

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

DR. P. CHART (CHAIR)) **Heard: May 8, 2019**
MR. J. LANGS)
DR. J. RAPIN)
MS G. SPARROW)

B E T W E E N:

COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO

- and -

DR. PAUL KING SHUEN

**ORDER AND REASONS
(under Rule 12.03 of the Rules of Procedure of the Discipline Committee)**

On March 12, 2019, a reporter with Toronto Life Magazine, Mr. Michael Lista, brought a motion in writing under Rule 12.03 of the Rules of Procedure of the Discipline Committee applying for access to the following exhibits filed in this matter:

- Exhibit 2: Agreed Statement of Facts
- Exhibit 3: Patient Charts (Volumes 1-3)
- Exhibit 4: Dr. Barrett's Acknowledgement of Expert's Duty
- Exhibit 5: Dr. Barrett's Curriculum Vitae
- Exhibit 6: Physician Delivery Statistics
- Exhibit 7: Transcript of Dr. Shuen's Interview with College Investigators
- Exhibit 8: Correspondence from CPSO to Dr. Barrett
- Exhibit 9: Appointment of Investigators
- Exhibit 10: Excerpt of Schedule 2 of the *RHPA*
- Exhibit 11: FAQs on preparing a College report
- Exhibit 12: Guidelines for Assessor's Reports
- Exhibit 13: Dr. Shuen's Practice Questionnaire

- Exhibits 14 and 15: Prior ICRC Decisions
- Exhibit 16: Dr. Shuen's Curriculum Vitae
- Exhibit 17: Dr. Luk's Curriculum Vitae

On March 21, 2018, the College delivered its response to this motion. Dr. Shuen delivered a response on March 25, 2019. On April 12, 2019, Mr. Lista and Toronto Life Magazine delivered written submissions in support of the motion. Advice from Independent Legal Counsel was filed in writing on April 20, 2019, and comments on that advice were delivered subsequently by the moving party and by Dr. Shuen.

Background

The Discipline Committee (the "Committee") of the College of Physicians and Surgeons of Ontario heard the *Shuen* matter at Toronto on April 9 to April 12, 2018. At the conclusion of the hearing the Committee stated its finding that Dr. Shuen committed an act of professional misconduct and is incompetent. The Committee reserved its decision on penalty and costs.

The Committee released its decision on penalty on June 25th, 2018, and ordered that Dr. Shuen's certificate of registration be revoked immediately and that Dr. Shuen appear before the Committee to be reprimanded. The Committee further ordered that Dr. Shuen pay costs to the College in the amount of \$40,720.00.

At the commencement of the hearing the Committee made a non-publication order that applies to all exhibits. That order prohibits the publication of the names of patients and information that may identify them and the publication of the names of physicians listed in Exhibit 6, other than Dr. Shuen.

Position of the Parties

Both the College and Dr. Shuen agree that access should be granted to some of the exhibits, subject to the non-publication order made in this matter.

The College does not oppose access to Exhibits 1, 2, 4, 5, 14, 15, 16, and 17, subject to redaction of all patient identifying information. The College takes no position on Exhibit 13. The College opposes release of Exhibit 3 (Volumes 1-3) and Exhibits 6-12.

Dr. Shuen does not oppose the release of the following exhibits in their entirety: 1, 4, 5, 8, 9, 10, 11, 12, 13, 16, and 17. Dr. Shuen agrees to disclosure of the following exhibits with redactions in accordance with the non-publication order: Exhibits 2 and 6. Dr. Shuen opposes release of Exhibits 3, 7, 14, and 15.

Legal Framework and Principles

Rule 12.03 of the Rules of Procedure of the Discipline Committee states:

Access to Hearing Record by the Public

12.03 If a member of the public wishes to have access to all or part of the record of the Discipline Committee other than the notice of hearing or the transcript of the evidence, he or she shall bring a motion before the Discipline Committee upon notice to the parties, and such motion shall be made, considered and decided in writing by the Chair of the Discipline Committee or by a panel of the Discipline Committee appointed by the Chair, without an oral hearing.

The issue is one of public access to the exhibits; there is no separate right of access for media applicants.

The critical principle underlying Rule 12.03 is the “open court principle”. Discipline Committee hearings are open to the public and, with few exceptions, members of the public including the media have a right to attend and observe a hearing.

Over time, the right of access has expanded to include a right to access documents filed as exhibits. As stated in *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC4, the ability of the public to inspect trial exhibits has been long held as a “corollary to the open court principle”. The

panel is aware of the importance of this principle to the justice system as it involves transparency and the right of the public to observe the decision-making process.

The Committee takes note of the case of the *Aboriginal People Television Network v. Alberta (AG)*, 2018 ABCA 133, where portions or entirety of exhibits not used or considered at trial, yet entered in whole as exhibits, were held by the Alberta Court of Appeal to be outside the purview of the open court principle.

A videotape marked for identification in that case as an exhibit at trial was not seen or considered by the Judge or Jury in deciding any factual, legal, substantive or procedural issue, and was deemed not to fall within the ambit of the open court principle.

In *Canadian Broadcasting Corporation v. R*, 2019 ONCA 726, the Ontario Court of Appeal held that absent some countervailing consideration sufficient to satisfy the *Dagenais/Menduck* test, the open court principle extends “to anything that has been made part of the record”.

With respect to confidential medical records of patients, the private nature of such records is self-evident given they contain sensitive and intimate information regarding aspects of a patient’s physical and mental health. Confidential medical records are often obtained by the College as regulator and are filed as exhibits without the knowledge or consent of the patient. It has been the practice of the Discipline Committee to protect the privacy and confidentiality of such records filed as exhibits. The Committee has not granted access to confidential medical records in the absence of patient consent, which is rarely sought.

DECISION AND REASONS

In reaching a decision the Committee carefully considered the submissions of the applicant, the responses of the parties, the advice of independent legal counsel, and the case law referenced. The Committee accepts that public access is the rule. The onus is on the party seeking to restrict public access to demonstrate that societal values trump the presumption of openness.

The duty of the panel is to make a determination based on the balancing of rights within the legal framework set out above as to whether the exhibits at issue should be released to the motion applicants and, if so, what limits or redactions should be imposed.

The Committee separated the exhibits into three categories to simplify analysis.

- I. Exhibits where the parties do not oppose access;
- II. Patient medical records; and
- III. Exhibits where one or both of the parties oppose disclosure in whole or in part.

I. Exhibits where neither of the parties oppose the granting of access (Exhibits 1, 4, 5, 13, 16, 17)

The above exhibits contain no specific patient information which would attract the conditions stipulated in the non-publication order. The Committee orders that the above exhibits shall be disclosed to the applicants in their entirety.

II. Patient medical records (Exhibit 3, Volumes 1-3)

Patient medical records are frequently filed as exhibits at disciplinary hearings. Recognizing the highly personal and intimate information contained in them, it has long been the practice of hearing panels of the Discipline Committee not to allow such charts to be accessed by the public. The Committee finds no justification to depart from the usual practice. The Committee orders that the records filed as Exhibit 3 shall not be disclosed.

III. Exhibits where one or both parties oppose disclosure

(a) Agreed Statement of Facts (including attachments) – Exhibit 2

Attached to Exhibit 2, the Agreed Statement of Facts, are a number of documents including, for instance, meeting notes and interviews etc., that contain the names of nurses, physicians and other hospital staff. There are multiple references to patients including initials, telephone numbers, delivery dates and medical record numbers. All references to patients fall under the existing non-publication order.

The College does not oppose release of Exhibit 2 subject to redactions of all patient identifying information.

Dr. Shuen requests that Exhibit 2 be released, subject to the redaction of the names of hospital staff and nurses, not specifically stated in the Agreed Statement of Facts or Decision, as well as patient names and identifying information.

The principles underlying s. 45 of the Code and the publication of evidence recognizes that it is the public interest to protect the confidential and private information of innocent parties, including the disclosure of personal health or other information of a private nature of those involved.

The existing non-publication order does not extend to the names of nurses or others (hospital staff including physicians). The names included in Exhibit 2 relating to professional and administrative staff are not generally covered by privacy and confidentiality concerns. Furthermore the information in the attachments is an inherent part of the narrative and context of the misconduct.

Under s 45(2)(b) of the Code, it is stated that to make a non-publication order a panel must be satisfied that the harm created by disclosure would outweigh the openness principle. The Committee does not agree with the position taken by Dr. Shuen regarding the names of hospital staff. In the Committee's view, the public is entitled to be able to see in detail the manner in which complaints come to attention of the College, and how they are handled by hospital administrators and health care professionals. There is in the Committee's view no harm created by including the names of individuals performing their expected role in the ordinary course of business. Mere embarrassment does not trump the open court principle.

The Committee orders that Exhibit 2 shall be disclosed to the applicants, subject to redactions in accordance with the non-publication order.

(b) Delivery statistics by physician – Exhibit 6

This exhibit is a chart which demonstrates delivery patterns by individual physician according to day of the week.

The College opposes disclosure of this exhibit to the public based on their position that this document was relied upon by the College's expert in forming his opinion and not for the truth of its contents. Dr. Shuen requests that physician names be redacted.

The panel does not agree with the position taken by the College. The Committee is not aware that the open court principle applies only to exhibits marked for the truth of their contents. While not dated or tested for accuracy, the chart purports to demonstrate the prevailing pattern of deliveries at the hospital and is relevant to the understanding of the context of the misconduct.

The non-publication order at the commencement of the hearing prohibits the publication of the names of physicians other than Dr. Shuen. The Committee finds no reason to vary the limited restriction imposed by the original non-publication order.

The Committee orders that Exhibit 6 shall be disclosed to the applicants subject to the non-publication order, which includes redaction of physicians' names, other than Dr. Shuen, in addition to patient information.

(c) Interview of Dr. Shuen, April 3, 2017 – Exhibit 7

The College opposes release of this document based on its position that it was relied on by the College's expert in forming his opinion and not for the truth of its content.

Dr. Shuen takes the position that release of the interview could result in wide publication and cause a serious risk to Dr. Shuen's rights and protections of confidentiality. Dr. Shuen maintains the interview was compelled and attracts protections afforded under the *Public Inquiries Act*.

The Committee understands that the filing of the pre-hearing interview as an exhibit is not standard practice; however, in this instance it was filed with the Committee and admitted as an exhibit.

The Committee is not aware of any case to support that the open court principle applies only to exhibits marked for the truth of their contents. The Committee does not agree with the College that their argument provides a justifiable reason to deny release of Exhibit 7 to the public.

Protections afforded a witness in a compelled interview, as noted by Dr. Shuen, address self-incrimination and liability in another proceeding.

The panel agrees with the advice of its independent legal counsel that such protections do not raise any presumption of confidentiality to the extent that the open court principle should be overridden in the balancing process.

The panel orders Exhibit 7 to be disclosed to the applicants subject to redaction of all patient identifying information in accordance with the non-publication order.

(d) Correspondence from CPSO to Dr. Barrett; Appointment of Investigators; Excerpt of Schedule 2 of the RHPA; FAQ on Preparing a College Report; and Guidelines for Assessor's Reports (Exhibits 8-12)

The College opposes disclosure of exhibits 8-12 based on the position that these exhibits were not filed for the truth of their contents but were used by the College expert to form his opinion.

Dr. Shuen does not oppose release of Exhibits 8-12.

The issue for the Committee is addressed in our reasons regarding the release of Exhibit 6. The fact that an exhibit may be filed other than for the truth of its content does not override the open court principle.

The Committee orders that Exhibits 8-12 be disclosed to the applicants, subject to redaction of all patient identifying information in accordance with the non-publication order, where applicable.

(e) Prior ICRC Decisions (Exhibits 14 and 15)

Both Exhibit 14 and 15 are reports of Committees of the CPSO and relate to prior complaints made against Dr. Shuen. The College does not oppose the release of these documents, subject to redaction of patient identifying information in accordance with the non-publication order. Dr. Shuen opposes release of these exhibits based on the fact they are not publically available documents and that they are protected under s. 36 (3) of the RHPA.

Section 36(3) states:

No record of a proceeding under this Act, a health profession Act or the Drug and Pharmacies Regulation Act, no report, document or thing prepared for or statement given at such a proceeding and no order or decision made in such a proceeding is admissible in a civil proceeding other than a proceeding under this Act, a health professions Act or the Drug and Pharmacies Regulation Act, or a proceeding relating to an order under section 11.1 or 11.2 of the Ontario Drug Benefit Act 1991, c. 18, s. 36(3); 1996, c. Schedule. G, s. 27(2).

The Committee is not being asked to admit these exhibits in another proceeding. As exhibits marked in the *Shuen* hearing, the Committee is not aware of any legal impediment to the granting of access subject to the non-publication order. These documents are relevant in understanding the penalty ultimately proposed and determined.

The Committee orders that Exhibit 14 and Exhibit 15 be disclosed to the applicants subject to the non-publication order and redaction of names and identifying information including the initials of patients.

Additional Procedural Considerations

The applicants have requested that photocopies of the exhibits be made available to them. The information is intended for media coverage. In the view of the Committee, accuracy in media reporting is an important consideration. There is no reason to unduly restrict access.

The Committee orders one copy of the exhibits to which access is granted, with the appropriate redactions, be made available to the applicants subject to the limitation that no further copies shall be made (electronic or otherwise) of these exhibits, without further approval of the Discipline Committee.

The Committee directs the hearing office to redact the exhibits to be disclosed in compliance with the existing non publication order.

ORDER

The Committee orders Exhibits 1, 4, 5, 13, 16, and 17 disclosed to the applicants in their entirety.

The Committee orders that Exhibit 2 be disclosed to the applicants, with redactions made in accordance with the non- publication order.

The Committee orders that the records filed as Exhibit 3 not be disclosed.

The Committee orders Exhibit 6 disclosed to the applicants, subject to redactions in accordance with the non-publication order, which includes removal of all physicians' names other than Dr. Shuen in addition to patient information.

The panel orders Exhibit 7 disclosed to the applicants, subject to the non-publication order and redaction of all patient identifying information.

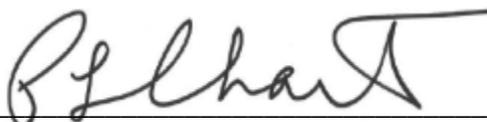
The Committee orders Exhibits 8-12 disclosed to the applicants, subject to redaction of all patient identifying information in accordance with the non-publication order, where applicable.

The Committee orders Exhibit 14 and Exhibit 15 disclosed to the applicants, subject to the non-publication order, and redaction of names and identifying information of patients, including the initials of patients.

The Committee orders that one copy of the exhibits, to which access is granted, with the appropriate redactions, be made available to each of the applicants, subject to the limitation that

no further copies of these exhibits shall be made (electronic or otherwise), without further approval of the Discipline Committee.

Order and Reasons Date: May 17, 2019

A handwritten signature in black ink, appearing to read "P. Chart", written in a cursive style. The signature is positioned above a horizontal line.

DR P. CHART (CHAIR)