

Memorandum

February 27, 2018

PRIVILEGED AND CONFIDENTIAL

To: File

From: Jennifer A. McKendry

e.c. Jeffrey Freedlander

Re: Dr. Akbar Khan
CM# 013514-461397

Notes from PHC – February 21, 2018

I attended on February 21, 2018 at the College for a mandatory, without prejudice, pre-hearing conference meeting. Present were the CPSO prosecutor, Amy Block, as well as the Chair of the meeting (who is also a representative of the Discipline Committee), Dr. Pamela Chart. Also in attendance was the College's Independent Legal Counsel, Jennifer McAleer.

The meeting began with Dr. Chart providing a standard overview of the pre-hearing process, reminding us that discussions are all without prejudice, and encouraging us to have open and candid discussions.

The College's Position

Ms Block opened with an outline of the College's case, which is set out in detail in her PHC memorandum, but which she summarized as follows:

This prosecution is specific to Dr. Khan's SEF chemo protocol. It does not involve any of the other CAM treatment modalities that are being offered (i.e. DCA therapy). Ms Block expressed the College's view that Dr. Khan is offering conventional chemotherapy agents in an unconventional way, which he misleadingly characterizes as "CAM". In truth, Dr. Khan's safe chemo is not safe at all - there were a number of deficiencies noted in his practice by two separate CPSO assessors (both medical oncologists with lots of experience with cytotoxic agents and their various permutations – Drs. Ko and Tozer), and the preparation and administration were also critiqued by a CPSO appointed chemo nurse and pharmacist (Albright and Arnott). While Dr. Khan indicated a willingness to make some changes, he refuted the need to make others, which was noted by the ICRC when referring this matter to Discipline.

In Dr. Tozer's view and, to a lesser extent, Dr. Ko's view, there are significant deficiencies in Dr. Khan's SEF chemo protocol that are concerning and that demonstrate a failure to meet the expected standard of care for a CAM physician. In particular, she focussed quite heavily on the fact that these cytotoxic agents were being used off-label to treat cancers for which

the medications are not normally used. Ms Block also cited concerns about the high success rate being promoted on Dr. Khan's website and to the patients, as well as concerns that the patients were not given conventional diagnoses, and were not properly informed prior to undergoing treatment.

Ms Block also mentioned the OncoBlot / suspected leukemia patient investigation (which has not yet been referred and is still being investigated) and confirmed that if that matter is ultimately referred to Discipline, she intends to join it with this current Discipline referral and have them all proceed together. She highlighted the fact that the Oncoblot patient was subjected to cytotoxic drugs when she didn't even end up having cancer. She stressed that there was clear harm to patient in this instance, and she has expert support for this.

There was also some discussion around Dr. Khan's billing practices, which she characterized as "mysterious". While Ms Block conceded that she has no evidence (just a strong hunch), she suspects that there must be some remuneration Dr. Khan is receiving from Mastumura/his organization. She speculated there might be a mutually beneficial arrangement between Dr. Khan and Dr. Mastumura but did concede that all patients confirmed they paid Berkeley directly and not Dr. Khan or Medicor. Ms Block did not think it plausible that Dr. Khan was able to spend as much time as he does with his SEF chemo patients and make ends meet by billing only OHIP palliative care billing codes. She also submitted that Dr. Khan's palliative care OHIP billings are not in line with the care Dr. Khan actually provided, or charted. She intends to call a representative from OHIP to testify as to what is expected when palliative care billing codes are billed to OHIP. She intends to proceed with this allegation of DDU as it relates to OHIP billings.

The College's overall position is that Dr. Khan is trying to dress up a chemotherapy based practice as complementary alternative medicine, and it is not. You can put lipstick on a pig, but it is still a pig.

Our Position

For our part, we outlined our position that Dr. Khan's practice adheres faithfully to the underlying precepts of the CPSO's CAM policy, that Dr. Khan respects his patient's right to make health care decisions that accord with their own values, wishes and preferences, that he addresses a pressing need in patients (virtually all end stage) who are looking for a gentler therapy with the potential to treat their cancer, with the goal of improving the remainder of their lives, and possibly prolonging it. Dr. Khan has never promised to cure cancer with SEF chemo. Further, all of Dr. Khan's patients are informed, sophisticated people who have sought out his care - none of them have been forced to take it, none of them have complained about it. Indeed, many of them have written moving letters of support which are before the College already. Many of them continue to contact the College with their stories and are begging the College to rescind its s. 25.4 Order.

We outlined our intention to challenge the qualifications of the College's proposed experts, as it is our position that they do not have the requisite experience to provide meaningful opinions in the area of CAM medicine. The College advised that it intends to challenge the

independence of Dr. Kenneth Mastumura, if he is proffered as an expert, because he benefits financially from the services provided by Dr. Khan (albeit indirectly).¹

We also discussed issues around documentary disclosure (there is mandatory reciprocal disclosure), and I advised that we have provided everything upon which Dr. Khan intends to rely to date, and if and when we come into possession of additional evidence which we intend to proffer at the hearing, then we will provide it forthwith to the CPSO in compliance with our reciprocal disclosure obligations. Ms Block advised that she would adhere strictly to the CPSO's disclosure timelines, and would not allow us to tender evidence at the hearing that was not previously disclosed to her with appropriate notice, pursuant to the *Rules*.

Dr. Chart's assessment

As is customary at pre-hearing conferences, the Chair of the meeting, Dr. Chart, offered her views on the case. For context, Dr. Chart is a family physician with over 30+ years of experience and a primary focus on oncology patients. She has been a member of the Discipline Committee for about 20 years, and has sat on many contested hearings. She explained that she was very well acquainted with the cytotoxic medications at issue, and assured us she understood quite clearly the issues being raised by the College and Dr. Khan.

What follows is a summary of Dr. Chart's assessments of the case:

1. This is not a case of conventional versus complementary medicine.
2. This is not a sounding board for disgruntled patients to voice their displeasure with the CPSO.
3. This is a case about Dr. Khan's failure to meet the standards of practice of the profession. She felt there were three broad areas of concern.
 - (a) Whether Dr. Khan is practising beyond his scope of practice with no training in the use of cytotoxic chemotherapy or any apparent critical appraisal of the skills necessary to interpret cancer staging results, whether he has the skills to appreciate what cancer care is appropriate in a given situation.
 - (b) Record Keeping - Dr. Ko identified several areas of deficiency in record keeping where there was inadequate information recorded in the charts, such that he wasn't able to provide a full opinion on certain cases because of the missing recorded information. She viewed there to be issues around proper, informed consent, issues around information given to patients about other therapies available, issues around monitoring cancer progression/regression (no pathology reports in the charts which she found unusual), as well as

¹ The challenge for us here will be that the College has framed its case very cleverly – they say Dr. Khan is not practicing CAM, he is practicing conventional medicine in an unconventional way but this does not make it CAM, per se. As a result, I do foresee our argument that Ko and Tozer are not properly placed to offer opinions on CAM medicine falling on deaf Discipline Committee ears. They are more likely to be persuaded that the treatments Dr. Khan is offering are conventional modalities (albeit in a different combination than is conventional) but this does not make it CAM therapy such as a CAM expert is required to opine for the CPSO.

various errors of commission such as providing misinformation to patients about the success rate, about their disease regression (when in fact it was progressing), she finds Dr. Khan's position in this case to be far too credulous. Thinks the Committee will be very interested in assessing his credulousness at the hearing.

(c) Issues around preparation and administration of cytotoxic agents.

As an aside, she is dubious about Dr. Khan's compensation - not clear from the evidence before her how he makes money on this treatment.

In her view, Dr. Chart predicted that a panel would have no difficulty making a finding of failure to meet the standards of the profession and incompetence in CAM practice regarding the administration of cytotoxic agents, and DDU around his billing practices.

She felt that a penalty after a contested hearing would need to comprise some / all of the following elements:

1. A restriction on his licence prohibiting him from administering cytotoxic agents to any patients;
2. A short suspension in order to provide general and specific deterrence ("has not killed anyone, but just a matter of time");
3. An order requiring Dr. Khan to practice within the expectations of the CAM policy;
4. Successful completion of the College's record-keeping course; and
5. Completion of an Ethics Course.

Dr. Chart concluded her opinion by punctuating her views with the observation that "you can't dress chemotherapy up in complementary medicine clothes; offering conventional cytotoxic agents in a non-conventional setting does not mean Dr. Khan can take shelter in the CAM policy." Just because Dr. Khan's patients may feel better, this is not an appropriate treatment for them. They are very vulnerable patients, they should be treated with care.

Dr. Chart was particularly troubled by the new OncoBlot case where a patient without active disease appears to have received cytotoxic chemotherapy agents. She observed that if this matter is joined with the current referral, it would reinforce the Committee's views that he is not practising in compliance with standards, and they will have a concrete example of a patient who was harmed by cytotoxic medications that ended up not being indicated.

On this note, we were directed by the Chair to engage in without prejudice discussions with Ms Block to see if there was any chance to resolve the matter without resorting to a full blown contested hearing.

At the PHC, we loosely discussed Ms Block's position that she would be prepared to resolve the case if Dr. Khan would be prepared to plead guilty to failing to meet the standards of the profession for a CAM doctor in respect of his SEF chemo practice, admit to certain aspects of failing to communicate a conventional diagnosis, deficient documentation, and would

agree to a restriction on his licence agreeing not to prescribe cytotoxic drugs any more. In the alternative, Ms Block would be prepared to entertain a restriction mirroring the current s. 25.4 order on his licence right now, which would allow him to provide SEF chemo but under the supervision of an oncologist approved by the CPSO. Ms Block did not seem inclined to be looking for a suspension, but Dr. Chart very unhelpfully emphasized that for specific and general deterrent purposes, a short suspension may be in order. We did not take any position on resolution, nor did we make any proposals. I simply undertook to take this information back to Dr. Khan for his consideration and discussion.

In this regard, we agreed that if Dr. Khan is inclined to make a without prejudice proposal to resolve the matter prior to a contested hearing, we will do so by **March 16, 2018**. The College will provide a response by **April 6, 2018**. A case management conference call was scheduled for **Thursday, April 26th at 4:15 pm**.

We estimated that the hearing may take up to 12 days in total, and I highlighted that there may be some difficulties with the health of some of Dr. Khan's patient witnesses which could lengthen the hearing. Counsel will have further discussions to explore the possibility of taking evidence from some of these witnesses in advance of the hearing given their health issues.

The hearing was booked for January 21 to 25; February 4 to 8; and February 11 to 15, 2019. These dates are now posted on the CPSO public website. Ms Block will not be available for the hearing, so if the matter proceeds then it is expected that the matter will be transferred to another College counsel. Parties were reminded about the new College daily tariff for hearing dates, which is **\$10,000 per hearing day**, payable by the member if they are not successful. In Dr. Khan's case, if we proceed to a 12 day contested hearing, he would be personally liable to pay a cost order to the College in the amount of **\$120,000²**.

JAM/mj

#17602242

² CMPA **does not** cover these costs.