

IN THE MATTER OF THE *HEALTH PROFESSIONS ACT* RSA 2000 c. H-7

AND IN THE MATTER OF AN APPEAL FROM DECISIONS OF THE HEARING
TRIBUNAL OF THE COLLEGE OF PHYSICIANS AND SURGEONS OF ALBERTA
REGARDING DR. ROWAN SCOTT

DECISION OF THE APPEAL PANEL OF COUNCIL OF
THE COLLEGE OF PHYSICIANS AND SURGEONS OF ALBERTA

1. An appeal was held before the Appeal Panel of the Council ("the Panel") of the College of Physicians & Surgeons of Alberta (the "College") on August 11, 2025, by videoconference. In attendance were:

Dr. Daisy Fung, Chair;
Dr. Nicole Cardinal;
Mr. Rob Merrifield;
Ms. Laurie Steinbach.
2. Also in attendance were:

Mr. Craig Boyer, legal counsel for the Complaints Director;
Dr. J. Rowan Scott, investigated person;
Ms. Katherine Fisher and Mr. Patrick Coones, legal counsel for Dr. Scott;
Mr. Gregory Sim, independent legal counsel to the Panel.
3. The appeal was conducted in accordance with section 87 of the *Health Professions Act* ("HPA"). The appeal was with respect to the Hearing Tribunal's decision on sanctions and costs dated April 23, 2025 (the "Sanction Decision").

I. PRELIMINARY MATTERS

4. The parties confirmed that there were no objections to the composition of the Panel or any preliminary matters to be addressed.

II. BACKGROUND

5. In its July 30, 2024 Merits Decision, the Hearing Tribunal found the following allegation of unprofessional conduct proven against Dr. Scott:

That the Investigated Person displayed a lack of knowledge, skill, or judgment in the provision of professional services when, in a medical letter, dated February 12, 2020, [he] speculated on the behaviour and potential [REDACTED] diagnoses of [the Complainant], who was not [his] patient, whom [he] had never examined, and without [the Complainant's] consent.

6. The Hearing Tribunal issued its Sanctions Decision on April 23, 2025. In the Sanctions Decision the Tribunal made the following orders:
 - a. Dr. Scott will receive a reprimand with the Hearing Tribunal's Merits Decision and this decision on sanction serving as the reprimand.
 - b. Dr. Scott is ordered to pay costs of 25% of the total amount for the investigation and hearing, to a maximum of \$25,000.00. Costs are to be paid within six months of this decision, or within such time as agreed to by the Complaints Director.

III. GROUNDS OF APPEAL

7. Dr. Scott raised the following grounds of appeal in his written and oral submissions:
 - a. The Hearing Tribunal erred in its application of *Jinnah v. Alberta Dental Association & College*,¹ including by treating Dr. Scott's conduct as serious unprofessional conduct warranting a cost award despite the lack of any necessary aggravating factors or evidence that Dr. Scott knew that the conduct was unacceptable;
 - b. The Hearing Tribunal's quantum of costs was unreasonable, arbitrary, and inconsistent with the findings in the Hearing Tribunal's Merits Decision and in prior sanctions decisions of hearing tribunals of the CPSA.

IV. SUBMISSIONS AT REVIEW

Standards of Review

8. The parties generally agreed about the standards of review. The standards of review to be applied by the Panel to the Hearing Tribunal's decision are as described in *Yee v. Chartered Professional Accountants of Alberta*:²
 - a. findings of fact made by the Hearing Tribunal, particularly findings based on the credibility of witnesses, should be afforded significant deference;
 - b. inferences drawn from the facts by the Hearing Tribunal should be respected, unless there is an articulable reason to disagree;
 - c. for questions of law arising from the interpretation of the governing statute, the Panel is equally well-positioned to make the necessary findings and can independently examine the issue, but regard should be had to the Hearing Tribunal's view;
 - d. for questions engaging the expertise of the profession, such as setting standards of conduct, the Panel is entitled to apply its own expertise and make findings about what constitutes unprofessional conduct, though it should not disregard the views of the Hearing Tribunal or proceed as if its findings were never made;
 - e. the Panel is also well-positioned to review the entire decision and conclusions of the Hearing Tribunal for reasonableness, to ensure that, considered overall, it properly protects the public and the reputation of the profession;

¹ *Jinnah v. Alberta Dental Association & College*, 2022 ABCA 336 ("Jinnah")

² *Yee v. Chartered Professional Accountants of Alberta*, 2020 ABCA 98 at paras. 34-35

- f. the Panel may also intervene in cases of procedural unfairness, or where there is a reasonable apprehension of bias.
- 9. Questions of mixed fact and law where the decision results from the application of the law to the evidence as a whole are given deference, but the Panel can intervene to address errors in the statement of a legal test or where there is an extricable question of law.³
- 10. A decision will be unreasonable if the decision-maker has fundamentally misapprehended or failed to account for the evidence, if the reasons contain a fundamental gap or an unreasonable chain of analysis, if the reasons do not “add up”, if there is no line of analysis that could reasonably lead from the evidence to the conclusions reached, or if the decision does not respect the statutory scheme.⁴

Submissions of Dr. Scott

- 11. Dr. Scott argued that the Hearing Tribunal erred in its application of *Jinnah* on the following grounds:
 - a. in treating Dr. Scott’s conduct as serious unprofessional conduct warranting a costs award, despite the lack of any necessary aggravating factors or evidence that Dr. Scott knew his conduct was unacceptable; and
 - b. by calculating an unreasonable quantum of costs inconsistent with the Hearing Tribunal’s Merits Decision and prior sanction decisions of hearing tribunals of the CPSA.
- 12. The Hearing Tribunal based its costs decision on the *Jinnah* case. *Jinnah* established that, in general, the costs of an investigation and hearing should be borne by the profession as a whole and not by the regulated member. A substantial amount of costs should only be payable by a regulated member if compelling reasons exist to justify their imposition. In this case, the Hearing Tribunal found Dr. Scott’s conduct to be serious unprofessional conduct and a compelling reason to order that he pay a substantial amount of the costs.
- 13. Since the Hearing Tribunal’s decision, the Court of Appeal in *Charkhandeh v College of Dental Surgeons of Alberta*,⁵ reconsidered this approach to costs. The Court held that the *Jinnah* approach should no longer be followed and it provided new principles. There is no longer any presumption that the costs of an investigation and hearing should be borne by the profession and not the professional absent compelling reasons.

³ *Zuk v. Alberta Dental Association and College*, 2020 ABCA 162 at para. 15

⁴ *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras. 96-126

⁵ *Charkhandeh v College of Dental Surgeons of Alberta*, 2024 ABCA 239, [2024] AJ No. 315.

14. Dr. Scott submitted that given the new principles articulated in *Charkhandeh*, the Hearing Tribunal erred in finding that he was guilty of serious unprofessional conduct and erred in its determination of the quantum of costs.
15. Dr. Scott explained that the parties had reached a joint submission as to what they believe to be a reasonable quantum of costs to be awarded against him. Dr. Scott asked the Panel to vary the Hearing Tribunal's costs order according to the joint submission.

Serious Unprofessional Conduct

16. Dr. Scott made submissions as to the flawed reasoning of the Hearing Tribunal in finding him to have engaged in serious unprofessional conduct warranting a substantial costs award.
17. Dr. Scott explained that in *Jinnah*, the Court of Appeal described serious unprofessional conduct as conduct meeting a higher threshold of unprofessional conduct than defined in the *HPA*. Unprofessional conduct arises when a regulated member is found guilty under the *HPA*, but the hearing tribunal must then assess whether the degree of culpability or moral reprehensibility justifies overturning the presumption that costs be borne by the profession and instead impose costs on the regulated member. Examples include sexual assault on a patient, fraud, or performing health procedures in a manner that is a marked departure from the standard of care.
18. Dr. Scott stated that in *Jinnah*, the Court of Appeal made it clear that aggravating factors such as criminal conduct, fraud, deceit or misuse are required to take conduct from unprofessional conduct to serious unprofessional conduct warranting a costs award. Dr. Scott submitted that no such aggravating factors are present with respect to his conduct.
19. Dr. Scott referred to paragraph 29 of the Hearing Tribunal's Sanctions Decision where the Tribunal wrote that its Merits Decision found him guilty of serious unprofessional conduct. Dr. Scott submitted that the Hearing Tribunal made no such finding of serious unprofessional conduct, referring to paragraph 121 of the Merits Decision where the Hearing Tribunal simply found that Dr. Scott was guilty of unprofessional conduct.
20. Dr. Scott explained that there must be a difference between unprofessional conduct under the *HPA* and serious unprofessional conduct as described in *Jinnah*. Serious unprofessional conduct must be more significant or morally blameworthy than normal unprofessional conduct. According to *Jinnah*, where there is a finding of serious unprofessional conduct, costs can be imposed against a member.
21. In its Merits Decision, the Hearing Tribunal simply found that Dr. Scott's conduct was unprofessional conduct. The Tribunal conducted no analysis of whether the conduct was serious unprofessional conduct. For the Hearing

Tribunal to rely on a finding that it did not make to justify the imposition of costs is unreasonable and an error that must be addressed by the Panel.

22. Dr. Scott argued that the Hearing Tribunal erred in finding that he engaged in frequent and extensive speculative diagnosis warranting a finding of serious unprofessional conduct. He argued that any speculation he engaged in was limited to the Complainant, confined to the report, and not repeated or applied to any other person.
23. Dr. Scott submitted that his comments qualifying his opinions in the report should have been considered by the Hearing Tribunal and should have negated any finding of serious unprofessional conduct warranting a cost award.
24. Dr. Scott referred to paragraph 29 of the Sanction Decision where the Hearing Tribunal justified its finding of serious unprofessional conduct by stating that his conduct undermined the integrity of the profession and was inconsistent with the expectations of physicians. The Tribunal's finding simply cited the definition of unprofessional conduct under the *HPA*. It could not justify a finding of serious unprofessional conduct. If that were the case, then every finding of unprofessional conduct would be serious unprofessional conduct warranting costs as per *Jinnah*.
25. Dr. Scott referred to paragraph 31 of the Hearing Tribunal's Sanction Decision which indicated that his conduct was serious unprofessional conduct because of the risk of misleading many and tarnishing the entire profession of psychiatry. Dr. Scott submitted that such an allegation was not supported by facts, given the report in question was prepared solely for the purpose of [REDACTED] and was never entered into evidence. As such, the risk of his conduct 'misleading many' was limited.
26. Dr. Scott responded to the Complaints Director's reliance on *M.M v College of Alberta Psychologists*,⁶ by noting that the case predates the *HPA* and *Jinnah*. Dr. Scott emphasized that the Hearing Tribunal was required to assess his conduct using the *Jinnah* framework for serious unprofessional conduct.
27. Dr. Scott then made submissions on the Hearing Tribunal's further error in finding him to have committed serious unprofessional conduct, because it failed to consider the requirement as per *Jinnah* that a regulated member be aware that their conduct was unacceptable and constituted unprofessional conduct in order to justify a costs award. The Hearing Tribunal made no findings in either the Merits Decision or the Sanctions Decision that Dr. Scott knew his conduct was completely unacceptable and only made findings as to what Dr. Scott should have known.
28. Dr. Scott stated that he testified at the merits hearing that he believed he had a positive obligation to prepare the report, a position the Hearing Tribunal agreed with in paragraph 71 of the Merits Decision. Dr. Scott explained that he

⁶ *M.M v College of Alberta Psychologists*, 2011 ABCA 110, [2011] AJ No 368.

also gave evidence that he believed commenting on the Complainant's behavior [REDACTED] was within the scope of his expertise. Dr. Scott had prior experience in responding to questions posed to him [REDACTED] which informed him of his approach in this matter. Dr. Scott argued that such belief was not unreasonable given the lack of clear guidance provided to physicians regarding the preparation of medical-legal reports.

29. Dr. Scott also referred to the conflicting expert evidence presented in the merits hearing which he argued demonstrated a lack of agreement in the profession as to the standards applicable to medical-legal reports. Dr. Scott submitted that the suggestion that he knew his conduct was unacceptable, in light of the lack of guidance and consensus amongst the experts, was entirely unreasonable.
30. Dr. Scott then argued that the Court's decision *Charkhandeh* changed the law in ways directly relevant to his position that the Hearing Tribunal erred in its finding of serious unprofessional conduct and its award of costs. Dr. Scott referred to the following paragraphs of *Charkhandeh* in support of his position:
 - a. Paragraph 138 of the decision clarifies that costs are not intended to be a form of sanction, but to allocate the costs of the proceedings, not to add another level of punishment.
 - b. Paragraph 139 of the decision notes that *K.C. v College of Physical Therapists of Alberta*⁷ and *Jinnah* emphasized the seriousness of the charges when determining costs, which is inconsistent with the principle that costs are not intended as a sanction.
 - c. Paragraph 140 clarifies that, despite the Court's prior decisions and comments, the seriousness of the charges relates to sanctioning, not to awarding costs. While serious charges may lead to higher costs due to longer hearings and investigations, the nature of the conduct itself is not a factor in calculating costs.
31. Dr. Scott submitted that upholding the Hearing Tribunal's finding of serious unprofessional conduct risks reputational harm to Dr. Scott, as it effectively imposes a punitive sanction by equating his conduct with acts such as sexual assault or fraud. Such punitive effect is specifically precluded by *Charkhandeh*.
32. Dr. Scott argued that the only reason the Hearing Tribunal made a finding of serious unprofessional conduct was to justify imposing costs against him, and to overcome the general presumption that costs be borne by the regulator. However, *Charkhandeh* overturned this presumption and clarified that seriousness of the conduct is not a factor to be considered when determining whether costs should be awarded.

⁷ *K.C. v College of Physical Therapists of Alberta*, 1999 ABCA 253, [1999] AJ No 973.

33. Dr. Scott explained that if the Panel were to overturn the Hearing Tribunal's finding of serious unprofessional conduct, this would ensure that his punishment flowed only from the sanction itself, which would bring the matter in line with the principles articulated in *Charkhandeh*.
34. Dr. Scott asked the Panel to overturn the finding of serious unprofessional conduct warranting costs, arguing the Hearing Tribunal misapplied *Jinnah* or, in the alternative, because *Jinnah* is no longer the applicable law in Alberta.
35. Dr. Scott explained that the common law is retrospective, and as such, any new decision of a court applies to conduct that predates the decision but will not overturn decisions that have been finally decided. Dr. Scott referred the Panel to *Hislop v Canada*, 2007 SCC 10, and *British Columbia v Imperial Tobacco Canada Ltd.*, 2005 SCC 49, *Hlady v Alberta*, 2005 ABCA 146, and *R v Letiec*, 2015 ABCA 123 in support of his position that the common law is retrospective. As Dr. Scott's matter has not been finally decided, it was his position that *Charkhandeh* should now apply and the Hearing Tribunal's decision should be overturned.

Varying the Hearing Tribunal's Cost Order

36. Dr. Scott then explained that he and the Complaints Director had reached a joint submission as to what was a reasonable cost order in light of the principles articulated in *Charkhandeh*. Dr. Scott proposed that the Panel vary the quantum of costs award according to the joint submission and impose costs that he would pay regardless of the degree of seriousness of his unprofessional conduct.
37. The Hearing Tribunal had ordered Dr. Scott to pay 25% of the costs of the hearing and investigation, to a maximum of \$25,000.000. Dr. Scott stated that, based on the principles established in *Charkhandeh*, he and the Complaints Director jointly submitted that an award of \$15,000.00 was reasonable.
38. Dr. Scott outlined some principles from *Charkhandeh* which he submitted were applicable:
 - a. Costs orders should only be considered after the discipline tribunal has determined a fit sanction as costs are not to be a further punishment;
 - b. There is no presumption that the regulator or the regulated member should bear any amount of the costs. The presumptive approach in *Jinnah* should not be used;
 - c. Full indemnity costs are neither a starting point nor a default outcome;
 - d. The number of allegations and the overall success of the parties should be considered, although this is not intended to be simply a mathematical calculation;

- e. The length and extent of the hearing should be considered, and parties who engage in unreasonable or inefficient conduct should bear the associated costs;
 - f. The regulated member's circumstances and overall burden that a costs award would place on them should be considered, but the evidence of ability to pay will not make an unreasonable costs award into a reasonable one;
 - g. The Court should evaluate whether a costs award would be disproportionate or crushing, and the possibility of excessive costs should not discourage or deprive regulated members of the opportunity to fully defend themselves;
 - h. Regulated members should generally not be required to pay a significant portion of expenses for the infrastructure of a hearing, and costs of expert witnesses should not be ordered unless it is reasonable and proportionate;
 - i. The Court should evaluate the reasonableness of the legal fees for the lawyer prosecuting the case, and the costs charged to the regulated member should generally be calculated as if the work was completed by one lawyer at mid-level seniority and appropriate rates;
 - j. Fees associated with lawyers advising the discipline tribunal and assisting in drafting its decision should be borne by the regulator;
 - k. The Tribunal should not make an 'in gross' percentage award of costs, and the Tribunal should have a reasonable idea of the types of expenses included and make some assessment of whether those expenses are reasonable.
39. Dr. Scott addressed the value of resolving matters by agreement, citing *R v Anthony-Cook*⁸, for the approach to considering joint submissions. Dr. Scott argued that the joint submission for a costs order of \$15,000 reflects a fair and reasonable award, in alignment with the *Charkhandeh* principles.

Panel Questions

40. The Panel asked Dr. Scott why it would be necessary to vary the Hearing Tribunal's findings on the seriousness of his conduct if there is a joint submission concerning the appeal of the costs and given that *Charkhandeh* has said that seriousness is not relevant to awarding costs.
41. Dr. Scott argued that the Hearing Tribunal's erroneous finding of serious unprofessional conduct should be overturned to prevent further reputational harm, as it wrongly suggests that his unprofessional conduct reached the

⁸ *R v Anthony-Cook*, 2016 SCC 43 ("*Anthony-Cook*").

higher threshold of morally reprehensible conduct as described in *Jinnah*. Dr. Scott argued that the correct approach to this matter would be to overturn the finding of serious unprofessional conduct, apply the *Charkhandeh* principles, and adjust the cost award according to the joint submission.

Submissions of the Complaints Director

42. The Complaints Director also described several factors in *Charkhandeh* to evaluate when determining costs. For example, a registrant who is substantially successful should not be expected to pay any costs. *Charkhandeh* also indicates that there should be consideration of whether a party engages in unreasonable or inefficient litigation conduct. The Complaints Director stated that this is a relevant factor in this matter given that Dr. Scott raised irrelevant arguments at the hearing such as referencing the Goldwater Rule and bringing a preliminary application which failed but wasted time and energy.
43. The Complaints Director also pointed to *Charkhandeh* for the principle that expenses must be reasonably incurred, quantum paid by the regulator must be fair and reasonable, cost awards must be proportionate to the issues, and full indemnity is neither the starting point, nor the default.
44. The Complaints Director submitted that Dr. Scott's reference to the lack of written guidance or standards of practice was unwarranted, as standards can be unwritten and proven through evidence of the consensus amongst the profession: *Walsh v Council of Licensed Practical Nurses*; ⁹ *Kherani v Alberta Dental Association*.¹⁰
45. The Complaints Director explained that overall costs for the matter are in the range of approximately eighty-thousand dollars. Twenty-five per cent of that total cost amounts to \$20,843.76. Dr. Scott was found guilty of unprofessional conduct worthy of sanction and was given a reprimand. In accordance with *Charkhandeh*, some burden of costs would be appropriately borne by Dr. Scott. The Complaints Director indicated that he and Dr. Scott had determined that \$15,000.00 would be an appropriate amount to deal with the matter in an effective way.
46. The Complaints Director supported the joint submission to vary the Hearing Tribunal's costs order and substitute an order for Dr. Scott to pay \$15,000. The joint submission was not a true joint submission, such as under *R. v. Anthony-Cook*, since it was not accompanied by an admission of guilt. Regardless, it would be practical and efficient to give effect to the parties' joint submission.

⁹ *Walsh v Council of Licensed Practical Nurses*, 2010 NLCA 11.

¹⁰ *Kherani v Alberta Dental Association*, 2025 ABCA 2, [2025] AJ. No 2.

Panel Questions

47. The Panel had a number of questions for the Complaints Director:
- Does the Complaints Director agree with Dr. Scott that the decision on costs is incorrect or unreasonable as a result of the decision in *Charkhandeh*?
 - Does the Panel have the power to overturn the decision on costs from the Tribunal and then make a new decision using the *Charkhandeh* factors?
 - Is it necessary for the Panel to make new findings about the seriousness of the conduct?
48. The Complaints Director explained that the Hearing Tribunal made its sanctions decision based on the law before it at the time, *Jinnah*. With the release of *Charkhandeh*, the law changed and the Panel must apply the law retrospectively. The Panel is empowered to vary the Hearing Tribunal's decision in light of the *HPA* and the new state of the law. While the Panel can comment on the moniker of seriousness, seriousness is no longer applicable to the Panel's analysis of costs.

Reply Submissions of Dr. Scott

49. Dr. Scott clarified that the Goldwater rule was not advanced as part of his defense, but was instead advanced by the Complaints Director's expert, Dr. [REDACTED]. As such, any additional time spent on dealing with the Goldwater rule was a result of the argument advanced by the Complaints Director and their expert.
50. Dr. Scott responded to the Complaint Director's submission that his preliminary application added additional time, explaining that this issue was already argued before the Hearing Tribunal who confirmed that it was not hearing misconduct or inappropriate under *Jinnah*. Dr. Scott further added that any costs associated with the preliminary application were already covered in the bill of costs.
51. Dr. Scott agreed that written guidance is not required to establish unprofessional conduct, but that he raised the absence of such guidance to counter the finding of serious unprofessional conduct. Dr. Scott reiterated his earlier comments that serious unprofessional conduct requires clear awareness that the conduct was unacceptable and unprofessional. Dr. Scott also reiterated the difference between the standards for unprofessional and serious unprofessional conduct which applied under *Jinnah*.

V. DECISION

52. The appeal is allowed in part. The joint recommendation on costs is accepted, and the cost order is accordingly varied to \$15,000.00 made payable by Dr. Scott within ninety days of the date of this decision according to the joint submission. The Panel decided not to vary the Hearing Tribunal's findings or reasons, or to refer the matter back for further consideration or for a rehearing.

VI. FINDINGS AND REASONS

53. The Panel reviewed the Hearing Tribunal's Sanctions Decision for reasonableness. Questions of the appropriate sanctions and costs orders are questions of mixed fact and law calling for deference when the decision results from a consideration of the evidence as a whole.¹¹
54. The Panel has reviewed the Hearing Tribunal's Decision as it was made in consideration of *Jinnah*. *Jinnah* is no longer the law in Alberta, and *Charkhandeh* has overturned the principles and directions in *Jinnah* regarding costs. The decision on costs made by the Hearing Tribunal is accordingly no longer consistent with the law as set out in *Charkhandeh*.
55. The Complaints Director and Dr. Scott agreed that costs should be varied. They provided a joint submission to vary the costs order to impose a new order that Dr. Scott pay \$15,000 in costs within 90 days. While not a joint submission as in the *Anthony-Cook* case, the Panel gave serious consideration to the parties' joint position. The Panel accepts the joint submission and orders costs against Dr. Scott in the amount of \$15,000.00 made payable within ninety days of this decision.
56. With respect to the Hearing Tribunal's reasons finding serious unprofessional conduct, that is a question or an inference of fact and is entitled to considerable deference. It is also no longer relevant to the determination of costs under the law as described in *Charkhandeh*. Dr. Scott was entitled by section 87 of the *HPA* to appeal the Hearing Tribunal's decisions, but it was not necessary, or appropriate for the Panel to re-weigh the evidence before the Hearing Tribunal and make new findings about the severity of Dr. Scott's unprofessional conduct.

VII. ORDER

57. The appeal is allowed, in part. The joint recommendation on costs is accepted, and the cost order is accordingly varied to \$15,000.00. The costs will be payable by Dr. Scott within ninety days of November 17, 2025. The Panel has

¹¹ *Zuk v. Alberta Dental Association and College*, 2020 ABCA 162 at para. 15

not varied the Hearing Tribunal's findings or reasons with respect to the severity of Dr. Scott's unprofessional conduct.

Signed on behalf of the Panel by the Chair:

A handwritten signature in black ink, appearing to read "Daisy Fung", written in a cursive style.

Dr. Daisy Fung

Dated this 17th day of November, 2025.