IN THE MATTER OF THE *HEALTH PROFESSIONS Act*, RSA 2000, c C-7
REGARDING DR. CAMILLE TORBEY

IN THE MATTER OF AN APPEAL FROM THE DECISIONS OF THE HEARING TRIBUNAL OF THE COLLEGE OF PHYSICIANS AND SURGEONS OF ALBERTA DATED JANUARY 4, 2016 AND AUGUST 25, 2016

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

[1] An appeal was held before Council of the College of Physicians & Surgeons of Alberta (the "College") on March 2, 2017, at the offices of the College in Edmonton, Alberta. In attendance were:

Council members:

Ms K. Wood (Chair)	Ms C. MacDonald
Dr. P. Alakija	Ms J. Blayone
Dr. N. Yee	Dr. J O'Connor
Ms M. Munsch	Dr. J. Meddings
Dr. C. Kollias	Dr. G. Campbell

Also in attendance were:

Mr. Craig Boyer, legal counsel for the College
Mr. Arman Chak, legal counsel for Dr. Torbey
Mr. Fred Kozak, Q.C. and Mr. Greg Weber, independent legal counsel to the Council

Dr. Torbey did not attend the appeal.

Two members of Council (Dr. J. Bradley and Dr. R. Martin) recused themselves.

[2] There were no objections to the composition of the Council hearing the appeal, the jurisdiction of Council to proceed with the appeal, or any procedural matters.

[3] Documents, submissions and case authorities reviewed and considered by Council included:

- Notice of Hearing, dated April 13, 2015

- Transcript of Proceedings held before the Hearing Tribunal on September 14-16, 2015 (the "Transcript")
- Hearing Tribunal Decision, dated January 4, 2016 (the "Decision")
- Transcript of Proceedings held before the Hearing Tribunal to determine Sanction on July 11, 2015
- Sanction Decision of the Hearing Tribunal, dated August 25, 2015
- Notice of Appeal, dated September 12, 2016
- Agreed Statement of Facts dated September 14, 2015
- Exhibit Book, which contains the following:
  - Notice of Hearing dated November 14, 2014
  - Affidavit of Service dated November 30, 2014
  - Amended Notice of Hearing dated April 13, 2015
  - Affidavit of Service dated April 22, 2015
  - Dr. Kevin Worry letter dated June 23, 2013 to Dr. Owen Heisler, Complaints Director of the College, with enclosures
  - Dr. Camille Torbey letter dated August 15, 2013 to Katherine Jarvis, College investigator
  - Dr. Torbey letter dated August 29, 2013 to Dr. Owen Heisler (with enclosures)
  - Dr. Miles letter dated December 14, 2012 to Dr. Torbey
  - Dr. Torbey letter dated January 3, 2013 to Dr. Pope
  - Dr. Pope letter dated January 4, 2013 to Dr. Torbey
  - Dr. Pope letter dated January 7, 2013 to Dr. Torbey
  - Nurse R. Young letter dated January 8, 2013 to Dr. Pope
  - Dr. Lewis letter dated January 11, 2013 to Dr. Torbey
  - Dr. Torbey letter dated January 24, 2013 copied to Dr. Pope
  - Minutes of the Surgical Services Committee on January 25, 2013
  - Final Surgical Services Committee Terms of Resolution
  - Dr. Lewis letter dated February 11, 2013 to Nurse R. Young
  - Nurse R. Young email dated February 12, 2013 to J. MacDonell
  - Dr. Torbey's office administrator letter dated April 4, 2013 to Dr. Pope
  - Dr. Pope letter dated April 15, 2013 to Dr. Torbey
  - Dr. Torbey letter dated April 18, 2013 to Dr. Eagle
  - Dr. Torbey letter dated April 18, 2013 to the MLAs
  - Dr. Torbey letter dated April 30, 2013 to patients
  - Dr. Beekman letter dated May 9, 2013 to Dr. Torbey

- Nurse R. Young email dated November 20, 2013 to Dr. Heisler with attached records regarding 2013 and 2014 surgical services utilization statistics and procedure count for Dr. Torbey for November 1, 2012 to November 20, 2013
- Dr. Torbey letter dated November 24, 2013 to Dr. Owen Heisler
- Dr. Beekman letter dated September 23, 2013 to Dr. Owen Heisler
- Fax from Dr. Beekman dated November 25, 2013 with list of 40 patients triaged for cystoscopy by Dr. Todd
- July 8, 2013 Dr. Pope letter to patient, Mr. Segal
- Dr. Pope letter dated October 31, 2013 to Dr. Owen Heisler with enclosures
- Dr. Miles letter January 18, 2014 to Dr. Owen Heisler with enclosure
- Summary of Dr. Torbey's use of OR time — January to May 2013
- QE II Hospital OR Elective Surgery Schedule — January to May 2013
- Nurse R. Young Statement of Fact dated June 21, 2013
- Summary of Dr. Torbey's use of OR time — January to May 2013
- Alberta Health billing records for Dr. Torbey's cystoscopies — September 1, 2010 to August 31, 2013
- Disclosure of Harm, AHS Policy Level 1

- Written Submissions of Dr. Camille Torbey, dated January 27, 2017 (the "Appellant's Brief")
- Dr. Torbey's undated Extracts of Key Evidence and Book of Authorities and attachments which contained many of the documents noted above in addition to the following:
  - Excerpts from the *Health Professions Act*
  - Excerpts from the *CMA Code of Ethics*
  - *Candler v Capital Health*, 2012 AHRC 5
  - *Bryniak v Regional Health Authority B*, 2013 NBQB 395
  - *AY, et al v ATM*, 2011 CanLII 42080 (ON HPARB)
  - *Ontario (CPSO) v Callaghan*, 1993 ONCPSD 8 (CanLII)
  - *Ontario (CPSO) v Rudinskas*, 2014 ONCPSD 1 (CanLII)
- Written Submissions of the Complaints Director of the College of Physicians and Surgeons of Alberta, dated September 29, 2015 and attachments (the "Respondent's Brief")
  - *Arabian Muslim Association v The Canadian Islamic Centre*, 2006 ABCA 152;
  - *Dechant v Law Society of Alberta*, 2000 ABCA 265;
  - *Hoffinger v Law Society of Alberta*, 2010 ABCA 302;
  - *Dunsmuir v New Brunswick*, 2008 SCC 9;
  - *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61;

- *Nelson v Alberta Association of Registered Nurses*, 2005 ABCA 229;
- *M.M. v College of Alberta Psychologists*, 2011 ABCA 110;
- *College of Physical Therapists of Alberta v J.H.*, 2010 ABCA 303;
- *Ho v Alberta Association of Architects*, 2015 ABCA 68;
- *Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11;
- *Lysons v Alberta Land Surveyors Assn.*, [2017] AJ No 10;
- *Wright v College and Assn. of Registered Nurses of Alberta (Appeals Commission)*, [2012] AJ No 943;
- *Friends of Old Man River Society v Assn. of Professional Engineers, Geologists and Geophysicists of Alberta*, [2001] AJ No 568;
- *Dore v Barreau du Quebec*, 2012 SCC 12;
- *Alberta Report v Alberta* (AHRCC), [2002] AJ No. 1539;
- *Al-Ghamdi v Peace Country Health*, 2015 ABQB 155;
- *Al-Ghamdi v Peace Country Health*, 2015 ABCA 31;
- *Beiko v Hotel Dieu Hospital St. Catherines*, 2007 ONCA 860;
- *Prairie North Regional Health Authority v Kutzner*, [2010] SJ No. 650;
- *Bryniak v Horizon Health Network*, [2016] NBJ No 96.

[4] In addition to the documents noted above, Council also reviewed the following for the purpose of considering Dr. Torbey's application to adduce fresh evidence on appeal:

- Affidavit of Dr. Torbey affirmed on January 23, 2017 (the "Affidavit")
- News article published June 25, 2013 which was contained in Dr. Torbey's undated Extracts of Key Evidence and Book of Authorities at pp 48-49 (the "Article")

I. BACKGROUND

[5] These proceedings arise from a dispute between administration at the Queen Elizabeth II Hospital ("Hospital Administration") in Grande Prairie, Alberta and Dr. Torbey regarding his allotment of operating room ("OR") time for cystoscopies and urodynamic studies.

[6] On December 14, 2012, Dr. Peter Miles wrote to Dr. Torbey on behalf of the Surgical Services Committee to inform Dr. Torbey that his OR cystoscopy allotments were being reduced effective January 1, 2013 (Exhibit Book, Tab 8).

[7] On January 3, 2013, Dr. Torbey responded, writing to Dr. Pope:

> Effective immediately, I will no longer do any Cystoscopy or Urodynamic Studies in the Operation Department of the hospital. From now on, those procedures will have to be done in the Outpatient Department as it should have been done all along.
>
> (Exhibit Book, Tab 9)

[8] Over the next few weeks, members of Hospital Administration and Dr. Torbey exchanged letters regarding the logistics of performing cystoscopies and urodynamic studies in the Outpatient Department. Dr. Torbey agreed with Dr. Pope to continue doing cystoscopies in the OR until other arrangements were made. However, on January 24, 2013, Dr. Torbey discovered that he was not scheduled for the OR as agreed and all his patient appointments were cancelled.

[9] Dr. Torbey presented his concerns to the Surgical Services Committee the next day (Exhibit Book, Tab 15). Dr. Torbey did not perform any cystoscopies in the OR from January 31, 2013 until at least three months later (Exhibit Book, Tab 20).

[10] On April 4, 2013, Dr. Torbey's Office Administrator wrote to Dr. Pope, Dr. Lewis, and Nurse R. Young to explain the frustration and angst experienced by Dr. Torbey's patients arising from the delay in their cystoscopies (Exhibit Book, Tab 19).

[11] On April 15, 2013, Dr. Pope responded directly to Dr. Torbey to remind him, among other things, that he had not used his scheduled OR time for cystoscopies and urodynamic studies since January 31, 2013 and that he should inform his patients of the situation so that they could choose to find another urologist (Exhibit Book, Tab 20).

[12] On April 30, 2013, Dr. Torbey wrote a letter to his patients where he explained the delay in their procedures and the background of his dispute with AHS administration at the Queen Elizabeth II Hospital. Dr. Torbey concluded his letter as follows:

> Your rights have been used and abused by greedy, self centred and a discriminating administration and it is up to you the tax payer to stand up for your rights. Please get involved in solving this issue.
>
> (Exhibit Book, Tab 23)

[13] On June 23, 2013, Dr. Worry wrote to Dr. Heisler, the acting Complaints Director, to report that Dr. Torbey had withdrawn his services from his patients (Exhibit Book, Tab 5).

[14] On November 14, 2014, the College issued a Notice of Hearing setting out the following charges (collectively, the "Charges"):

> IT IS CHARGED THAT:
>
> 1. You did between February 1 and May 9, 2013 refuse to use your scheduled operating room days at the Queen Elizabeth II Hospital for the patients on your waiting list for cystoscopies;
>
>   (the "First Charge")
>
> 2. On or about April 30, 2013 you did inappropriately send a letter to approximately 300 of your patients in which you asked the patient to become involved in your dispute with the administration of the Queen Elizabeth II Hospital regarding your scheduled operating room days.
>
>   (the "Second Charge")

[15] On September 14-16, 2015, the Hearing Tribunal held a hearing into the conduct of Dr. Torbey with respect to the Charges.

II. SUMMARY OF THE DECISION OF THE HEARING TRIBUNAL

[16] At the beginning of the hearing, Dr. Torbey admitted the facts underlying the charges, but contested whether or not his actions detailed in the admitted facts constituted unprofessional conduct (HT Decision, p 19; Transcript, p 4 / 16 to p 5 / 3).

[17] The Hearing Tribunal heard evidence called by the College from members of the Hospital Administration (Dr. Pope, Rita Young ((operating room manager from 2005-2015)), Dr. Worry, and Dr. Beekman). Counsel for Dr. Torbey called Dr. Torbey and Janet Loseth (a preoperative nurse in Grande Prairie) to testify before the Hearing Tribunal.

[18] The Hearing Tribunal also heard submissions from counsel for the College and counsel for Dr. Torbey with respect to the College's Standards of Practice on Job Action and the Canadian Medical Association Code of Ethics (the "Code of Ethics"). Particularly, Mr. Boyer argued that Dr. Torbey violated sections 1, 13, 19, 43, and 44 of the Code of Ethics in withdrawing his services and soliciting his patients in his dispute with Hospital Administration. Mr. Boyer also argued that Dr. Torbey was partly motivated by a sense of entitlement in the stance he took with Hospital Administration.

[19] Counsel for Dr. Torbey submitted that Dr. Torbey was passionate about patient care and did not put any patient at risk. She submitted that he communicated clearly with his patients throughout the ordeal. Counsel for Dr. Torbey also pointed out the dysfunction that he was working in and the negative responses that he received when he tried to have his voice heard, including one occasion when Dr. Beekman had laughed at him.

[20] The Hearing Tribunal issued a written decision dated January 4, 2016 finding Dr. Torbey's conduct unprofessional on both Charges. The Hearing Tribunal considered the definition of "unprofessional conduct" in the *HPA* and referenced the Standard on Job Action and the Code of Ethics.

[21] On both Charges, the Hearing Tribunal found that Dr. Torbey had not violated the Standard on Job Action because he did not receive any economic gain, as required by that Standard.

[22] However, on the First Charge, the Hearing Tribunal found Dr. Torbey's conduct to be unprofessional in failing to consider first the well-being of his patients, exploiting patients for personal advantage (i.e. acting to satisfy his sense of entitlement), and failing to provide services for his patients contrary to sections 1, 13, and 19 of the Code of Ethics.

[23] With respect to the Second Charge, the Hearing Tribunal found that Dr. Torbey's actions violated section 13 (exploiting patients for personal advantage) and section 48 (avoid impugning reputation of colleagues for personal motives) of the Code of Ethics.

[24] After reconvening on July 11, 2016 to hear submissions, the Hearing Tribunal released additional reasons on sanction on August 25, 2016. After noting the presence of mitigating circumstances, including the perceived inability of Dr. Torbey to advocate for himself and his patients along with the atmosphere of significant acrimony and dysfunction, the Hearing Tribunal ordered:

> **1. Suspension**
> The Member will be suspended for one (1) month; however the suspension will be stayed pursuant to section 82(2) of the HPA, pending successful completion of point 2, below. If point 2 is successfully completed within a reasonable time as determined by the Registrar, no actual suspension shall occur.
>
> **2. Assessment**
> The Member will undergo a Comprehensive Occupational Assessment for Professionals as referenced in the entered Book of Authorities.

3. Costs

The Member will be responsible for 50% of the costs associated with the investigation and hearing, and all costs associated with the Comprehensive Occupational Assessment for Professionals

III. GROUNDS OF APPEAL

[25] On September 12, 2016, Dr. Torbey appealed the substantive Hearing Tribunal Decision and the Sanction Decision, listing the following grounds:

1. The Hearing Tribunal did not have the Jurisdiction to make the alleged conduct of the member as a disciplined conduct.

2. The College had not proven the majority of the alleged allegations against the CMA's Code of Ethics.

3. The Charges did not relate to patient care and therefore should not have been considered.

4. The Hearing Tribunal made unreasonable findings of facts against the Appellant.

5. The Hearing Tribunal made unreasonable conclusions on the legal test to find that the conduct was subject to sanction.

6. The additional findings of facts confirms that the Complainant had contributed to the negative environment and therefore his actions should have been a mitigating factor to ensure that those conditions have been removed.

7. No sanction should have been ordered when the contributing factors were not considered. Specifically dealing with the opinion of the medical doctor as well as the exclusion from the decision making for the Appellant's own patients. This put patient care at risk.

8. The Remedy was disproportionate to the alleged finding.

9. The Remedy did not address the jurisprudence on review of charges.

10. The decision does not address the main elements of the statutory criteria under the Health Professions Act.

11. The Complaint was done without consideration of Procedural Fairness of the Entire Investigation and the Hearing.

12. The College has breached their Duty to Protect the Public in their actions against the Doctor. The actions of the Doctor was in the best practices for patient care.

13. The Tribunal did not consider the Charter Issues and the Charter Values which needed to be considered in the context of the communications that were subject to the charge.

[26] Mr. Chak, counsel for Dr. Torbey on appeal, did not include the second ground listed above in the Appellant's Brief.

IV. PARTIES' SUBMISSIONS

1. Application to Adduce Fresh Evidence

[27] Through his counsel, Dr. Torbey applied to adduce the Affidavit and the Article as fresh evidence on appeal. Mr. Chak did not make submissions in his written brief on this application other than to say that "the additional evidence that is presented should be considered in its totality" (Appellant's Brief, p 9 at para 41).

[28] In oral submissions, Mr. Chak urged that Council must not fetter the discretion it is afforded by section 89(4)(b) of the *HPA*:

> 89(4) The council on an appeal may . . . (b) on hearing an application for leave to introduce new evidence, direct the hearing tribunal that held the hearing to hear that evidence and to reconsider its decision and quash, confirm or vary the decision . . .

[29] In Mr. Chak's view, s. 89(4)(b) allows Council to consider fresh evidence on appeal.

[30] Mr. Chak also suggested, without referencing authority, that the law is clear that an appeal to Council is the proper place where Dr. Torbey may have new evidence heard if it is relevant to a ground of appeal.

[31] Finally, Mr. Chak submitted that the Article and Affidavit articulate the background and public importance of why Dr. Torbey has appealed to Council. He invited Council consider what a specialist in circumstances like Dr. Torbey's should have done, and admonished that decisions of hospitals are public and cannot be shielded.

[32] In response, Mr. Boyer submitted that s 89(4)(b) of the HPA does not allow Council to hear fresh evidence on appeal. Rather, where Council feels it is warranted, s 84(4)(b) provides Council with the ability (in appropriate circumstances) to send the matter back to the Hearing Tribunal with a direction that it must hear new evidence. According to Mr. Boyer, as appeals are heard on the record under s 89(2), new evidence should only be permitted in exceptional circumstances.

[33] Mr. Boyer directed Council to his written submissions and the test for fresh evidence articulated by the Supreme Court of Canada in *R v Palmer*, [1980] 1 SCR 759 and by the Alberta Court of Appeal in *Arabian Muslim Association v The Canadian Islamic Centre*, 2006 ABCA 152 at para 3; *Dechant v Law Society of Alberta*, 2000 ABCA 265 at para 8; and *Hoffinger v Law Society of Alberta*, 2010 ABCA 302 at para 10:

a) Evidence should not generally be admitted if by due diligence it could have been adduced at the trial (Hearing Tribunal).

b) The evidence must bear upon a decisive or potentially decisive issue in the trial.

c) The evidence must be credible in the sense that it is reasonably capable of belief.

d) The evidence if believed could reasonably, when taken with other evidence adduced at trial, be expected to have affected the result.

[34] Mr. Boyer submitted that Dr. Torbey's application fails to satisfy each branch of the *Palmer* test and is, in substance, a back-door effort to provide further testimony. Mr. Boyer reminded Council that each party had a complete opportunity to present their case before the Hearing Tribunal.

[35] In response to questions, Mr. Chak argued that the *Palmer* test had no application to fresh evidence on appeals before Council, submitting that s 89(2) allows for discretion to allow fresh evidence. He referred to *Al-Ghamdi*, saying that the appellant in that case was chastised for not putting fresh evidence before the panel on appeal and the same thing is happening in this case. Mr. Chak indicated that, specifically, the Article is relevant for the Second Charge and the Affidavit is relevant for the First Charge.

[36] In response to a question from Mr. Kozak, Mr. Boyer agreed that Council could review the Affidavit and Article for the purposes of considering this application.

2. Standard of Review

[37] Mr. Chak did not make express submissions on the standard of review, but generally argued that appeals before Council are *de novo* due to the wording of s 89(4) of the *HPA*:

> 89(4) The council on an appeal may
>
> (a) grant adjournments of the proceedings or reserve the determination of the matters before it for a future meeting of the council but no adjournment may be granted without the consent of the investigated person if that person's practice permit is suspended or cancelled,
>
> (b) on hearing an application for leave to introduce new evidence, direct the hearing tribunal that held the hearing to hear that evidence and to reconsider its decision and quash, confirm or vary the decision, and
>
> (c) draw inferences of fact and make a determination or finding that, in its opinion, should have been made by the hearing tribunal.

[38] In oral submissions, Mr. Chak submitted that the authorities cited by the College suggesting a standard of review of reasonableness do not apply to Council. Mr. Chak stated that the burden is on the College to show why Council should fetter its decision making and the College did not meet this burden.

[39] Mr. Boyer submitted that the courts have said that Council reviews the decisions of Hearing Tribunals on the record and reviews findings of fact and discretion on the standard of reasonableness. For an appeal body like Council to find something unreasonable, it must say that the decision or finding was not within the range of possible outcomes, given the facts and the law.

[40] Mr. Boyer suggested that the first step in the decision making process should be to decide the standard of review. Very few issues are reviewed on a standard of correctness. On a reasonableness assessment, the issue is not what Council would have done; it should not merely substitute its decision for that of the Hearing Tribunal's.

[41] Mr. Boyer relied on *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 51-64 and *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 39 in support of his assertion that the reasonableness standard applied in this case. Mr. Boyer further pointed to *Nelson v Alberta Association of Registered Nurses*, 2005 ABCA 229 at paras 4-6, 8, 12 & 15 [*Nelson*], *MM v College of Alberta Psychologists*, 2011 ABCA 11 at paras 17-21

[*MM*] and *College of Physical Therapists of Alberta v JH*, 2010 ABCA 303 at para 7 [*JH*] as precedents for Council's use of the reasonableness standard on appeal. In particular, the College submitted that the following principles arise from these cases:

> a) the role of Council is not to retry the case but to determine whether the Hearing Tribunal's decision was reasonable;
>
> b) the Hearing Tribunal's conclusions are reasonable if there is some basis for the conclusions in the evidence;
>
> c) Council should not reweigh and reassess the evidence because weighing and assessing evidence is the role of the Hearing Tribunal;
>
> d) Council should not substitute its interpretation of practice standards for the interpretation of the Hearing Tribunal unless the Hearing Tribunal's interpretation is untenable;
>
> e) Council should consider the reasons for a decision in its totality in deciding whether the decision was reasonable.
>
> (Respondent's Brief, p 10)

[42] Mr. Boyer pointed out that Mr. Chak did not explain how such authorities do not apply to these proceedings and, particularly, that there was no authority presented in support of the idea that Council hears appeals *de novo*.

3. Grounds of Appeal

a) Dr. Torbey's Submissions

[43] Mr. Chak stated that this appeal required Council to turn its attention to how a problem Dr. Torbey had with Hospital Administration transformed into the "prosecution" of Dr. Torbey. He reminded Council that Dr. Torbey is a long-standing specialist and an immigrant to Canada. Mr. Chak argued that the decision in December 2012 to unilaterally take away OR days from Dr. Torbey required Council to make a strong statement criticizing the conduct of the hospital, and to set a proper standard of practice when taking away OR access that would obviously impact patient care.

[44] Mr. Chak suggested that Hospital Administration was a power figure trying to justify its actions without having first performed a proper analysis of the standard of care; it was not proper to make up the standard of care as things moved along. In Mr. Chak's view, suggesting

that Dr. Torbey modify his practice while taking away two OR days was an error going to the heart of this appeal.

[45] According to Mr. Chak, until Dr. Torbey questioned the hospital's decision, no one cared about Dr. Torbey, which Mr. Chak suggested was a terrifying aspect of this proceeding. He submitted that Dr. Torbey was "targeted without rhyme or reason", and that was unreasonable. Dr. Torbey is an independent physician with autonomy and was merely reacting to a decision that dramatically affected his patients.

[46] In submitting that there was no record of harm to a patient, Mr. Chak described this complaint as inappropriate exercise of the College's prosecutorial discretion in targeting Dr. Torbey over a non-medical issue. Mr. Chak questioned the appropriateness of the investigation, and submitted the matters should not have been referred to a hearing when the underlying dispute had been resolved.

[47] Mr. Chak reminded Council of its authority under the *HPA* and its public role. He argued that denying that the hospital had a duty to Dr. Torbey would be an error of law, and that Council should issue careful reasons to help with future situations where a hospital makes unilateral decisions affecting a physician and then complains to the College about how the physician responds to those decisions.

[48] Regarding the Hearing Tribunal's finding of Dr. Torbey's sense of entitlement, Mr. Chak pointed out that neither the *HPA* nor the Code of Ethics includes "sense of entitlement" as an identified category of unprofessional conduct, and that there was no "standard of care" applicable to Dr. Torbey to guide his behaviour. It was not appropriate for the Hearing Tribunal to make up such standards after-the-fact. Rather, Mr. Chak submitted, Council must look at established practices and whether Dr. Torbey's actions contradicted those established practices.

[49] Mr. Chak also criticized the "shotgun" approach of the College. He suggested that the fact that most of the allegations relating to the Standard on Job Action and specific provisions of the Code of Ethics were unsuccessful before the Hearing Tribunal means that the decision makers were not focused on their statutory role. Mr. Chak submitted that this amounted to an error of law.

[50] Mr. Chak argued that, without a recognized standard against which to judge conduct, the Decision was arbitrary and improperly focused on finding guilt. The College had the burden to prove a standard that was recognized by the profession, communicated to the profession, and then breached. The College failed to prove that in this case.

[51] Mr. Chak submitted that Hospital Administration engaged in a "bait and switch" with Dr. Torbey. They lured him into conflict by changing his practice without consultation and expected him to comply like a mere employee rather than an independent specialist. Mr. Chak suggested that the hospital's approach was paternalistic, and their subsequent complaint to the College was vindictive. According to Mr. Chak, it was further wrong, legally incorrect, irresponsible and contrary to its statutory duties for the College to use resources against an independent specialist with no benefit to the public or the profession, particularly when the underlying issues between Dr. Torbey and Hospital Administration were subsequently resolved.

[52] Mr. Chak also commented on the case cited in the College's materials, *Dore v Barreau du Quebec*, 2012 SCC 12 [*Dore*], explaining that this was a case where a lawyer wrote an uncivil letter to the presiding judge. Mr. Chak said that both the lawyer and the judge were sanctioned in that case.

[53] Mr. Chak also made submissions on the reasonableness of the decision to reduce Dr. Torbey's OR time for cystoscopies and urged Council to consider this when deciding whether Dr. Torbey's actions in response were unprofessional. Mr. Chak submitted that there was no basis in fact for a finding of unprofessional conduct; Dr. Torbey practiced as he practiced and there were no issues of competence or patient care. He urged Council to take the dysfunctional hospital context into account when considering Dr. Torbey's response.

[54] Mr. Chak also submitted that at the heart of the Hearing Tribunal's decision was an overarching attitude of discrimination. He said that it was clear that no one within the Hospital Administration wanted to communicate with Dr. Torbey due to his broken English but they wanted to make judgments against him. Dr. Torbey received letters to set him up in a trap and to create a record against him. In context, Dr. Torbey's letters were clear, and he attempted to work through the issues in a healthy way.

[55] Returning to the theme of a "bait and switch", Mr. Chak suggested that the College does not want Council to focus on real medical issues or unprofessional conduct. He stated that the College cannot make up the law as they go along and the Hearing Tribunal had been spoon fed something that was not correct. Mr. Chak stated that it is not acceptable to expand the definition of "unprofessional conduct" and bring a "shotgun approach" to get the result of unprofessional conduct in this case. Mr. Chak said there was no rhyme or reason to the Hearing Tribunal Decision.

[56] Mr. Chak also commented on some of the words and language used by Dr. Torbey to describe hospital administrators. Dr. Torbey had a right to put the dispute to his patients. Dr. Torbey used words that he felt were reasonable.

[57] According to Mr. Chak, if Council looks at what he described as the underlying factors of racism and discrimination, then the fact that Dr. Torbey was not properly communicated to and was not properly addressed by the College shows a bias that cannot be ignored.

[58] Mr. Chak denied that Dr. Torbey made admissions before the Hearing Tribunal. Mr. Chak pointed to Dr. Torbey's letter of January 3, 2013 and stated that he would personally be shocked if Council found that its contents were unprofessional. He urged Council to examine this letter. Mr. Chak clarified that Dr. Torbey did not apply for an injunction or appeal because the hospital lured him into cooperating for a period by promising to look into moving cystoscopies to the Outpatient Department.

[59] Mr. Chak stated that the finding regarding Dr. Torbey's sense of entitlement should be eradicated from the decision as it was highly exaggerated and improper for the College to put it to the Hearing Tribunal; such things are not valid reasons for sanction. Mr. Chak suggested that bias and prejudice underlined the Hearing Tribunal's Decision.

[60] At the appeal, Mr. Chak produced and circulated a copy of *Constable A v Edmonton (Police Service)*, 2017 ABCA 38 and referenced para 53 for the various factors that should be taken into consideration when determining fitness of sanction. He suggested that most resources should go to situations where patients are hurt. But in circumstances where hospital administration keeps pressing the issue, Council has a duty to say the matter was dealt with because the College's forum is not appropriate for personal vendettas.

[61] Mr. Chak relayed that Dr. Torbey is very upset with the treatment he has been subjected to by the College. If Hospital Administration had a problem, they should have worked it out with Dr. Torbey rather than running to the College.

[62] Mr. Chak urged that if Council affirms the finding of unprofessional conduct, then it must define what that conduct was, and what the appropriate sanction is in light of the fact that Dr. Torbey is still practicing in Grande Prairie. Mr. Chak stated that the Sanction Decision shows no pattern of actually addressing the conclusion that Dr. Torbey was "entitled" or "uncivil" with hospital administrators, and therefore the sanction was not reasonable. Rather, Council should recognize that there was a problem, but the problem was not caused by Dr. Torbey and therefore there should be no sanction.

[63] Regarding Mr. Boyer's written submissions, Mr. Chak criticized the suggestion that Dr. Torbey admitted everything such that the only issue is whether his admitted actions were unprofessional and to what degree. There is no doubt that he sent a letter to his patients, which Mr. Chak conceded was important, but it was wrong to bring this letter before Council as

if that determined the issue, especially when Dr. Torbey was told that he must address his patients. Mr. Chak submitted these letters were not admissions and Dr. Torbey did not need to defend the letters as, according to Mr. Chak, there is no jurisprudence in Canada suggesting that Dr. Torbey crossed the line of medical ethics.

[64] Mr. Chak specifically disagreed with para 105 in the Respondent's Brief regarding the Hearing Tribunal's treatment of *Charter* values. Mr. Chak described the findings of unprofessional conduct as unreasonable and contrary to the Charter.

[65] Mr. Chak also responded to the College's written submission that there was no evidence of discrimination in this case. He urged Council to look at the entire context and send the matter back to the Hearing Tribunal. He submitted it was inappropriate for the College to refer to the *Al-Ghamdi v Peace Country Health* case as authority for a lack of discrimination in the hospital environment, because of general systematic discrimination in Alberta.

[66] In response to questions from Council, Mr. Chak confirmed that cystoscopies are currently being performed by Dr. Torbey as Dr. Torbey eventually accepted the decision of the Hospital Administration.

[67] In reference to the January 3, 2013 letter, Mr. Chak agreed with the suggestion that autonomist rural specialists should have the opportunity to provide input into decisions, but not to ultimately make the decisions.

b) The College's Submissions

[68] Mr. Boyer responded to Mr. Chak's statement that Dr. Torbey had his privileges taken away. Mr. Boyer distinguished between what happened in December 2012 (when Dr. Torbey's OR privileges were reduced) and in June 2013 (when they were taken away entirely after he failed to use his allotted OR time for the three months following January 31, 2013). In any event, Mr. Boyer submitted that there is a process under the *Hospitals Act* to deal with such disputes, but in this forum, the only issue before Council is Dr. Torbey's response to the decisions of the Hospital Administration and whether his reactions were inappropriate in the context of those circumstances.

[69] Mr. Boyer also addressed the January 3, 2013 letter and clarified that it wasn't the letter that was the subject of the Second Charge. Rather, he submitted that the letter provided context and background.

[70] Mr. Boyer also questioned Dr. Torbey's motives for the way in which he responded to the decision to reduce his OR time and suggested that it was inconsistent for Dr. Torbey to withhold services to patients for three months, when his position was that a delay of two weeks would compromise patient care.

[71] Regarding the new issues raised by Mr. Chak, Mr. Boyer submitted that new issues shouldn't arise on appeal as there are no facts to provide context. Mr. Boyer said it was improper for Mr. Chak to attack the investigation now as this was not raised before the Hearing Tribunal.

[72] With respect to Mr. Chak's submissions on the facts in *Dore*, Mr. Boyer clarified that this case was only included in his materials in reply to the allegation by Dr. Torbey that the Hearing Tribunal's decision failed to take into consideration *Charter* values. Mr. Boyer submitted that the Hearing Tribunal was alive to *Charter* values in a manner consistent with the approach outlined in *Dore*.

[73] Mr. Boyer also addressed Mr. Chak's submissions that Dr. Torbey did not refuse to provide services. Mr. Boyer stated that this submission was inconsistent with the conduct admitted before the Hearing Tribunal and the findings of the Hearing Tribunal based on the evidence which supported those admissions. It was not open to Dr. Torbey at this stage before Council to go back and say he didn't refuse to provide services as, in Mr. Boyer's view, he cannot simply walk away from an admission and a finding of the Hearing Tribunal based on the evidence.

[74] In reference to paras 5-7 of the Appellant's Brief, Mr. Boyer stated the Hearing Tribunal did not make any findings that the Hospital Administration became vindictive and malicious in using all bureaucratic means to undermine patient care, as was suggested by Mr. Chak.

[75] Mr. Chak had also argued in paras 10, 47, and 80 of the Appellant's Brief that Dr. Torbey should be reimbursed for his costs for these proceedings. Mr. Boyer submitted that Council does not have jurisdiction to make such an order and the costs cannot be awarded against the College. In response to a question from Council, Mr. Boyer clarified that costs can only be awarded against the College on appeal to the Court of Appeal where the Rules of Court apply.

[76] Council also asked Mr. Boyer whether it should consider events leading up to Dr. Torbey's impugned conduct as mitigating for the purposes of sanction. Mr. Boyer submitted that the starting point for Council should be the factors considered by the Hearing Tribunal in the Sanction Decision. Council should then ask whether the sanction ordered properly weighs the factors set out in *Jaswal v Newfoundland Medical Board*, [1996] NJ No 50. Council should

ask whether the order is within the range of possible sanctions given the facts and the law. Mr. Boyer submitted that determinations of sanction are discretionary and should be afforded deference by both Council and the Court of Appeal.

V. SUMMARY OF COUNCIL'S DECISION

[77] Council carefully reviewed and considered the Exhibit Book, Dr. Torbey's Extracts of Key Evidence, the written submissions of the parties, the oral submissions made at the appeal, and the case authorities cited.

[78] Council agrees with the College that for all of the issues that arise in this appeal, the appropriate standard of review is reasonableness. A decision will only be unreasonable if it does not fall within the acceptable range of rational outcomes. Although the evidence must support a decision, findings in relation to the evidence must truly be outside that acceptable range to be overturned.

[79] With respect to the questions before Council, Council has found that the Hearing Tribunal's decisions were both within an acceptable range of rational outcomes and the appeal is therefore dismissed.

VI. FINDINGS AND DECISION

1. Application to Adduce Fresh Evidence

[80] An appeal to Council is on the record under s 89(2). Further, s 89(4) cannot be interpreted in the way that Mr. Chak suggests because it is clearly limited to the circumstance where Council chooses to send a matter back to the Hearing Tribunal with a direction to hear new evidence.

[81] To the extent that Council has discretion to admit and consider fresh evidence on appeal, Council agrees with the policy reasons behind *Palmer* and finds that the *Palmer* test should apply in any event. Allowing parties to freely admit new evidence so long as it relates to a ground of appeal would disturb the policy reason of finality and would operate to allow appellants a free second chance regardless of the prior opportunity to present evidence before the Hearing Tribunal.

[82] Council finds that *Palmer* applies to Council's consideration of applications to adduce fresh evidence. Mr. Chak did not point to any authority suggesting that *Palmer* should not apply

to such applications to Council. Council further finds that the Article and the Affidavit do not pass any aspect of the *Palmer* test and, therefore, Council denies Dr. Torbey's application to adduce fresh evidence.

[83] Before the Hearing Tribunal, Dr. Torbey gave evidence that was then tested through cross-examination by Mr. Boyer. If accepted, Mr. Chak's arguments would allow Dr. Torbey to give new evidence on appeal without ever being subjected to cross-examination, or allowing Mr. Boyer the opportunity to call rebuttal evidence. Such a situation would be untenable regardless of which party sought to introduce the evidence. For these reasons, Council finds that the *Palmer* test reflects good policy.

[84] In applying the *Palmer* test to the Affidavit and the Article, Council finds that both could have been adduced at the Hearing Tribunal proceeding with due diligence. Council further finds that there is nothing in either the Affidavit or the Article that would have been potentially decisive to an issue.

2. Standard of Review

[85] The standard of review for issues arising in this appeal is reasonableness. Mr. Chak relied solely on the bare wording of s 89(4) and did not provide reasons why the authorities cited by the College were inapplicable. Council finds that it is bound by the authorities cited by the College, which clearly state that Council hears appeals of the Hearing Tribunal on a standard of review of reasonableness.

[86] The *HPA* creates a two-step administrative framework for the College with respect to complaints of unprofessional conduct. First, the Hearing Tribunal hears the evidence and makes a determination. A party then has 30 days to appeal to Council with a further right of appeal directly to the Court of Appeal in some instances. All cases cited by the College on the standard of review concerned tribunals with a nearly identical two-step administrative structure such that the reasoning in those cases applies to decisions of Council.

[87] In particular, Council notes *Nelson* where the Alberta Court of Appeal commented on the scope of review available to Council, citing the Supreme Court of Canada (at para 4):

> [T]he Act allows a right of appeal to the Appeals Committee. The Act also authorizes the Appeals Committee to make any decision or findings that the Conduct Committee ought to have made. Provisions such as these do not necessarily require less deference because, as the Supreme Court said in H.L. v. Canada, 2005 SCC 25 at para. 88: "the scope of the powers conferred must not be confused with the manner in which they are to be exercised." The Conduct

> Committee hears the evidence and the appeal to the Appeals Committee in this case was on the record. This suggests some deference.

[88] *Nelson* is clear authority for the College's position. Dr. Torbey's counsel only provided a general denial that *Nelson* applies and did not provide an explanation on how *Nelson* should be distinguished for appeals to Council under s 89 of the *HPA*.

[89] The Court of Appeal has consistently followed the reasoning in *Nelson* for professional disciplinary appeal bodies under a similar statutory framework to the *HPA*. *JH* expressly cited *Nelson* in affirming that the Council in that case should apply the reasonableness standard to the decision of the Discipline Committee that had heard the evidence and made determinations (at para 7).

[90] In *MM*, another case with a similar administrative and statutory framework, the Court of Appeal expressly affirmed the appeal body's use of the reasonableness standard and stated that appeals to Council were not *de novo* (emphasis added):

> [19] . . . On each issue, the Council reviewed the decision of the Discipline Committee on a standard of reasonableness.
>
> [20] Several considerations support that choice. First, there is the expertise of the Discipline Committee. A panel of the Discipline Committee hearing a complaint must consist of a minimum of three persons, at least two of whom will therefore be chartered psychologists: s. 38 of the *Act*. The nature of the questions before the Discipline Committee here – what constitutes unskilled practice and the scope of consequential sanctions – directly engage the expertise of the Discipline Committee and its oversight role in protecting the members of the public. Further, on appeal to the Council, that appeal is to be heard on the record of the proceedings before the Discipline Committee: s. 57(3). It is true that the Council is given the authority to draw inferences of fact and make a determination or finding that, in its opinion, ought to have been made by the Discipline Committee (s. 57(5)(c)) along with the authority to "receive further evidence" (s. 57(5)(b)). Nevertheless, the fact remains that the Council does not hear the appeal *de novo*. This too indicates a deferential standard of review, at least with respect to fact findings made based on the evidence heard by the Discipline Committee: ***K.V. v. College of Physicians and Surgeons of the Province of Alberta***, 1999 ABCA 125 (CanLII), 173 D.L.R. (4th) 431 at para. 12.

> [21] Therefore, the Council was correct in choosing to apply a standard of review of reasonableness to its consideration of the Discipline Committee's decisions on both issues in dispute here.

[91] As a result of these authorities and Council's interpretation of s 89 the *HPA*, Council finds that a standard of reasonableness applies to issues in this appeal arising from the decision of the Hearing Tribunal in this appeal.

3. Grounds of Appeal

[92] In the Notice of Appeal, Dr. Torbey enumerated thirteen grounds of appeal.

[93] Throughout his submissions, Mr. Chak invited Council to impugn the decision of Hospital Administration. Although that decision provides contextual background, Council agrees with the College that the only issue before the Hearing Tribunal was whether Dr. Torbey's responses to administration's decision constituted unprofessional conduct. In order for Dr. Torbey to be successful in this appeal, he must demonstrate that the Hearing Tribunal's findings with respect to the Charges were unreasonable.

i. The Hearing Tribunal did not have the Jurisdiction to make the alleged conduct of the member as a disciplined conduct.

[94] Through his counsel, Dr. Torbey did not object to the Hearing Tribunal's jurisdiction (HT Decision, p 2, Transcript, p 3 *ll* 8-16).

[95] In Mr. Chak's written submissions, he clarified that this ground of appeal was intended to question the Hearing Tribunal's jurisdiction under the *HPA* to "expand the definition of 'unprofessional conduct'. There was no Standard of Care which was applied" (Appellant's Brief, p 12). Although Council finds the use of the term "standard of care" confusing in this context, Council understands Dr. Torbey's submission to be that the Hearing Tribunal did not have jurisdiction to give the meaning of unprofessional conduct that it did.

[96] "Unprofessional conduct" is defined in s 1(1)(pp)(ii) as a "contravention of this Act, a code of ethics or standards of practice." The Hearing Tribunal had jurisdiction to decide whether Dr. Torbey's conduct constituted unprofessional conduct under s 80(1) of the *HPA* by interpreting the Code of Ethics. Mr. Chak did not refer to any specific aspect of the Hearing Tribunal's interpretation of the Code of Ethics or explain why those interpretations were outside its jurisdiction.

[97] In this case, the Hearing Tribunal did not invent unpromulgated meanings of "unprofessional conduct" but merely interpreted the meaning of the Code of Ethics and applied that meaning to the facts of this case. As the College pointed out by reference to *Lysons v Alberta Land Surveyors Assn*, 2017 ABCA 7, [2017] AJ No 10 at para 4, it is entirely within the jurisdiction of the Hearing Tribunal to determine whether Dr. Torbey's conduct was unprofessional. This appeared to be conceded by Mr. Chak in oral submissions when he submitted that the meaning of "unprofessional conduct" is general in nature and it is up to the College to flesh that out in greater detail. Fleshing that detail out is done in part by examining the Code of Ethics (as referenced in the *HPA* definition of unprofessional conduct) and the interpretations of the Code of Ethics by decisions of Hearing Tribunals and Council. Simply because Dr. Torbey disagrees with that interpretation does not mean that the Hearing Tribunal was without jurisdiction to make the interpretation that it did.

ii. The College had not proven the majority of the alleged allegations against the CMA's Code of Ethics.

[98] In Council's view, this is not a valid ground of appeal. The number of Code of Ethics violations alleged are irrelevant so long as there is at least one that has been proven in relation to a given charge.

iii. The Charges did not relate to patient care and therefore should not have been considered.

[99] Mr. Chak made extensive submissions suggesting that College should not refer a complaint to a hearing on unprofessional conduct charges unless those charges relate to patient care. This ground of appeal, in substance, challenges the provisions of the Code of Ethics that do not directly relate to patient care, such as s 48. Council rejects this proposition. The College's mandate is clearly broader as the policy considerations that inform the content of unprofessional conduct includes and transcends concerns relating directly to patient care.

[100] Council further notes that concerns regarding patient care were central for the First Charge in that Dr. Torbey failed to perform cystoscopies on his patients for at least three months when it was his belief that a delay of 2 weeks could jeopardize patient well-being.

iv. The Hearing Tribunal made unreasonable findings of facts against the Appellant.

[101] Mr. Chak focused on the finding that Dr. Torbey was motivated by a sense of entitlement, which informed the Hearing Tribunal's finding of unprofessional conduct in relation to sections 13 and 48 of the Code of Ethics, which read as follows:

> 13. Do not exploit patients for personal advantage.
>
> . . .
>
> 48. Avoid impugning the reputation of colleagues for personal motive; however, report to appropriate authority any unprofessional conduct by colleagues.

[102] These provisions provided the basis of the finding of unprofessional conduct with respect to the Second Charge, and the finding of Dr. Torbey's sense of entitlement satisfied the personal advantage/motive aspects of these sections. (The First Charge was also based on ss 1 and 19 of the Code of Ethics in addition to s 13 and so it remains largely unaffected by the finding that Dr. Torbey acted out of a sense of entitlement.)

[103] In his closing argument to the Hearing Tribunal, Mr. Boyer referenced the following testimony of Dr. Torbey to support the notion that Dr. Torbey had acted out of a sense of entitlement (Transcript, p 248, *l* 22 to p 249, *l* 19; Emphasis added):

> Q: And then the next paragraph, you say given that position of the Alberta Health Services, you have chosen to suspend your cystoscopy services, right?
>
> A: Trust me and believe me that the suspension was a bitter pill to swallow. I didn't want it. I was desperate for time. I was asking for more time to do. All along I wanted normal, regular predicting time like everybody, other surgeon in the hospital had, or every urologist in Canada has. I was never asking for anything luxury. I was asking for simple, decent place where I know what to do, I know when I'm coming, and I know when I'm going. And they give me places. Yes they gave me days to do cystoscopy, but they give me days to keep me alive. Not to live. To keep me alive. That's big difference.
>
> If I am a specialist, gifted with what I do, I am committed to the area, have been there for 25 years, the only urologist in the north, I deserve better. My patients deserve better. I am not an animal. I am not somebody second-class. I deserve like they deserve. I am not asking to be better than them. I want to be equal, have the same opportunity, the same as my patients. Because I am my patients. But if I am mistreated, they are mistreated. And this is totally unacceptable, especially to somebody like me.

[104] In this passage, and throughout the Record, while it is clear that Dr. Torbey was expressing concern about his patients' wellbeing, it is possible to conclude (as the Hearing Tribunal did) from the underlined portions above that he was acting out of a sense of entitlement. Unlike the Hearing Tribunal, Council did not have the benefit of seeing and hearing Dr. Torbey testify.

[105] Council finds that it was reasonable for the Hearing Tribunal to find that Dr. Torbey exploited his patients for personal advantage and impugned the reputation of colleagues for a personal motive in relation to the Second Charge, whether or not his actions arose out of, or can be characterized as, a sense of entitlement.

[106] In his letter to his patients dated April 30, 2013, Dr. Torbey made a concerted effort to recruit his patients to advocate on his behalf in his battle with Hospital Administration. Crucially, this was done after many of them were put in a desperate position. In Dr. Torbey's Office Administrator's letter of April 4, 2013, she reported substantial distress on the part of Dr. Torbey's patients as a result of the long delay and lack of treatment. Attempting to bring Dr. Torbey's patients into his dispute with Hospital Administration when his withdrawal of services had already caused desperation was exploitative.

[107] Similarly, the Hearing Tribunal was reasonable to find that describing his colleagues as "greedy, self centred and discriminating" had the effect of impugning their reputation.

[108] In regards to both the exploitation of patients and the impugning of colleagues' reputation, in Council's view, Dr. Torbey was personally motivated. In response to a question from Council, Mr. Chak stated that Dr. Torbey should have a right to provide input into decisions that affect his practice, but admitted that Dr. Torbey had no right to participate in the making of the decision, even as an autonomist specialist. However, the evidence is most consistent with the view that Dr. Torbey was not satisfied with merely providing input. He wanted to prevail in this dispute at all costs and was willing to exploit his patients and impugn the reputation of his colleagues in order to do so.

[109] It was reasonable for the Hearing Tribunal to find that Dr. Torbey was personally motivated in violation of ss 13 and 48 of the Code of Ethics.

[110] To the extent that this ground of appeal is intended to challenge the basic facts behind the Charges, such as whether Dr. Torbey withdrew his services from his patients for at least three months, Council takes it as a complete answer that Dr. Torbey admitted these facts before the Hearing Tribunal.

v. The Hearing Tribunal made unreasonable conclusions on the legal test to find that the conduct was subject to sanction.

[111] Council's reasons for the first ground of appeal apply here as well. The Hearing Tribunal reasonably interpreted the Code of Ethics and applied those interpretations, which was entirely within its statutory mandate.

[112] To the extent that Mr. Chak's written submissions impugn the statutory framework which cloaks the Hearing Tribunal with broad discretion to determine unprofessional conduct, such issues are for the legislature to decide.

vi. The additional findings of facts confirms that the Complainant had contributed to the negative environment and therefore his actions should have been a mitigating factor to ensure that those conditions have been removed.

[113] This ground of appeal reflects Mr. Chak's attempt throughout his submissions to have Council focus on the original decision of Hospital Administration rather than on Dr. Torbey's response. However, the only issues before Council related to the Charges which are solely about Dr. Torbey's response to the decision of Hospital Administration. It was both reasonable and correct for the Hearing Tribunal to proceed accordingly.

[114] The negative environment and dysfunction in the hospital are relevant mitigating factors for sanction and such factors did play a significant role in the Sanction Decision (p 5). However, if a member engages in conduct that is unprofessional, it is no justification to say that someone else started it.

vii. No sanction should have been ordered when the contributing factors were not considered. Specifically dealing with the opinion of the medical doctor as well as the exclusion from the decision making for the Appellant's own patients. This put patient care at risk.

[115] Mr. Chak's written submissions do not explain this ground of appeal and, orally, he only stated Dr. Torbey's view that there should have been no sanction.

[116] Sanction decisions of the Hearing Tribunal are afforded deference. Dr. Torbey has not demonstrated why the Sanction Decision did not fall within the range of acceptable outcomes. The specific "contributing factors" identified by Mr. Chak were expressly and properly considered by the Hearing Tribunal as mitigating factors in determining sanction.

viii. The Remedy was disproportionate to the alleged finding.

ix. The Remedy did not address the jurisprudence on review of charges.

[117] Grounds eight and nine both concern the reasonableness of the Sanction Decision and are best addressed together.

[118] Again, Mr. Chak did not address these grounds orally, but in written submissions he appears to suggest that the sanction ordered by the Hearing Tribunal was disproportionate to Dr. Torbey's conduct in light of the fact that the College failed on its job action standard arguments and in light of the fact that Dr. Torbey eventually resolved his dispute with Hospital Administration.

[119] Mr. Chak also suggests that the College's failure to make out the majority of its arguments before the Hearing Tribunal means that Dr. Torbey should not be sanctioned for those that were proven. This argument is without merit as it ignores the fact that the College succeeded on both Charges. Mr. Chak did not point Council to any jurisprudence which would support Mr. Chak's suggestion that no sanction should follow the findings of unprofessional conduct in this case.

[120] With respect to both grounds of appeal, the Hearing Tribunal's decision was reasonable in coming to a decision on sanction. The Hearing Tribunal heard submissions from counsel for both the College and Dr. Torbey and then meticulously worked through the sanction factors identified in the relevant jurisprudence.

x. The decision does not address the main elements of the statutory criteria under the Health Professions Act.

[121] Mr. Chak did not address this ground of appeal in oral submissions, but his written submissions appear to be focused on the "shotgun approach" he alleges the College took which are said to have distracted from the actual Charges. As explained above, Council finds that the Hearing Tribunal was reasonable in its use of the Code of Ethics, which is expressly included in the definition of "unprofessional conduct" in the *HPA*, in finding that Dr. Torbey committed unprofessional conduct.

xi. The Complaint was done without consideration of Procedural Fairness of the Entire Investigation and the Hearing.

[122] Based on Mr. Chak's written submissions, this ground of appeal appears to suggest that the College was vindictive and malicious in investigating the complaint against Dr. Torbey. As the College pointed out, this issue was not raised before the Hearing Tribunal. Nevertheless there was no evidence on the Record showing that the investigation was carried out

maliciously. The fact that the investigation continued after Dr. Torbey resolved his issues with Hospital Administration simply reflects the fact that the College was investigating Dr. Torbey's conduct, not the validity of Hospital Administration's decision.

[123] In oral submissions, Mr. Chak suggested that it was improper for the College to not refer the matter to alternate complaint resolution under s 55(1)(b) of the *HPA*. Such referrals are discretionary. Generally, though, the Complaints Director will only consider alternate complaint resolution if it is appropriate and viable in the circumstances, and only if both parties agree and are amenable to participating in such a process. In this case, the Complaints Director referred the matter to an investigation. There was no evidence before the Hearing Tribunal or Council about the decision making process in this case, let alone evidence that it was vindictive or malicious.

[124] Once an investigation is complete, the Complaints Director must refer the matter to the Hearing Tribunal under s 66(3)(a) unless he or she is of the view that the complaint is trivial or vexatious, or if there is insufficient evidence of unprofessional conduct. Upon finding that neither of those exceptions applied, the Complaints Director was required by the *HPA* to send the matter to the Hearing Tribunal. This ground of appeal does not justify disturbing the Decision.

xii. The College has breached their Duty to Protect the Public in their actions against the Doctor. The actions of the Doctor was in the best practices for patient care.

[125] This ground of appeal squarely addresses the heart of this case. The Hearing Tribunal found that removing care for three months without informing or advising patients of other options, while also continuing to accept new patients, is fundamentally inconsistent with the best practices for patient care. That finding was reasonable. There was evidence before the Hearing Tribunal that some of Dr. Torbey's patients were in great distress due to his withdrawal of services. In this regard, the Hearing Tribunal's Decision is entirely consistent with the protection of the public and was reasonable.

[126] Mr. Chak emphasized Dr. Torbey's autonomy and independence throughout oral submissions. This autonomy and independence is also inconsistent with shifting the blame to Hospital Administration for his own actions and decisions. No one at the hospital directed Dr. Torbey to stop administering cystoscopies or prevented him from developing care plans for his patients.

xiii. The Tribunal did not consider the Charter Issues and the Charter Values which needed to be considered in the context of the communications that were subject to the charge.

[127] Mr. Chak suggested that Charge 2 constituted a violation of Dr. Torbey's s 2(b) *Charter* right to free expression. Mr. Chak also suggested that Hospital Administration's treatment of Dr. Torbey was discriminatory.

[128] In *Dore*, the SCC instructed administrative tribunals on how they should consider *Charter* guarantees in carrying out their mandate. Rather than carrying out a s 1 *Charter* analysis, the SCC said that balance is achieved by applying the following test: "has the decision-maker disproportionately, and therefore unreasonably, limited a *Charter* right" (*Dore* at para 6). The court clarified what reasonableness means in this context (*Dore* at para 7):

> In the *Charter* context, the reasonableness analysis is one that centres on proportionality, that is, on ensuring that the decision interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives. If the decision is disproportionately impairing of the guarantee, it is unreasonable. If, on the other hand, it reflects a proper balance of the mandate with *Charter* protection, it is a reasonable one.

[129] Accordingly, it is not Council's role to consider issues of *Charter* values afresh, but to assess whether the Hearing Tribunal was reasonable in its balancing of *Charter* values as explained in *Dore*.

[130] The Hearing Tribunal heard no evidence or submissions regarding *Charter* values. Nevertheless, the Hearing Tribunal considered the effect of a finding of unprofessional conduct on Dr. Torbey's right to free expression in the context of s 48 of the Code of Ethics (at p 24):

> The Hearing Tribunal also considered the potential competing or even over-riding interests of free expression and a physician's ability to advocate for their patients. However, as previously noted the Hearing Tribunal agrees that this letter was being used by Dr. Torbey to solicit personal gain, namely satisfying his sense of entitlement that he deserved cystoscopy access on at least a weekly basis. Further, the tone of the letter does not reflect respectful airing of differences of opinion, particularly given the fact that the audience for the letter were patients in the health care system.

[131] This passage demonstrates that the Hearing Tribunal was aware of the implications of the Second Charge for Dr. Torbey's right to free expression. The panel viewed Dr. Torbey's

disparaging comments about his colleagues in light of the audience and the context of how the College desires to see conflicts resolved, both of which are squarely within the statutory mandate of the College.

[132] The Hearing Tribunal did not say that Dr. Torbey could not communicate by letter with his patients, but only that he must stay within his professional and ethical obligations as set out in the Code of Ethics when doing so. Council finds that the Hearing Tribunal reasonably balanced the censoring effect of their decision with the objectives of the *HPA* and mandate of the College.

[133] To the extent that Dr. Torbey raises other issues such as discrimination, the Hearing Tribunal cannot be expected to engage in a *Dore*-type balancing analysis when the evidence, submissions, and issues that they are considering do not engage issues of discrimination.

VII. ORDERS OF COUNCIL

[134] Council dismisses this appeal and confirms the Hearing Tribunal's decision which ordered the following:

1. Suspension

   The Member will be suspended for one (1) month; however the suspension will be stayed pursuant to section 82(2) of the HPA, pending successful completion of point 2, below. If point 2 is successfully completed within a reasonable time as determined by the Registrar, no actual suspension shall occur.

2. Assessment

   The Member will undergo a Comprehensive Occupational Assessment for Professionals as referenced in the entered Book of Authorities.

3. Costs

   The Member will be responsible for 50% of the costs associated with the investigation and hearing, and all costs associated with the Comprehensive Occupational Assessment for Professionals.

[135] In rendering its decision, Council should not be taken as making any statement (positive or negative) on the decisions or actions made by Hospital Administration which led to the dispute with Dr. Torbey. Council was only properly called upon to review the Hearing Tribunal's decision in relation to the Charges. The Charges only concern Dr. Torbey's conduct in

responding to the decisions of Hospital Administration. Nevertheless, it is apparent that Dr. Torbey has been significantly impacted by those decisions and subsequent events. For that reason, and in these unique circumstances, rather than ordering Dr. Torbey to pay 100% of the costs of this appeal, Council has elected to order him to pay 20% of the costs of this appeal rather than the normal award of full costs of an unsuccessful appeal. Council notes that costs are within their discretion and that each case is considered on its particular facts. Future appellants should not construe this decision as a precedent that they will escape the default rule of paying full costs in the event of an unsuccessful appeal.

Signed on behalf of Council this 18th day of May, 2017.

K Wood

Kate Wood (Ms)