

## NOTICE OF PUBLICATION BAN

In the College of Physicians and Surgeons of Ontario and Dr. Wagdy Abdalla Botros, this is notice that the Discipline Committee ordered that no person shall publish or broadcast the names and any identifying information that could disclose the identity of the patients of Dr. Botros who are referred to orally or in the exhibits filed at the hearing under subsection 45(3) of the Health Professions Procedural Code (the "Code"), which is Schedule 2 to the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18, as amended.

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

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

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

Indexed as: **Ontario (College of Physicians and Surgeons of Ontario) v. Botros,  
2015 ONCPSD 16**

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

**IN THE MATTER OF** a Hearing directed  
by the Inquiries, Complaints and Reports Committee of  
the College of Physicians and Surgeons of Ontario  
pursuant to Section 26(1) of the **Health Professions Procedural Code**  
being Schedule 2 of the *Regulated Health Professions Act, 1991*,  
S.O. 1991, c. 18, as amended.

**B E T W E E N:**

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

**- and -**

**DR. WAGDY ABDALLA BOTROS**

**PANEL MEMBERS:**

**DR. P. CHART (CHAIR)  
P. GIROUX  
DR. E. STANTON  
J. LANGS  
DR. D. PITT**

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<b>Hearing Dates:</b>	October 6 to 7, 2014
<b>Decision Date on Finding:</b>	April 21, 2015
<b>Release of Written Reasons on Finding:</b>	April 21, 2015
<b>Penalty Hearing Date:</b>	August 20, 2015
<b>Penalty Decision Date:</b>	February 22, 2016
<b>Release of Written Reasons on Penalty:</b>	February 22, 2016

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## **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 October 6 to 7, 2014. At the conclusion of the hearing, the Committee reserved its finding.

### **ALLEGATION**

The Notice of Hearing alleged that Dr. Botros 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 conduct or an act or omission relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.

### **RESPONSE TO ALLEGATION**

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

### **OVERVIEW OF THE ISSUES**

The allegation of disgraceful, dishonourable or unprofessional conduct in this case arises from conduct by Dr. Botros in relation to allegedly failing to comply with an Order of the Inquires, Complaints and Reports Committee (ICRC).

The ICRC, in a decision dated March 16, 2011, made an order that “Dr. Botros shall complete the Communications Skills course or if this course is not available, an alternative course that is acceptable to the College, within six months.” Dr. Botros requested that the Health Professions Appeal and Review Board (HPARB) review the ICRC decision. By a decision dated April 20, 2012, HPARB confirmed the decision of the ICRC. In providing its decision to Dr. Botros, HPARB informed him of his right to request a judicial review of the HPARB decision. Dr. Botros chose not to request a judicial review. As a result, the ICRC order remained in effect.

As of May 15, 2013, Dr. Botros had not attended a Communications Skills course and the ICRC referred to the Discipline Committee the allegation that by failing to comply with the Order of the ICRC, Dr. Botros had committed an act of professional misconduct.

This case raises two primary issues as follows:

- (i) Did Dr. Botros fail to comply with an order of the ICRC by not attending a Communication Skills course or another course that was acceptable to the College, within six months?
- (ii) If Dr. Botros failed to comply with an order of the ICRC, does that constitute engaging in conduct or an act or omission relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional?

### **ONUS OF PROOF**

The Committee recognizes that the College has the onus of proving the allegations against Dr. Botros, and the standard of proof is on the balance of probabilities. The allegations must be proven with evidence that is clear, cogent and convincing: *F.H. v. McDougall*, [2008] 3 S.C.R. 41. *Osif v. College of Physicians and Surgeons of Nova Scotia*, [2009] N.S.J. No. 111(C.A.), has affirmed that the principles set out in *F. H. v. McDougall* apply to disciplinary proceedings involving physicians.

### **FACTS AND EVIDENCE**

The Committee heard the testimony of Ms. L on behalf of the College. Dr. Botros did not call any witnesses. A joint book of documents was filed, which included: the Decisions and Reasons of both the ICRC and HPARB; correspondence between Dr. Botros, his counsel and Ms. L; and internal notes and memoranda of Ms. L.

Ms. L testified that she began working at the College in 1985. Except for a six-year leave of absence to raise her family, she has worked at the College since then. She has worked in the Compliance Monitoring and Supervision department since 2007 as a Compliance Monitor. Her role is to review and assess all orders, undertakings and other documents

from the Discipline Committee, the ICRC, the Fitness to Practise Committee, the Quality Assurance Committee or Registrar's Investigations, in order to determine what requirements are in place for physicians who need further official follow-up. Ms. L was the Compliance Monitor assigned to Dr. Botros' file in regard to the order made by the ICRC on March 16, 2011, that required Dr. Botros to "complete the Communication Skills course or if this course is not available, an alternative course that is acceptable to the College, within six months".

Ms. L testified that Dr. Botros was notified of the ICRC's decision by letter dated June 6, 2011, from Ms. M, then Manager of Committee Support at the College, that was addressed to Dr. Botros c/o his then counsel. Enclosed with this letter was a copy of the ICRC's Decision and Reasons. In her cover letter, Ms. M informed Dr. Botros that if he did not agree with the ICRC decision, he could request that the decision be reviewed by HPARB. Dr. Botros did request that HPARB review the ICRC's decision.

Ms. L testified that implementation of the ICRC's Order was put on hold until a decision was rendered by HPARB. HPARB rendered its decision on April 20, 2012. It confirmed the decision of the ICRC. The cover letter from HPARB to Dr. Botros stated that he had the right to request a judicial review of HPARB's decision.

On June 6, 2012, Ms. L sent a letter to Dr. Botros c/o his then counsel, in which she introduced herself as the Compliance Monitor assigned to him. She explained that her role was to assist him in implementing the ICRC's decision and ensuring that all parties were aware of their roles and obligations. She indicated in her letter that she would contact Dr. Botros with further information regarding enrollment in a Communications course in due course. She testified that she would normally follow up with the physician within a month or so, but she unfortunately had a cycling accident and was off work most of the summer and so she did not do so, nor did anyone else from the College.

The next contact that Ms. L had with Dr. Botros was on September 11, 2012, when she received a faxed memorandum from him dated September 4, 2012. In the memorandum, Dr. Botros requested Ms. L's "direction, information, instruction on an acceptable



available course by The College in order to comply with The Committee decision”. On September 18, 2012, Dr. Botros faxed a second memorandum to Ms. L requesting the same information. He attached a proposed communication course for health care professionals, and asked for the College’s consent to his taking that course.

Ms. L testified that she telephoned Dr. Botros’ office on September 18, 2012, after she received the second memorandum, and asked to speak with Dr. Botros. Dr. Botros’ receptionist said that she would have him call Ms. L back, but later called and left a message in which she indicated that Dr. Botros wanted all of their communications to be in writing. Ms. L did call back to Dr. Botros’ office and left a message indicating that the College had a communications course that was facilitated by Dr. X, and that she would be sending Dr. Botros information about the course in the mail the following week.

On September 19, 2012, Ms. L sent a letter by fax to Dr. Botros that described the “Individualized Communication Skills Course” offered by the College through Dr. X, the course instructor. Ms. L testified that Dr. X, who has a Ph.D. in education, worked at the University of Toronto as an education and curriculum consultant. She was an independent contractor whom the College used to provide the Communications Skills course. The course would usually require a minimum of two, two-hour sessions with an additional follow-up session, but it could increase to three, two-hour sessions if the physician had a previous history. Dr. X would determine how many sessions were required after reviewing the decision of the ICRC, and any previous history. Ms. L testified that usually Dr. X would receive a copy of the ICRC decision and review it to determine possible discussion points, and also to see what the issues were that led to the physician being referred for the Communications course.

Ms. L’s letter of September 19, 2012, included information about Dr. X’s fees, and stated that Dr. Botros would receive an invoice from the College for the fees. It also included a copy of the evaluation form that Dr. X would complete and forward to the College upon the completion of the course, as well as a copy of the ICRC decision that would be sent to Dr. X. Dr. Botros was asked to sign a “Participant Agreement” and return it by October 3,

2012. This Agreement contained, among other provisions, an “irrevocable” consent to the College and the course instructor “to disclose all information necessary to fulfill the terms of the within Agreement or otherwise to facilitate my completion of the course.” In addition, Dr. Botros was informed that if he required any further assistance in the matter, he could contact Ms. L and she would be pleased to assist him.

Ms. L testified that she did not receive any response from Dr. Botros to her September 19, 2012, letter. Accordingly, she faxed a letter to Dr. Botros dated December 7, 2012, which attached a copy of her letter of September 19, 2012, and asked Dr. Botros to sign and return his Agreement by December 14, 2012. Dr. Botros did not respond to this letter either. Ms. L sent Dr. Botros a third letter dated January 3, 2013, this time by way of both fax and regular mail. This letter informed Dr. Botros that having not received a response to her two previous letters, the matter of his apparent failure to comply with the ICRC Order was being referred to an upcoming ICRC meeting, and that she would advise Dr. Botros of the date shortly. In addition, she requested that Dr. Botros provide her with any submissions by January 18, 2013. Ms. L also indicated in this letter that the ICRC may take any action it deemed appropriate including “referring specified allegations of professional misconduct to the Discipline Committee on the basis of your failure to comply with the Order”.

Dr. Botros did not respond to Ms. L’s January 3, 2013 letter, so Ms. L sent another follow-up letter, again by way of fax and regular mail, to Dr. Botros on January 28, 2013. She informed him that the matter would be considered at the February 5, 2013, meeting of the ICRC. Ms. L testified that at no time prior to January 28, 2013, did Dr. Botros express any concerns or pose any questions regarding the Communications course that she was seeking to arrange. Further, as of this time, she had not received any correspondence or telephone calls from Dr. Botros or his counsel since her September 19, 2012 letter to Dr. Botros.

On January 30, 2013, Dr. Botros faxed back to Ms. L her letter of January 28, 2013. On it there was a handwritten note dated January 29, 2013, and signed by Dr. Botros stating

“legal counsel was instructed to contact you”. On January 31, 2013, Ms. L received a telephone call from a lawyer who had been retained as Dr. Botros’ legal counsel. Counsel indicated to Ms. L that Dr. Botros had an issue with the term “irrevocable” in the consent that he was required to sign. She inquired as to whether this was negotiable. Ms. L told her that Dr. Botros had not previously raised this as an issue. She also noted that Dr. Botros had not contacted her in any way despite multiple letters having been sent to him. Ms. L testified that she informed Dr. Botros’ counsel that the matter was going to the ICRC on February 5, 2013, and if she had any submissions, she should forward them to Ms. L’s attention as soon as possible.

On February 1, 2013, counsel sent a submission on behalf of Dr. Botros by letter to Ms. L. In that submission, counsel stated that Dr. Botros did not object to completing the Communications course but had concerns with the consent and the agreement form that was provided to him. She included with her submission an amended consent and agreement that had been signed by Dr. Botros. The word “irrevocable” was removed from the consent to disclosure of information, and Dr. Botros had added the following sentence: “I will be provided with copies of all information that is disclosed by the College and/or Inspector.” In addition, Dr. Botros added a handwritten paragraph to the Agreement, which stated that the complete investigation file would be provided to Dr. X.

The ICRC considered the matter on February 5, 2013, and decided to defer the matter to allow Dr. Botros one further opportunity to take the Communications course. Ms. L testified that she contacted Dr. Botros’ counsel by telephone on February 5, 2013, to inform her of the ICRC decision. Ms. L suggested that counsel should work with Dr. Botros to contact Dr. X and schedule the course. Ms. L followed up her telephone call with a letter sent by courier to counsel dated February 6, 2013. In that letter, she again informed counsel of the ICRC’s decision to defer consideration of the matter. In addition, she advised counsel that Dr. Botros’ consent was not a legal requirement because participation in the Communication course had been ordered by the ICRC, and that therefore the College intended to proceed with the course and did not intend to negotiate the terms of the consent.

Ms. L's letter of February 6, 2013, offered three possible dates for the first of the three sessions that Dr. Botros would have with Dr. X: February 25, March 1 or March 2. She testified that usually the physician and Dr. X would communicate with one another directly, but she thought that it would be useful to help facilitate the process by providing Dr. Botros with some proposed dates to meet with Dr. X. In her letter, she asked for a response by February 14, 2013, as to which of the dates Dr. Botros would prefer and she said that she would make the arrangement and confirm it with Dr. Botros' counsel. She added that if she did not receive a response, it would be Dr. Botros' responsibility to arrange times with Dr. X. Her letter further stated that when the matter was returned to the ICRC for disposition, it would consider any further delays by Dr. Botros in considering what action, if any, it should take.

On February 7, 2013, Ms. L faxed a letter to Dr. Botros' counsel, advising her that the February 25, 2013, date was no longer available and providing her three additional dates: March 4, 8, and 9, 2013.

Ms. L testified that Dr. Botros called her on February 12, 2013, to say that he would be out of the country from February 20 to March 10, 2013. Ms. L asked Dr. Botros during this call to provide proof that he would be out of the country during that time. She also informed Dr. Botros that she would contact Dr. X's office and get three additional dates after March 10, 2013. Later that day, Dr. Botros faxed copies of his e-tickets to Ms. L. However, the return reservation did not include Dr. Botros' name.

Ms. L testified that she contacted Dr. X to make an appointment for the week after he was scheduled to return. The appointment she made for Dr. Botros was on Friday, March 15, 2013. (Dr. Botros had expressed a preference for meeting on Fridays). On February 13, Ms. L faxed a letter to Dr. Botros' counsel (copied to Dr. Botros). In the letter, she advised of the March 15 appointment with Dr. X and asked for confirmation by February 18 that he would attend that day. She also asked that Dr. Botros re-send his return flight information, showing him as the passenger. In response, on February 15, 2013, Dr. Botros contacted Ms. L and left a message suggesting that she go to the airline website

where she could find the information requested in regard to the e-tickets. Ms. L testified that she did go to the website and confirmed that Dr. Botros was the passenger shown on the e-tickets. However, Dr. Botros did not mention the proposed March 15 appointment with Dr. X in his message. Ms. L called Dr. Botros' counsel on February 28, 2013. She told counsel that Dr. Botros had not confirmed that he would be attending the appointment with Dr. X on March 15, but she assumed that he would be and she would confirm the appointment with Dr. X, which she then did.

On March 1, 2013, Ms. L sent a letter to Dr. Botros, copied to Dr. X and Dr. Botros' counsel, confirming the March 15 appointment with Dr. X. The letter provided directions to Dr. Botros for how to get to Dr. X's office.

The next communication from Dr. Botros to Ms. L was on March 12, 2013. Dr. Botros faxed back her letter of March 1, 2013, with a handwritten note signed by him and dated March 12, 2013, stating "please note that I am not able to attend. I will provide reason in due course if requested". Ms. L testified that she had not had any conversation with Dr. Botros prior to receiving this fax and had been unaware it was coming. On March 13, 2013, Ms. L telephoned Dr. Botros' counsel and asked that immediately, and no later than March 19, 2013, she provide Dr. Botros' explanation for why he was unable to attend on March 15. She followed this up with a letter written the same day. Having not received a response, Ms. L left a message for Dr. Botros' counsel on March 19, 2013, asking if she was going to provide a response as to why Dr. Botros did not attend the appointment with Dr. X. On the same day, counsel faxed a letter to Ms. L which stated that "Dr. Botros advises that in light of the 16 year history of matters with the College, he requires time to respond".

On April 4, 2013, Ms. N, then Compliance Monitor who was covering for Ms. L while she was on vacation, sent an e-mail to Dr. Botros' counsel indicating that the matter concerning Dr. Botros had been scheduled for review by the ICRC on May 15, 2013. She stated in that letter that if Dr. Botros wished to make a submission he must forward it to

Ms. L's attention by April 26. Counsel acknowledged receipt of the e-mail by return e-mail.

Ms. L testified that on April 25, 2013, she had a conversation with one of Dr. Botros' new counsel. She told counsel that the matter was going before the ICRC on May 15, 2013, and that submissions were to have been made by April 26. Counsel requested an extension to make submissions and was granted until May 8. Ms. L confirmed her conversation with counsel by way of a letter faxed to her colleague on May 6, 2013. She again requested that any submissions be forwarded by May 8, and indicated that at its May 15 meeting, "the ICRC may take any action it deems appropriate, including referring specified allegations of professional misconduct to the Discipline Committee on the basis of Dr. Botros' failure to comply with the Order".

Counsel replied by fax on May 8, 2013, indicating that they had not had sufficient time to provide a response due to recently being retained by Dr. Botros and both the "historical nature of the matter" and the "volume of materials relevant to the matter". Counsel noted that in their discussion on May 6, Ms. L had indicated that further requests for an extension of time to respond would not be granted. She stated that "Dr. Botros reserves his right to provide a full response to the allegations made against him should the ICRC decide to take further action". On May 10, 2013, Ms. L responded to clarify that she had not said that "further requests for an extension of time to respond would not be granted", but rather that any decision on whether additional time to respond would be granted would be the decision of ICRC.

The matter did go before ICRC on May 15, 2013. The ICRC referred the matter to the Discipline Committee and a Notice of Hearing was issued. Ms. L testified that she was unaware of Dr. Botros providing any explanation prior to that time for why he had not attended the Communications course; she also testified that in her experience as a Compliance Monitor at the College, she had never before dealt with a physician who had refused to attend a Communications course.

## **FINDINGS AND DECISION**

During Ms. L's testimony, several references were made to the background material and particulars of the case that led to the ICRC decision and Order for Dr. Botros to complete the Communication Skills course. The ICRC decision and Order was subsequently confirmed by HPARB. It would not be appropriate, nor is it the role of this Committee, to review the original decision of either the ICRC or HPARB or to comment on the reasons for their respective decisions. Dr. Botros chose not to seek judicial review of HPARB's decision even though he was clearly informed of his right to do so. Therefore, the decisions stand and the Committee cannot look behind them.

The issue before this Committee is whether Dr. Botros failed to comply with an Order of the ICRC, and if he did fail to comply, whether that constitutes professional misconduct. The Order of the ICRC clearly stipulated that Dr. Botros was required to complete the Communication Skills course or, if that course was not available, an alternative course that was acceptable to the College, within six months of the date of the Order. His application to HPARB for a review of the ICRC's decision quite properly stopped the clock from running until HPARB released its decision. HPARB's decision was released to the parties on April 20, 2012. Having chosen not to seek judicial review of HPARB's decision, at a minimum Dr. Botros should have completed his course within six months of the release of that decision. There was no reason why he needed to wait to hear from a College Compliance Monitor before the six months began to run. However, even if the six months began to run only once he received Ms. L's first letter (June 6, 2012), the latest date on which he should have completed the course in order to be in compliance with the Order was six months after that, December 6, 2012.

There is no dispute that Dr. Botros did not attend a Communication Skills course prior to December 6, 2012. In fact, there is no dispute that Dr. Botros failed to attend a Communication Skills course at any time before the Notice of Hearing was issued by the ICRC on May 15, 2013. The Committee is satisfied that the "Individualized Communication Skills Course" offered by the College through Dr. X met the

requirements of the ICRC's order ("the Communication Skills Course or if this course is not available, an alternative course that is acceptable to the College"). Therefore, the Committee finds that Dr. Botros failed to comply with an order of the ICRC.

In considering whether the failure to comply with an ICRC order constituted professional misconduct, the Committee considered all of the evidence before it, both written and oral submissions. The Committee could find no evidence of any extenuating circumstance, such as a prolonged illness, that would provide a reasonable explanation for why Dr. Botros failed to comply with the Order.

The Committee did note that not having heard further from Ms. L after her letter of June 6, 2012, Dr. Botros sent two memoranda in September 2012, in which he sought clarification of what an acceptable course would be, the second of which contained an outline for a proposed Communications course for health care professionals. However, when Ms. L attempted to discuss the matter directly with Dr. Botros by telephone, Dr. Botros requested, through his receptionist, that all communications between the College and himself be in writing. Again, Ms. L responded immediately, leaving a message and then sending a letter to Dr. Botros on September 19, indicating that there was an Individualized Communications Skills Course offered by the College. From that point on, for several months, Dr. Botros went silent. The Committee was disturbed by Dr. Botros' conduct in failing to communicate with the College following his receipt of this letter. He chose not to respond to this letter from his governing body, nor did he respond to follow-up letters dated December 7, 2012, and January 3, 2013. The uncontradicted evidence of Ms. L was that Dr. Botros offered no explanation as to why he did not respond to these letters. Between September 19, 2012, and January 28, 2013, Dr. Botros did not communicate in any way with Ms. L.

It was not until January 31, 2013, over four months after the letter of September 19, 2012, that Dr. Botros, through his counsel, first raised any issue with Ms. L about the proposed Communications Skills course. He did so only after being told that his apparent failure to comply with the ICRC's order was being referred to the ICRC. The issue that he raised



was that he was having difficulty with the wording of the agreement he was being requested to sign, including the use of “irrevocable”, in relation to a consent clause. It is noteworthy that this was the only concern Dr. Botros ever raised. The evidence before the Committee is that he never raised a concern in regard to the Individualized Communications Skills course that the College had specified he attend, nor concerning the qualifications of the course instructor. In fact, in her letter to Ms. L dated February 1, 2013, counsel for Dr. Botros stated “Dr. Botros does not object to completing the Communications Course. However, he had concerns respecting the consent and agreement form that was provided to him”. This “barrier” to Dr. Botros’ proceeding with the Communication Skills course was removed by the College when it decided that he would not be required to sign the agreement as there was no legal requirement for him to do so. This was communicated to Dr. Botros’ counsel on February 6, 2013.

When Ms. L then proposed several dates to Mr. Botros for the first session with Dr. X, his response was that he would be out of the country on those dates. In an effort to facilitate the process, on February 13, 2013, Ms. L provided Dr. Botros with an additional date of March 15, which was after Dr. Botros’ scheduled return. Even though she sent that letter a week before Dr. Botros’ departure, it was not until March 12 that he informed the College, by way of a faxed handwritten note on a copy of the College’s letter, that he would not be attending the March 15 appointment with Dr. X. In that note, Dr. Botros offered to provide a “reason in due course if requested”. However, when he was asked for an explanation by a letter sent the next day to his counsel, he failed to provide one. The only response, from counsel, was that Dr. Botros required time to respond. No such explanation was provided at that time, nor in the two months that passed before the ICRC considered the matter on May 15. This was despite the fact that Dr. Botros was informed that the matter of his non-compliance was going to be reviewed at the May 15 ICRC meeting, and that the ICRC might take any action it deemed appropriate including a referral of allegations of professional misconduct to the Discipline Committee.

In the Committee’s view, Dr. Botros was given more than ample time to provide an explanation as to why he did not attend the appointment with Dr. X. The Committee is of

the opinion that the possibility of a referral to the Discipline Committee should have in itself been a sufficient incentive for him to provide an explanation to the ICRC as to why he failed to attend the appointment with Dr. X, but this was clearly not the case.

In addition, during this period of two months before the ICRC meeting, Dr. Botros had the opportunity to contact Dr. X directly to arrange alternative times to meet. There is no evidence that he did so. The Committee concluded that Dr. Botros' failure to provide an explanation to the College as to why he did not attend the appointment with Dr. X or initiate contact to arrange alternative times to meet, demonstrated not only a blatant disregard for College processes, but also an attempt to control the process, thus resulting in an unnecessary delay on his part in complying with the Order. In addition, it demonstrated a lack of cooperation with his governing body and a lack of *bona fide* intention to comply with an Order of the ICRC.

The Committee noted that during the cross-examination of Ms. L, she was questioned on the qualifications of Dr. X, and why Dr. X, who is not a physician, should be instructing a physician of 35 years standing. It was unclear to the Committee whether this line of questioning was an attempt to propose a hypothesis that Dr. Botros failed to comply with the Order because of a concern that the course instructor lacked the proper qualifications. If so, the Committee rejected such a hypothesis. If Dr. Botros had questions or concerns in regard to the qualifications of Dr. X, he could have raised those at any time with his Compliance Monitor, which he did not. To the contrary, as noted above, the only concern that he ever raised was with the consent he was asked to sign, such request being eventually withdrawn. The Committee makes one further observation in this regard. There was no evidence to suggest that Dr. X lacked the necessary qualifications to be a course instructor for a Communications Course provided to a physician. In fact, Exhibit 3, which was put to Ms. L by counsel for Dr. Botros on cross-examination, listed Dr. X's degrees and designations and summarized her responsibilities as part of the Education and Research Unit Team in Postgraduate Medical Education at University of Toronto, shows that she was well qualified to teach the course.

The College is Dr. Botros' governing body. Self-regulation is a privilege. While the provincial government provides the legislative framework to permit the profession to self-regulate, the expectation is that the profession will do so in an effective manner. In order to maintain that privilege, the College must maintain not only the confidence of the public but also of the government, that it can effectively govern its members. The mandate of the College is clear: to protect the public. Amongst other things, the public and members of the profession have a right to expect that members will abide by any Orders that are made by the ICRC.

In summary, Dr. Botros chose not to comply with an Order of the ICRC despite being given many opportunities, including extensions of time, to do so. In refusing to respond to three letters between September 2012 and January 2013, Dr. Botros thwarted the College's attempts to assist him in complying with the Order. Even after the ICRC considered his non-compliance on February 5, 2013, it decided to defer any decision, thereby allowing Dr. Botros one more opportunity to comply with the Order. Again, every effort was made by the College to assist Dr. Botros in complying with the Order. The absence of a response to these letters, combined with the absence of any explanation as to why he failed to comply, demonstrated contempt for his governing body. Dr. Botros failed to cooperate with his governing body, and attempted to control the process, and as a result he frustrated the College staff assigned to his case.

Therefore, having regard to all the facts in this case, the Committee finds that in failing to comply with the order of the ICRC, Dr. Botros engaged in conduct or an act or omission relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional, and thereby committed an act of professional misconduct under paragraph 1(1)33 of O. Reg. 856/93.

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

## **DECISION AND REASONS FOR DECISION ON PENALTY**

The Discipline Committee (the “Committee”) of the College of Physicians and Surgeons of Ontario delivered its written Decision and Reasons on Finding in this matter on April 21, 2015, and found that Dr. Botros committed an act of professional misconduct in that he engaged in conduct or an act or omission relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.

The Committee heard evidence and submissions on penalty and costs on August 20, 2015, and reserved its decision and reasons on penalty.

### **EVIDENCE AND SUBMISSIONS ON PENALTY**

The Committee heard evidence from Dr. Botros. Dr. Botros received his medical degree from Ain Shams University in Cairo, Egypt in 1976. After a general rotating internship in Cairo, he subsequently moved to the United Kingdom where he received a diploma in psychological medicine. Entry into that program required Dr. Botros to pass an exam with respect to linguistic abilities in English. In 1987, Dr. Botros moved to Canada. Between 1987 and 1990, he practised psychiatry at the University of Saskatchewan and also provided psychiatric services for Saskatchewan’s correctional services. He became a Fellow of the Royal College of Physicians and Surgeons of Canada in psychiatry in 1990. He moved to Kitchener-Waterloo in 1990 and practised psychiatry there from 1990 to 1994. Since 1994, he has been practising sleep medicine at various clinics in Ontario. He took two two-week courses in sleep medicine in the United States and obtained his American Board Certification in sleep medicine in 2002.

At the penalty hearing, Dr. Botros provided, for the first time, his explanation for why he did not take Dr. X’s Communication Skills course. Dr. Botros explained that, in 2012 and 2013, he had been having “a bad year for me at a personal level.” He said that he had been experiencing anxiety and apprehension as he was then involved in another discipline proceeding at the College, and also as a result of the political unrest that was occurring in Egypt, where he still had family. However, under cross-examination, Dr. Botros

acknowledged that, other than for vacation or illness, there were no significant breaks in his practice in the past five years while he was practising in the sleep clinics that he services.

Dr. Botros stated that he did not view the Inquiries, Complaints and Reports Committee's (ICRC) Order that he participate in the Communication Skills course as an exercise in education, and he was apprehensive about the consequences if it was determined that he could not fulfill course expectations.

Dr. Botros testified that, because English was his second language, he misread Ms. L's letter of September 19, 2012, which referred to Dr. X as an "agent" of the College. This caused him concern, as he thought it meant that Dr. X was working for the College's interest. An agreement attached to the letter would have given an "irrevocable consent" to the College and the course instructor to disclose information necessary to fulfill its terms or to facilitate Dr. Botros' completion of the course. Dr. Botros testified that he could not understand why anyone would need an "irrevocable" consent for an educational activity; seeing the words "agent" and "irrevocable" increased his sense of apprehension and ignorance. He was concerned that, rather than being an educational exercise, the course was some sort of evidence-gathering for an upcoming discipline hearing that he was facing.

When asked why he did not take any steps to take the Communication Skills course in the eighteen months following the referral to the Discipline Committee leading up to his hearing in October 2014, Dr. Botros testified that, "once you have not participated, then the door is shut."

On August 6, 2015, ten months after his discipline hearing, Dr. Botros sent an e-mail to Dr. X asking if he could now take her course. To his surprise, she responded positively. When asked why he had written to Dr. X at that time, Dr. Botros responded that it was an "act of despair," that he was "in a bad situation," and that he never thought she would accept him. Their first meeting was on August 16, 2015 -- five days before this penalty hearing.

During his testimony, Dr. Botros often portrayed himself as a victim of the ICRC's process. Under cross-examination, he was shown a Health Professions Appeal and Review Board (HPARB) decision dated April 20, 2012. This was a decision on a request by Dr. Botros that HPARB review an ICRC decision that required him to complete a Specified Continuing Education or Remediation Program (SCERP) at his own expense. This 2012 HPARB decision confirmed the ICRC's decision. Dr. Botros acknowledged that he stated in his written submission to HPARB that it was his belief that the complaints against him were not investigated in a fair manner. He told HPARB that he believed there was a history of the College targeting and acting prejudicially against him, and that the investigative staff "repeatedly exercised selective recording, (maximizing or minimizing material as it suits their agenda)".

Another HPARB decision, dated April 24, 2013, was presented to Dr. Botros during cross-examination. In this decision, HPARB confirmed a decision of the ICRC to, among other things, issue a caution in person to Dr. Botros regarding his obligation to provide records and responses to complaints in a timely manner. Dr. Botros acknowledged that in his written submission to HPARB on that occasion, he wrote that he believed that the College had been targeting him for sixteen years, and that "the College made a mountain out of nothing as part of the 'treadmill' that started with a complaint filed in the 1990s by a physician who had a sleep clinic in the same community as the Applicant." He also suggested that the College was targeting foreign-trained graduates like him.

During his cross-examination, Dr. Botros was also shown a recent decision of the Discipline Committee dated July 31, 2015. He acknowledged that the Committee had found that he had made derogatory and disparaging remarks of College investigators and that his dealings with the investigators had been unprofessional. The Committee on that occasion also found that he was often disparaging of the questions asked by College counsel.

Dr. Botros was asked by his counsel what statements, if any, he would like to make to the Committee about the findings of the Committee in this case. He responded, "I read what

I read about me and I say this is not me. This is not me. The idea that I am a person who will not take direction is not me. So, somehow the image portrayed is totally not me.”

Later in his testimony, Dr. Botros reiterated this point by saying, “But, that’s not me. That’s not the person that says he is not going to obey. He doesn’t listen. He doesn’t follow”. Similarly, in response to this Committee’s findings that he “showed a blatant disregard for the College process and attempt to control that process, and that you demonstrated a lack of co-operation with your governing body that is the College, and a lack of *bona fide* intention to comply with the order,” Dr. Botros responded, “They’re talking about somebody I don’t know, somebody I don’t want to know.”

When asked what comfort he could give to the Committee of what he had learned as a result of the process, Dr. Botros responded in an obtuse fashion, indicating that “the task for the College is almost impossible. You (CPSO) are trying to ensure that 300,000 services delivered every day, that are delivered in a manner that is good, is positive, that those 25,000-30,000 physicians in Ontario, they are professionals, they are proper”. He added: “It was always. I’m just – I’m going to be found – some wrongdoing is going to come along. I mean, it’s – if you put anybody under a microscope 24 hours a day, seven days a week, you are going to find something.” When asked again what he had learned and what would be his part moving forward, Dr. Botros responded, “I think personally and honestly is that eventually, the answer will be the technology”.

Throughout his cross-examination, his answers to questions put to him were often obtuse or rambling and he had great difficulty answering them directly. For example, despite being asked repeatedly, Dr. Botros would not respond directly to the proposition that it was because of his views about the College’s targeting him and his feeling of being harassed that it was difficult for him to accept the ICRC’s decision requiring him to attend the Communications Skills course.

## **DECISION AND REASONS ON PENALTY AND COSTS**

There was no dispute between the parties that a reprimand, a suspension, and an award of costs were appropriate in this case. However, there was a disagreement as to the length of the suspension, with the College seeking a suspension of six months and Dr. Botros submitting that a one month suspension was sufficient. There was also disagreement as to the quantum of costs.

### ***Guiding Principles***

The Committee, in arriving at its decision on an appropriate penalty, considered a number of key guiding principles, the most important of which is the need to protect the public. In addition, the penalty must reflect the need to maintain the public's confidence in the system of self-regulation and the ability of the profession to regulate itself. The Committee also considered the need for specific as well as general deterrence and the remedial needs, if any, of the member.

The Committee also considered to what extent Dr. Botros had insight into or a clear understanding of the seriousness of his misconduct. It is the Committee's view that insight is an extremely important factor to be considered when determining whether an individual can be remediated.

The Committee carefully considered Dr. Botros' evidence and the submissions of counsel for the College and for Dr. Botros. The Committee also considered the various documents filed, including Dr. Botros' history before the ICRC and HPARB, as well as previous cases that were put before it by counsel.

### ***Aggravating Factors***

In considering potential aggravating factors, the Committee is aware that there is well-established law that a physician's history with the regulatory body, including prior decisions of the Discipline Committee and also decisions of other committees such as the ICRC is relevant to penalty. The Committee understands that the purpose of looking at



other decisions is not to punish Dr. Botros for other matters, but rather to determine whether there is a pattern of conduct that may be relevant in determining an appropriate penalty. A record of previous behaviour or misconduct that is the same or similar to that which is before this Committee, might speak to the likelihood of rehabilitation and, in addition, the need for specific deterrence. In addition, the Committee understands the principle that a screening committee's cautions, while relevant, bear less weight than a previous discipline finding that was arrived at after a full hearing.

The Alberta Court of Appeal stated in *Del Bianco v. Alberta Securities Commission*, 2004 ABCA 344 at para. 16:

“Courts and tribunals will often consider recent conduct, both positive and negative, in fashioning an appropriate sentence. An individual is not being sanctioned for other offences. Rather, the conduct highlights relevant sentencing considerations, such as the need for specific deterrence and rehabilitation.”

In *College of Physicians and Surgeons of Ontario v. Sokol*, 2011 ONCPSD 42, this Committee stated:

“The Committee believes it is significant that Dr. Sokol has been questioned about his billing practices and has been required to repay OHIP in the past. The Committee would have expected Dr. Sokol to have had a higher degree of vigilance to the appropriateness of his billing practices given this history. Unfortunately, there is no evidence that this was the case for Dr. Sokol. In addition, the Committee would be unduly fettered in considering measures to deal with the risk that a physician poses for similar behaviour in the future if prior history could not be considered in the penalty phase of the hearing.”

Accordingly, in fashioning an appropriate penalty, the Committee considered not only the fact that Dr. Botros had not complied with the ICRC's order to attend a Communication

Skills course approved by the College, but also whether there was a past history of similar conduct in his previous dealings with his governing body.

***Mitigating Factors***

Dr. Botros testified that he practised in an “under-serviced area.” There are no other physicians practising with him now in his sleep medicine clinics. The other sleep labs in the areas in which he practises have very long wait lists. He testified that if his certificate of registration is suspended, he will have patients who will be harmed. Between two and four times a year, he comes across patients who have suffered a stroke after complaining of snoring. He intimated that if his certificate of registration is suspended, there may be patients who, if they do not have timely access to a sleep study, may suffer a stroke. Counsel for Dr. Botros submitted that this should be considered a mitigating factor against imposing a suspension of six months.

The Committee disagrees. The Committee’s duty is to determine a penalty proportionate to the findings. To send a message to the profession that the rules governing appropriate behaviour and conduct are dependent upon where one practises in the province, or that patients in under-serviced areas can be subjected to lesser standards of physician conduct, would not be in the public interest.

***No Review of Original Decisions of ICRC or HPARB***

Counsel for Dr. Botros spent time reviewing the material that resulted in the ICRC’s Order that he take the Communication Skills course. Whether Dr. Botros believed that the ICRC’s Order was fair or not is irrelevant to the determination of the appropriate penalty. It is neither appropriate nor this Committee’s role to review the original decision of either the ICRC or HPARB, or to comment on the reasons for their respective decisions. The decisions of the ICRC and HPARB stand on their own and the Committee cannot look behind them. Rather, it is the task of this Committee to determine an appropriate penalty for Dr. Botros’ professional misconduct and behaviour in failing to comply with an order of his governing body.

## **Review of Evidence and Findings**

Following the discipline hearing on October 6 and 7, 2014, and prior to the release of the Committee's decision, Dr. Botros did not take any steps to comply with the ICRC's order. Following the release of the Committee's decision on April 21, 2015, Dr. Botros took no steps until August 6, 2015 to contact Dr. X to arrange his first meeting with her. Further, Dr. Botros offered no explanation for his conduct prior to the penalty hearing. As of the date of the penalty hearing, Dr. Botros remains in non-compliance with the ICRC's order.

Dr. Botros attempted to provide explanations at his penalty hearing as to why he had not complied with the Order. The Committee did not find any of his explanations credible for the following reasons. Dr. Botros testified that he had concerns with Dr. X being an "agent of the College". This concern was never raised by Dr. Botros or his counsel prior to the ICRC referring the matter to the Committee. Dr. Botros had ample opportunity to do so at the time he made his objection to the "irrevocable consent" he was asked to sign. The Committee did not find credible Dr. Botros' explanation that he was going through a bad time and was anxious and stressed about another College discipline matter as well as the political unrest in Egypt. In addition, as noted above, on cross-examination, Dr. Botros acknowledged that, in the previous five years, he had not taken any time away from his medical practice other than for vacation or illness. The Committee concluded that if the anxiety and stress he felt as a result of these factors did not impede his ability to continue to earn a living as a physician throughout that period, it was unlikely that these same factors would have impeded him from complying with the ICRC's order.

Dr. Botros testified that he was under the impression that once he refused to take the Communication Skills course, "the door was shut" and he would not be allowed to take the course. There is nothing in the College's correspondence or communications with Dr. Botros which, in the Committee's opinion, could have led him to believe that was the case. On the contrary, these interactions often focused on him completing the course and addressing under what terms and conditions he was prepared to take the course. From the

College's perspective, correctly, taking the course was not negotiable given that the ICRC's order had been duly made and had been upheld on appeal.

Dr. Botros testified that it was an "act of despair" that prompted him to finally contact Dr. X by email just two weeks before the date of the penalty hearing. As a result of that email an initial meeting between Dr. Botros and Dr. X was arranged just a few days before the penalty hearing. The Committee questions Dr. Botros' true motivation for contacting Dr. X at the "eleventh hour" just prior to the penalty hearing. The Committee was not reassured from Dr. Botros' testimony that he has now accepted the ICRC's Order, or that he fully understands that his communication skills require remediation and that taking the Communication Skills course will offer him an opportunity to improve those skills. Rather, it is the Committee's opinion that it is more likely than not that Dr. Botros had finally come to the realization that he had exhausted all possible tactics to avoid complying with the ICRC Order and as a result he was facing a suspension of his certificate of registration.

The Committee is satisfied that Dr. Botros' failure to take the Communication Skills was not due to a misunderstanding or an oversight on his part, but was in fact deliberate. The Committee is appalled by Dr. Botros' persistent defiance of a duly constituted ICRC Order, despite repeated requests by and attempts of the College to facilitate his compliance. The Committee can merely repeat its conclusion in its original decision that Dr. Botros' conduct demonstrates contempt for the College and College processes.

The Committee has noted, in reviewing Dr. Botros' history with the College, that he has repeatedly made derogatory comments towards his governing body. In addition, Dr. Botros was cautioned on two previous occasions regarding his manner of communications with the College and failing to respond to College requests in a timely manner -- conduct that was also evident in the case which is before this Committee.

Dr. Botros' unacceptable behaviour regarding his manner of communication with the College is long-standing, persistent, and recurring. The Committee expected Dr. Botros to have learned from the previous cautions that, when requested to respond to a communication from his governing body, he should do so not only in a timely manner but

also in an appropriate manner. It is evident that the two previous cautions had no impact on Dr. Botros and did not result in a change in his behaviour. The Committee considers this to be an aggravating factor.

In addition, Dr. Botros appeared to exhibit a significant lack of insight into his professional misconduct. As noted above, he gave obtuse answers to questions from his counsel about what he had learned from the disciplinary process. However, what was more telling to the Committee was what Dr. Botros did not say in response to these questions. He did not offer what he may have learned at a personal level. Specifically, the Committee was hoping to hear that Dr. Botros now recognizes that he could improve his skills by taking the Communication Skills course. However, that response was not forthcoming. Similarly, when asked what he had learned, Dr. Botros did not indicate, that he now recognizes the importance of responding in a timely fashion to requests from his governing body for information, or that it is important that a member comply with the terms and conditions of an Order of or undertaking given to the College.

The lack of insight into his conduct was further established on more than one occasion when Dr. Botros was asked by his counsel to comment on this Committee's findings. Despite having several months to reflect on the decision, Dr. Botros could only respond by saying that he did not recognize the individual that the Committee was referring to in its decision, and he insisted that he was not that individual. It was evident to the Committee that Dr. Botros was attempting to disassociate himself from his own conduct. This lack of insight in regard to his misconduct caused the Committee to be concerned about whether, as a result of this process, Dr. Botros will gain sufficient insight to take the necessary steps that he will require in order to be remediated. It also supported the Committee's conclusion that Dr. Botros has great difficulty in taking responsibility for his actions, which has also been noted in Dr. Botros' past history with the College.

The Committee also concluded that Dr. Botros has great difficulty accepting the fact that his persistent defiance of an order of the College and his inappropriate behaviour and manner of communication with the College would be considered to be professional misconduct. Dr. Botros' actions demonstrate that he had great difficulty accepting that, as

a member of the College, he is bound by its rules and orders. The Committee was not convinced that Dr. Botros has demonstrated significant remorse for his actions.

***Prior Cases***

A number of cases were put before the Committee, several of which dealt with the issue of governability. Although Dr. Botros' behaviour and manner of communication with the College were inappropriate, and his misconduct was repetitive and egregious, this Committee was not asked to, nor did it find Dr. Botros to be ungovernable.

In regard to failing to abide by an order of the College, the College put a number of cases before the Committee, including *Ontario (College of Physicians and Surgeons of Ontario) v. Achiume*, 2015 ONCPD 4 and *Ontario (College of Physicians and Surgeons of Ontario) v. Maytham*, 2011 ONCPSD 18 (the latter of which was affirmed by the Divisional Court: *Maytham v. College of Physicians and Surgeons of Ontario*, 2011 ONSC 6875.)

In the *Achiume* case, Dr. Achiume was informed on March 17, 2010 that the ICRC had ordered him to complete a SCERP in medical record keeping. As of February 19, 2014, he had not complied with the order and he was referred to the Discipline Committee. Dr. Achiume's certificate of registration was ordered suspended until the later of one month or until the medical record keeping course was completed. Dr. Botros' case is different than the *Achiume* case in that Dr. Achiume admitted to his professional misconduct, accepting responsibility for his actions. In addition, as of the date of his hearing, Dr. Achiume had taken significant steps to comply with the ICRC order, which is in contrast to Dr. Botros who took no steps prior to his discipline hearing in October 2014 to comply with the ICRC's Order.

In the *Maytham* case, Dr. Maytham breached his undertaking to maintain a narcotics register, among other things. Dr. Maytham's certificate of registration was suspended for four months. In that case, Dr. Maytham had taken steps to partially comply with his undertaking, in that he had completed the prescribing skills course, but his narcotics register remained deficient. It was also noted that Dr. Maytham had previously breached the terms of an earlier undertaking. One of the mitigating factors in that case was that all

of the prescriptions were recorded in the patient charts, and it was only the completion of the narcotics register that was at issue. This case can also be distinguished from Dr. Botros' case in that Dr. Botros took no steps to comply with the ICRC's Order.

Counsel for Dr. Botros asked the Committee to consider the case of *Ontario (College of Physicians and Surgeons of Ontario) v. Lowe*, 2015 ONCPSD 21. That case involved breach of an undertaking given to the College to take an educational program in communications and a "Crucial Communications" course. Dr. Lowe failed to attend at the communication course. He was reprimanded and not suspended, and was ordered to pay costs of \$9,000.

Dr. Botros' case can be distinguished from the *Lowe* case in that Dr. Lowe admitted his professional misconduct. In addition, in contrast to Dr. Botros, Dr. Lowe took significant steps to comply with the undertaking prior to his discipline hearing. Dr. Botros failed to take any steps to comply with the ICRC's Order prior to his discipline hearing or for that matter, until just days prior to the penalty hearing. By admitting his professional misconduct and taking responsibility for his actions, which also included failing to appear at his hearing on the originally scheduled date, Dr. Lowe demonstrated insight into his misconduct, which also distinguishes his case from that of Dr. Botros.

In addition, while this was not an excuse for his actions, prior to his discipline hearing, Dr. Lowe provided a credible explanation for why he had failed to fully comply with the terms of the undertaking to complete the Communications course or appear at his originally scheduled hearing date. This is in contrast to Dr. Botros who provided no explanation prior to his discipline hearing, credible or otherwise, for not complying with his order once the issue of "irrevocable consent" in the Participant Agreement has been addressed.

Although Dr. Lowe failed to comply with his undertaking, he did not display the same contempt for his governing body that Dr. Botros exhibited. Finally, while Dr. Lowe's penalty did not include a suspension of his certificate of registration, the Discipline Committee in that case was aware that Dr. Lowe's certificate had been suspended for

approximately five months before his discipline hearing after he failed to appear at his original discipline hearing date.

***Conclusion on Length of Suspension***

Therefore, the Committee, considering the specific facts of this case, including the absence of any mitigating factors together with a number of aggravating factors, and after considering the case law put before it, has determined that a suspension of six months of Dr. Botros' certificate of registration is the appropriate penalty and is proportionate to the findings in this case. This will convey a clear message to Dr. Botros that his behaviour and misconduct will not be tolerated. It is hoped that, during the six-month suspension, Dr. Botros will have an opportunity to reflect on this Committee's decision; that he will gain sufficient insight to be able to recognize that he is in fact the individual described in that decision; and that he will take the necessary steps to modify his behaviour.

The penalty will also meet the objectives of providing general deterrence to the profession. Specifically, it is hoped that the penalty will send a clear message to the entire membership of the importance of being compliant with College requirements, so that it may to function as a self-governing body charged with the protection of the public. In addition, for those physicians who, like Dr. Botros, may consider avoidance tactics in the face of an undertaking given to or order of the College, this penalty will serve as a reminder that such behaviour will not be tolerated. Such avoidance tactics divert significant College resources that would be better utilized in investigating and disposing of existing or new public complaints, as well as of discipline matters, in a timely manner. These tactics also divert attention from the College's important work of regulating the profession and protecting the public. In addition, such tactics undermine the governing body and the entire profession and erode public confidence in the profession's ability to govern itself.



## **COSTS**

In addressing costs, the Committee considered the following: The Committee has, under section 53.1 of the Code, the authority in an appropriate case to require a member who has committed an act of professional misconduct to pay all, or part of, the College's costs and expenses incurred in conducting the hearing, among other things. Where the Committee determines that it is an appropriate case to order costs, it has discretion as to the amount of costs to order. Also, the Committee must consider the specific facts and particulars of the case before it, as well as any aggravating and/or mitigating factors, to determine whether an award of costs should fall within or outside the range of costs that has been presented to it based upon prior cases.

The parties agreed that this was an appropriate case for awarding costs, and the Committee concurred. In regard to quantum, the College asked for costs in the amount of \$24,656.10. This amount is based upon the actual expenses incurred by the College in relation to two days of hearing including:

- \$12,910.43 paid by the College to the physician panel members for their attendance and travel for the hearing;
- \$542.40 paid to the Court Reporter for her attendance at the hearing; and
- \$6,743.27 paid by the College for the cost of independent legal counsel to prepare for and attend the hearing.

It also includes the Tariff rate of \$4,460.00 for the one day penalty hearing.

Dr. Botros submitted that costs should be awarded based on the Tariff rate of \$4,460.00 for each day of the hearing, and nothing further.

The following factors are relevant to determining the quantum of costs:

- i. the nature of the misconduct;
- ii. any settlement offer made in writing , and the date and terms of the offer;
- iii. the member's failure to acknowledge any error or to act reasonably and professionally to avoid a hearing;
- iv. the relative success of the parties;
- v. the costs of the investigation, legal, and hearing;
- vi. the nature of the member's defence; and
- vii. the impact of the costs order on the member's ability to continue to practise.

The Committee is aware that a cost award is not a penalty, and that the Committee must balance the concern that the profession ought not to bear the entire cost of a discipline hearing against the concern that a member should not be dissuaded from defending himself by the possibility of a large cost award being made against him.

In considering the nature of Dr. Botros' misconduct, the Committee found in its original decision that Dr. Botros demonstrated "blatant disregard" and "contempt" for the College, and that he lacked a bona fide intention to attend the Communications Skills course. In the Committee's view, there was no valid reason for Dr. Botros not to comply with the ICRC's order.

While the Committee considered the College's offer to settle the case prior to the hearing, it did not give it much weight. The Committee was satisfied that the costs the College is seeking were reasonable and appropriate, without needing to consider the offer.

The Committee fully understands the principle that a member is entitled to require the College to prove its case and has the right to make full answer and defence to the allegations against him. However, when considering the nature of the member's defence in this case, the Committee noted that, while Dr. Botros denied the allegation that non-compliance with an ICRC order constituted professional misconduct, he did not dispute that he had failed to comply with an Order of the ICRC to take the

Communication Skills course. Nor did he dispute that he failed to respond to College requests for information in a timely manner, or failed to explain, when asked, why he would not be able to attend the scheduled appointment with Dr. X on March 15, 2013. Further, at the discipline hearing Dr. Botros did not provide any explanation or extenuating circumstances such as illness, injury or incarceration for his non-compliance with a College order. In fact, the defence led no evidence at all. The Committee therefore concluded that Dr. Botros did not act reasonably or professionally to avoid a hearing, which is a relevant factor in determining an appropriate cost order.

Regarding the relative success of the parties, the College was entirely successful in proving its case. There was no evidence that there would be any hardship to Dr. Botros in paying an award of costs that was higher than the Tariff rate.

For these reasons, the Committee is of the opinion that the incremental amount the College is seeking for costs over and above the Tariff rate is modest and reasonable in this case. The College is neither seeking costs associated with the investigation, nor the legal costs associated with the prosecution of this case, which the Committee envisions would be significantly higher.

Therefore, the Committee finds the costs of \$24,656.10 requested by the College is reasonable and supported by the particulars of this case, and it orders Dr. Botros to pay those costs.

## **POSTSCRIPT**

On December 16, 2015, which was after the conclusion of the penalty hearing in this case, Dr. Botros' certificate of registration was suspended for six months by a differently constituted panel of the Discipline Committee in another matter (CPSO v. Botros, 2015 ONCPSD 31, referred to in these reasons as the "other Dr. Botros case"). The panel in that case also ordered that Dr. Botros be reprimanded, that certain terms, conditions and limitations be placed on his certificate of registration, and that he pay costs. In view of this, the Committee, through its independent legal counsel, asked counsel for the parties to provide written submissions as to when the suspension in this case should take effect:

specifically, should it commence immediately upon the coming into effect of the Committee's order, such that it runs concurrently with the existing suspension, should it take effect upon the conclusion of the current suspension, or should it commence at some other time?

In its written submissions, the College stated that any suspension ordered in this case should commence upon the conclusion of the current suspension. It further submitted that the Committee should bear in mind the impact of the total period of suspension when ordering a consecutive penalty, and that it would not be a disproportionate burden on Dr. Botros to serve three additional months of suspension after his current suspension ends.

Dr. Botros submitted that the Committee must take into consideration the cumulative effect of the current suspension and any suspension it chooses to order in this case. The cumulative effect of the suspensions and any other sanctions cannot exceed his overall culpability. At most, a cumulative suspension of seven months is appropriate in the circumstances. This would mean suspending Dr. Botros' certificate of registration for one month after the conclusion of his current suspension.

The Committee carefully reviewed the reasons for decision concerning the finding of professional misconduct in the other Dr. Botros case, as well as the decision and order concerning penalty. It did so with a view to determining whether there was any connection between the acts of professional misconduct that Dr. Botros was found to have committed in the other case, and the acts of professional misconduct that he was found to have committed in this case.

The Committee in the other Dr. Botros case found that Dr. Botros had committed an act of professional misconduct in that he failed to maintain the standard of practice of the profession. The Committee also found Dr. Botros to be incompetent. Furthermore it found that Dr. Botros had engaged in unprofessional conduct during the College's investigation, by making demeaning and derogatory comments to the investigators, being uncooperative, and failing to comply with repeated requests of the investigators. The Committee in that case commented that it did not accept that Dr. Botros understands his

professional obligations. The Committee in that case also noted Dr. Botros' obtuse, obstructionist, rude and delaying tactics, which "are not condoned in any way."

In this case, the Committee found that Dr. Botros committed an act of professional misconduct in that he engaged in conduct or an act or omission relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional. This was in relation to failure to comply with an ICRC Order.

This Committee characterized Dr. Botros' conduct as:

"... a blatant disregard for College processes, but also an attempt to control the process, thus resulting in an unnecessary delay on his part in complying with the Order. In addition, it demonstrated a lack of cooperation with his governing body and a lack of *bona fide* intention to comply with an Order of the ICRC."

It commented further:

"The absence of a response to these letters, combined with the absence of any explanation as to why he failed to comply, demonstrated contempt for his governing body."

This Committee, after careful consideration, concludes that there is some commonality between this case and the other Dr. Botros case. There is no commonality between this case and the findings related to failure to maintain the standard of practice of the profession, and incompetence, in the other case. However there is commonality between the two cases in that they contain similar findings in relation to Dr. Botros' unprofessional conduct toward the College over a similar time period. While the College states that an additional three months of suspension over and above the current suspension in the other Dr. Botros matter is appropriate, Dr. Botros states that it should be a one month suspension. For the reasons stated above, the Committee has determined that a six-month suspension is necessary and appropriate in this case. However, having regard to the degree of commonality in the two cases in regard to Dr. Botros' unprofessional conduct, the Committee deems it appropriate to have two months of the

six-month suspension run concurrently with, and the remaining four months to run consecutively to, the suspension in the other Dr. Botros case.

The Committee's order will therefore provide that the suspension of Dr. Botros' certificate of registration will be from April 16, 2016 (four months after the commencement of his current suspension) until the later of: (a) six months from that date and (b) the date he provides to the College proof of his compliance with the SCERP that the ICRC ordered. The period of suspension should be more than enough time for Dr. Botros to complete the Communications Skills course.

Should there be a stay of the suspension in the other Dr. Botros case as a result of an appeal by Dr. Botros in that case at any time prior to April 16, 2016, the suspension in this case will take effect immediately upon the stay taking effect.

## **CONCLUSION**

Dr. Botros' persistent defiance of an ICRC Order demonstrated contempt for his governing body, which this Committee considers to be a very serious matter that cannot be tolerated. Dr. Botros provided no credible reason as to why he did not comply with the order. In addition, Dr. Botros attempted to control the process and frustrated the College staff assigned to his case. He repeatedly thwarted the College's attempts to assist him in complying with the order by availing himself of any and all delaying tactics at his disposal. It was only when Dr. Botros realized that he was facing a suspension of his certificate of registration that he contacted Dr. X to initiate the Communication Skills course a mere two weeks before the penalty hearing. Dr. Botros also failed to acknowledge or take responsibility for his actions, and attempted to disassociate himself from his own conduct as described in the Committee's decision. This indicated to the Committee that Dr. Botros lacked insight into his misconduct. He portrayed himself as a victim and attempted to place the blame elsewhere for his non-compliance. The

Committee also noted as an aggravating factor that Dr. Botros has been cautioned on two previous occasions by the ICRC regarding his manner of communication with his governing body. Therefore, the Committee, considering all the facts and particulars of this case as well as the relevant penalty principles has determined that the appropriate penalty for this egregious misconduct is a six-month suspension of Dr. Botros' certificate of registration. In addition, he must complete the Communication Skills course as ordered by the ICRC.

The Committee, being made aware of the suspension that Dr. Botros was serving as a result of a decision in another College discipline proceeding, considered whether the suspension ordered by this Committee should run consecutively or concurrently with the suspension in the other Dr. Botros case. After careful consideration and for the reasons noted above, the Committee ordered that two months of the six-month suspension should run concurrently, and the remaining four months consecutively. Should the suspension in the other Dr. Botros case be stayed, then the six-month suspension in this case will commence immediately.

Finally, the Committee orders the administration of a public reprimand, which is not disputed by either party.

## **ORDER**

The Committee therefore orders and directs that:

1. The Registrar suspend Dr. Botros' certificate of registration commencing on the earlier of April 16, 2016 and the date of any stay of the Order in the other Dr. Botros case, and running until the later of:
  - a) six months after the date the suspension commences; and
  - b) the date Dr. Botros provides to the College proof of his compliance with the Specified Continuing Education and Remediation Program directed by the Inquiries, Complaints and Reports Committee in its March 16, 2011 decision.

2. Dr. Botros appear before the panel to be reprimanded.
3. Dr. Botros pay costs to the College in the amount of \$24,656.10.



**TEXT of PUBLIC REPRIMAND**  
**Delivered May 19, 2016**  
**in the case of the**  
**COLLEGE OF PHYSICIANS and SURGEONS of ONTARIO**  
**and**  
**Dr. Wagdy Abdalla Botros**

Failing to adhere to an order of the College is not a trivial matter. Compliance is expected by the College and is your responsibility as a member of the profession. It is not a matter subject to your own interpretation.

You have demonstrated to this Committee that you seriously misunderstand the role of the College, by portraying yourself as a victim and suggesting that the College was targeting you or acting in a prejudicial manner against you or other foreign-trained graduates. You demonstrated a lack of appreciation of the role of the College in governing the profession and protecting the public.

To disavow your own actions by attempting to distance yourself from this misconduct is disingenuous at best. Your attempts to explain your actions demonstrate a lack of insight. It was a straight forward matter. You were required to comply and you did not. It was only at the last minute that you made any serious attempt to comply, and only did so in part.

The Committee did not hear from you that it had gained any insight from this process, despite questions put to you to allow you to explain how you had achieved some understanding.

This Committee is also seriously concerned that this was not your first time before it. Your actions have shown a disrespect for your governing body. In future, the Discipline Committee expects you to make every effort to comply with the College.

*This is not an official transcript*