COLLEGE OF PHYSICIANS & SURGEONS OF ALBERTA

IN THE MATTER OF
A HEARING UNDER THE *HEALTH PROFESSIONS ACT*,
RSA 2000, c H-7

AND IN THE MATTER OF A HEARING REGARDING
THE CONDUCT OF DR. J. ROWAN SCOTT

# DECISION OF THE HEARING TRIBUNAL OF THE COLLEGE OF PHYSICIANS & SURGEONS OF ALBERTA
# July 30, 2024

## I. INTRODUCTION

[1] The Hearing Tribunal held a hearing into the conduct of Dr. J. Rowan Scott on May 22 and 23, 2024. The members of the Hearing Tribunal were:

Mr. Glen Buick as Chair (and public member);
Dr. Don Yee;
Dr. Kim Loeffler;
Mr. Terry Engen (public member).

[2] Appearances:

Ms. Stacey McPeek, legal counsel for the Complaints Director;
Dr. J. Rowan Scott ("**Dr. Scott**" or the "**Investigated Person**");
Ms. Laura Inglis and Ms. Katherine Fisher, legal counsel for Dr. Scott;
Ms. Julie Gagnon, independent legal counsel for the Hearing Tribunal.

## II. PRELIMINARY MATTERS

[3] The parties confirmed that there were no objections to the composition of the Hearing Tribunal or its jurisdiction to proceed with the hearing.

[4] An application was brought by the Complaints Director to hold the hearing in private under section 78(1) of the *Health Professions Act*, RSA 2000, c. H-7 (the "**HPA**"). Counsel for the Complaints Director noted that at issue in the hearing is information about a patient of the Investigated Person (the "**Patient**") and the complainant (the "**Complainant**") [redacted]. Some of the information in the hearing will relate to very personal issues including the Patient's [redacted] health issues, and comments about the Complainant [redacted]. [redacted] Counsel for the Complaints Director pointed to section 78(1)(a)(i) and (iii) of the HPA in support of her application.

[5] Counsel for the Investigated Person agreed the hearing should be held in private. The parties confirmed that they were not seeking an order to exclude the Complainant from attending the proceedings as an observer.

[6] The Hearing Tribunal adjourned to consider the matter. The Hearing Tribunal agreed that the hearing would be held in private under section 78(1)(a)(i) and (iii) of the HPA. In this case, both the Complaints Director and Investigated Person jointly recommended that the hearing be held in private to preserve the personal information of the Patient and Complainant [redacted]. [redacted] The Hearing Tribunal also found that the desirability of not disclosing personal information about the Patient and Complainant outweighed the desirability of having the hearing open to the public.

## III. CHARGES

[7] The allegations in the Notice of Hearing (the "**Allegations**") are as follows:

1. You displayed a lack of knowledge, skill, or judgment in the provision of professional services when you failed to decline a request to provide medico-legal report outside the scope of your professional obligations to your patient;

2. You displayed a lack of knowledge, skill, or judgment in the provision of professional services when, in a medical letter, dated February 12, 2020, you speculated on the behaviour and potential [redacted] diagnoses of [the Complainant], who was not your patient, whom you had never examined, and without [the Complainant's] consent.

[8] The Investigated Person denies the allegations.

## IV. EVIDENCE

[9] The following Exhibits were entered into evidence during the hearing:

Exhibit 1 – Notice of Application - Preliminary

Exhibit 2 – Agreed Statement of Facts

Exhibit 3 – Agreed Exhibit Book (Part 1) (Containing Tabs 1-8):
Tab 1 – July 22, 2020 Complaint Form
Tab 2 – June 18, 2021 response from Dr. Scott and enclosed copy of December 15, 2020 response
Tab 3 – February 12, 2020 report of Dr. Scott (the "**Report**")
Tab 4 – December 23, 2019 Pre-Trial Conference Order
Tab 5 – January 18, 2020 email and questions from Patient's counsel to Dr. Scott
Tab 6 – February 25, 2020 Form 25 – Dr. Scott
Tab 7 – June 12, 2020 letter
Tab 8 – November 20, 2020 letter

Exhibit 4 – Notice of Hearing

Exhibit 5 –Agreed Exhibit Book (Part 2) (Containing Tabs 9-15):
Tab 9 – CV of Dr. [redacted], updated March 29, 2024
Tab 10 – Expert opinion of Dr. [redacted], June 3, 2022
Tab 11 – CV of Dr. [redacted], updated March 2024
Tab 12 – Expert opinion of Dr. [redacted] (Redacted), March 18, 2024
Tab 13 – Dr. [redacted]'s Response to Dr. [redacted]'s report, dated May 9, 2024
Tab 14 – CV of Dr. James Rowan Scott

Tab 15 – Letter from Patient's counsel to Dr. Scott, dated February 24, 2020

Exhibit 6 – Standard of Practice: Responding to Third Party Requests

Exhibit 7 – Blog Post entitled 'The Goldwater Rule: Why Breaking it is Unethical and Irresponsible'

Exhibit 8 – CMPA Article Entitled 'Treating Physician Reports, IME Reports and Expert Opinions: The Way Forward'

Exhibit 9 – Article Entitled 'Lessons from Canadian Courts for all Expert Witnesses'

Exhibit 10 – CPA Position Statement Entitled 'Third Party Assessments/ Independent Medical Evaluations'

Exhibit 11– CPA Position Statement Entitled 'Courtroom Testimony'

[10] The Complaints Director called the following witness:

Dr. [redacted]

[11] The Investigated person called the following witnesses:

Dr. J. Rowan Scott, Investigated Person
Dr. [redacted]

Dr. [redacted]

[12] Dr. [redacted] is a psychiatrist practicing in Alberta. Counsel for the Complaints Director sought to qualify him to give expert opinion on the appropriateness of the Investigated Person providing a diagnosis and comment on the Complainant without treating or meeting her, as well as other aspects of the investigated Person's Report. Counsel for the Investigated Person did not object to Dr. [redacted] being qualified as an expert. The Hearing Tribunal confirmed that Dr. [redacted] was qualified to give expert evidence.

[13] Dr. [redacted] reviewed his report dated June 3, 2022 (Exhibit 5, Tab 10). He summarized the complaint received by the College. The Complainant was concerned about the conduct of the Investigated Person in relation to [redacted] and an expert opinion Report prepared by the Investigated Person for the purpose of [redacted]. There were two primary areas of concern. First, that the Investigated Person was not independent in his opinion and second that he made several alleged diagnoses, statements and conclusions about the Complainant in his Report.

[14] Dr. [redacted] gave evidence regarding the Goldwater Rule and his understanding of the origins and purpose of the rule, which in essence is that a psychiatrist should refrain from diagnosing a person without meeting or examining them. Dr. [redacted] noted that the Canadian Psychiatric Association ("**CPA**") has drafted a statement around courtroom testimony, that psychiatrists should only testify in court if they have examined that person or made significant attempts to do so. They may review records and critique a diagnosis, but should not make a diagnosis without an examination.

[15] Dr. [redacted] noted that the Investigated Person did not testify in Court about his Report, but the Investigated Person had indicated that he was prepared to do so and that he considered his Report to be an expert medical opinion.

[16] Dr. [redacted] also provided evidence regarding his review of Dr. [redacted]'s report. He noted that Dr. [redacted] differentiated in his report between expert court reports and treating physician reports. Dr. [redacted] noted that it was appropriate that the Investigated Person responded to the request for the report and supported his Patient. Dr. [redacted] noted that it was within the bounds for the Investigated Person to provide a medico-legal report from a treating psychiatrist.

[17] Dr. [redacted] reviewed the Standard of Practice: Responding to Third Party Requests which states that a regulated member is not obligated to provide an expert opinion or become an expert witness.

[18] Dr. [redacted] pointed to the Canadian Medical Protective Association ("**CMPA**") guidance which notes that experts should not act as advocates. In addition, the CPA suggests that treating physicians should avoid giving legal opinions. The Investigated Person could have denied the request by the Patient's lawyer to comment on the question of whether the behaviours of the Complainant were consistent with any pattern recognized in psychiatry.

[19] Dr. [redacted] pointed to the CMPA guidance which states: "Respond only to the specific questions posed and seek clarification if the questions aren't clear. Feel free to say I don't know if you lack specific factual information or if the questions are outside your area of expertise."

[20] Dr. [redacted] noted that ultimately it will be up to the Hearing Tribunal to determine if the comments in the Report about the Complainant constitutes unprofessional conduct or not.

*Cross-Examination*

[21] In cross-examination, Dr. [redacted] confirmed that he did not have concerns with the portions of the Report where the Investigated Person is commenting as a treating physician on the Patient's condition or on his Patient's ability to work. The comments regarding the Complainant were based on information that the Investigated Person received from his Patient and the Patient's lawyer.

Dr. [redacted] confirmed his understanding that the Report did not ultimately form part of the Court record.

[22] Dr. [redacted] noted that the Goldwater Rule informed his opinion in part, as it has a lot of influence on Canadian practice, although he was not aware of any official statement about it from a Canadian organization. Dr. [redacted] indicated that he was not entirely sure if the Goldwater Rule applies only to people that are in the public eye or not. Dr. [redacted] confirmed that the CPA does not set regulatory standards for psychiatrists or for courtroom practice.

[23] Dr. [redacted] indicated that he did not believe it was outside of the Investigated Person's scope of expertise to speculate on diagnoses.

[24] The comments at issue in the Report relate to [redacted]. Dr. [redacted] noted while it may not be considered pejorative for a psychiatrist [redacted] to make diagnoses or speculate on diagnoses, there can be a lot of weight placed on a psychiatrist's comments and stigma associated with such diagnoses.

Dr. J. Rowan Scott

[25] The Investigated Person reviewed his background and experience. He was first qualified as a psychiatrist in June 1985. He retired from practice on December 31, 2020. He described his practice setting and noted he was able to consult with colleagues on difficult files if needed.

[26] The Investigated Person discussed the difference in his work between speculation, hypothesis and diagnosis. In terms of speculation and hypothesis, he noted that he can do that based on a little bit of information or a lot of information. Diagnosis is entirely different. It is very complicated psychiatric or psychoanalytic procedure that is interpersonal and always involves meeting with the person, who must agree to be assessed. Speculation and hypothesis do not necessarily have an interpersonal context.

[27] The Investigated Person discussed his experience as an expert. He noted that he had testified in court numerous times. He also prepared reports, as the physician summarizing the case; as well as expert reports. He described a case in which he was involved where children had been abused emotionally and sexually by their father, and became emotional during his testimony.

[28] The Investigated Person discussed the case at issue, including the concerns of the Patient [redacted]. With the Patient's consent, he made a psychiatric diagnosis of the Patient.

[29] The Investigated Person received a request by email from the Patient's lawyer [redacted]. He obtained the Patient's consent to proceed with preparing a letter in response to the lawyer's request.

[30] The Investigated Person noted that it was unusual to receive the request by email. He had never received a request for a medico-legal letter by way of email. He had always received a formal letter from a lawyer on letterhead. He found this disconcerting. He reviewed the request carefully to determine the exact questions he was being asked. He phoned the lawyer's office to make sure that the email and questions were actually the requests of the lawyer and that the email outlined the questions the lawyer wanted answered. The lawyer's assistant spoke to the lawyer and confirmed to the Investigated Person that the email was from the lawyer, those were her questions and that she wanted the Investigated Person to proceed to write a report.

[31] The Investigated Person testified that as the treating physician of the Patient, he believed he had an obligation to provide a medico-legal report to the Patient's lawyer. He viewed that he had no choice. He noted that he considered whether to answer all the questions from the lawyer. He felt that he needed to answer all the questions he was asked.

[32] In terms of the questions about the Complainant, the Investigated Person believed that he could create a summary and put it together as a speculation or hypothesis within a boundary and that this was totally within the scope of his expertise. In preparing his Report, he used his charts from his sessions with the Patient and contents of the email from the Patient's lawyer. With reference to the Complainant, he described the boundaries around making comments about the Complainant and pattern recognition and described that "there's a great big boundary that has to be established around that, maintained and persistently managed" as the information is based on what the Patient has said about somebody that the Investigated Person had never met.

[33] The Investigated Person considered that he did not know who might read the Report and so put in a boundary in the Report. The Investigated Person stated that he was not diagnosing the Complainant, but rather trying to describe the thoughts of the Patient about the Complainant. He noted that he tried his best to be honest, objective and thorough in preparing his Report. He viewed that the Report accurately reflected the information provided to him by the Patient and the Patient's lawyer.

[34] After providing the Report to the Patient's lawyer, the Investigated Person did not hear from the Patient's lawyer. He phoned her office but did not speak to her. She was busy until the court date. He arrived for court and spoke to the lawyer for the first time. The lawyer indicated that his Report was not being used and that she only wanted him to speak about the Patient's past work and "entirely just about the facts." The Report was not entered at the trial as an exhibit. The Investigated Person noted that he believed he was a factual witness at the trial, rather than being qualified as an expert.

[35] The Investigated Person confirmed that he signed a [redacted], which he felt compelled to do as he had felt compelled to write his Report. At the time of

signing [redacted] and sending it to the Patient's lawyer, he phoned the lawyer's office and the lawyer was again not available.

*Cross-Examination*

[36] In cross-examination, the Investigated Person confirmed that he did not outline the assumptions that were made in preparing the Report.

[37] The Investigated Person described his understanding that the Goldwater Rule specifically refers to the political context of public figures where psychiatrists might express an opinion.

[38] The Investigated Person agreed that a psychiatrist cannot make a diagnosis of a person unless they have seen them, obtained consent, and have gone through the interpersonal procedure. He stated he would never make a diagnosis without those conditions being met. If something does not fulfill those conditions, it is not a diagnosis. The Investigated Person was taken through his Report in detail.

*Hearing Tribunal Questions*

[39] The Investigated Person was asked about his usual experience in dealing with requests from lawyers for a medico-legal report. He described his prior experiences preparing medico-legal reports which involved discussions with the lawyer about the reports.

[40] The Investigated Person stated that in this case, he did consider the possibility of not answering all the questions posed of him but felt obliged to try to answer them. He noted that his understanding of his obligation to the Court was to provide the Court with a thorough understanding of the case and his Patient's unique situation, a thorough understanding of the psychiatric knowledge that he had about the case and situation and to respond to the specifics of the questions that were asked, so the Court would be alert to the issues being considered.

Dr. [redacted]

[41] Dr. [redacted] is a psychiatrist practicing in Ontario. Counsel for the Investigated Person sought to qualify Dr. [redacted] to give expert opinion evidence in the field of psychiatry. Counsel for the Complaints Director did not object to Dr. [redacted] being qualified as an expert. The Hearing Tribunal confirmed that Dr. [redacted] was qualified to give expert evidence.

[42] Dr. [redacted] reviewed his report dated March 18, 2024 (Exhibit 5, Tab 12). Dr. [redacted]'s report refers to the term "participant expert", which he noted was a reference to treating physicians. He described that the Court's view of treating physicians as witnesses has evolved. The participant expert is a treating physician, who will generally know their patient well. The role of the participant

expert is to provide clarity about the clinical picture of the patient, presenting symptoms, the evolution of the symptoms, the course of the symptoms, an account of treatment, the vicissitudes of treatment and the results of the treatment. The role is similar to an independent expert in that both try to present a clear picture of the clinical phenomena and the clinical course and findings, and then provide an opinion. The difference is that the treating physician can have some bias and end up advocating for their patient while an independent expert is supposed to remain impartial.

[43] Dr. [redacted] reviewed the Investigated Person's Report. He noted that the Investigated Person was a treating physician in this case. He had some obligation to his Patient to provide information that only he may have and to participate, as best as he could as a treating physician and provide a response for the legal process.

[44] Dr. [redacted] noted that the Report by the Investigated Person was not well written. The clinical evidence was scattered and the Investigated Person made comments about the Complainant. Dr. [redacted] noted that the Report was not written tightly enough or well enough to support a number of things that were said. He noted that a Court might not accept it as evidence or might give it reduced weight.

[45] Dr. [redacted] reviewed the College's Standard of Practice: Responding to Third Party Requests and some other guidelines, including the CPA and CMPA guidelines. He reviewed the Goldwater Rule which he noted relates to commenting publicly about public figures. Dr. [redacted] did not view that the Goldwater Rule applied to the Investigated Person's Report. Dr. [redacted] noted his opinion that standards for medico-legal reports are established by the Court.

[46] Dr. [redacted] noted that although the Investigated Person acknowledged in the Report the limits of his evidence, he went beyond what his evidence would support, making it a weak opinion. Dr. [redacted] stated that if a hypothesis is provided which is well substantiated, then it can be supported. However, if it is not supported, it can confuse matters. Dr. [redacted]'s report references the term "hypothetical diagnosis" which he described as speculation with some clinical evidence, but not enough to confirm the diagnosis.

[47] Dr. [redacted] was of the opinion that it was reasonable for the Investigated Person to provide a report as a treating physician. It was his responsibility to provide information from the treatment to assist the Court. Further, the Investigated Person's comments were not outside of his expertise. Finally, Dr. [redacted] did not view that the Investigated Person's conduct in preparing the Report constituted unprofessional conduct.

*Cross-examination*

[48] In cross-examination, Dr. [redacted] agreed that what an expert chooses to put in a report is a question of judgment, including whether to include a hypothetical diagnosis.

*[49]* Dr. [redacted] stated his opinion that the Report was poorly done which was a question of skill or experience. He was taken through the questions posed of the Investigated Person by the Patient's lawyer and the Report. With respect to the question of whether there was a pattern recognized in psychiatry, the evidence was what the Patient told the Investigated Person and there was no basis to say more. Dr. [redacted] agreed that the psychiatrist is in charge in preparing a medico-legal report. The psychiatrist must consider if they have the information needed or if not, whether to give only a partial answer.

*Hearing Tribunal Questions*

[50] Dr. [redacted] was asked when it would be appropriate to provide a hypothetical diagnosis. Dr. [redacted] provided an example of a psychiatrist providing a hypothetical diagnosis for an Ontario College of Optometrists case based on emails from the member. He also noted that it is more common in forensic psychiatry.

## V. CLOSING SUBMISSIONS

Closing Submissions of the Complaints Director

[51] Counsel for the Complaints Director submitted that the Allegations are proven. The Investigated Person created the Report at issue. He did not decline any of the requests made of him and provided the Report.

[52] Counsel for the Complaints Director took the position that the statements in the Report were outside of the Investigated Person's professional obligations to his Patient, for the purposes of proving Allegation 1. She pointed to the evidence of Dr. [redacted] and his report.

[53] Counsel for the Complaints Director noted that both experts agreed that the Investigated Person provided hypothetical or speculative diagnoses. Counsel pointed to several comments in the Report and noted that these did not fall within the professional obligations to the Patient. Counsel submitted that there were statements in the Report that were outside of the Investigated Person's professional obligations to the Patient.

[54] With respect to Allegation 2, the Investigated Person admitted that he speculated on the conduct of the Complainant, who was not his patient, whom he had never met or examined and from whom he did not obtain consent.

[55] Counsel for the Complaints Director noted that the Investigated Person provided opinion evidence during the hearing. He was not qualified as an expert in this hearing and these opinions should be given very little weight.

[56] The expert opinions assist the Hearing Tribunal in determining the standard of conduct that is expected. However, the Hearing Tribunal should not rely on experts for the determination of the ultimate issue, that is, whether or not there was unprofessional conduct.

[57] Counsel for the Complaints Director noted that it is integral to allowing expert evidence in a legal process that experts act within the bounds of their ethics. The Hearing Tribunal should consider the Report in its entirety.

[58] Further, the Hearing Tribunal should consider sending a clear message to the profession regarding the ethical obligations of regulated members who provide expert reports.

[59] Counsel for the Complaints Director submitted that Allegation 1 constitutes unprofessional conduct on the basis of a lack of knowledge, skill or judgment. Allegation 2 is conduct that constitutes a lack of knowledge, skill or judgment and that harms the integrity of the medical profession.

Closing Submission of the Investigated Person

[60] Counsel for the Investigated Person noted that this hearing is fundamentally about language and expert evidence. Counsel reviewed the role of an expert and noted that treating physicians occupy a somewhat hybrid role when they give evidence as fact witnesses in Court, as they are recognized as having a specialized expertise. Counsel for the Investigated Person reviewed case law and legal texts regarding the role of the expert witness and opinion evidence. Counsel took the position that this case is fundamentally about the Courts and that is the context in which the Hearing Tribunal must consider the allegations. The Court process is governed by the Rules of Court and rules of evidence and the Courts set the standards for expert evidence.

[61] With respect to Allegation 1, counsel for the Investigated Person noted that the evidence before the Hearing Tribunal, including the Standard of Practice, is clear that the Investigated Person had a positive obligation to respond to the request for a medico-legal report. The Investigated Person ensured he had consent from his Patient and sought additional clarification from the Patient's lawyer as to the questions he was being asked. Both experts agreed that it was appropriate for the Investigated Person to respond to the request. Allegation 1 is not proven.

[62] With respect to Allegation 2, counsel for the Investigated Person noted that the allegation references a "professional service". This is a defined term under section 1(1)(ff) of the HPA. "Practice" is defined at section 1(1)(z) of the HPA as the practice of a regulated profession within the meaning of section 3 of a

schedule to the HPA. Schedule 21 is the relevant schedule. In providing an opinion on the Complainant or otherwise as part of a court process, the Investigated Person was not providing a professional service as defined in the HPA.

[63] Counsel for the Investigated Person reviewed specific questions asked of the Investigated Person, as set out in the Report. The Investigated Person was clear in his Report that he had not assessed the Complainant or established a diagnosis. His comments in the Report were subject to this boundary. Dr. [redacted] testified that a hypothetical diagnosis is a speculation with some clinical evidence but not enough to confirm the diagnosis. This is what the Investigated Person said in his Report. The Investigated Person provided clear boundaries setting out the limitations of his comments.

[64] Counsel for the Investigated Person submitted that the College's Standards of Practice and Code of Ethics provide no guidance regarding expert evidence. The Goldwater Rule does not apply. The CPA provides some guidance including on hypothetical questions. The CMPA document also provides guidance. Neither the CPA nor CMPA documents create a standard of practice.

[65] Counsel for the Investigated Person noted that the Hearing Tribunal must read the Report in its entirety and not parse it out. The Hearing Tribunal also needs to consider the Report in the context of the Investigated Person's evidence and the evidence of the two experts. Allegation 2 is not proven. While the language in the Report is not perfect, it does not rise to the level of unprofessional conduct.

## VI. FINDINGS

[66] The Hearing Tribunal finds that the conduct in Allegation 1 is not proven. The Hearing Tribunal finds that the conduct in Allegation 2 is proven and constitutes unprofessional conduct as follows: the conduct constitutes a lack of judgment in the provision of a professional service (section 1(1)(pp)(i) of the HPA) and is conduct that harms the integrity of the medical profession (section 1(1)(pp)(xii) of the HPA).

## VII. DECISION WITH REASONS

[67] The Hearing Tribunal carefully considered the evidence, testimony and submissions from the parties.

> Allegation 1 <u>You displayed a lack of knowledge, skill, or judgment in the provision of professional services when you failed to decline a request to provide medico-legal report outside the scope of your professional obligations to your [Patient];</u>

[68] The Hearing Tribunal considered whether Allegation 1 was proven. Allegation 1 as worded requires the Complaints Director to establish that the Investigated

Person should have declined the request to provide the medico-legal report and that the medico-legal report was outside of the scope of the Investigated Person's professional obligations to his Patient.

[69] The Hearing Tribunal determined that it was within the Investigated Person's scope of his professional obligations to provide the medico-legal Report. Dr. [redacted] and Dr. [redacted] both agreed that the Investigated Person could provide the Report. The Investigated Person had information about the Patient and it was within the scope of his professional obligations to provide information about his Patient following a valid request for such information.

[70] The Hearing Tribunal considered that, as a treating physician, the Investigated Person had an obligation under the Standard of Practice: Responding to Third Party Requests (section 1) to provide details of his findings, assessment, advice and treatment given to the Patient following the request from the Patient's lawyer.

[71] The Hearing Tribunal found that as the treating psychiatrist, the Investigated Person was within his professional obligations to provide the Report. Under the College's Standard of Practice: Responding to Third Party Requests, the Investigated Person had an obligation to provide information and could not decline to provide a response to the Patient's lawyer.

[72] Allegation 1, as worded, is not proven. The issues of whether the Investigated Person should have declined to answer some of the questions posed to him or should have sought further clarification before proceeding with his Report are addressed in Allegation 2.

Allegation 2 <u>You displayed a lack of knowledge, skill, or judgment in the provision of professional services when, in a medical letter, dated February 12, 2020, you speculated on [redacted] of [the Complainant], who was not your patient, whom you had never examined, and without [the Complainant's] consent.</u>

[73] The Hearing Tribunal carefully considered the wording of Allegation 2. Most of the facts are not in dispute. There is no dispute that the Investigated Person prepared the Report dated February 12, 2020. There is also no dispute that the Complainant was not the Investigated Person's patient and he had never examined or met the Complainant and did not obtain consent from the Complainant.

[74] The Investigated Person agrees he made comments regarding [redacted] the Complainant. However, at issue is whether the Investigated Person was simply relaying what his Patient told him in the clinical context rather than offering an opinion. It is also disputed whether the Investigated Person displayed a lack of knowledge, skill or

judgment and whether if Allegation 2 is proven, the conduct constitutes unprofessional conduct.

[75] The Hearing Tribunal carefully considered whether the Investigated Person speculated on [redacted] the Complainant. Counsel for both parties urged the Hearing Tribunal to consider the Report in its entirety. The Hearing Tribunal carefully read and considered the full Report. The Hearing Tribunal found that the Investigated Person did speculate on [redacted] the Complainant. This is set out in more detail below.

*Specific concerns with the Report*

[76] The Report indicates: "Your asked in your letter whether or not I would attend Court to answer questions about my expert medical opinion. I am prepared to do so." (Exhibit 3, Tab 3, page 20) The Report states that the Investigated Person completed the Report from his chart notes and interviews with the Patient.

[77] It is clear from this that the Investigated Person intended the Report be an expert medical Report and the Hearing Tribunal finds as such. The Investigated Person was the treating psychiatrist and purported to provide a report on this basis. However, it is clear from reviewing the Report that the Investigated Person went beyond the scope of relaying his findings, assessments, advice and treatment given to the Patient. The Investigated Person accepted as fact the information relayed by his Patient and proceeded to then engage in speculation about the behaviour of the Complainant and provided potential [redacted] diagnoses. The Hearing Tribunal sets out below several examples of the speculation and potential [redacted] diagnoses in the Report.

[78] The Report states (Exhibit 3, Tab 3, page 25):

[redacted]

[79] Although the Investigated Person notes that this is from the available clinical description, he goes on to indicate that [redacted]

[80] The Report continues (Exhibit 3, Tab 3, pages 32 to 34):

[redacted]

…

[redacted]

[81] The Report continues (Exhibit 3, Tab 3, pages 36 and 37):

[redacted]

…

[redacted]

[82] [redacted]

[83] The Report continues (Exhibit 3, Tab 3, pages 42 to 48):

[redacted]

…

[redacted]

…

[redacted]

[redacted]

...

[redacted]

...

[redacted]

[84] In the above passages, the Report is written as though the Patient's reports are factual and from this, the Investigated Person engages in speculation regarding the behaviour of the Complainant, [redacted]

[85] The Report continues (Exhibit 3, Tab 3, pages 50 to 53):

[redacted]

…

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

…

[redacted]

[86] The Investigated Person starts his response to this question, at page 49, as follows: "Again, I cannot make a clinical diagnosis of [the Complainant]." He also provides some comments within the above passages to caution the reader that his statements "cannot be considered diagnostic." However, the above passages clearly show that the Investigated Person is engaging in speculation and providing potential [redacted] diagnoses of the Complainant.

[87] It was open to the Investigated Person to respond to Question 2c to indicate that this was beyond the scope of the opinion he could provide as the treating psychiatrist and that he was not able to answer this question. The Investigated Person made efforts to discuss the questions with the Patient's lawyer, who did not make herself available to the Investigated Person. However, that does not absolve the Investigated Person of his professional obligations to provide only the information that was within the scope of what information he could provide as the treating psychiatrist.

[88] The Report continues (Exhibit 3, Tab 3, pages 54 to 56):

[redacted]

[redacted]

…

[redacted]

…

[redacted]

[89] The Report again sets the context and boundaries, however, despite this, the Investigated Person engages in speculation on the behaviour and potential [redacted] diagnoses.

[90] The Report continues (Exhibit 3, Tab 3, pages 57 and 59):

[redacted]

…

[redacted]

[91] Finally, the Report continues (Exhibit 3, Tab 3, page 60):

[redacted]

[92] In the above passages, the Investigated Person draws conclusions [redacted]. Again, these are examples of speculation by the Investigated Person on the Complainant's behaviour.

[93] The Hearing Tribunal found that the Investigated Person speculated on [redacted]. The Hearing Tribunal next considered if the Investigated Person was providing a professional service when preparing the Report.

*Does the Conduct Constitute Unprofessional Conduct*

[94] The Hearing Tribunal considered the argument advanced by counsel for the Investigated Person that he was not providing a professional service. The HPA at section 1(1)(ff) provides a definition of a "professional service" to mean "a service that comes within the practice of a regulated profession". Schedule 21 of the HPA, at section 3, sets out what comes within the practice of the profession of physicians. This includes to "assess the physical, mental and psychosocial conditions of individuals to establish a diagnosis" and "to treat physical, mental and psychosocial conditions".

[95] The Report was a medico-legal report prepared to assist the Patient [redacted]. The Report describes the Investigated Person's diagnoses, findings, assessment, advice and treatment given to the Patient. The Report was created because of the physician-patient relationship and based on the services provided to the Patient. Such a report is clearly within the scope of practice of a physician and is a professional service as defined in the HPA.

[96] The Hearing Tribunal also considered that there is a specific Standard of Practice addressing the provision of medico-legal reports (the Standard of Practice: Responding to Third Party Requests). This also supports a finding that

the provision of a medico-legal report is a professional service within the practice of the profession.

[97] Further, whether as a treating physician or as an independent expert, a physician will only provide a medico-legal report because of their status as a physician. Again, this weighs in favour of finding that the provision of a medico-legal report is a professional service.

[98] The Hearing Tribunal also considered the argument advanced by the Investigated person that it is the role of the Courts, rather than the role of the College, to establish the standards regarding expert evidence, including reports. The Hearing Tribunal found that to accept such an argument would undermine the ability of the College to regulate its members.

[99] Although the Courts may have the ability to set the standards for expert evidence in Courts, including rejecting the evidence of an expert, this does not remove the ability of the College to regulate its members if an expert report is prepared in a way that calls into question the member's professional conduct.

[100] The Report was prepared by the Investigated Person as the treating physician. It would not have been prepared, but for the fact that the Investigated Person is a physician. The conduct is clearly within the scope of what can be regulated by the College.

*Does the Conduct Constitute Unprofessional Conduct*

[101] The Hearing Tribunal found that Allegation 2 is proven. The Hearing Tribunal then considered if Allegation 2 constitutes unprofessional conduct, including whether the Investigated Person displayed a lack of knowledge, skill or judgment in the provision of the Report.

[102] The Hearing Tribunal considered the testimony and reports prepared by the experts, Dr. [redacted] and Dr. [redacted]. The Hearing Tribunal accepted the evidence of both experts in part.

[103] However, the evidence of the experts was of limited assistance to the Hearing Tribunal's ultimate determination of whether the conduct was unprofessional conduct. That is a question solely for the determination of the Hearing Tribunal. Experts providing opinion evidence to the Hearing Tribunal should not opine on the ultimate issue. To the extent that Dr. [redacted] opined on whether the conduct was unprofessional conduct, the Hearing Tribunal disregarded his opinion.

[104] Both experts agreed that there were concerns with the Report. Dr. [redacted] stated that the Report was not well written. The Hearing Tribunal found that the Report went beyond not being well written. The Investigated Person could have summarized the information provided to him by the Patient, summarized

his findings, assessments, advice and treatments provided and gone no further. This was not what the Investigated Person did in his Report.

[105] There is a substantial amount of guidance provided to physicians and specifically psychiatrists preparing medico-legal reports.

[106] The Hearing Tribunal considered the guidance provided by professional associations in Canada, which were entered as exhibits. The guidance provided by the CMPA in its June 2019 publication (Exhibit 8) notes the difference between treating physician reports and independent medical examinations. In terms of preparing a report, the CMPA advises to "Respond only to the specific questions posed, and seek clarification if the questions are unclear. Feel free to say 'I don't know' if you lack specific factual information or if questions are outside your area of expertise."

[107] It was open to the Investigated Person to respond to questions posed of him to indicate that this was beyond the scope of the opinion he could provide as the treating psychiatrist and that he was not able to answer this question.

[108] The Investigated Person, as the medical professional, had the ability to decline answering questions that were objectionable. That is, he could have refused to answer questions that asked him to improperly speculate or provide a diagnosis on the Complainant, as this was someone he had never met or examined and had not obtained consent from.

[109] While the Investigated Person noted that he attempted to contact the Patient's lawyer, having failed to do so, it was open to him to decline to answer some of the questions, or to limit his answer. Instead, the Investigated Person engaged in inappropriate speculation about diagnoses.

[110] The CPA Position Statement: Third-party Assessments/Independent Medical Evaluations (May 2020) (Exhibit 10) cautions psychiatrists who engage in third-party assessments and independent medical evaluations. It provides several recommendations including that psychiatrists only provide opinions within their area of training and expertise; that they be aware of potential conscious and unconscious biases in providing opinions to third parties; they provide opinions that are truthful, fair and objective; they ensure evaluees give informed consent; and that treating physicians providing information in independent contexts strive for objectivity and truthfulness and must disclose how the treatment relationship may affect their opinion.

[111] The Canadian Psychiatric Association Position Statement: Courtroom Testimony (June 1978) (Exhibit 11), states: "Psychiatrists should provide courtroom evidence that is fair, objective and impartial. The opinion evidence provided should be in the areas where the psychiatrist has expertise. Whenever possible, psychiatrists should testify in a court of law as to the mental state of a particular person only if they have examined that person or made significant attempts to do so. They may review records and critique a

diagnosis but should not make a diagnosis without an examination of the person."

[112] The Hearing Tribunal also considered the Goldwater Rule. The experts disagreed on the interpretation and application of the Goldwater Rule in Canada. Given that there was no evidence presented that a Canadian professional regulatory authority has adopted the Goldwater Rule in Canada, the Hearing Tribunal placed little weight on the Goldwater Rule in determining whether or not the conduct was unprofessional.

[113] The Hearing Tribunal agreed with Dr. [redacted] that the Report is not well written. Reading the Report in its entirety creates many concerns. Some of the paragraphs have no context, are not a summary of third-party information and the Investigated Person simply states conclusions about the Complainant. The Investigated Person represented the information that he stated was provided to him by his Patient as fact and then proceeded to speculate [redacted]. Even in paragraphs where the Investigated Person states that he cannot make a diagnosis about the Complainant he proceeds to speculate as to a diagnosis.

[114] Given the Investigated Person's lengthy career as a psychiatrist and experience in preparing medico-legal reports, the Investigated Person should have understood his professional responsibilities. The Hearing Tribunal found that the conduct by the Investigated Person constituted a lack of judgment pursuant to the HPA.

[115] An expert must understand their professional obligations and meet those professional obligations. Whether a physician is called as an independent expert witness, or as a treating physician, they must understand their role and ethical obligations.

[116] Here, the Investigated Person was a treating physician who was requested to provide a report by the Patient's lawyer. The Standard of Practice: Responding to Third Party Requests states that a physician has an obligation to provide details of findings, assessment, advice and treatment given to a patient when requested by the patient or authorized agent but that a regulated member is not obligated to provide an expert opinion or become an expert witness.

[117] A member of the public reading the Report would be left wondering if this is what psychiatrists do, in terms of providing speculative diagnoses of individuals they have never met.

[118] The Hearing Tribunal also considered that Courts rely on expert evidence. A Court may not be aware of the professional obligations on a psychiatrist and may accept as fact diagnoses or speculative diagnoses made by a psychiatrist in a report. The role of the expert is to be of assistance to the Court and it is imperative that physicians acting as experts understand the boundaries and their professional obligations in providing an expert opinion.

[119] As noted by Dr. [redacted], engaging in speculative diagnoses can confuse matters. The Investigated Person made speculative diagnoses about the Complainant [redacted]. The Report had the potential to create serious implications for the parties, in particular, the Complainant.

[120] The conduct in this case undermines the integrity of the profession. As noted in the Canadian Psychiatric Association Position Statement: Third-party Assessments/Independent Medical Evaluations (May 2020) (Exhibit 10): "Unfortunately, when inexperienced individuals or unethical practice come to legal or public attention, the entire profession of psychiatry is tarnished." The Hearing Tribunal agrees with this statement and finds that the Investigated Person's conduct undermined the integrity of the medical profession.

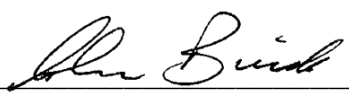
[121] For these reasons, the Hearing Tribunal found that the conduct displayed a lack of judgment, constituting unprofessional conduct pursual to section 1(1)(pp)(i) of the HPA and that the conduct harmed the integrity of the medical profession, constituting unprofessional conduct pursuant to section 1(1)(pp)(xii) of the HPA.

## VIII. CONCLUSION

[122] The Hearing Tribunal finds that Allegation 1 is not proven and dismisses Allegation 1. The Hearing Tribunal finds that the conduct in Allegation 2 is proven. The conduct in Allegation 2 constitutes unprofessional conduct pursuant to section 1(1)(pp)(i) of the HPA, as a lack of judgment in the provision of a professional service and pursuant to section 1(1)(pp)(xii) of the HPA as conduct that harms the integrity of the medical profession.

[123] The Hearing Tribunal will receive submissions from the parties on sanction. The Hearing Tribunal requests that the parties consult each other with respect to the process for submissions and advise the Hearing Tribunal of the proposed procedure for submissions on sanction within 3 weeks of receipt of this decision. If the parties are unable to agree on the process for submissions, the Hearing Tribunal will provide further direction.

Signed on behalf of the Hearing Tribunal by the Chair:



Glen Buick

Dated this 30th day of July, 2024.