

# Criminal Records: An Accidental Trilogy – What Regulators Should Know About Discharges

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By Debra McKenna

It has been a hot minute and a pandemic later since I have had an opportunity to write about criminal records ([What You Need to Know about Police Record Checks](#) and [Criminal Records Redux](#)). But, not unlike the excitement for some of the prospect of a new Star Wars episode or the return (yet again) of flared jeans, you can imagine my delight when I came across the Divisional Court's recent decision in *Dr. Jha v. College of Physicians and Surgeons of Ontario* and a chance to talk about the *Criminal Records Act* once again.<sup>[1]</sup>

This decision is super interesting! To set the stage, under the Health Professions Procedural Code ("HPPC"), section 51(1)(a) provides that a discipline panel shall find a member has committed an act of professional misconduct where "the member has been found guilty of an offence that is relevant to the member's suitability to practise."<sup>[2]</sup> In this case, Dr. Jha had been charged and was "found guilty" of assault under the *Criminal Code* arising from an incident of domestic violence involving his then-fiancée. After making those guilty findings, the trial judge granted Dr. Jha an absolute discharge.

As explained in my previous article, [Criminal Records Redux](#), a court has jurisdiction under section 730(1) of the *Criminal Code* to make an order that an individual who pleads guilty or is found guilty of certain offences be "discharged", either absolutely or on conditions, instead of registering a conviction.<sup>[3]</sup> The order can only be made in those circumstances where it is in the best interests of the accused and not contrary to the public interest. It is essentially a legislative mechanism to provide individuals with a "second chance" and avoid having a permanent criminal record.

As confirmed by the Divisional Court in its decision, by operation of section 730(3) of the *Criminal Code*, a person granted an absolute or conditional discharge is deemed not to have been convicted of an offence. But, importantly, section 730(3) has not been interpreted as meaning that there is no finding of guilt.<sup>[4]</sup> Rather, section 6.1(2) of the *Criminal Records Act* requires that all references to a discharge under section 730(1) be removed from CPIC (which is the criminal conviction records retrieval system maintained by the RCMP) on the expiration of the discharge; that is, one year after an absolute discharge and three years after a conditional discharge.<sup>[5]</sup> Thereafter, section 6.1(1) of the *Criminal Records Act* prohibits discharge records or the fact of a discharge from being disclosed by the RCMP or by any department or agency of the Government of Canada (except in narrow circumstances).<sup>[6]</sup>

In this case, Dr. Jha argued before the Discipline Committee and the Divisional Court that section 51(1)(a) of the HPPC was unconstitutional on the grounds that it conflicted with and/or frustrated the purpose of section 6.1 of the *Criminal Records Act*. It was Dr. Jha's submission that, because of the doctrine of federal paramountcy (which provides that federal legislation is paramount or takes precedence over provincial legislation to the extent that both pieces of legislation are valid, overlap, and inconsistent), section 51(1)(a) was therefore rendered inoperative because it was incompatible with the requirements of *Criminal Records Act* when applied to a person granted a discharge under section 730(1) of the *Criminal Code*.

While this was an interesting argument advanced by Dr. Jha, he was ultimately unsuccessful in persuading either the Discipline Committee or the Divisional Court. It was the view of the Divisional Court that, based on its interpretation of the purpose and effect of section 6.1 (which the Court concluded was to be interpreted narrowly and only applies to federal agencies), there is no paramountcy issue vis-à-vis section 51(1)(a).<sup>[7]</sup> Of particular significance, the Divisional Court concluded that section 6.1 does not extend to prevent a provincial regulator from pursuing misconduct proceedings under section 51(1)(a) based on a finding of guilt, even where a discharge is granted. Regulators are not required to relitigate those facts and can rely on the findings made by a criminal court – notwithstanding a discharge.<sup>[8]</sup> Upon proof of the finding of guilt by way of the criminal proceeding, the question for the discipline panel then becomes whether those findings are “relevant to the member’s suitability to practise.”<sup>[9]</sup>

The Divisional Court also concluded that the purpose and effect of section 6.1 does not extend to prohibit the disclosure or use of records relating to findings of guilt where those records are “in the hands of private parties, provincial entities, or entities regulated under provincial law”.<sup>[10]</sup> Furthermore, section 6.1 does not operate to “claw back” those records or renders them inadmissible in a discipline proceeding.<sup>[11]</sup> However, as noted by the Divisional Court, section 6.1 can create a practical hurdle for regulators where they fail to investigate in a timely way and obtain the necessary records before a discharge is purged under the *Criminal Records Act* (either in one year for an absolute discharge or three years for a conditional discharge). In those circumstances, regulators may be faced with a refusal by the Crown and/or police to provide the requisite records due to the bar on disclosure created by section 6.1.<sup>[12]</sup>

So, there is a lot to process here about discharges and section 6.1, but it is possible that this decision by the Divisional Court may not be the final word. As discussed in my previous article, [Criminal Records Redux](#), the Ontario Court of Appeal touched on these issues (but not in the professional regulatory context) in *R. v. Montesano* in 2019 and concluded that section 6.1 precludes the disclosure of “the existence and fact” of an absolute discharge to anyone beyond one year following its imposition. On his appeal, Dr. Jha relied on *Montesano* and argued that the Ontario Court of Appeal’s decision prohibited the disclosure of the discharge and the finding of guilt underlying it “by any person”, and the use of the finding of guilt for any purpose after the statutory period had expired. The Divisional Court did not accept that argument by Dr. Jha, and further indicated that such an interpretation of *Montesano* and section 6.1 of the *Criminal Records Act* would be inconsistent with other precedents.<sup>[13]</sup>

Consequently, stay turned for an update on a possible leave to appeal application to the Court of Appeal for Ontario and, perhaps, an opportunity to build this trilogy of articles on criminal records into a tetralogy.

***The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.***

<sup>[1]</sup> *Dr. Jha v. College of Physicians and Surgeons of Ontario*, 2022 ONSC 769 (CanLII) [<https://canlii.ca/t/jp0xr>].

<sup>[2]</sup> Health Professions Procedural Code (“HPPC”), being Schedule 2 of the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18. [[www.ontario.ca/laws/statute/91r18](http://www.ontario.ca/laws/statute/91r18)] **Note:** In addition to the HPPC, this is fairly standard language/provision that appears in several acts in the professional regulatory context including, for example: *Registered Insurance Brokers Act*, R.S.O. 1990, c. R.19; *Veterinarians Act*, R.S.O. 1990, c. V.3; *Architects Act*, R.S.O. 1990, c. A.26; *Professional Engineers Act*, R.S.O. 1990, c. P.28;

*Surveyors Act*, R.S.O. 1990, c. S.29.

[3] *Criminal Code*, RSC 1985, c. C-46, s. 730(1) [<https://laws-lois.justice.gc.ca/eng/acts/c-46/>].

[4] *Dr. Jha v. College of Physicians and Surgeons of Ontario*, 2022 ONSC 769 (CanLII) at para. 44 [<https://canlii.ca/t/jp0xr>].

[5] *Criminal Records Act*, RSC 1985, c. C-47, s. 6.1(2) [<https://laws-lois.justice.gc.ca/eng/acts/c-47/>].

[6] *Criminal Records Act*, RSC 1985, c. C-47, s. 6.1(1) [<https://laws-lois.justice.gc.ca/eng/acts/c-47/>].

[7] *Dr. Jha v. College of Physicians and Surgeons of Ontario*, 2022 ONSC 769 (CanLII) at paras. 93-96 [<https://canlii.ca/t/jp0xr>].

[8] *Dr. Jha v. College of Physicians and Surgeons of Ontario*, 2022 ONSC 769 (CanLII) at paras. 89-92 and <https://canlii.ca/t/jp0xr>.

[9] *Dr. Jha v. College of Physicians and Surgeons of Ontario*, 2022 ONSC 769 (CanLII) at paras. 109, 114, 118-124. [<https://canlii.ca/t/jp0xr>].

[10] *Dr. Jha v. College of Physicians and Surgeons of Ontario*, 2022 ONSC 769 (CanLII) at para. 94 [<https://canlii.ca/t/jp0xr>].

[11] *Dr. Jha v. College of Physicians and Surgeons of Ontario*, 2022 ONSC 769 (CanLII) at para. 82 [<https://canlii.ca/t/jp0xr>].

[12] *Dr. Jha v. College of Physicians and Surgeons of Ontario*, 2022 ONSC 769 (CanLII) at para. 83 [<https://canlii.ca/t/jp0xr>].

[13] *Dr. Jha v. College of Physicians and Surgeons of Ontario*, 2022 ONSC 769 (CanLII) at para. 75 [<https://canlii.ca/t/jp0xr>].

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