COLLEGE OF PHYSICIANS & SURGEONS OF ALBERTA

IN THE MATTER OF
A HEARING UNDER THE *HEALTH PROFESSIONS ACT*,
R.S.A. 2000, c. C-7

AND IN THE MATTER OF A HEARING REGARDING
THE CONDUCT OF DR. CAMILLE TORBEY

DECISION OF THE HEARING TRIBUNAL OF THE COLLEGE OF PHYSICIANS & SURGEONS OF ALBERTA

INTRODUCTION

The Hearing Tribunal held a hearing into the conduct of Dr. Camille Torbey, a registered member of the College of Physicians and Surgeons of Alberta ("CPSA"). The members of the Hearing Tribunal were:

- Dr. John S.J. Bradley of Edmonton (Chair),
- Dr. Randall Sargent of Canmore (Physician Member), and
- Mr. Mackenzie (Scott) Grayson of St. Albert (Public Member).

Mr. Matthew Woodley acted as independent legal counsel for the Hearing Tribunal.

In attendance at the hearing were:

- Dr. Camille Torbey;
- Ms. Liza Wold, legal counsel for Dr. Torbey; and
- Mr. Craig Boyer, legal counsel for the CPSA.

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

ALLEGATIONS

The Notice of Hearing indicates that Dr. Torbey was charged with the following:

> **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;
>
> 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;

Dr. Torbey admitted the allegations contained in the Notice of Hearing. Subsequently, Ms. Wold specified that the hearing would focus on whether or not the allegations admitted by Dr. Torbey constituted unprofessional conduct under the *Health Professions Act*.

I. PRELIMINARY MATTERS

The parties indicated that there were no preliminary matters to address prior to the commencement of the evidence.

II. EVIDENCE – EXHIBITS

The parties provided the Hearing Tribunal with an Exhibit Book, which was marked as Exhibit 1 in the hearing. Exhibit 1 contained the following information at the tabs indicated:

1. Notice of hearing dated November 14, 2014.
2. Affidavit of Service dated November 30, 2014.
3. Amended Notice of Hearing dated April 13, 2015.
4. Affidavit of Service dated April 22, 2015.
5. Dr. Kevin Worry letter dated June 23, 2013 to Dr. Owen Heisler, Complaints Director of the College, with enclosures.
6. Dr. Camille Torbey letter dated August 15, 2013 to Katherine Jarvis, College investigator.
7. Dr. Torbey letter dated August 29, 2013 to Dr. Owen Heisler [with enclosures].
8. Dr. Miles letter dated December 14, 2012 to Dr. Torbey.
9. Dr. Torbey letter dated January 3, 2013 to Dr. Pope.
10. Dr. Pope letter January 4, 2013 to Dr. Torbey.
11. Dr. Pope letter dated January 7, 2013 to Dr. Torbey.
12. Nurse R. Young letter dated January 8, 2013 to Dr. Pope.
13. Dr. Lewis letter dated January 11, 2013 to Dr. Torbey.
14. Dr. Torbey letter dated January 24, 2013 copied to Dr. Pope.
15. Minutes of the Surgical Services Community on January 25, 2013.
16. Final Surgical Services Community Terms of Resolution.
17. Dr. Lewis letter dated February 11, 2013 to Nurse R. Young.
18. Nurse R. Young email dated February 12, 2013 to J. MacDonell.
19. Dr. Torbey's office administrator letter dated April 4, 2013 to Dr. Pope.
20. Dr. Pope letter dated April 15, 2013 to Dr. Torbey.
21. Dr. Torbey letter dated April 18, 2013 to Dr. Eagle.
22. Dr. Torbey letter dated April 18, 2013 to MLAs.
23. Dr. Torbey letter dated April 30, 2013 to patients.
24. Dr. Beekman letter dated May 9, 2013 to Dr. Torbey.
25. Nurse R. Young e-mail 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.
26. Dr. Torbey letter dated November 24, 2013 to Dr. Owen Heisler.
27. Dr. Beekman letter dated September 23, 2013 to Dr. Owen Heisler.
28. Fax from Dr. Beekman dated November 25, 2013 with list of 40 patients triaged for cystoscopy by Dr. Todd.
29. July 8, 2013 Dr. Pope letter sent to patient, Mr [redacted]
30. Dr. Pope letter dated October 31, 2013 to Dr. Owen Heisler with enclosures.
31. Dr. Miles letter January 18, 2014 to Dr. Owen Heisler with enclosure.
32. Summary of Dr. Torbey's use of OR time–January to May 2013.
33. QE II Hospital OR Elective Surgery Schedule–January to May 2013.
34. Nurse R. Young Statement of Fact dated generally June 21, 2013.
35. Summary of Dr. Torbey's use of OR time–January to May 2013.
36. Alberta Health billing records for Dr. Torbey cystoscopies–September 1, 2010 to August 31, 2013.
37. Alberta Health Services–Disclosure of Harm Policy.

The parties also presented the Hearing Tribunal with an Agreed Statement of Facts document, which was entered as Exhibit 2. A copy of Exhibit 2 is appended to this decision as Schedule “A”.

Prior to the commencement of testimony from witnesses, legal counsel for each of the parties made opening statements. They agreed that the central issue for determination by the Hearing Tribunal was whether the admitted conduct set out in the Notice of Hearing represented unprofessional conduct as defined by *Health Professions Act*.

EVIDENCE

A. Summary of the Facts Presented in Exhibit #1

In 2012, a review was done by the Surgical Services Committee assessing utilization of operating room (OR) resources in the Queen Elizabeth II Hospital in Grande Prairie. As a result of this review, Dr. Torbey's operating room and cystoscopy allotments were reduced.

In a letter dated January 3, 2013 from Dr. Torbey to Dr. Pope, Dr. Torbey indicated he would no longer perform cystoscopies in the operating room. Instead, these procedures "will have to be done in the Outpatient Department as it should have been done all along."

On January 4, 2013, Dr. Pope, acting as the Facility Medical Director, advised Dr. Torbey that he would try and expedite his request but in the interim was unsure whether or not Dr. Torbey would want to maintain performing cystoscopies in the operating room.

In a letter dated January 7, 2013, Dr. Pope indicated to Dr. Torbey that if he wished to have his concerns reviewed, he was to send Dr. Pope a letter within 10 business days outlining his concerns pursuant to Article 6.1 of Alberta Health Services’ Medical Staff Bylaws.

Dr. Cledwyn Lewis (Acting Facility Medical Director at the time) wrote a letter to Dr. Torbey on January 11, 2013 to inquire as to how Dr. Torbey's cystoscopy/urodynamic study patients would be managed and specifically asked if he would consider continuing to perform cystoscopy/urodynamic studies in the operating room until the logistics of the considered move to Ambulatory Care had been reviewed and worked out.

In a January 24, 2013 letter dated to his legal counsel at the time, Dr. Torbey indicates Dr. Pope had confirmed with him on January 16, 2013 that until cystoscopies could be moved to the Outpatient Department Dr. Torbey would continue to perform cystoscopies in the operating room on a weekly basis (every Thursday). However, when he presented to the hospital on Thursday January 24, 2013 he was told no patients were scheduled for that day.

Dr. Torbey attended a Surgical Services Committee meeting on January 25, 2013. Although initially asked by the Co-chair of the Surgical Services Committee to leave the January 25, 2013 meeting, Dr. Torbey presented his concerns regarding his reduced allocation of operating room resources.

Dr. Torbey last performed cystoscopies in the operating room on January 31, 2013. From this point until at least the end of June 2013 he no longer performed cystoscopies at the Queen Elizabeth II Hospital.

On February 11, 2013, Dr. Lewis wrote a letter to nurse R. Young (OR Manager) indicating that Dr. Torbey typically started his operating room later in the day and was wondering if Dr. Torbey could operate first with the second surgeon following afterwards.

In a letter addressed back to Dr. Lewis from Ms. Young dated February 12, 2013, she noted the established OR booking policy that “in the event that a surgeon’s day is not completely full and the remainder of the day is picked up by another surgeon to do one or more cases, the surgeon picking up the time shall work first in the room unless it is their preference to do their cases at the end of the list.”

On April 4, 2013, Dr. Torbey's office administrator, Terrilene Ray, addressed a letter to amongst others Dr. Pope, Dr. Lewis and Ms. Young, explaining the frustration that many of Dr. Torbey's patients had with respect to having a cystoscopy performed. She requested that this concern be addressed as soon as possible.

In response, on April 15, 2013, Dr. Pope responded directly to Dr. Torbey. He again reiterated that the issue regarding the use of Outpatient Department for cystoscopies/urodynamic studies was being addressed. He also noted that Dr. Torbey had not utilized his regularly scheduled OR time for cystoscopy/urodynamic study since January 31, 2013. Lastly, he indicated to Dr. Torbey that he trusted he was informing his patients of his decision not to use his regularly scheduled OR time for cystoscopy/urodynamic studies so that his patients could either consent to remaining on his wait list or request referral to another urologist.

Dr. Torbey produced a letter on April 30, 2013 which was distributed to his patients. The letter notes that as of January 1, 2013 his surgical schedule was cut down to two days per month from the previous schedule of four days per month. He also indicated he requested that cystoscopies be moved to the Outpatient Department where they could be done on a weekly basis. He explained that the current allocation of resources was unacceptable and as a result he suspended his cystoscopy/urodynamic study services until the problem was resolved. Patients were informed that if they were in urgent need of a urologist they would have to be referred to Edmonton but if they felt comfortable with waiting until everything was resolved their name would go on Dr. Torbey's wait list. Finally, after specifically naming Drs. Worry and Pope earlier in the letter, he commented that administration was “greedy, self centered and a discriminating administration.”

On April 30, 2013, Dr. Pope, Dr. Beekman and Don Hunt (Patient Care Director) met with Dr. Torbey. They indicated they could offer time for five cystoscopies to be performed on May 2, 2013 in the operating room. Dr. Torbey acknowledged that he would be agreeable to doing cystoscopies in the operating room but insisted that he do 20 cases each week in the operating room, otherwise he would not return.

On May 9, 2013, Dr. Beekman wrote a letter to Dr. Torbey as to the outcome of a meeting of the Queen Elizabeth II Regional Hospital Surgical Services Committee which was held on May 2, 2013. He reiterated that in December 2012 the committee reviewed Dr. Torbey's operating room and cystoscopy times. The operating room and cystoscopy times were adjusted to reflect his actual utilization of these resources over the previous quarters. It was also noted that none of his regularly scheduled cystoscopy time had been utilized in February, March or April 2013. During this time Dr. Beekman stated six cystoscopy days would have been able to accommodate 20-25 procedures per day to manage approximately 150 people. Therefore, consistent with the Queen Elizabeth II Surgical Services Committee Operating Room Time Allocation Guidelines [2011] all of Dr. Torbey’s previously allocated operating room cystoscopy time had been re-

allocated. Dr. Beekman indicated that Dr. Torbey could reapply for operating room cystoscopy time in the future.

Between April and June, 2013 Dr. G. Todd (Head of the University of Alberta Department of Urology) was asked to review the files of each of the patients on Dr. Torbey's cystoscopy/ urodynamic study waiting list to determine if any patient required an urgent assessment.

Dr. Torbey's legal counsel requested in a letter to Dr. R. Beekman (dated July 5, 2013) that Dr. Torbey have his OR cystoscopy time reinstated through the Queen Elizabeth II Hospital's Surgical Services Committee. Dr. Torbey notes his cystoscopy time was not reinstated until December 2013.

Legal counsel for the CPSA called Dr. J. Pope as a witness. Dr. Pope was sworn in by the court reporter.

Dr. Pope noted in his January 4, 2013 letter that the Outpatient Department was not prepared or equipped to deal with the request to transfer cystoscopies to this location. He stated his January 11, 2013 letter was done with the intent to clarify whether or not Dr. Torbey would agree to continue performing cystoscopies/urodynamic studies in the operating room until the logistics of a considered moved to an Ambulatory Care setting was reviewed.

Dr. Pope stated that around April 2013 Dr. Worry (Zone Medical Director) and Dr. Todd (Northern Alberta Head of Urology) became involved as he wanted to ensure that patients requiring urgent cystoscopies were taken care of.

Dr. Pope reiterated that in his letter dated April 15, 2013 to Dr. Torbey, he wanted to ensure that patients were being informed that Dr. Torbey was not utilizing his regularly scheduled operating room time for cystoscopy/urodynamic studies and that they could give consent regarding whether or not to be referred to another urologist in Edmonton or remain on Dr. Torbey's wait list.

Following receipt of Dr. Torbey's letter to his patients dated April 30, 2013, Dr. Pope, Dr. Beekman and Don Hunt met with Dr. Torbey. They offered a limited cystoscopy schedule to accommodate five urgent cystoscopies. Dr. Torbey indicated he wanted 20 cystoscopies per week or would perform none. Dr. Pope stated he was unable to comply with this request. Dr. Pope indicated that although Dr. Torbey had always been respectful towards him, there was obviously tension in the room during this meeting.

Finally, Dr. Pope requested that Dr. Kevin Worry takeover concerns with respect to Dr. Torbey's practice as Dr. Pope had a long-standing and complex relationship with Dr. Torbey which could make him biased.

In cross-examination by legal counsel for Dr. Torbey, Dr. Pope stated he continued referring patients to Dr. Torbey during 2013 if he felt they did not require cystoscopies.

With respect to the October 31, 2013 letter from Dr. Pope to Dr. Owen Heisler, Dr. Pope did note that Dr. Torbey always had the option to bring an emergency case to the operating room as an add-on to the emergency list. However, Ms. Wold did clarify that these patients would be low priority, and Dr. Pope agreed.

Dr. Pope clarified in his January 4, 2013 letter that he would not be able to guarantee cystoscopies could be done on a weekly basis.

Dr. Pope reviewed his letter dated July 8, 2013 to Mr. [redacted]. Dr. Pope indicated that Dr. Torbey had not been using his scheduled cystoscopy or urodynamic studies operating time since the end of January 2013. He indicated that Dr. Todd had reviewed his case and that he was triaged as a non-urgent assessment. He was given the choice of waiting to see if/when Dr. Torbey chose to resume his cystoscopy/urodynamic practice or alternatively his family physician could refer Mr. [redacted] to a new urologist who had started in the region. Ms. Wold clarified that this type of letter was sent to every patient on Dr. Torbey's wait list, and Dr. Pope agreed.

With respect to the recruitment of a another urologist to the hospital, Dr. Pope indicated that he would have been involved however the Department of Surgery's input was most important as resources were limited and would be further diluted with a new recruit. Family physicians in the zone would also have had some input.

Dr. Pope states he did not clearly remember previous conversations before January 2013 with Dr. Torbey with regards to moving cystoscopies to the Outpatient Department. He also did not recall offering assistance in arranging an appointment with Dr. Worry concerning this issue.

In response to questions posed by the Hearing Tribunal, Dr. Pope clarified that cystoscopies had not been removed and were still being performed in the operating room.

Further, when Dr. Torbey stopped performing cystoscopy/urodynamic studies his other operating room activities were not affected.

Counsel for the CPSA called Ms. Rita Young as his next witness. She was sworn in by the court reporter.

Ms. Young stated that she was the operating room manager from 2005-2015 at the Queen Elizabeth II Hospital. In that time she noted a significant increase (if not doubling) in the utilization of the operating room. Finally, she stated that cystoscopies require a urologist, specially trained nursing staff and specialized equipment and supplies.

She noted that in 2012 the booking policy for operating rooms was updated. If surgeons were assessed to be underutilizing their allotted resources, then a redistribution of their resources would be considered.

As part of this review, it was found that Dr. Torbey's utilization of allotted time for surgeries was 56% and only 39% with respect to cystoscopies.

After Dr. Torbey indicated he would no longer perform cystoscopies in the operating room after January 31, 2013, cystoscopy time was still allocated for two Thursdays in each of February and March 2013. Given he stopped performing cystoscopy/urodynamic studies at the end of January 2013, beginning in April 2013 cystoscopies were no longer allocated on the monthly surgical schedule.

In cross-examination, Ms. Young stated in 2012 surgeons received a copy of minutes of the Surgical Services Committee meeting explaining the utilization and assessment process. After the assessment, Ms. Young recommended that Dr. Torbey's allocation for operating room

resources be decreased. However, she noted that if his wait list increased, there would be consideration to reallocate the resources back to Dr. Torbey.

Ms. Young also detailed that for patients requiring urgent cystoscopies Dr. Torbey could either add them on to the end of the day if he was already scheduled for doing elective cystoscopies or otherwise they could be added onto the general urgent/emergent operating room list. In this case the priority would be assigned by anesthesia.

Ms. Young was aware that the Outpatient Department was considered for accommodating cystoscopies but ultimately the decision was that logistically it would not be feasible.

Ms. Young reviewed the policy that unfilled operating room days would be offered to another surgeon. The surgeon who is filling in would get priority with respect to performing the operations first with the regularly scheduled surgeon performing their slate afterwards. If the order was to change, it would be the result of direct discussions between the two affected surgeons.

Ms. Young could only recall one incident where a surgeon's operating list was canceled part way through the day. She states that this was due to Dr. Torbey's concerns regarding the performance of the assigned nurses in the operating room. According to Ms. Young, Dr. Torbey described that the nurses in question were taking too long between operations. Ms. Young states she discussed this case with Dr. Pope and the decision was made at that point.

Ms. Young stated that occasionally operating slates have to be cancelled a few days before the scheduled time due to a lack of anesthesia support, resources or equipment. Providing anesthesia is in agreement, even a partially filled list would still proceed as scheduled. Finally, Ms. Young could not recall ever canceling a day of cystoscopies.

With respect to the Surgical Services Committee, the meetings were held monthly but not in July or August. Ms. Wold indicated to Ms. Young that Dr. Torbey had requested resumption of his cystoscopy privileges in July of 2013 and that while the issue was discussed in the September meeting, the privileges were not resumed until December 2013.

In re-examination by counsel for the CPSA, Ms. Young stated that Dr. Torbey would have his operating room schedule at least 30 days in advance and that it is typically released one calendar month beforehand. It was Ms. Young's understanding that in July 2013 Dr. Torbey wished to resume cystoscopies on a weekly basis.

In response to questions from the Hearing Tribunal, Ms. Young testified that with respect to the January 2013 schedule, she could not explain why Dr. Torbey's scheduled room was crossed out in the morning. She states that this was retrospective in nature and was done for record keeping purposes. Ms. Young testified that she typically felt comfortable speaking to the surgeons at the Queen Elizabeth II Hospital.

With respect to the reassessment of operating room resources at the end of 2012, Dr. Torbey was the only physician who had his resources diminished.

Mr. Boyer called Dr. Worry as his next witness. Dr. Worry was affirmed by the court reporter.

Since 2009, Dr. Worry has been the full time Zone Medical Director of the North Zone. On June 23, 2013, Dr. Worry wrote to Dr. Owen Heisler (Assistant Registrar and Complaints Director of

the CPSA). He indicated that in his opinion Dr. Torbey's conduct was not consistent with the CPSA's Standards of Practice and Code of Conduct.

His concerns were that Dr. Torbey had effectively taken "job action" in booking patients for cystoscopy procedures over many months while voluntarily choosing not to perform the cystoscopies. Dr. Torbey would appear to be guilty of unprofessional conduct when he misrepresented information to Dr. Worry (Alberta Health Services' Zone Medical Director North). Dr. Worry stated that Dr. Torbey had effectively abandoned his cystoscopy/urodynamic study patients when he voluntarily chose not to perform cystoscopies/urodynamic studies, and made no follow up arrangements.

Dr. Worry submitted recorded witness statements regarding Dr. Torbey's choice not to perform any cystoscopies during an April 16, 2013 meeting. Dr. Torbey stated he would not perform any cystoscopies if he did not immediately have access to a full day of cystoscopies every week. Dr. Worry asked Dr. Torbey if he would be willing to use his current cystoscopy time to perform cystoscopies on his wait listed patients and bring any utilization concerns he may have to the Surgical Services Committee for further review. Dr. Torbey reiterated that he would not do any cystoscopies unless he had a full day of cystoscopy time available to him every week. As well, Dr. Worry asked Dr. Torbey if he was obtaining informed consent from the patients he was booking for cystoscopies, including the consent to remain on the cystoscopy wait list at a time when Dr. Torbey was voluntarily choosing not to perform cystoscopies. Dr. Torbey replied that he had given his wait listed patients this information. Again, Dr. Worry repeated the question and Dr. Torbey confirmed his reply.

Dr. Worry stated he was concerned that even though Dr. Torbey was refusing to perform cystoscopies, he continued to book patients. In his opinion, Dr. Worry stated that Dr. Torbey was essentially engaging in "all or nothing propositions." Dr. Worry also noted that cystoscopies historically had never been done in the Outpatient Department at the Queen Elizabeth II Hospital but rather always in the operating room.

A witness statement regarding patient J.M. presenting to the Queen Elizabeth II Hospital Medical Affairs Office on May 3, 2013 was reviewed. Mr. M stated he was advised by Dr. Torbey to speak with "administration" regarding cystoscopy. Upon further questioning, Mr. M stated he was not aware that Dr. Torbey had a cystoscopy wait list. He was also not aware that Dr. Torbey had regular cystoscopy time in the operating room that he had not used since the end of January 2013. Mr. M also stated that he was not aware of Dr. Torbey making any other arrangements for him to receive his cystoscopy. Evidence was provided that Mr. M was booked for a future cystoscopy on January 31, 2013.

On June 7, 2013, Dr. Pope wrote to Dr. Torbey informing him that for patient safety and quality of care concerns, Drs. Beekman and Todd had reviewed the current Queen Elizabeth II Hospital cystoscopy/urodynamic study wait list. Patients on the wait list had been medically triaged by Dr. Todd. Those patients he felt required an urgent cystoscopy and/or urodynamic study would be referred to an Edmonton urologist. Those felt to be non-urgent were given the option of remaining on the Queen Elizabeth II Hospital wait list to be seen by a urologist in the near future. According to the letter, this step was being taken solely for the purpose of protecting the

safety of these patients. Forms were sent to each patient informing them of Dr. Todd's assessment.

Finally, he also commented regarding Dr. Torbey's April 18, 2013 letter in which he stated he had not received his personnel file despite requests being made almost three years previous. Dr. Worry stated that prior to 2008 there was no robust/adequate sorting mechanism for each physician file. He did say however that eventually Dr. Torbey did receive his entire file.

In cross-examination, Dr. Worry testified that at the time of Dr. Worry's June 23, 2013 letter to Dr. Owen Heisler, Dr. Torbey had not been suspended. Prior to the April 16, 2013 meeting, Dr. Worry believes he may have met Dr. Torbey in person once before. Dr. Worry attended this meeting via video conferencing. During this meeting Dr. Torbey stated he would not perform any cystoscopies unless his previous cystoscopy resources were reinstated. Including a full day of cystoscopy every week.

Dr. Worry indicated that at some point in either April 2013 or shortly thereafter, Dr. Torbey indicated that his request was to ensure he could provide "proper patient care." Dr. Worry was of the opinion that if Dr. Torbey had specific concerns or suggestions regarding allocation of operating room resources he should bring them to the Surgical Services Committee.

Dr. Worry commented that the Surgical Services Committee must balance patient needs versus operational and logistical concerns. Balance must be achieved amongst all departments and divisions.

On further questioning by Ms. Wold, Dr. Worry stated he wasn't aware that Dr. Torbey had wanted and requested to resume his allotted OR cystoscopy time when he wrote his June 23, 2013 letter to Dr. Heisler. With respect to the letter, Dr. Worry indicated that informal attempts were undertaken to try and resolve these issues. However, he states he was not aware as to the specifics of the attempts but was under the impression that such attempts were made by local medical leadership and administration. Again Dr. Worry was of the opinion that Dr. Torbey should return to his current allocation of operating room and cystoscopy resources and if he wanted to request alterations he should proceed with the processes set out through the Surgical Services Committee and Alberta Health Services bylaws. With respect to the witness statements regarding comments attributed to Mr. M, Dr. Worry stated that he believed there was at least one other patient who was involved but couldn't provide details.

Finally, Dr. Worry stated he was never made aware that other arrangements had been made regarding the patients on the cystoscopy wait list, including the absence of any feedback from the team who had contacted each of the patients on the wait list as to how Dr. Torbey was managing their care.

In re-examination, Dr. Worry referenced the final Surgical Services Committee Terms of Resolution, specifically detailing the membership of the committee.

In response to questions from the Hearing Tribunal, with respect to the job action referenced in Dr. Worry's June 23, 2013 note to Dr. Owen Heisler, Dr. Worry clarified that in his opinion patients were identified by a physician (in this case Dr. Torbey) to require a medical procedure, the procedure was booked but would not be performed until Dr. Torbey's conditions for more

resources were met. He also stated that in his opinion Dr. Torbey was putting patients on the wait list without specifically notifying them that he was not using the allotted cystoscopy resources made available to him. Dr. Worry also stated he was aware that Dr. Torbey had continued to book patients for cystoscopy after February 1, 2013.

Legal counsel for the CPSA called Dr. Beekman as a witness. He was sworn in by the court reporter.

He testified that since December 2012, he has been the chief of surgery at the Queen Elizabeth II Hospital. Prior to that in 2009 he was made Medical Director of the Outpatient Department.

Dr. Beekman noted from 2006-2012 there was a significant increase in the demand for surgical services at the Queen Elizabeth II Hospital. From 2012 to 2013, the demand for operating room resources was exceedingly busy and after-hours lists were up to 25 patients.

Dr. Beekman testified that he started his role as chief of surgery in December 2012 just as the review of operating room resource allocation was completed. He states at that time it was rare that a surgeon would not be filling all of their allotted operating room time. He noted that urology appeared to be an exception and roughly 50% of the allocated time was actually being used. As a result, Dr. Torbey's allotment of operating room resources was decreased by 50% to two operating room days and two days of cystoscopy every four weeks.

Dr. Beekman reviewed the minutes from the Surgical Services Committee from January 25, 2013. As well, his recollection was that Dr. Torbey came to the meeting on his own accord. He describes the atmosphere as being tense. Dr. Torbey apparently stated he could not fill his operating room slates, as he did not have enough referrals. He blamed the lack of referrals on the hospital administration. Dr. Beekman noted that Dr. Torbey had previously refused to take referrals from himself and other physicians based on perceived personality conflicts.

Dr. Beekman indicated that one other surgeon had been identified as underutilizing their allotted OR time. Dr. Beekman reviewed the process for add-on patients after-hours. Essentially, the operating room was notified of the patient, the proposed procedure and the equipment required to complete the procedure. Anesthesia would be contacted. The list would proceed in order of booking except in circumstances involving urgent cases, which would be prioritized.

Dr. Beekman commented that Dr. Torbey essentially refused to meet with him. He also found it was difficult getting consistent communication back from Dr. Torbey despite numerous requests. Dr. Beekman also referenced the witness statements from the April 30, 2013 meeting. Dr. Beekman commented that Dr. Torbey continued to book cystoscopies even though he had not performed any since the end of January 2013. With respect to the five urgent cystoscopy cases, Dr. Beekman believed these may have been at least some of the patients who presented to the Medical Affairs Office but could not be sure.

Dr. Beekman also commented on his May 9, 2013 letter to Dr. Torbey. He reiterated that in December 2012 after reviewing the utilization of both his operating room and cystoscopy times, these resources were adjusted to reflect his actual utilization. Furthermore, he noted Dr. Torbey

had not utilized any of his regularly scheduled cystoscopy times for February, March and April 2013. During the six cystoscopy days scheduled over this period, approximately 150 patients could have been attended to. Consistent with the Queen Elizabeth II Hospital Surgical Services Committee Operating Room Time Allocation Guidelines [2011], the Surgical Services Committee had reallocated all of his previous cystoscopy time to address urgent Queen Elizabeth II Hospital surgical cases. He also clearly stated that Dr. Torbey could reapply for operating room cystoscopy privileges in the future through the Queen Elizabeth II Hospital Surgical Services Committee.

With respect to Dr. Beekman's September 23, 2013 letter to Dr. Heisler, he also commented that the space in Ambulatory Care is limited, the quality-control on airflow was not as rigorous (and did not meet infection, protection and control standards), at the time there were no space constraints in the operating room and that a new hospital was slated to open in 2017, the location for cystoscopies would remain in the OR. He believes this proposal would have been discussed with himself, Tracey Parsons (Ambulatory Care Manager), Dr. J. Pope and Rita Young (Operating Room Manager). Dr. Beekman noted that Dr. Todd assessed Dr. Torbey's wait list and identified approximately 40 patients who, in his opinion, required more urgent assessment and cystoscopies.

In cross-examination, Dr. Beekman testified that he believes that with respect to the requests for moving cystoscopies to the Outpatient Department, this was initially made before his term as Medical Director. He was unaware that previously a room had been dedicated for cystoscopy but recalls that someone from maintenance had assessed the room and found it not to be suitable.

Dr. Beekman expanded upon the role and process of the Surgical Services Committee with respect to the allotment of resources. Although the committee was supposed to reassess the allotment every six months, realistically this has not been done at that frequency. With respect to the allotments themselves, depending on how cohesive in the department was, the allotment was either made to the entire department for them to divide as they felt was necessary, while other allotments were given to specific physicians. If a physician disagreed, they could make a presentation to the Surgical Services Committee.

Dr. Beekman states he was unaware that Dr. Torbey had asked a secretary if he could attend the Surgical Services Committee meeting on January 25, 2013. Dr. Beekman indicated that he remembers both himself and other committee members actually laughing when Dr. Torbey stated he did not have enough referrals to fill his operating room slate. Dr. Beekman apologized for his behavior. Dr. Beekman noted that Dr. Torbey has since attempted to utilize the add-on list for urgent procedures. However, by definition he stated that elective cystoscopies could wait two weeks.

Dr. Beekman confirmed the operating room manager had the authority to cancel a list if there were concerns regarding patients' safety or the availability of necessary equipment. He was unsure as to whether or not there was a formal and organized process to do so. Dr. Beekman states at times he has also been involved in terms of determining if an operating room list should be canceled. Dr. Beekman alleged that Dr. Torbey would leave the room if the operating

room manager ever presented. It was his expectation that the operating room manager should attempt to speak to the surgeon if their operating room slate was canceled.

On further questioning Dr. Beekman indicated that all general surgeons in Grand Prairie currently share an office. He also noted that when the new urologist came to Grand Prairie he temporarily utilized the same office.

Dr. Beekman states he did not recall an extraordinary Surgical Services Committee meeting which was initiated following the April 30, 2013 meeting with Dr. Torbey. He also does not recall when Dr. Torbey initiated his request for resumption of cystoscopy resources at the Queen Elizabeth II Hospital. It was noted that even recognizing the Surgical Services Committee did not meet in July or August 2013, Dr. Torbey did not resume performing cystoscopies until late December 2013.

Dr. Beekman was asked why Dr. Torbey had a short wait list. Dr. Beekman replied it was rare for surgeons to have short wait list and if this occurred it could be a reflection of "how they're treating people".

In response to questions from the Hearing Tribunal, Dr. Beekman testified that he was also unaware as to why the January 2013 operating room elective surgical schedule had Dr. Torbey's name crossed out on Monday, January 7, 2013.

In response to re-examination questions, Dr. Beekman indicated that in the past he too had his operating room slate canceled for various reasons.

Following the evidence from Dr. Beekman, Mr. Boyer indicated that the CPSA had finished presenting his case.

Ms. Wold called Dr. Torbey as a witness. He was sworn in by the court reporter.

Dr. Torbey discussed his history as a urologist in Grand Prairie. Initially when starting out he had a good relationship with senior administrators at the hospital. However, by 1992-1993 he noted that local leadership had changed. While previously he felt part of both the general and hospital communities, he began to feel alone and excluded. His access to operating room and cystoscopy resources became more restricted. By the mid-1990s, due to difficulties with surgical beds and operating room resources, his practice changed to incorporate more day surgeries. He noted that he was on call on a daily basis up until 2010.

Starting in 2004, he also perceived increasing hostility and insults directed towards physicians from North Africa and Middle East nations. Around this time, he states what he perceived to be significant dysfunction in medical administration which ultimately led him to request assistance from the CPSA. Recommendations were implemented and for the short-term the situation improved but subsequently worsened again.

By 2010 the hospital operating room capacity had expanded which required increased recruitment of new nurses. He did not feel the new recruits were strong and objected to some of their behavior. He claimed although he brought these concerns to Ms. Young, she appeared

resistant to making any changes. Around this time he notes one incident in particular when he became particularly frustrated with the behavior of a nurse. He states he politely asked that she no longer scrub in with him. He was subsequently approached by Ms. Young and was accused of harassing and insulting the nurse in question. He claimed the remainder of his surgical schedule for that day and the following day's cystoscopies were canceled.

He stated Ms. Young cancelled his days on "many, many" occasions.

With worsening depression, a perceived poor working environment and what he felt was constant harassment, he subsequently took a short leave of absence. He states during that time he had asked Dr. Pope, other physicians, nurses and administrators for assistance. From what he recalls, the ultimate advice was that he required a psychiatric assessment and needed to "lower his standards".

He states when he returned, his access to operating room resources and beds was reduced. He also states his previous operating room was dismantled with respect to specific instrumentation. It took him approximately two months to get a dedicated room set up.

He also noted that his instrumentation was old and out of date. Requests for newer instrumentation were denied while in his opinion other surgeons were provided with appropriate funding. Finally, through the hospital foundation a laser was purchased in order to provide updated management of renal calculi. However, it sat dismantled in the corner for approximately 2.5 years. It was only until an adverse event occurred, which he felt could have been prevented with the use of this laser, that the hospital finally got the laser operational.

From 2011 to the beginning of 2013, he stated numerous cystoscopy days were canceled for unfounded reasons.

With respect to not filling all of his operating room time in advance, Dr. Torbey noted he did not practice like "other physicians". In order to try and minimize his wait list and facilitate the care of patients (particularly those from out of town), he tried to arrange a consult and all investigations to occur within a one-two day period. As a result, he stated he needed the flexibility of having room to add on patients at the end of his regularly scheduled cystoscopy slate.

Dr. Torbey noted that elsewhere in Canada cystoscopies are typically done in the Outpatient Department. He felt if this was instituted at the Queen Elizabeth II Hospital, patients would experience less hassle, operating room resources would be freed up for other services and there would be likely less cancellations of his cystoscopy lists. Again he referenced that since 2011 numerous cystoscopy slates were canceled in their entirety.

Dr. Torbey noted interpersonal issues with Dr. Beekman and felt demeaned by him. He recognized that he could go to Dr. Pope with his concerns. He had asked Dr. Pope to set up a meeting with Dr. Worry but nothing materialized. Dr. Torbey then personally notified Dr. Worry's office but never received a return phone call.

With these events he became increasingly frustrated with performing cystoscopies in the operating room and felt that his patients were receiving diminished access to necessary

interventions. He stated the reason for suspending his cystoscopy practice was not actually about the Outpatient Department but rather ensuring that he had a regular time, location and availability to perform cystoscopies.

Once he suspended performing cystoscopies, Dr. Torbey insisted that if he felt any patient required an urgent cystoscopy he would make arrangements with colleagues in Edmonton. He also states he notified his patients that he was currently unable to do cystoscopies but was working on a solution.

With respect to the offer made regarding arranging urgent cystoscopies for five patients on May 2, 2013, Dr. Torbey claimed he recognized one patient who he did not feel was urgent and had concerns that selecting five patients would be unfair to the remainder of his wait list.

With respect to the letter he sent out to his patients dated April 30, 2013, he claims his motivation was to ensure his patients were informed as to what was happening with respect to urologic services in Grand Prairie. He was unaware that Dr. Pope would be sending a form letter dated June 7, 2013 to the patients on his wait list referencing Dr. Todd's determination of their triage urgency. Dr. Torbey clarified that with respect to his not presenting to the operating room for his slate scheduled for January 7, 2013, this was simply an issue of miscommunication and he did not realize he had an operating room booked at that time.

In cross-examination, Dr. Torbey testified that from 2011-2012, both his cystoscopy and surgery days were frequently cancelled. He estimated that for every four days of scheduled cystoscopies, approximately two to three would be cancelled.

Mr. Boyer referenced cystoscopy billings by Dr. Torbey from September 1, 2010 to August 31, 2013. Review of these billings indicates that cystoscopies were performed for the most part on a weekly basis. There may have been approximately a half dozen dates which were missed, but not the 13-26 that Dr. Torbey claimed.

Mr. Boyer again referenced Dr. Torbey's letter to his patients dated April 30, 2013. In particular he noted Dr. Torbey claimed that "… unfortunately the administration does not want to focus on what needs to be done, they would rather focus on what should be done. There solution is for me to continue working with the current schedule of 2 days per month, which causes serious delays between tests, which of course could put you, the patient, at risk."

Mr. Boyer referenced Dr. Torbey's letter to the Complaint Inquiry Coordinator of the CPSA dated August 15, 2013. Specifically he noted Dr. Torbey failed to include any mention that he had triaged the patients on his wait list who may require urgent cystoscopies. He also referenced Dr. Torbey had written in this letter that he had "…brought the wait list to their attention in April, and it took them until mid-June to start making arrangements for people to go to Edmonton. I feel this is an injustice to the urology patients of this region that nothing had been happening at all on anyone's part for the first 6 months of this 2013."

Dr. Torbey noted that he utilized Dr. Lewis as a mediator as he did not feel he could have constructive conversations with Dr. Beekman. He also previously tried to engage AHS administration and elected representatives.

Mr. Boyer confirmed that in February 2013 cystoscopy resources were still made available to Dr. Torbey, even though he elected not to utilize these resources. Dr. Torbey stated he continued to book cystoscopies anticipating he would eventually have his cystoscopy availability increased to one day per week.

In response to questions from the Hearing Tribunal, Dr. Torbey indicated cystoscopies could be performed anywhere. Endoscopy was already being performed in the Outpatient Department and in his opinion this was appropriate for cystoscopy as well. On the other hand, patients requiring surgery could not wait nor could they be accommodated elsewhere.

Dr. Torbey again indicated that in late 2012 access to cystoscopy was unpredictable and ultimately what he wanted was routine access to cystoscopy.

Dr. Torbey clarified that when he states a day was "canceled" it was the entire list, not simply a portion of it.

With respect to informed consent, Dr. Torbey stated his usual practice was to have patients booked and undergo cystoscopy within two weeks of their initial assessment. Therefore patients who were seen in December of 2012 would have had their cystoscopy done in January 2013 before he suspended his practice.

Dr. Torbey was asked to clarify how he managed patients requiring urgent cystoscopies while he was not performing cystoscopies in 2013. He states that for a few patients he had them referred to Edmonton for the procedure. Otherwise, if urgent he simply handled the matter himself in the operating room. In his opinion the other patients could wait.

He was then questioned as to how he could reconcile Dr. Todd's opinion that forty patients on his wait list required urgent cystoscopy. Dr. Torbey indicated again that in his opinion this was not accurate.

Ms. Wold called Ms. Janet Loseth as a witness. She presented to the hearing over teleconferencing and was affirmed by the court reporter. The college had no objections to calling the witness over the phone.

Ms. Loseth has been a perioperative nurse in Grand Prairie for the last ten years. She gave evidence that surgeons may have their operating room slates canceled, sometimes without having anyone consult the affected surgeons. She felt that when nurses called in sick, it appeared that Dr. Torbey's or other selected surgeons' operating room slates may have been preferentially canceled.

In her opinion, the operating room administration offered differential treatment to varying surgeons. Furthermore, some of the operating room management and some of the other surgeons ignored and antagonized Dr. Torbey.

After Ms. Loseth provided a list of names and attributed statements to other surgeons and physicians, some of whom were previously called as witnesses in this hearing, Mr. Boyer objected that she was simply airing a long list of grievances. Ms. Wold indicated the purpose of

the testimony was to give another perspective as to the atmosphere Dr. Torbey was working in. Mr. Boyer noted that with comments attributed to previous witnesses, it is difficult to judge the evidence as the witnesses did not have a chance to respond to the issues. As a result Ms. Wold was asked to redirect the witness.

Ms. Wold stated that Ms. Loseth contradicted Ms. Rita Young's assertion that she never unilaterally canceled an operating room slate.

Following the evidence of Ms. Loseth, counsel for Dr. Torbey closed her case.

III. SUBMISSIONS

In his closing submission, Mr. Boyer referenced *Walsh v. Council for Licensed Practical Nurses*, 2010 NLCA 11. Specifically, he noted a professional discipline tribunal had three functions. One is to make findings of fact. The second is to identify the standard against which the facts are judged. Third, make the finding or conclusion as to whether or not the conduct in issue is above or below the standard so as to amount to unprofessional conduct.

Mr. Boyer submitted that in this case the facts are not in dispute as Dr. Torbey acknowledged those set out in the Notice of Hearing. Referring to the *Health Professions Act*, a breach in the Standards of Practice or Code of Ethics is an example of unprofessional conduct.

The CPSA's Standards of Practice specifies that a physician cannot engage in job action if it could put the immediate health of patients at significant risk. Mr. Boyer referenced the Canadian Medical Association's Code of Ethics, specifically noting sections 1, 13, 19, 43 and 44.

He also noted that the CPSA Code of Conduct is consistent with the Canadian Medical Association's Code of Ethics and complements the CPSA Standards of Practice. Mr. Boyer provided the Hearing Tribunal with excerpts from the Standards of Practice, the Code of Ethics and the Code of Conduct in support of his argument.

He stated that no evidence was presented which disputes the fact that Dr. Torbey refused to use his available cystoscopy days which would have benefited his patients. Although recognizing that there had been a series of disputes between Dr. Torbey and the administration, Mr. Boyer stated that there is no justification for choosing not to treat his patients or trying to recruit his patients to become his advocates in the battle with the hospital administration. Ultimately, the evidence supports that Dr. Torbey believed he was entitled to/deserved one day a week for cystoscopies.

Mr. Boyer noted that Dr. Torbey's recollection of the number of cystoscopy days which were cancelled is inaccurate. Billing records clearly show that he performed cystoscopies on most weeks and the occasional missed day was likely consistent with Dr. Torbey's statement about participating in professional development. Furthermore, many of the days revealed less than seven cystoscopies were performed, contradicting his assertion that days would be cancelled if they were not full. Ultimately, it was Dr. Torbey's sense of entitlement which lead him to take

job action. Any mitigating factors regarding why he took the job action is not relevant to the question of guilt but could be taken into consideration regarding the issue of sanction.

In her closing argument, Ms. Wold, as counsel for Dr. Torbey stated that he is passionate about his patients and any obstruction to the care of his patients is taken as a personal injustice. She noted that there was no evidence presented which cast doubt on his clinical abilities or surgical skills and that in relation to the allegation regarding job action under the Standards of Practice, Dr. Torbey did not experience any economic gain by suspending his cystoscopy practice.

She states that Dr. Torbey did not put the immediate health of his patients at significant risk and appropriately triaged his patients from January 2013. This was done by utilizing other diagnostic tools. Any patient he would have seen in November or December 2012 would have undergone a cystoscopy before he suspended his practice. Hospital administration did not begin to triage any patients until April 2013.

She noted that nowhere in the Code of Ethics does it comment on resource allocation.

Dr. Torbey treated patients with dignity and respect by structuring his practice to cut down on patient travel and time commitments. She states that, in his view, this was undermined by the unilateral decisions made by the Surgical Services Committee. This same Committee failed in its mandate to, amongst other things, provide an interdisciplinary approach to the delivery of surgical services and to foster a spirit of collaboration amongst the department. This was evident when Dr. Beekman tried to prevent Dr. Torbey from making a submission to the committee shortly after his cystoscopy time was reduced. Even when this occurred, Dr. Beekman admitted he laughed at Dr. Torbey.

Dr. Torbey contends that his suspension of cystoscopy was not done to exploit patients for personal advantage and that Dr. Torbey spoke with every patient he saw in January and onwards about the situation he was in. In the end when the dispute continued on longer than he had anticipated, he wrote a letter to all of the patients on his wait list to further explain his position, especially after hearing in the community that there were rumours regarding his ability or even if he was still practicing.

On numerous occasions, Dr. Torbey attempted to engage administration, both personally and with the use of a “champion”. In his opinion, he chose his patients’ care and advocacy over the needs of administration.

Following a brief adjournment, the Hearing Tribunal posed questions to legal counsel for the parties. With respect to the definition of “job action” in the Standards of Practice, and the reference to personal economic gain, Mr. Boyer responded the Standard should be interpreted liberally and not limited to one circumstance. In his opinion, Dr. Torbey did undertake this action in order to obtain an increased amount of cystoscopy time.

With respect to whether or not there was any evidence about how Dr. Torbey dealt with his patients who had been previously or automatically booked for cystoscopies prior to January of 2013, Ms. Wold confirmed that there was no evidence that Dr. Torbey had a mechanism in place to identify and contact those patients about his decision not to perform the procedure. These were patients who prior to November 2012 would have been booked for cystoscopy for some

time in 2013, and who Dr. Torbey would not have seen in person in January of 2013 to explain their options as a result of his refusal to perform the procedure.

IV. FINDINGS

As noted by legal counsel for the CPSA, the Hearing Tribunal's function is to determine whether the facts proven represent unprofessional conduct having regard to the relevant standards which are applicable to regulated members of the CPSA.

The term "unprofessional conduct" is defined in section 1(1)(pp) of the *Health Professions Act*. The relevant aspects of the definition of unprofessional conduct for the purpose of this hearing is section 1(1)(pp)(ii) of the HPA, which is a "contravention of this Act, a code of ethics or standards of practice".

The Standards of Practice, approved by the CPSA, including a Standard on Job Action and also incorporates the Canadian Medical Association Code of Ethics. Further, the CPSA has adopted a Code of Conduct which establishes certain standards expected of regulated members.

Charge 1

Charge 1 alleges that Dr. Torbey:

> *Did between February 1 and May 9, 2013 refuse to use [his] scheduled operating room days at the Queen Elizabeth II Hospital for the patients on [his] waiting list for cystoscopies.*

As noted above, Dr. Torbey admitted to the facts set out in the charge. The evidence supports this admission, and the Hearing Tribunal finds that he did engage in this behaviour. The Hearing Tribunal therefore turns to the standards against which this behaviour is to be judged to determine whether the standard has been violated, and then whether such violation represents unprofessional conduct.

Standard on Job Action

The Standard on Job Action states:

> (1) A physician must not withdraw services with the direct or indirect purpose of supporting job action for personal economic gain if such actions could put the immediate health of patients at significant risk.

Although the Hearing Tribunal agrees that the interpretation of the Standard on Job Action should be more generally worded in terms of "personal gain", the Standard as written specifically contemplates "personal economic gain". That is, the Hearing Tribunal finds that in order to support a finding of a violation of the Standard, personal economic gain must have been a direct or indirect motivating factor for the withdrawal of services.

To the extent that there is evidence of an economic impact on Dr. Torbey resulting from the acknowledged behaviour, it is that Dr. Torbey suffered economically as a result of his actions. The Hearing Tribunal agrees that a direct motivating factor for Dr. Torbey's conduct was to exert pressure on administration to capitulate to his demands, which might represent "personal gain", but the Hearing Tribunal does not agree that the wording of the Standard supports such an interpretation.

The Hearing Tribunal therefore finds that there is insufficient evidence indicating that Dr. Torbey has violated the Standard of Practice regarding Job Action. It is not necessary to determine whether the actions set out in Charge 1 had the result of putting the immediate health of Dr. Torbey's patients at immediate risk.

Code of Ethics

As set out in the Notice of Hearing, the following sections of the Code of Ethics were considered in determining whether Dr. Torbey's actions constituted unprofessional conduct.

> (1) Consider first the well-being of the patient.

Dr. Torbey could not identify, inform or triage all of the patients he had put on his cystoscopy list prior to November 2012. In particular, the Hearing Tribunal was concerned about his patients who were automatically booked for follow up examinations and who were not scheduled through his office. It is clear to the Hearing Tribunal that they were a category of patients who would not have been notified by Dr. Torbey about his withdrawal of services, and who would not have been informed until a letter was sent several months after the withdrawal. No evidence was presented to indicate that any steps were taken, and the Hearing Tribunal finds that the behaviour in Charge 1 represents a failure by Dr. Torbey to consider first the well-being of his patients who fell into this category. Furthermore, the Hearing Tribunal noted that there was no evidence indicating that Dr. Torbey formally triaged every patient on his cystoscopy list and certainly no mention was ever made of the same in his response to the CPSA. His conduct therefore represents a violation of the Code of Ethics. Having regard to all of the circumstances, including the potential seriousness of this violation, the Hearing Tribunal finds that his actions represent unprofessional conduct.

> (11) Recognize and disclose conflicts of interest that arise in the course of your professional duties and activities, and resolve them in the best interests of patients.

After considering the evidence presented, the Hearing Tribunal does not find that Dr. Torbey's actions were in conflict with this section. There was no specific evidence to suggest a conflict of interest.

(13) Do not exploit patients for personal advantage.

The CPSA suggests that the evidence indicates that Dr. Torbey used his patients for the purpose of extracting a personal advantage from administration at the QEII hospital with respect to his operating room time. While the Hearing Tribunal did not give much weight to the third-hand evidence attributed to a single patient, Mr. M., the Hearing Tribunal finds that there is sufficient evidence which supports a finding that Dr. Torbey's did in fact exploit his patients for personal gain.

By suspending his cystoscopy/urodynamic practice and writing a letter to his patients encouraging their intervention on his behalf, Dr. Torbey was attempting to solicit personal gain, and was attempting to utilize his patients to accomplish his goal of receiving regularly scheduled cystoscopy access on at least a weekly basis. The Hearing Tribunal agreed that the decision to rationalize operating room resources by the Queen Elizabeth II Surgical Services Committee was reasonable and justifiable, and the evidence presented by Dr. Torbey does not indicate that the decision was made based solely or principally to harm him. The Hearing Tribunal agrees with the evidence provided that Dr. Torbey's opposition to the decision was at least partly founded in a sense of entitlement. Dr. Torbey's decision to withdraw his services and to enlist the assistance of his patients who required these procedures, was exploitative, and as such his conduct violates this section of the Code and is unprofessional.

(19) Having accepted professional responsibility for a patient, continue to provide services until they are no longer required or warranted; until another suitable physician has assumed responsibility for the patient; or until the patient has been given reasonable notice that you intend to terminate the relationship.

The Hearing Tribunal again had concerns regarding the care of patients who were automatically booked for follow-up cystoscopies and who were not scheduled through his office. As well, even for patients who were added to his waiting list after January 2013, the Hearing Tribunal finds that the evidence does not support Dr. Torbey's claim that he adequately reviewed and triaged patients who required urgent cystoscopy assessment. Even allowing for differences in clinical opinion, the fact that Dr. Todd identified forty patients who required urgent assessment raises the concern that that Dr. Torbey's care was not adequate. For this reason, the Hearing Tribunal finds that Dr. Torbey failed or refused to continue to provide services to his patients in circumstances not permitted by section 19. His conduct is therefore a violation of this section, and represents unprofessional conduct.

(43) Recognize the responsibility of physicians to promote equitable access to health care resources.

Dr. Torbey's testimony clearly demonstrates that he attempted to facilitate efficient patient interactions during the consultative process, both with himself and access to cystoscopy. On the other hand, there is also evidence that through advocating for his own patients, he may not have considered the impact in general to patient access to surgical services in the Grande Prairie

region. Regardless, the Hearing Tribunal does not feel this constitutes a violation of this section and is therefore not unprofessional conduct.

> (44) Use health care resources prudently.

No evidence was presented that suggested Dr. Torbey did not advocate for the prudent use of resources with respect to his patients. To this point, the Hearing Tribunal does not feel his actions constitute a violation of this section and is therefore not unprofessional conduct.

> (48) Avoid impugning the reputation of colleagues for personal motives; however, report to the appropriate authority any unprofessional conduct by colleagues.

The withdrawal of his services does not represent a violation of this section.

> (52) Collaborate with other physicians and health professionals in the care of patients and the functioning and improvement of health services. Treat your colleagues with dignity and persons worthy of respect.

The Hearing Tribunal recognizes that the atmosphere surrounding the Department of Surgery in Grande Prairie in late 2012 and 2013 was acrimonious and dysfunctional. In particular, the Hearing Tribunal recognizes the attempt to prevent Dr. Torbey from speaking at the Surgical Services Committee meeting at the beginning of 2013 was unfair and jeopardized the legitimacy of the Committee's supposed impartial decision in reducing his allotment of cystoscopy resources. Again, with respect to this point the Hearing Tribunal does not feel his actions constitute unprofessional conduct.

With respect to Charge 1, the Hearing Tribunal finds that Dr. Torbey's actions contravened sections 1, 13 and 19 of the Code of Ethics and that his actions constitute unprofessional conduct.

Charge 2

Charge 2 alleges that Dr. Torbey:

> *On or about April 30, 2013 [he] inappropriately [sent] a letter to approximately 300 of [his] patients in which [he] asked the patient to become involved in [his] dispute with the administration of the Queen Elizabeth II Hospital regarding [his] scheduled operating room days.*

As with Charge 1, Dr. Torbey admitted to the facts. The Hearing Tribunal finds that the evidence supports this admission. The Hearing Tribunal turns to the standards against which this behaviour is to be judged to determine whether the standard has been violated, and whether such violation represents unprofessional conduct.

Standard on Job Action

The Hearing Tribunal found no evidence to suggest that the purpose of the letter was for "personal economic gain". Therefore, Dr. Torbey's conduct in Charge 2 does not violate this Standard and does not constitute unprofessional conduct.

Code of Ethics

The following sections were considered in determining whether Dr. Torbey's actions constituted unprofessional conduct.

> (1) Consider first the well-being of the patient.

The Hearing Tribunal finds that part of the impetus for the distribution of the letter was in response to correspondence from Dr. Pope on April 15, 2013, essentially asking Dr. Torbey to ensure he was informing his patients of his decision not to use his scheduled cystoscopy resources. The Hearing Tribunal does not find that this letter contravened this section.

> (11) Recognize and disclose conflicts of interest that arise in the course of your professional duties and activities, and resolve them in the best interests of patients.

No evidence was provided which suggests that Dr. Torbey had a conflict of interest when he sent the letter. Therefore, the Hearing Tribunal did not find any evidence that this letter contravened this section and does not constitute unprofessional conduct.

> (13) Do not exploit patients for personal advantage.

Certainly the letter does note that in Dr. Torbey's opinion the reduction in cystoscopy time does jeopardize standard urologic care and potentially puts urologic patients at risk. However, the Hearing Tribunal also finds that this letter was being used by Dr. Torbey to solicit personal advantage, namely to satisfy his sense of entitlement that he deserved cystoscopy access on a weekly basis. The sending of the letter was a part of the sequence of events which resulted in Dr. Torbey using his patients to extract a personal advantage from hospital administration. In this context, the Hearing Tribunal agrees that the distribution of this letter represents a violation of this section and is unprofessional conduct.

> (19) Having accepted professional responsibility for a patient, continue to provide services until they are no longer required or warranted; until another suitable physician has assumed responsibility for the patient; or until the patient has been given reasonable notice that you intend to terminate the relationship.

After considering the evidence provided, the Hearing Tribunal does not feel this section is relevant with respect to distributing the letter to his patients and therefore does not constitute unprofessional conduct.

> (43) Recognize the responsibility of physicians to promote equitable access to health care resources.

While not undermining the finding regarding the extraction of a personal advantage noted above, the Hearing Tribunal accepts Dr. Torbey's argument that this letter is, in effect, an attempt to advocate for access to health care resources on behalf of urologic patients and therefore does not constitute unprofessional conduct.

> (44) Use health care resources prudently.

Again, with respect to actually distributing the letter, the Hearing Tribunal does not find this section to be relevant and therefore does not constitute unprofessional conduct.

> (48) Avoid impugning the reputation of colleagues for personal motives; however, report to the appropriate authority any unprofessional conduct by colleagues.

The letter specifically names members of the administration and then refers to administration as "greedy, self centered and … discriminating". The Tribunal finds that Dr. Torbey did not simply comment on the administration's competency but actually impugned the reputations of some of the administrators by name. 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. In this context, the Hearing Tribunal finds that the distribution of the letter impugns the reputation of colleagues for personal motives and therefore constitutes unprofessional conduct.

> (52) Collaborate with other physicians and health professionals in the care of patients and the functioning and improvement of health services.

The Hearing Tribunal does not feel this section is relevant with respect to distributing the letter to his patients and therefore does not constitute unprofessional conduct.

With respect to Charge 2, the Hearing Tribunal finds that Dr. Torbey's actions contravened sections 13 and 48 of the Code of Ethics and that his actions constitute unprofessional conduct.

V. ORDERS / SANCTIONS

Given the findings of unprofessional conduct in relation to both Charge 1 and Charge 2, the Hearing Tribunal invites the parties to make submissions to it with respect to appropriate sanctions in the circumstances.

The Hearing Tribunal requests that the Hearings Director coordinate the making of submissions, which may be done in writing if agreed to by the parties.

Signed on behalf of the Hearing Tribunal by the Chair

Dated: January 4, 2016

_____

Dr. John S.J. Bradley

COLLEGE OF PHYSICIANS & SURGEONS OF ALBERTA

IN THE MATTER OF
A HEARING UNDER THE *HEALTH PROFESSIONS ACT*,
R.S.A. 2000, c. C-7

AND IN THE MATTER OF A SANCTION HEARING REGARDING
THE CONDUCT OF DR. CAMILLE TORBEY

DECISION OF THE HEARING TRIBUNAL OF THE COLLEGE OF PHYSICIANS & SURGEONS OF ALBERTA

I. BACKGROUND

In a written decision dated January 4, 2016 the Hearing Tribunal in this matter made findings of unprofessional conduct against Dr. Camille Torbey (the "Member") in relation to charges 1 and 2 in the Notice of Hearing.

The Hearing Tribunal therefore reconvened the hearing on July 11, 2016, at the CPSA offices in Edmonton, Alberta, to hear from the parties with respect to what sanctions should result from those findings.

In addition to the members of the Hearing Tribunal and independent legal counsel, the following individuals were in attendance:

- The Member;
- Ms. Liza Wold and Chaylene Gallagher (student at law), legal counsel for the Member; and
- Mr. Craig Boyer, legal counsel for the CPSA.

II. ORDERS / SANCTIONS

Submissions on Sanction

Mr. Boyer began his submissions on sanction by entering a Book of Authorities containing:

1. *Jaswal v. Newfoundland Medical Board*, [1996] N.J. No. 50;
2. *Visconti v. College of Physicians and Surgeons of Alberta*, [2012] A.J. No. 123;
3. *Artinian v. College of Physicians and Surgeons of Ontario*, 73 O.R. (2d) 704;
4. *Alberta (College of Physicians and Surgeons) v. Moosa*, [1986] A.J. No. 1014; and
5. Comprehensive Occupational Assessments for Professionals, program description

Mr. Boyer presented a summary of the findings of unprofessional conduct. He then discussed the principles to consider when determining sanction, including both rehabilitation of the individual member and deterrence to both the member and the profession as a whole.

He referenced *Jaswal v. Newfoundland* and specifically commented in detail on each of the factors listed in paragraph 36 in relation to the determination of sanctions, including the following points:

- The proven allegations were serious given that those patients who were automatically scheduled for follow-up were abandoned and scarce health resources were not optimized.

- Although the Member did not have any previous findings of unprofessional conduct, he was experienced and his conduct lasted for greater than 3 months.

- The Member did not dispute the facts and evidence was presented during the original hearing demonstrating a sense of entitlement and portraying himself as the victim. Furthermore, there were no relevant mitigating factors.

- In the context of protecting patients, there is a clear need for both specific and general deterrence. Physicians have a fiduciary duty to place the interest of patients ahead of their own. In this case, it was the Member's sense of entitlement which was the underlying motivation of his behaviour.

Mr. Boyer acknowledged that he was unaware of any similar cases involving the refusal to utilize operating room or other scarce resources in the context of job action. He did however provide reference to *Visconti v. College of Physicians and Surgeons of Alberta*, Artinian *v. College of Physicians and Surgeons of Ontario* and *Alberta (College of Physicians and Surgeons) v. Moosa*. Finally, he also provided a summary of the program description for the Comprehensive Occupational Assessments for Professionals service.

With respect to specific sanctions, and based on the factors noted above, Mr. Boyer argued for the following:

- Considering the need for both specific and general deterrence, a suspension of on to 1-3 months.
- From a rehabilitation perspective - an occupational assessment to determine if any underlying medical or psychologic factors are present which influence his behaviour. To this end, the Comprehensive Occupational Assessments for Professionals service would be of relevance.
- Finally, as the Member's decisions were consciously and deliberately made, he should be responsible for the full costs of the investigation and hearing before the Hearing Tribunal.

Ms. Wold began by emphasizing that the Member was found guilty of only a few of the sections in the CMA's Code of Ethics referenced in the hearing, and was not guilty of violating the CPSA's Standards of Practice on job action. She also pointed out that on one the hand the Member was found guilty of not communicating with patients, yet on the other hand was found guilty of unprofessional conduct with respect to Charge #2, dealing with communications to his patients.

In total, between the two charges, she noted that the Member only violated 5/16 of the considered sections of the CMA's Code of Ethics.

Ms. Wold also referenced *Jaswal v. Newfoundland* and specifically commented in detail on each of the factors listed in paragraph 36 in relation to the determination of sanctions, including the following points:

- She noted that the Member did in fact admit to the facts presented, showed remorse and admitted he could have handled the relevant issues in a more constructive manner.
- The Member had no previous complaints and if anything, suffered a financial detriment by taking these actions.
- In this case, there were in fact mitigating factors. Principally, the atmosphere in the Department of Surgery at the time was noted by the Hearing Tribunal to be acrimonious and dysfunctional. Testimony was given that there was an attempt to prevent the Member from speaking at the Surgical Services Committee meeting at the beginning of 2013 and when he did speak, committee members laughed at him. The Member felt bullied, mistreated and

had difficulties with administration. In his opinion, he legitimately felt his actions were to advocate in the best interests of his patients. Finally, he never assumed it would take so long to resolve this situation.

In response to the 3 cases referenced by Mr. Boyer, Ms. Wold noted the cases were not applicable. *Visconti v. College of Physicians and Surgeons of Alberta* involved 31 convictions involving 9 patients; *Artinian v. College of Physicians and Surgeons of Ontario* was in relation to non-cooperation with a professional regulatory body (which was not an issue in this case) and *Alberta (College of Physicians and Surgeons) v. Moosa* was in relation to fraudulent billings.

With respect to specific sanctions, Ms. Wold argued the following:

- In this case remedial rather than punitive sanctions are appropriate. Given that the situation in Grande Prairie has improved, the central issue has essentially self-remediated. Therefore, an actual suspension is not warranted.
- If the Member were to participate in a professional assessment, it should not be cost prohibitive, and if costs are awarded against the Member, costs for any assessments should be taken into account.
- Finally, with respect to costs, because the Member was only found guilty of approximately 30% of the violations against the considered sections of the CMA Code of Ethics, full costs are unreasonable. Again, if costs are to be awarded against the Member, the costs associated with any continuing medical education programs and assessments should be taken into account.

In reply, Mr. Boyer noted that the Member was found guilty of both charges and the percentage of the CMA Code of Ethics he was found to violate was irrelevant. The length of the hearing (and therefore the cost) would not be affected by the number of sections of the CMA Code of Ethics considered.

In response to questioning by the Hearing Tribunal, the potential cost of the Comprehensive Occupational Assessments for Professionals service would be estimated between $8,000 and $15,000.

The Member also requested to address the Hearing Tribunal. He again noted his pattern of practice was different than his colleagues, his scheduling of patients and interventions was done to facilitate timely assessments and use of resources and reiterated many of the points he testified to earlier in the proceedings.

Decision on Sanction

The Hearing Tribunal considered the following in the determination of sanctions against the Member.

Deterrence

The Hearing Tribunal notes that the Member did undertake his actions in part to satisfy a sense of entitlement with respect to the allocation of surgical resources. However, there is no evidence to suggest that he purposefully intended to put patients at risk; he did not seek financial gain and ultimately felt this was the right course of action for his patients. This is in contrast to the standpoint of the profession as a whole. Job action cannot jeopardize the care and well-being of patients. The Hearing Tribunal agrees that physicians have a fiduciary duty to place the interest of patients ahead of their own.

Rehabilitation

The Hearing Tribunal notes that the Member had difficulties constructively and effectively advocating for himself and his patients. The Hearing Tribunal agrees that an assessment to determine if any underlying medical or psychologic factors are present which influenced his behaviour would be warranted. With respect to the Comprehensive Occupational Assessments for Professionals service, the Hearing Tribunal finds the assessments of disruptive behaviour in the workplace, professional role functioning and fitness to practice issues are particularly relevant.

The Number of Violations

With respect to costs, the Hearing Tribunal rejects the argument regarding the percentage of considered CMA Code of Ethics which the Member was found to have violated. Ultimately, the Member was convicted of both of the charges brought forward by the CPSA.

Costs

The Hearing Tribunal recognizes the costs of both a hearing and subsequent assessments may be disproportionate and impose an unfair financial burden.

Mitigating circumstances

The Hearing Tribunal agrees that mitigating circumstances were present. It would appear that some of the motivation for the Member's actions centered on the inability to advocate for himself and his patients (perceived or actual) due to the atmosphere surrounding the Department of Surgery in Grande Prairie.

Although the Hearing Tribunal agrees with the Surgical Services Committee's mandate to objectively rationalize the utilization of scarce resources, it is again clear the atmosphere was one of significant acrimony and dysfunction. In particular, an attempt to prevent the Member from speaking and laughing at him lends to the argument he was desperate in his attempts to advocate for himself and his patients.

With the above considerations in mind, the Hearing Tribunal orders 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.

The Hearing Tribunal may be consulted if any clarity or further direction is required in implementation of the sanctions.

Signed on behalf of the Hearing Tribunal by the Chair

Dated: August 25, 2016

Dr. John S. J. Bradley