

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

IN THE MATTER OF AN APPEAL FROM THE DECISION OF THE HEARING
TRIBUNAL OF THE COLLEGE OF PHYSICIANS AND SURGEONS OF ALBERTA
REGARDING DR. NEIL SKJODT

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

An appeal was heard before the Council Review Panel ("the Panel") of the College of Physicians & Surgeons of Alberta (the "College") on September 22, 2022 by zoom videoconference. In attendance were:

Council members:

Dr. Nicole Cardinal, Chair
Dr. Richard Buckley, physician member
Dr. Daisy Fung, physician member
Ms. Laurie Steinbach, public member
Ms. Stacey Strilchuk, public member
Ms. Levonne Louie, public member

Also in attendance were:

Mr. Craig Boyer and Ms. Stacey McPeek, legal counsel for the Complaints Director;
Mr. James Heelan, K.C., Natasha Laffin and Elizabeth Hyndman, legal counsel for Dr. Neil Skjodt;
Ms. Julie Gagnon, independent legal counsel for the Hearing Tribunal;
Ms. Jennifer White, Hearing Facilitator.

PRELIMINARY MATTERS

[1] There were no objections to the composition of the Panel hearing the application, or the jurisdiction of the Panel to proceed with the appeal.

[2] The parties confirmed that there were no preliminary or jurisdictional issues.

[3] Documents and submissions reviewed and considered by the Panel included:

1. *Health Professions Act*, section 89
2. Decision of the Hearing Tribunal on the Preliminary Application
3. Notice of Appeal
4. Record of Hearing:
 1. Transcript of Proceedings April 7, 2022
 2. Exhibit 1 – Notice of Hearing

3. Affidavit of Dawn Hartfield sworn January 27, 2021
4. Transcript of Cross examination on Affidavit of Dr. Skjodt held March 4, 2022
 - Exhibit D-1 Correspondence from Dr. Caffaro to Dr. Skjodt dated December 18, 2015 with draft undertaking
 - Exhibit D-2 Response letter to Dr. Caffaro from Dr. Skjodt dated January 6, 2016
 - Exhibit D-3 Email from Dr. Caffaro to Simon Renouf dated November 17, 2016 with terms of resolution
 - Exhibit D-4 CPSA website – Notice of Hearing
 - Exhibit D-5 Email from James Heelan dated November 4, 2021 re service of the notice of hearing – edited
 - Exhibit D-6 Combined media stories
 - Exhibit D-7 OIPC-Order-P2021-13 dated December 12, 2021
5. Written Submissions of the Complaints Director – Preliminary Hearing dated April 1, 2022
 - Tab 1: *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44;
 - Tab 2: *Hennig v. Institute of Chartered Accountants of Alberta*, 2008 ABCA 241;
 - Tab 3: *Sazant v The College of Physicians and Surgeons of Ontario*, 2012 ONCA 727;
 - Tab 4: *Health Professions Act*, RSA 2000, Chapter H-7, section 54(3);
 - Tab 5: *R. v. Harker*, 2020 ABQB 603;
 - Tab 6: *Kalashnikoff v. Her Majesty the Queen*, 2021 ABQB 327;
 - Tab 7: *R v Pettitt*, 2021 ABQB 84;

Tab 8: *Law Society of Alberta v. Odishaw*, 2011 ABLs 28;

Tab 9: *R. v. La*, 1997 CanLII 309 (SCC), [1997] 2 SCR 680.

6. Written Submissions of Dr. Skjodt - Preliminary Hearing dated March 17, 2022

- Notice of Application
- Written Submissions of Dr. Skjodt regarding application to stay proceedings for delay
 1. *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643.
 2. *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 SCC 699.
 3. *Kane v University of British Columbia*, [1980] 1 SCR 1105.
 4. *Diaz-Rodriguez v British Columbia (Police Complaint Commissioner)*, 2020 BCCA 221.
 5. *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44.
 6. *Abrametz v Law Society of Saskatchewan*, 2020 SKCA 81, leave to appeal to SCC granted, No 39340.
 7. *Investment Dealers Association of Canada v MacBain*, 2007 SKCA 70.
 8. *United Food and Commercial Workers, Local 1400 v Tora Regina (Tower) Limited*, 2008 SKCA 38.
 9. *Health Professions Act*, RSA 2000, c H-7.
 10. *Peet v Law Society of Saskatchewan*, 2014 SKCA 109. 11. *R v Power*, [1994] 1 SCR 601.
 11. *Giguère v Chambre des notaires du Québec*, 2004 SCC 1.

12. *Jacobs v McElhanney Land Surveys Ltd*, 2019 ABCA 220, leave to appeal to SCC refused, No 38938.
 13. *Davison v Nova Scotia Construction Safety Association*, 2006 NSCA 63.
 14. *Wachtler v College of Physicians and Surgeons (Alberta)*, 2009 ABCA 130.
- Affidavit of Dr. Skjodt sworn January 7, 2022
 - Affidavit of Leslie New sworn January 11, 2022
 - Transcript and Exhibits from Dr. Dawn Hartfield's cross-examination on Affidavit dated March 4, 2022
7. Preliminary Application Decision, April 29, 2022
 8. Notice of Appeal dated May 2, 2022
 9. Email from Hearings Coordinator to James Heelan and Craig Boyer, May 26, 2022 re appeal of interim decision
 10. Email from James Heelan to Hearings Coordinator, June 30, 2022 re confirmation of Review Panel of Council
5. Dr. Skjodt's Written Submissions:
1. *Health Professions Act*, RSA 2000, c H-7.
 2. *Yee v Chartered Professional Accountants of Alberta*, 2020 ABCA 98.
 3. *Moffat v Edmonton (City) Police Service*, 2021 ABCA 183.
 4. *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.
 5. *Halifax (Regional Municipality) v Anglican Diocesan Centre Corporation*, 2010 NSCA 38.
 6. *Bergeron v Canada (Attorney General)*, 2015 FCA 160.
 7. *Watchmaker v Kehewin Cree Nation #466*, 2022 FC 909.
 8. *Robertson v Wasylyshen*, 2003 ABCA 279.

9. *Volochay v College of Massage Therapists of Ontario*, 2012 ONCA 541.
10. *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61.
11. Robert McCaulay, James Sprague & Lorne Sossin, *Practice and Procedure Before Administrative Tribunals* (Toronto: Thomson Reuters, 2022).
12. *Syncrude Canada Ltd v Alberta (Human Rights & Citizenship Commission)*, 2008 ABCA 217.
13. *Alberta Rules of Court*, Alta Reg 124/2010.
14. *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44.
15. *Abrametz v Law Society of Saskatchewan*, 2020 SKCA 81.
16. *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29.
17. *Altius Royalty Corporation v Her Majesty the Queen in Right of Alberta*, 2022 ABQB 255.
18. *Fawcett v College of Physicians and Surgeons of the Province of Alberta*, 2019 ABQB 788.
19. *Guttman v Law Society of Manitoba*, 2010 MBCA 66.
20. *Law Society of Upper Canada v Neinstein*, 2010 ONCA 193.
21. *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817, [1999] SCJ No 39. 22.
22. *Palmer v R*, [1980] 1 SCR 769, [1979] SCJ No 126.
23. *McLeod Re*, 2005 ABASC 191, aff'd 2006 ABCA 231.
24. *Newton v Criminal Trial Lawyers' Association*, 2010 ABCA 399.
25. Affidavit of Dr. Neil Skjodt sworn January 7, 2022.
26. Affidavit of Leslie New sworn January 11, 2022.
27. Transcripts from Cross Examination on Affidavit of Dawn Hartfield, March 4, 2022.
28. Decision of the Hearing Tribunal of the College of Physicians and Surgeons of Alberta on the Preliminary Application, April 29, 2022.
29. Affidavit of Dr. Neil J. Skjodt sworn August 15, 2022.
30. Affidavit of Dr. John Kennedy sworn August 17, 2022.

6. Complaints Director's Written Submissions:

- Tab 1: *Robertson v. Wasylyshen*, 2003 ABCA 279 (CanLII);
- Tab 2: *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29 (CanLII);
- Tab 3: *Palmer v. The Queen*, 1979 CanLII 8 (SCC), [1980] 1 SCR 759;
- Tab 4: *Barendregt v. Grebliunas*, 2022 SCC 22 (CanLII);
- Tab 5: *Abrametz v Law Society of Saskatchewan*, 2020 SKCA 81 (CanLII);
- Tab 6: *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 (CanLII);
- Tab 7: *Yee v. Chartered Professional Accountants of Alberta*, 2020 ABCA 98 (CanLII);
- Tab 8: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (CanLII);
- Tab 9: *Ratzlaff v. British Columbia (Medical Services Commission)*, 1996 CanLII 616 (BC CA);
- Tab 10: *R. v. Proudlock*, CanLII 15 (SCC), [1979] 1 SCR 525;
- Tab 11: *McIntosh v College of Physicians and Surgeons of Ontario*, [1998] O.J. No. 5222, 1998 CanLII 19444 (ON SCDC).

BACKGROUND

[4] Between 2015 and 2018, the College received three complaints regarding Dr. Skjodt alleging sexual misconduct towards three patients.

[5] The first complaint was received by the College in December 2015 regarding alleged conduct earlier in 2015. The College received an investigation report in September 2016 and an expert opinion in September 2017.

[6] The second complaint was received by the College in March 2018 regarding alleged conduct in 2012. The College received an expert opinion in April 2019 and the investigation report in February 2020.

[7] The third complaint was received in June 2018 regarding alleged conduct in 2010. The College received an expert opinion in June 2019 and the investigation report in February 2020.

[8] The Complaints Director referred the three complaints to a hearing. The Notice of Hearing (Exhibit 1 in the hearing) is dated October 27, 2021. The hearing was scheduled for and commenced on April 7, 2022.

[9] At the outset of the hearing, on notice to the Complaints Director, Dr. Skjodt brought a preliminary application seeking a stay of the matter, arguing undue delay. The Hearing Tribunal convened for the sole purpose of considering the stay application and the hearing on the merits of the allegations was delayed pending the application by Dr. Skjodt.

[10] The Hearing Tribunal issued its decision on April 29, 2022. The Hearing Tribunal dismissed Dr. Skjodt's application for a stay and for a direction that he be relieved of all obligations relating to his undertaking to the College. The Hearing Tribunal directed that the hearing on the allegations continue.

GROUND OF APPEAL

[11] The Notice of Appeal listed the following grounds of appeal:

1. The Hearing Tribunal misapprehended the evidence and made errors of fact in its findings and in particular erred in failing to find prejudice to Dr. Skjodt as a result of the delays in investigation when there was significant evidence of such prejudice before the Hearing Tribunal and further erred in failing to find inordinate delay notwithstanding clear evidence of inordinate delay;
2. The Hearing Tribunal made errors in its application of the law;
3. The Hearing Tribunal's findings were unreasonable when it failed to grant the Stay sought by Dr. Skjodt despite compelling evidence to grant a Stay, and
4. Such further and other grounds of appeal as Dr. Skjodt may assert.

SUBMISSIONS

Submissions on behalf of Dr. Skjodt

[12] Mr. Heelan, counsel for Dr. Skjodt, submitted that the Hearing Tribunal's decision should be overturned; the three complaints pending against Dr. Skjodt stayed; and that Dr. Skjodt be relieved of his undertaking to the College that he see only male patients.

[13] Mr. Heelan submitted that unreasonable delay in the College processes has caused serious prejudice to Dr. Skjodt. There was uncontroverted evidence before the Hearing Tribunal that Dr. Skjodt's physical and mental health have been profoundly impacted and he has been affected financially.

There was evidence Dr. Skjodt's family had been prejudiced and of the strain on his family relationships. There was evidence from his professional staff that they have been unduly stressed and concerned about the viability of Dr. Skjodt's continued practice.

[14] Mr. Heelan submitted that the Hearing Tribunal unreasonably disregarded evidence, misapprehended evidence and misapplied the law.

[15] Mr. Heelan addressed the argument of prematurity. He noted that the prematurity principle does not apply to this case because the Hearing Tribunal's decision was a final decision. It was not an interlocutory decision in the course of the hearing. Mr. Heelan took the position that the HPA contemplates this appeal pursuant to section 87(1).

[16] Mr. Heelan addressed the standard of review to be applied by the Panel. The Panel should consider whether the decision of the Hearing Tribunal was reasonable. However, the Court of Appeal in *Yee v Chartered Professional Accountants of Alberta* noted that Council should remain flexible without a rigid focus on an abstract standard of review. There is a great degree of discretion in the review of the Hearing Tribunal's decision and the Panel can intervene in cases where there has been unfairness.

[17] Mr. Heelan submitted the Hearing Tribunal erred in misapplying the leading case with respect to delay, *Blencoe v British Columbia (Human Rights Commission)*. The *Blencoe* case identified the following key principles: 1) the period of delay must be so inordinate as to be clearly unacceptable; 2) the party claiming abuse of process must show that the inordinate delay directly caused them a significant prejudice; 3) the analysis requires a weighing of competing interests; and 4) a stay is not the only remedy available.

[18] Mr. Heelan noted that the Hearing Tribunal erroneously concluded that there was no compelling evidence that any delay had, on its own, been directly responsible for prejudice to Dr. Skjodt. The Hearing Tribunal distinguished Dr. Skjodt's situation from *Law Society of Saskatchewan v Abrametz*. Mr. Heelan suggested that the Hearing Tribunal erred in concluding that similar evidence as demonstrated in *Abrametz* or *Blencoe* was required. Rather, a party merely needs to show that the inordinate delay caused them prejudice. The Hearing Tribunal misinterpreted the law as requiring corroborating third party evidence. The Hearing Tribunal erred in suggesting that the presence of such evidence in *Abrametz* meant that this was a requirement in all undue delay applications.

[19] Mr. Heelan took the position that the Hearing Tribunal misinterpreted the law which is revealed at paragraph 59 of the Hearing Tribunal's decision. Dr. Skjodt has met the evidence required under the *Blencoe* framework.

[20] Mr. Heelan submitted that the Hearing Tribunal also incorrectly found that there was no evidence of prejudice. This finding is unreasonable and a factual error. There was uncontroverted and unchallenged evidence before the Hearing Tribunal. The Hearing Tribunal erred in dismissing the evidence present as bare assertions. It was incumbent on the Hearing Tribunal to explain why it did not accept the evidence and it failed to do so.

[21] It was submitted that Council has the power under section 89(5)(b) of the HPA to substitute or make a finding or order of its own. The first complaint has been outstanding since December 2015. The delay lies entirely on the College. On several occasions Dr. Skjodt urged the College to move forward with a hearing to resolve the complaints. The pandemic had no impact on these complaints.

[22] Mr. Heelan noted that the decision of the Hearing Tribunal failed to hold the College to the standard required under the HPA that the College carry out its activities and govern registrants in a manner that protects and serves the public interest.

[23] Mr. Heelan reviewed the additional evidence put forward by Dr. Skjodt in the appeal. He noted that, given the findings of the Hearing Tribunal that Dr. Skjodt needed to provide third party evidence, Dr. Skjodt should be allowed to do so. The Panel is asked to consider the evidence of Dr. Kennedy and a further Affidavit of Dr. Skjodt. Given the findings of the Hearing Tribunal, this new evidence should be admitted.

[24] Mr. Heelan reviewed the principles in the decision of *Palmer v The Queen* for adducing new evidence on appeal. He noted the evidence here is relevant and credible and would clearly affect the result. Dr. Skjodt could not have anticipated that he would be required to adduce third party evidence before the Hearing Tribunal, since that is not the law, but should be allowed to do so given the findings of the Hearing Tribunal and as a matter of fairness.

[25] Mr. Heelan urged the Panel to quash the decision of the Hearing Tribunal, replace it with its own decision and conclude that the complaints ought to be stayed and direct the Complaints Director to relieve Dr. Skjodt of all obligations related to his undertaking to the College.

Submissions on behalf of the Complaints Director

[26] Mr. Boyer noted that the burden of proof in an application to stay a hearing is on the applicant, here Dr. Skjodt. Dr. Skjodt has not met that burden in this case.

[27] Mr. Boyer pointed to the decision of the Supreme Court of Canada in *Abrametz*, which was issued following the decision of the Hearing Tribunal. The Affidavit of Dr. Skjodt was parroting the type of evidence in *Abrametz* regarding harm and prejudice which had been found by the Saskatchewan Court of Appeal to be sufficient. The Supreme Court of Canada has since stated that the evidence in *Abrametz* was not sufficient to establish prejudice and overturned the Court of Appeal decision. That is why Dr. Skjodt is now trying to add new evidence. He took an educated gamble that if he parroted the evidence in *Abrametz*, it would be enough to get a stay application.

[28] Mr. Boyer submitted that the Hearing Tribunal did not conclude that there was no evidence of prejudice. The Hearing Tribunal at paragraph 59 of its decision, found that the evidence presented was insufficient. The Hearing Tribunal concluded, based on its review of the evidence, that Dr. Skjodt had not met the high burden required for a stay application.

[29] Mr. Boyer noted that Dr. Skjodt is asking the Panel to reweigh evidence. He is doing so for two purposes. To have a do-over on the evidence required at a hearing and to essentially have the Panel take over the role of the Hearing Tribunal.

[30] Mr. Boyer noted that this was not a final determination before the Hearing Tribunal but rather a preliminary application. The HPA does not have an express process for bringing preliminary applications. However, the Hearing Tribunal is the master of its procedure. The Hearing Tribunal heard the matter and determined that the hearing should be held.

[31] In *Abrametz*, the application was made following a full hearing. Mr. Boyer submitted that, in that way, the Hearing Tribunal has the benefit of seeing witnesses testify and the ability to assess credibility. In this case, the Hearing Tribunal determined that the full hearing should be held. This would not stop Dr. Skjodt from bringing an application for delay at the end of a full hearing when all the evidence is in front of the Hearing Tribunal. He is not denied that full argument, but rather, he brought it on a preliminary basis and it failed.

[32] Mr. Boyer noted that there can be a remedy for delay at the conclusion of a hearing and this can be addressed in the sanction phase, as was done in *Wachtler v College of Physicians and Surgeons of Alberta*. Dr. Skjodt is not prevented from raising the delay argument at the conclusion of the hearing and asking for relief at that time.

[33] In terms of the timeline of the complaints, Mr. Boyer noted that by mid-2018 there were two additional complaints raising similar issues to the first complaint. The Complaints Director was concerned about whether there was

a pattern with these complaints. While the investigation reports for the second and third complaint were completed by February 2020, the pandemic hit. There were no contested hearings in 2020. There was a backlog of hearings in 2021 and hearings resumed in 2021. While it is acknowledged that the first complaint is old, the fact of the other two complaints in 2018 creates complexities in this case.

[34] With respect to Dr. Skjodt's evidence of his undertaking, Mr. Boyer noted that Dr. Skjodt had been given the option to practice with a chaperone. He chose to give an undertaking to see only male patients. He has not requested a change of the undertaking to see female patients as well, with a chaperone present.

[35] Mr. Boyer also referred to the evidence that Dr. Skjodt was involved in a vehicle accident where his vehicle struck a young boy and killed him in a marked crosswalk. That case continues to be in litigation and been reported in the media. The media reports were part of the evidence before the Hearing Tribunal.

[36] While Dr. Skjodt claims serious trauma and emotional stigma, Mr. Boyer noted that there have been no public announcements about the complaints or investigations. The allegations did not become public until after the Notice of Hearing was issued.

[37] Mr. Boyer took the position that the Hearing Tribunal's findings that there was a bare assertion about stigma in the context of the other evidence before it, including the media attention around the vehicle accident is reasonable.

[38] Mr. Boyer submitted that the Hearing Tribunal decision is one that is reasoned. It interprets and applies the law. Further, the Supreme Court of Canada's decision in *Abrametz* reinforces the decision of the Hearing Tribunal.

[39] With respect to the application to adduce new evidence, Mr. Boyer noted that the *Palmer* test requires that the new evidence be rejected if by the exercise of due diligence, it could have been adduced at the hearing. This is fatal to Dr. Skjodt's application to adduce new evidence. The evidence was available but Dr. Skjodt chose not to call it.

[40] In addition, Mr. Boyer addressed the policy reasons to not allow litigation by installment. The application by Dr. Skjodt results in an evidentiary vacuum. It has the effect of delaying the proceedings further. It unnecessarily wastes resources. It is not in the public interest as the complainants have not had an opportunity to testify and be cross-examined. Further, Dr. Skjodt is asking for the matter to be concluded permanently which is not in the public interest.

[41] Mr. Boyer concluded by noting that the appeal should be dismissed. The Hearing Tribunal's decision was reasonable. The Panel should find that the application and appeal are premature and direct the matter to be heard by the Hearing Tribunal who can hear full evidence and submissions on the issues, including the issue of delay and prejudice.

Reply Submissions on behalf of Dr. Skjodt

[42] Mr. Heelan noted that the Supreme Court of Canada decision in *Abrametz* does not change the law. The law is still the four-part test in the *Blencoe* case.

[43] Mr. Heelan noted that the new evidence is not needed if the evidence before the Hearing Tribunal is properly considered. However, if in fact third party evidence is required, then it is being adduced and should be considered.

[44] Mr. Heelan confirmed that he is asking the Panel to weigh the evidence, since the Hearing Tribunal failed to do so. The reasons of the Hearing Tribunal are sparse and not comprehensive.

Questions from the Panel

[45] The Panel asked for information from the record as to when Dr. Skjodt's health issues first arose. Mr. Heelan noted that Dr. Skjodt's initial Affidavit sworn January 7, 2022 speaks of sufferings, including psychological harm and stress for a period of over six years. The Affidavit notes the effects on his professional practice. There is also evidence from Dr. Kennedy from his Affidavit of August 17, 2022. Dr. Skjodt's latest Affidavit lists a number of issues that he has been dealing with and states the timing as being throughout the years that he has had the complaints hanging over his head. Mr. Boyer noted that the evidence before the Hearing Tribunal contains no information about diagnoses or treatment or anything of that nature.

[46] The Panel asked for clarification from the record of when Dr. Skjodt asked the College to move the hearing forward. Mr. Heelan noted that in the Complaints Director's cross-examination, there is reference to a letter to Dr. Skjodt from the prior Complaints Director dated December 18, 2015, where the prior Complaints Director states that the College will make every effort to manage the complaint in as timely a manner as possible. There is a further exhibit which is a letter dated March 10, 2017 from Dr. Skjodt's prior counsel to Mr. Boyer requesting to bring things to a conclusion, that complaint 1 be dismissed and the undertaking removed. The letter goes on to say that if this is not satisfactory, they request a prompt hearing in this matter. The Complaints Director also gave evidence in cross-examination on her Affidavit where she agreed that Dr. Skjodt asked for expediency to resolve the matters.

Mr. Boyer noted that the evidence of the Complaints Director in responding to questions in cross-examination must be reviewed in the entire context where she provided a chronology of events.

[47] Finally, the Panel asked for further submissions on balancing the public interest, in accordance with the test set out in *Abrametz*. Mr. Heelan noted that inordinate delay brings the administration of justice into disrepute and the Panel cannot allow complacency to seep in College proceedings. Delay is detrimental not only to the registrant dealing with the complaint, but to society as a whole, as it fundamentally erodes the College's ability to continue to engage in self-regulation. Mr. Boyer noted that the specific question is whether going ahead with the proceeding will result in more harm to the public interest than if the proceedings were permanently halted. It is in the public interest to hear such matters even where complainants come forward several years after the allegations are made. Mr. Heelan clarified that this was not a case of the complainants taking too long to come forward. The issue is with the College's delay.

SUMMARY OF THE PANEL'S DECISION

[48] The Panel carefully reviewed and considered the record of the hearing and submissions of the parties.

[49] The Panel applied the standard of review in *Yee v Chartered Professional Accountants of Alberta* and noted that while the standard of review is reasonableness, the Panel should remain flexible in reviewing the Hearing Tribunal's decision. The Panel can intervene in cases where there has been unfairness.

[50] In the present case, while findings of fact were made by the Hearing Tribunal, these were based on Affidavit evidence and transcripts of questioning put before the Hearing Tribunal. There were no witnesses called to give evidence before the Hearing Tribunal. In addition, at issue in this appeal, is the application of the test for a stay arising from delay. These factors weigh in favour of a more robust analysis by the Panel, in accordance with the principles set out in *Yee*.

[51] The Panel found that the Hearing Tribunal's decision was reasonable. The Hearing Tribunal's findings that the evidence presented was insufficient evidence of prejudice resulting from delay and that, in the circumstances of this case, the delay was not inordinate were reasonable.

[52] The Panel found that the delay, having regards to all of the circumstances of the case, was not inordinate. The Panel also considered the

evidence presented and found that there was insufficient evidence of prejudice resulting from the delay.

[53] The Panel did not find that there was unfairness to Dr. Skjodt. The Panel agreed with the submissions of counsel for the Complaints Director that Dr. Skjodt could have provided additional evidence during the hearing. As noted by counsel for Dr. Skjodt, the test for a stay based on inordinate delay has not changed. It was reasonable for the Hearing Tribunal to conclude that there was insufficient evidence of prejudice arising from delay. This does not result in an unfairness to Dr. Skjodt.

[54] The Panel found that the test in *Palmer* to introduce new evidence was not met. Specifically, Dr. Skjodt could have adduced the new evidence during the hearing.

[55] The appeal of Dr. Skjodt is dismissed. The Panel confirms the decision of the Hearing Tribunal and the Panel directs that the hearing will proceed. The application for a stay is premature. Dr. Skjodt may raise any further issues of delay or the appropriate remedy as part of the hearing.

FINDINGS AND REASONS

[56] The Panel found that the Hearing Tribunal's decision was reasonable. The Hearing Tribunal applied the test in *Blencoe*. The Hearing Tribunal's decision is balanced and provides its reasoning.

[57] Subsequent to the Hearing Tribunal's decision, the Supreme Court of Canada issued its decision in *Abrametz*, which affirmed the test in *Blencoe*. The Panel considered the test as set out in *Blencoe* and *Abrametz*, as follows:

1. The period of delay must be so inordinate as to be clearly unacceptable.
2. The party claiming abuse of process must show that the inordinate delay directly caused them a significant prejudice that is related to the delay itself.
3. The analysis requires a weighing of competing interests, that is whether the damage to the public interest in the fairness of the administrative process should the hearing go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted.
4. A stay is not the only remedy available. A finding of abuse of process is available only in the clearest of cases.

[58] The Panel considered the issue of delay. The Panel did not find the delay to be inordinate, having regard to all of the circumstances of the case.

[59] There was a period of lengthy delay for the first complaint, which has been acknowledged by the Complaints Director. However, in considering the context of the delay, the Panel accepted that the two additional complaints made within a short period of time in 2018 created concerns for the Complaints Director about a possible pattern of misconduct and created complexities in addressing the complaints and investigations. The Panel accepted that, given the very serious nature of the allegations, these factors added time and complexity to the investigation process.

[60] In addition, the Panel accepted that the COVID-19 pandemic did have an effect on scheduling of hearings. Further, the Panel noted from the record that Dr. Skjodt had four different counsel over the period of time from December 2015 to March 2019. The change in counsel would result in some delay for counsel to become familiar with the matter.

[61] The Panel acknowledged that lengthy delays in investigations and hearings create concerns. It is important for the College to ensure that matters are investigated and addressed in a timely manner, in order to ensure a fair process for registrants and that the public is protected. There cannot be complacency on the part of the College. However, there were a number of factors at play in this case. Given the circumstances of the three complaints which raised concerns about a pattern of conduct, the corresponding investigations and the COVID-19 pandemic, the Panel did not find that the delay amounted to inordinate delay.

[62] The Panel also considered that complaints 2 and 3 are not out of line in terms of timing for investigations and referrals to hearing. Further, the Panel viewed that the potential pattern of very serious misconduct was an important factor in this case.

[63] The Panel also considered the arguments raised regarding prejudice to Dr. Skjodt arising from the delay. The Panel reviewed the Hearing Tribunal's findings on this point.

[64] The Hearing Tribunal set out its findings regarding the evidence at paragraph 59 of its decision. The Panel did not agree with counsel for Dr. Skjodt that the Hearing Tribunal effectively required corroborating evidence. Rather, the Hearing Tribunal held that there was "no compelling evidence that any delay in these proceedings has, on its own, been directly responsible for prejudice" to Dr. Skjodt. The Hearing Tribunal noted that Dr. Skjodt offered no third party information to support "what amounts to bare assertions in his Affidavit."

[65] The Hearing Tribunal weighed the evidence before it and found that the evidence presented did not meet the requirements set out in *Blencoe*. While the Hearing Tribunal noted that no third party information was provided, the Hearing Tribunal did not find that this was a requirement.

[66] The Hearing Tribunal did not err or make unreasonable findings in this determination. The test for a stay based on inordinate delay is a heavy one.

[67] The Panel agreed that Dr. Skjodt presented evidence of health issues, but that the evidence did not clearly link the health issues to the delay. It is not clear from the record that these arise from the delay.

[68] The Panel considered the media reports and evidence in the record regarding the vehicle accident and related litigation. The Panel noted that this would have caused anyone tremendous stress. However, the evidence presented by Dr. Skjodt does not address these matters.

[69] The evidence presented about Dr. Skjodt's health issues was not sufficient to establish the link required by the test in *Blencoe* that the significant prejudice arises from the delay.

[70] Further, while evidence was provided regarding prejudice to Dr. Skjodt's family and employees, this was not sufficient to meet the test for significant prejudice required by *Blencoe*.

[71] The Panel considered whether the new evidence presented by Dr. Skjodt (being the Affidavit from Dr. Kennedy and the additional Affidavit from Dr. Skjodt) should be considered. In *Palmer*, the Court held that the evidence should not generally be admitted if, by due diligence, it could have been adduced in the proceedings below. Dr. Skjodt made a decision about what evidence to present to the Hearing Tribunal. It was a calculated risk. Dr. Skjodt could have provided this additional evidence at the time. The Panel therefore rejected the new evidence.

[72] The Panel noted however, that even if the new evidence was permitted to be adduced, it would not be sufficient to establish that there was significant prejudice arising from the delay. The new evidence still does not clearly establish prejudice to Dr. Skjodt arising from the delay.

[73] In terms of prejudice, the Panel also considered that Dr. Skjodt has continued to practice. He was offered the possibility of practicing with a chaperone but chose instead to restrict his practice to male patients. He has not asked for this undertaking to be revisited.

[74] Further, the allegations against Dr. Skjodt were not public until the Notice of Hearing was posted and the Notice of Hearing is general in nature.

As such, there has not been prejudice to Dr. Skjodt that might arise if the matter was in the public domain.

[75] The Panel considered the argument of counsel for Dr. Skjodt that Dr. Skjodt was trying to urge the College to move expeditiously. There was a letter in the record from the College (Record page 118) indicating that the "College will make every effort to manage this complaint in as timely a manner as possible." There was the questioning of the Complaints Director on her Affidavit in which the Complaints Director acknowledged that Dr. Skjodt asked for expediency to resolve the matters. (Record, page 731). The Panel also considered the letter dated March 10, 2017 from Dr. Skjodt's counsel at the time asking "to bring things to a conclusion, we ask that the College issue a statement that [the] complaint has been dismissed and Dr. Skjodt's undertaking removed." (Record, page 742). Counsel for Dr. Skjodt noted that the letter goes on to say that if this is not satisfactory they "would request a prompt hearing in this matter and consideration of prompt referral of this investigation's privacy breaches for investigation by a non-conflicted outside regulator."

[76] The Panel did not find this to be compelling evidence of Dr. Skjodt urging the College to move expeditiously. There was no evidence Dr. Skjodt raised any of his health or other concerns about prejudice with the College prior to the hearing.

[77] The threshold to be met before a stay is granted is very high. It should only be ordered in the clearest of cases (*Abrametz* (SCC), para. 83). Dr. Skjodt has not met the threshold in this case.

[78] Finally, the Panel considered whether the damage to the public interest in the fairness of the administrative process should the hearing proceed exceeds the harm to the public interest in the enforcement of the legislation if the proceedings were halted. The Panel found that the public interest favours proceeding with the hearing.

[79] The public interest consideration in proceeding with the hearing outweighs staying the allegations. Protection of the public and proceeding with a hearing on very serious allegations where there is a possibility of a pattern of very serious conduct outweighs the potential prejudice to Dr. Skjodt. In balancing the interests, the Panel found that there was more harm to the public interest in staying the hearing than in proceeding with the hearing.

[80] The Panel also considered that the Supreme Court of Canada noted that where a stay of proceedings is not warranted, other remedies may be appropriate (*Abrametz* (SCC), para. 89).

[81] Dr. Skjodt will be able to present full evidence at the hearing and raise the issue of delay at the hearing. There are remedies other than a stay available. These remedies can be argued following the hearing, should there be one or more findings of unprofessional conduct.

ORDERS

[82] Dr. Skjodt's application for leave to admit new evidence is denied.

[83] Dr. Skjodt's appeal is dismissed. The Panel confirms the decision of the Hearing Tribunal and the Panel directs that the hearing will proceed. The application for a stay is premature. Dr. Skjodt may raise any further issues of delay or the appropriate remedy as part of the hearing.

[84] The issue of costs was not addressed in the submissions of the parties. The parties may provide brief written submissions on costs for the Panel's consideration within 30 days of receipt of the Panel's decision.

Signed on behalf of the Council Appeals Committee by the Chair:



Dr. Nicole Cardinal

Dated this 13th day of December, 2022.