subsequent pleas of professional misconduct, his registration was suspended for six months. Other conditions and terms were also imposed. In 2005, Dr. Kitakufe re-offended, and was convicted of fraud through the use of fraudulent prescriptions for oxycodone, trafficking in a controlled substance, and fraud for submitting false claims for medical services.

Despite testimony from character witnesses, Dr. Kitakufe's expressions of remorse and acceptance of full responsibility for his acts, a commitment to professional psychotherapy, his engagement in pastoral counselling, and expert testimony that his risk of re-offending was low to moderate, the Committee ordered revocation. In the weighing of principles, in *Kitakufe* the reputation of the profession and its ability to self-regulate took precedence. It was a matter of personal criminal misconduct, serious and repeated, that bore most heavily on the decision. In Dr. Khan's case, there was a single event which resulted in a criminal proceeding leading to an absolute discharge. There has been no repeat offense in the ensuing 10 years.

The College cited *Warnes v. College of Physicians and Surgeons of Ontario*, 1992 CarswellOnt 790, [1992] O.J. No 3748, 37 A.C.W.S. (3rd)1283, 62 O.A.C 258 (Div. Ct.) to emphasize the importance attached to the reputation of the profession and the ability of the College to govern in the public interest. There is a significant difference between the facts in that case and the present circumstance. Dr. Warnes was not only a senior physician, but he was also a training analyst, in other words a role model for aspiring specialists. In testimony quoted in the decision, the added weight of this role was emphasized. The affair with the patient was ongoing and, it appears, caused her difficulty. Adding to the gravity of the professional misconduct, Dr. Warnes billed OHIP for some of those visits and was disingenuous at best in his explanation. He did not seek professional help until after legal proceedings had been started, and under pressure from his wife. In Dr. Khan's case, he was a trainee at the time of the incident in question. It was a single episode for which he sought help, forgiveness and reconciliation. It was not with a patient. The professional help he sought and received may have had complex motivation, and may have been interrupted over the years. However, the unrefuted consensus of expert opinion is that he has had effective therapy and is at low risk to reoffend.

The Committee appreciates that the "least restrictive" penalty principle is not applicable in discipline proceedings (*College of Physicians and Surgeons of Ontario v. McIntyre*, 2017 ONSC 116 ["*McIntyre*"]). Our role is to protect the public. In the regulatory setting it may well be appropriate to impose a sanction more severe than would be meted out in a criminal proceeding. Thus, in *McIntyre*, revocation was upheld on appeal, though the violation was with a single vulnerable patient over a considerable time, and the dispute revolved around when the professional relationship had ended.

Similarly, in *Ontario (College of Physicians and Surgeons of Ontario) v. Fung*, 2016 ONCPSD 51 ("*Fung*"), revocation was the penalty for a single offense by a senior physician touching the thigh of a minor during an examination many years previously, leading to a criminal conviction in another jurisdiction. The facts in *Fung* are, in some

respects, similar to the current case. However, the current case does not involve a physician patient relationship, the context was decidedly different, and while not determinative, the [redacted] stated desire that Dr. Khan not have his career prejudiced and the absolute discharge which ensued factored in consideration.

In the present circumstance, the Committee is satisfied that public safety is not at issue. In addition, our view is that the overall effect of the processes and penalties Dr. Khan has already received serve to protect both the public and the reputation of the profession, and to deter Dr. Khan from future misconduct,

When the penalty was contested, counsel for Dr. Khan brought forward nine prior decisions relating to suspension and two leading to revocation in support of his submission for a twelve-month suspension (which is the penalty proposed by way of joint submission). Each case relied upon by Dr. Khan dealt with repeated offenses, involving multiple persons, “grooming” of victims, and an offender exhibiting denial or lack of remorse. The facts in Dr. Khan’s case are quite different.

The Committee recognises the shift in public perception and tolerance for sexual transgressions that has taken place in recent years, and that it is continuing to evolve. Penalties assessed today therefore might be more stringent than would have been the case three or five years ago. As such, the Committee considered in particular the following three cases:

In *Ontario (College of Physicians and Surgeons of Ontario) v. Yaghini*, 2017 ONCPSD 29, Dr. Reza Yaghini was facing possible revocation of his license for two serious sexually inappropriate advances toward a teenage female during a medical appointment. At the first appointment, he made suggestive sexual comments. At the second, he attempted to kiss her on the lips saying she reminded him of a former girlfriend, and that excited him. When she rebuffed him, he immediately apologized. At the hearing, the Committee heard evidence from experts that Dr. Yaghini exhibited both recognition and remorse

and was at low risk to re-offend. It also considered the young woman's impact statement. Egregious as it was, the doctor had no prior discipline history. The Committee concluded that a nine-month suspension, in addition to a Boundaries Course and counselling was the appropriate penalty. Additionally, Dr. Yaghini was required to post security or the equivalent to pay for the patient support program under section 85.7 of the *Code*. The Committee finds the facts in the Yaghini case to be more serious. Dr. Yaghini's conduct was repeated and in the context of a doctor - patient relationship.

In 2015, Dr. Bruce Gordon Minnes' license was revoked. Over six years, he had engaged in repeated boundary violations with female nursing staff at the hospital where he practised as a paediatrician. In addition, he engaged in overt and intrusive sexual behaviour with a 17 year old female counsellor at a summer camp where he was the doctor, which he denied and attempted to portray as owing to the sexually aggressive behaviour of an adolescent. The Committee was particularly troubled by the latter episode which it considered worthy of revocation in and of itself. Coupled with his prior history at the hospital, which may not have led to revocation in the view of the Committee, it was viewed as part of a continuum, if not progression, of a serious behaviour problem. Moreover, Dr. Minnes was found not to have accepted responsibility for his actions, and had not undertaken a risk assessment by a qualified expert. There was no evidence of a psychiatric assessment that made mention of the camp incident, nor of the possibility of deviant sexuality, nor any evidence pertaining to progress from group sessions he was said to have participated in. This is in contrast to the current case, which was a single incident followed by recognition, remorse, therapy and assessment, as well a review by both legal and institutional administrative processes.

In conclusion, the Committee finds that the cases provided by the parties, which are not binding, are not similar to the conduct at issue in this case and the Committee is not persuaded that the proposal of a twelve-month suspension falls within a reasonable range of penalties.

There was one case, however, which the Committee did find of assistance, although not on the basis for which it was submitted. The College referred the Committee to the decision in *Boulton v Law Society* [1994], 1 W.L.R. 512 at pp. 6-7, and at pp. 1, 7 (*"Boulton"*), asserting that a professional body, such as the College, must take into account not simply protection of the public but public confidence in the integrity of the profession when fashioning a proper disposition. However, a full reading of *Boulton*, in fact, supports the Committee's view that one must take into account the specific facts of a case and fashion a penalty that is truly reflective of the conduct at issue and the parties involved.

In *Boulton*, a young solicitor was found to have committed an act such that "while not deliberately dishonest, was naïve and foolish", and that although such conduct would normally be regarded very seriously as to merit being struck off the Roll (the equivalent of revocation in the present instance), in the circumstance the penalty was suspension from practise for two years. Two facts of this case are particularly salient. First, the single offense was uncovered incidentally some time later and made right by the defendant. Second, the suspension was deferred for some years while an appeal was made. A lower court quashed the penalty of suspension and imposed a fine in substitution. The Law Society appealed.

In his judgement, Sir Thomas Bingham, in citing the basis of a severe penalty, wrote:

The second purpose is most fundamental of all: to maintain the reputation of the solicitor's profession as one in which every member, of whatever standing, may be trusted to the end of the earth. To maintain this reputation and sustain public confidence in the profession it is often necessary that those guilty of serious lapses are not only expelled, but denied re-admission.

He then went on to say:

The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is part of the price.

This is the point on which the College relies. However, in this case, the Court dismissed the appeal, writing:

In the ordinary way I would without hesitation allow this appeal and restore the order of the disciplinary tribunal. In the present circumstances, however, a real question arises as to what should be done now, having due regard to the time which has elapsed in the course of these proceedings.

The Court concludes:

But (2) dismissing the appeal, that having regard to the lapse of time and to the stay of the tribunal's order pending determination of the appeal it would be oppressive to reinstate the order for suspension.

Dr. Khan's case has been very prolonged. Two substantial contested issues were raised after the initial hearing of the allegations. The College sought retrospective application of amendments to the legislation that expand the scope of mandatory revocation, which led to a further hearing on this issue. The College position seeking mandatory revocation was withdrawn subsequent to the release of the decision of the Divisional Court in *Ontario (College of Physicians and Surgeons of Ontario) v. Kunynetz*, 2019 ONSC 4300, which held that the legislation should not be applied retrospectively.

A further delay resulted from the Committee's question to the parties regarding the absolute discharge and the application of the *Criminal Records Act*, which also led to a further scheduled contested hearing. This was withdrawn immediately prior to the

hearing of the current joint submission. These issues resulted in a substantial delay of more than a year to the hearing process at no fault to Dr. Khan.

The Committee finds that in light of the passage of time, the arc of this case, and the significant remedial efforts made by Dr. Khan, it would be oppressive to impose the proposed penalty, namely a twelve-month suspension.

2. The Proposed Penalty is Excessive given the Penalty Principles Recognized by the Committee

The joint submission is excessive and does not satisfy the penalty principles typically considered by this Committee.

1. Does the proposed penalty protect the public? The Committee heard ample uncontested evidence that Dr. Khan poses no risk greater than other practising physicians. This view is buttressed by the expert evidence, and a ten-year period of observation. To suggest otherwise, among other concerns, would draw into question the value of the therapy, counselling and other interventions used to educate, advance and rehabilitate our professionals. The Committee does not think a suspension is required to protect the public.

2. Does the proposed penalty provide specific and general deterrence? Dr. Khan is sufficiently deterred by his remorse and efforts which followed, his therapy and the burden of this prolonged legal process. The facts in this case are unique. The events took place before Dr. Khan was even a member of the College. There is no reason to believe that the penalty in this case would deter aspiring physicians from sexual misconduct before they enter training or even become eligible for licensure.

3. Does the proposed penalty maintain the honour of the profession? Someone makes a significant, isolated mistake, recognizes what has happened,

immediately and persistently expresses remorse, seeks help and sustains it for years, and for more than a decade performs to high professional standards. What more can the Committee expect? The Committee acknowledged that Dr. Khan did all the right things. Taken as a whole, the Committee thinks it is something to be acknowledged more than punished. Draconian measures at the edge of legal process may have the opposite effect on the honour of our profession. The measure is not the severity of the penalty, but the integrity and fairness of the regulatory processes. The fact that the College has until recently sought revocation of Dr. Khan's certificate of registration, in the Committee's view, had the opposite effect and only reflects negatively on the honour of the profession.

4. Does the proposed penalty foster public confidence in the ability of the College to govern in the public interest? By all accounts, Dr. Khan is a skilled and valued professional. The facts in this case reflect a single transgression, years ago, before Dr. Khan was even a member of the profession. The Discipline Committee must make tough decisions based on the transparent application of principles. It must, however, base its decision on the specific facts of the case and should not allow broad policy principles to trump fairness and the needs of the public. To do so would effectively be removing a competent member of the profession for twelve months without any reasonable basis.

5. Rehabilitation of the Member - By all accounts, Dr. Khan is already rehabilitated. There is nothing in the proposed penalty that would further his rehabilitation. A twelve-month suspension would, if anything, result in a deficit in his experience and practical education.

For all of these reasons, the Committee finds that the proposed penalty is so disproportionate to the circumstances of the case as to bring the administration of justice into disrepute and also finds it contrary to the public interest. The Committee will not impose any penalty on the facts of this case.

COSTS

Dr. Khan should not bear any costs of the proceedings since the joint submissions is effectively the same as his position at first instance.

ORDER

Under the particular circumstances in this case, the Committee orders and directs on the matter of penalty and costs that there shall be no penalty imposed on Dr. Khan in this matter, and no order that he pay costs to the College.

DISSENTING REASONS OF DR. CLAPPERTON AND MR. PIELSTICKER

ACCEPTANCE OF JOINT SUBMISSION

At the hearing of the joint submission on penalty, the Committee expressed some reservation about accepting the proposed penalty, on the basis that the proposed suspension of twelve months was in fact excessive. The Committee found the facts of this case to be unique and the Committee was quite taken with Dr. Khan's rehabilitation efforts. The Committee noted that all of the assessors thought there was virtually no risk for re-offence and Dr. Khan had expressed empathy for his victim and expressed repeated apologies.

The dissenting members agree with the Committee's summary and findings of the Oral Evidence on Penalty and the Aggravating and Mitigating Factors as written in the Committee's reasons for decision. We do not, however, agree with the Committee's Conclusions with respect to the proposed penalty. The dissenting members accepted that in order to depart from a joint submission there is a very high bar to meet. As the Supreme Court of Canada stated in *Anthony-Cook* at para 34:

... a joint submission should not be rejected lightly... Rejection denotes a submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down. This is an undeniably high threshold — and for good reason...

Taking into account this guidance from the Supreme Court of Canada, the dissenting members would have accepted the joint submission. We do not find that the proposed penalty brings the administration of justice into disrepute or is otherwise contrary to the public interest.

APPLICATION OF PENALTY PRINCIPLES

In our view, Dr. Khan's unresolved guilt and inability to achieve reconciliation with his some of those close to him over so many years, and the fact that he has been subject to criminal and regulatory proceedings over the last five years should be significant specific deterrents to Dr. Khan. A twelve-month suspension and reprimand would also serve to deter Dr. Khan and the profession in general from engaging in similar conduct. We are also confident that the penalty proposed, in the unique circumstances of this case, taking into account the significant remediation undertaken by Dr. Khan with various health care providers, should maintain public confidence in the integrity of the profession and the College's ability to regulate the profession in the public interest. A twelve-month suspension, even in the face of significant insight and rehabilitation, should give the public confidence that the profession will not tolerate sexual misconduct by any member of the profession.

CONCLUSION

The dissenting members would have accepted the jointly-proposed penalty as appropriate.

COSTS

In the matter of costs, the dissenting members considered that this was an appropriate case in which to require Dr. Khan to pay hearing costs and accepted the joint submission of the parties in respect of the amount of costs sought by the College, being \$20,550.00. College counsel explained that as part of the resolution, the parties had agreed that Dr. Khan pay the equivalent of two days of costs at the tariff rate. It was submitted that this reflected the fact that both liability and penalty proceeded by way of joint submission. Prior to the resolution on penalty, there were other days of evidence, but the College accepted that while some of the evidence might still be useful to the

Committee in crafting its penalty order and reasons (which it was), that evidence would not likely have been necessary if the parties had had a joint submission on penalty at the time the plea was originally entered. The dissenting members agree and would have ordered that Dr. Khan pay \$20,550.00 in costs to the College.

ORDER (Dissent)

The dissenting members would have ordered and directed on the matter of penalty and costs that:

1. The Registrar suspend Dr. Khan's certificate of registration for 12 months, with a start date to be determined taking into account the COVID-19 emergency in the province of Ontario. .
2. Dr. Khan appear before the panel to be reprimanded.
3. Dr. Khan pay costs to the College in the amount of \$20,550.00 within 60 days from the date of this Order.