

IN THE MATTER OF THE *HEALTH PROFESSIONS ACT*, R.S.A. 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. JOHANN MARITZ

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

- [1] An appeal was held before a Council Review Panel (“the Panel”) of the College of Physicians & Surgeons of Alberta (the “College”) on January 21, 2019 at the offices of the College in Edmonton, Alberta. In attendance were:

Council members:

Dr. John Bradley (Chair)
 Dr. Graham Campbell
 Ms. Levonne Louie, Public Member
 Dr. Richard Martin
 Ms. Laurie Steinbach, Public Member

Also in attendance were:

Dr. Michael Caffaro, Complaints Director
 Mr. Craig Boyer, legal counsel for the Complaints Director
 Dr. Johann Maritz, Investigated Person
 Ms. Valerie Prather and Mr. Mathieu LaFleche, legal counsel for Dr. Maritz
 Ms. Katrina Haymond, independent legal counsel to the Panel
 Dr. Bill Sara, workplace monitor for Dr. Maritz’ office and hospital practice

- [2] The appeal was conducted in accordance with sections 87 and 89 of the *Health Professions Act* (“HPA”).
- [3] The appeal is regarding the Hearing Tribunal’s decision with respect to sanction, dated August 3, 2018. The Complaints Director appealed the orders imposed by the Hearing Tribunal, including their decision to order a suspension for 18 months. Dr. Maritz filed a cross-appeal with respect to the quantum of costs ordered to be paid by Dr. Maritz.

I. PRELIMINARY MATTERS

- [4] Ms. Levonne Louie noted that she had previously been retained to act as an expert witness by Bennett Jones LLP on behalf of one of its clients regarding an unrelated matter. Ms. Louie’s involvement was brought to the attention of the parties in advance of the appeal. Counsel for both parties confirmed there was no objection to Ms. Louie’s participation in the appeal.
- [5] There were no objections to the composition of the Panel hearing the appeal, or the jurisdiction of the Panel to proceed with the appeal.
- [6] Documents, submissions and case authorities reviewed and considered by the Panel included:
1. Transcripts of hearing, November 13-14, 2017
 2. Transcripts of hearing, April 10, 2018
 3. Exhibits 1-42

4. Decision of the Hearing Tribunal Regarding the Allegations, dated February 14, 2018
5. Decision of the Hearing Tribunal Regarding Sanction, dated August 3, 2018
6. Notice of Appeal to Council on behalf of Complaints Director, dated October 4, 2018
7. Notice of Cross Appeal on behalf of Dr. Maritz, dated October 25, 2018
8. Written Submissions of the Complaints Director, with authorities, dated December 3, 2018
9. Written Submissions of Dr. Maritz, with authorities, dated December 3, 2018, in regard to the Cross Appeal
10. Written Submissions of Dr. Maritz, with authorities, in Response to the Appeal by the Complaints Director, dated December 17, 2018

II. BACKGROUND

[7] A Hearing Tribunal was convened on November 13 and 14, 2017 to consider the following allegations against Dr. Maritz set out in the Notice of Hearing:

1. In or about January 2000, you did have an inappropriate sexual relationship with your patient, Ms. A¹;
2. Between March 2003 and April 2015, you did have an inappropriate sexual relationship with your patient, Ms. M., which was also in breach of your personal covenant to the College of Physicians and Surgeons of Alberta (“College”) set out in paragraph 7 of Schedule B and paragraph 5 of Schedule C of your Continuing Care Contract with the College dated April 25, 2006;
3. You did fail to disclose in a timely matter to the College or your therapist, Meg Hinton, that you were involved in a sexual relationship with your patient, Ms. M., during the currency of your Continuing Care Contract dated April 25, 2006;
4. You did breach your Undertaking with the College dated May 27, 2016, in that you did assess and prescribe medication to Mr. S. on Saturday, June 11, 2016 contrary to the restrictions set out in your Undertaking to the College dated May 26, 2016.

[8] At the outset of the hearing, Dr. Maritz admitted to Allegations #1, #2 and #3 and that all three constituted unprofessional conduct. Dr. Maritz did not admit to Allegation #4. The Complaints Director’s Legal Counsel called Dr. Caffaro as his only witness in relation to Allegation #4, the only allegation in dispute. Dr. Maritz testified on his own behalf. In addition, Dr. Bill Sara and Dr. Louise Webb were called to testify on Dr. Maritz’s behalf in relation to penalty.

¹ Although the Notice of Hearing referred to the patients by their full name, for the purposes of its decision, the Review Panel has referred to each of the patients using a pseudonym.

- [9] The Hearing Tribunal accepted Dr. Maritz's admissions of unprofessional conduct with respect to Allegations #1, #2 and #3, and in its written decision dated February 14, 2018, found Dr. Maritz guilty of unprofessional conduct worthy of sanction with respect to Allegation #4 ("Merit Decision").
- [10] The Hearing Tribunal reconvened on April 17, 2018 to hear oral submissions regarding the orders that should be imposed on Dr. Maritz in light of the Merit Decision. In a written decision dated August 3, 2018 (the "Sanction Decision") the Hearing Tribunal ordered that:
1. Dr. Maritz shall be suspended for a period of eighteen (18) months.
 2. Dr. Maritz shall receive credit for the time he served for interim suspensions imposed by the College, and for the period Dr. Maritz voluntarily withdrew from practice. Accordingly, Dr. Maritz has served the period of suspension imposed by this decision.
 3. All current restrictions on Dr. Maritz's practice license shall remain in effect for a period of three years from the date of this decision.
 4. Dr. Maritz shall employ, or otherwise engage, a mature practicing physician (approved by the Complaints Director) who shall report to the College on demand regarding Dr. Maritz's adherence to his practice restrictions for a period of three years from the date of this decision.
 5. Dr. Maritz shall post a notice to his patients, in his place of practice, setting out the restrictions on his license.
 6. Dr. Maritz shall be responsible for 100% of the costs of the investigation and hearing. The terms of this payment shall be at the discretion of the Complaints Director, acting reasonably.

III. GROUNDS OF APPEAL

- [11] The Complaints Director appealed the Sanction Decision of the Hearing Tribunal on the following grounds:
1. The Hearing Tribunal failed to consider relevant factors when determining the sanction ordered.
 2. The Hearing Tribunal considered irrelevant factors when determining the sanction ordered.
 3. The Hearing Tribunal erred in its interpretation regarding the determination of sanction.
 4. The sanction imposed by the Hearing Tribunal was unreasonable and disproportionate to the gravity and magnitude of the conduct found to be unprofessional.

[12] Dr. Maritz cross-appealed the Hearing Tribunal's decision to order Dr. Maritz to pay 100% of the costs of the investigation and hearing, on the following grounds:

1. The Hearing Tribunal failed to take into account Dr. Maritz's success on the issue of sanction, which formed the majority of the time allocated to both evidence and argument before the Hearing Tribunal.
2. The Hearing Tribunal failed to take into account Dr. Maritz's admission with respect to three of the citations against him.
3. The Hearing Tribunal made unreasonable findings regarding the length of the hearing and, as a result, made an unreasonable finding that the length of the hearing was an aggravating factor against Dr. Maritz.
4. The Hearing Tribunal failed to assess the quantum of the Costs Award in rendering its decision and, as a result, failed to consider the overall reasonableness of the Costs Award in all of the circumstances.
5. The quantification of the Costs Award as calculated by the Hearings Director is in error.

IV. PARTIES' SUBMISSIONS

[13] The Complaints Director provided written submissions, dated December 3, 2018, with respect to the decision issued by the Hearing Tribunal ordering that Dr. Maritz be suspended for a period of 18 months. The Complaints Director submitted that the Hearing Tribunal's decision to permit Dr. Maritz to continue as a member of the profession was incorrect, and that the Hearing Tribunal's decision to order an 18 month suspension should be overturned. The Complaints Director submitted that the Panel should instead order cancellation of Dr. Maritz's registration and practice permit (the "Sanction Appeal").

[14] Dr. Maritz provided written submissions with respect to his appeal on costs, dated December 3, 2018. Dr. Maritz submitted that the Hearing Tribunal's decision ordering him to pay 100% of the costs of the investigation and hearing was unreasonable, given that he was successful, in part, in advancing his position at the hearing (the "Costs Appeal").

[15] Dr. Maritz also provided written submissions in response to the Sanction Appeal, dated December 17, 2018.

[16] The parties were also provided with an opportunity to provide further submissions in person.

[17] The Panel requested that the parties first make oral submissions with respect to the Sanction Appeal, and then make separate submissions with respect to the Costs Appeal.

(a) **The Sanction Appeal**

Submissions of the Complaints Director

- [18] Mr. Boyer, legal counsel for the Complaints Director, submitted that the Panel should review the Hearing Tribunal's decision to order a suspension rather than cancellation, based on a correctness standard of review.
- [19] Mr. Boyer reviewed a number of legal authorities issued by the Alberta Court of Appeal, including *Newton v. Criminal Trial Lawyers Assn.*, and *Pelech v. Law Enforcement Review Board*, where the courts considered the "internal" standard of review to be applied by a statutory decision-maker when reviewing a decision by the tribunal of first instance.
- [20] Mr. Boyer also referred to several legal authorities from other jurisdictions, including a decision of the British Columbia Court of Appeal in *Harding v. Law Society*, where the Court held that the internal standard of review was correctness, rather than reasonableness.
- [21] Mr. Boyer submitted that the central issue that the Hearing Tribunal was required to consider was whether Dr. Maritz continues to meet the eligibility requirements established in s. 28(1)(e) of the HPA and s. 12 of the *Physicians, Surgeons and Osteopaths Profession Regulation*, including the "good character and reputation" requirements. The central question in the appeal is whether Dr. Maritz continues to have the "good character and reputation" that is a pre-requisite to membership in the profession.
- [22] This question is one which is squarely within the relative expertise of the College's Council. This is reinforced by reviewing the structure of which suggests that Council is in the best position to make a determination of this nature. Accordingly, it is not appropriate to defer to the Hearing Tribunal's decision regarding whether the Investigated Person is suitable to continue as a member of the profession. As such, the Panel should apply the correctness standard when reviewing the Hearing Tribunal's decision.
- [23] Although Mr. Boyer acknowledged that penalty decisions are normally reviewed based on a standard of reasonableness, where the member's suitability to maintain membership as a regulated member of the CPSA is in issue, the standard of review is correctness, rather than reasonableness.
- [24] Mr. Boyer then submitted that the Hearing Tribunal erred in its conclusion that Dr. Maritz should be permitted to remain a member of the profession. In particular, Mr. Boyer submitted that the Hearing Tribunal erred in finding that Dr. Maritz was not ungovernable, because there were no prior disciplinary findings against him. Mr. Boyer submitted that it is not necessary for there to be any prior disciplinary history before finding that a member is ungovernable, referencing the Court's decisions in: *College of Physicians and Surgeons of Saskatchewan v. Ali*, *Ahluwalia v. College of Physicians and Surgeons of Manitoba*, and *Litchfield v. College of Physicians and Surgeons of Alberta*.

- [25] In addition, Mr. Boyer submitted that the Hearing Tribunal erred in its consideration of the evidence provided by Dr. Webb. The Hearing Tribunal concluded that it should place “less weight” on the conclusions reached by Dr. Webb, but should have placed no weight on it, given that Dr. Webb gave evidence on the “ultimate issue.”
- [26] Mr. Boyer submitted that the appropriate penalty in this case was revocation. Revocation is necessary in order to protect the public and serve the public interest. In addition, revocation is consistent with society’s expectations, given the nature of the conduct at issue.

Submissions of the Investigated Person Regarding the Sanction Appeal

- [27] Counsel for the Investigated Person, Ms. Valerie Prather, made submissions in reply to the Sanction Appeal.
- [28] Ms. Prather submitted that the Alberta Court of Appeal has clearly established that a Hearing Tribunal’s decision on sanction should be reviewed based on a reasonableness standard, citing the Court’s recent decision in *Zuk v. Alberta Dental Association and College*.
- [29] Ms. Prather submitted that the matter should not be characterized as whether Dr. Maritz meets the “good character and reputation” requirements in the HPA and *Physicians, Surgeons and Osteopaths Profession Regulation*, since those are questions to be asked by the Registrar when considering an application for registration or renewal. Instead, the Panel must consider whether the Hearing Tribunal’s decision to order a suspension, rather than cancellation, was reasonable. That is a matter which is squarely within the Hearing Tribunal’s expertise, and the decision should be afforded deference.
- [30] Further, Ms. Prather noted that there have been three recent appeals to the Court of Appeal where the Complaints Director has taken the position that the Council should review penalty decisions based on a reasonableness standard: *Al Ghamdi, Torbey* and *Hunter*. It is inconsistent to now argue that a penalty decision should be reviewed on a correctness standard instead.
- [31] With respect to the merits of the Complaints Director’s appeal, Ms. Prather submitted that the Hearing Tribunal held that Dr. Maritz was not ungovernable. This finding was not based on the fact that he had no prior disciplinary history, but was based on other factors. Specifically, Dr. Maritz had not demonstrated that he was incapable or unwilling of addressing and correcting his behavior.
- [32] Moreover, the cases relied upon by the Complaints Director in support of its submission that Dr. Maritz was ungovernable were all distinguishable and did not support a finding of ungovernability in this case.
- [33] Ms. Prather submitted that the Hearing Tribunal’s conclusions regarding Dr. Webb’s testimony were reasonable. The Hearing Tribunal properly disregarded Dr. Webb’s testimony on the ultimate issue (the decision to write the note to Mr. S., which gave rise

to the single contested charge), but was not remiss in taking his testimony into account regarding sanction. Accordingly, there was no error in the Hearing Tribunal's consideration of Dr. Webb's testimony.

- [34] Further, Ms. Prather submitted that the Hearing Tribunal reasonably considered the factors set out in *Jaswal v. Newfoundland Medical Board* before determining that an 18 month suspension was appropriate and provided adequate protection of the public. The Hearing Tribunal's decision on sanction was reasonable, and ought to be upheld.

(b) The Costs Appeal

Submissions on Behalf of Investigated Person

- [35] Ms. Prather submitted that the Hearing Tribunal's decision to order Dr. Maritz to pay 100% of the costs of the investigation and hearing was unreasonable.
- [36] Ms. Prather submitted that the hearing took place over the course of two days, and Dr. Maritz admitted to $\frac{3}{4}$ of the allegations.
- [37] While Dr. Maritz was found guilty of the Allegation #4, which was the only allegation that he contested, a good deal of time at the hearing was spent addressing matters that were relevant to sanction, including whether or not Dr. Maritz was governable. This evidence was called before the Hearing Tribunal rendered the Merit Decision, for the sake of convenience.
- [38] The issue on sanction was whether the Hearing Tribunal should order a suspension, or whether the Hearing Tribunal should order cancellation. The Hearing Tribunal did not accept the Complaints Director's submission that Dr. Maritz's registration should be cancelled. The Hearing Tribunal erred in failing to consider that Dr. Maritz was successful on sanction, which took up a significant portion of the hearing. Where there is mixed success, the member should not bear the entire costs of the investigation and hearing.
- [39] Further, Ms. Prather noted that there was no evidence before the Hearing Tribunal regarding the quantum of costs. Information was provided to the parties after the Sanction Decision was issued, indicating that the total costs were approximately \$104,000.00. Accordingly, Dr. Maritz did not have an opportunity to make submissions regarding the reasonableness of the amounts incurred.
- [40] Some of the costs were associated with a judicial review application that had been commenced by Dr. Maritz to have an interim suspension imposed by the Complaints Director lifted. This matter was ultimately resolved on a consensual basis, and accordingly, the costs associated with the judicial review application should not be borne by Dr. Maritz.
- [41] Although Dr. Maritz agreed that he should bear some of the costs of the investigation and hearing (in the range of $\frac{1}{2} - \frac{2}{3}$), the Hearing Tribunal erred in ordering him to pay 100%

of the costs, given that he was largely successful with respect to the issue of sanction, and given his cooperation and admissions of unprofessional conduct on ¾ of allegations.

Submissions on Behalf of Complaints Director

- [42] Mr. Boyer indicated that there were very limited submissions on costs during the course of the hearing. Further, the total costs of the hearing were unknown at the time the parties made submissions on sanction, therefore it was not possible to address the reasonableness of the costs when the parties were making their submissions.
- [43] Mr. Boyer submitted that it was not inappropriate to consider the costs associated with the judicial review proceedings, since it was an unsuccessful attack on the integrity of the Complaints Director.
- [44] Nevertheless, the Complaints Director agreed that a costs order of 100% in this case was unreasonable, given that Dr. Maritz was successful on some of the issues, and given that the total costs were not known at the time.
- [45] Mr. Boyer submitted that although Dr. Maritz should not be ordered to pay 100% of the costs, he should be required to pay a “majority” of the costs arising from the investigation and hearing.

V. SUMMARY OF THE PANEL’S DECISION

- [46] The Panel carefully reviewed and considered the Hearing Tribunal decision, exhibits, transcripts, written submissions and case authorities of the parties and the oral submissions made at the appeal hearing.
- [47] The Panel has reviewed all the material and considered the submissions of the parties. The Panel has the jurisdiction under section 89(5) of the HPA to:
 - a. make any finding that, in its opinion, should have been made by the hearing tribunal,
 - b. quash, confirm or vary any finding or order of the hearing tribunal or substitute or make a finding or order of its own,
 - c. refer the matter back to the hearing tribunal to receive additional evidence for further consideration in accordance with any direction that the council may make, or
 - d. refer the matter to the hearings director to schedule it for rehearing before another hearing tribunal composed of persons who were not members of the hearing tribunal that heard the matter, to rehear the matter.
- [48] The Panel finds that the appropriate standard of review to be applied to the Sanction Decision is reasonableness. A decision will be reasonable if it falls within a range of possible acceptable outcomes that are defensible in terms of the facts and the law.

- [49] The Panel has reviewed the Sanction Decision and finds that the Hearing Tribunal's decision to impose an 18 month suspension on Dr. Maritz's practice permit, rather than order a cancellation of his registration and practice permit, was reasonable. Accordingly, the Complaints Director's appeal is denied.
- [50] The Panel has also considered the costs order imposed by the Hearing Tribunal. The Panel finds that the Hearing Tribunal's decision to order Dr. Maritz to pay 100% of the costs of the investigation and hearing was not reasonable. Dr. Maritz's appeal with respect to costs is therefore allowed.
- [51] The Panel's reasons are set out below.

VI. FINDINGS AND REASONS

Standard of Review

- [52] Both parties agreed that the Panel should apply the reasonableness standard of review to the Hearing Tribunal's decision with respect to costs. However, the parties disagreed with respect to the standard of review the Panel should apply to the Hearing Tribunal's decision to order a suspension of Dr. Maritz's practice permit, rather than cancellation.
- [53] The Panel carefully considered the submissions of the parties, and the legal authorities presented. The Panel finds that it should apply the reasonableness standard of review to the entirety of the Sanction Decision.
- [54] The Complaints Director submitted that the correctness standard of review should be applied to the Hearing Tribunal's decision to order a suspension rather than cancellation, since the nature of the issue was whether Dr. Maritz has the necessary good character and reputation to remain as a regulated member of the profession. The Complaints Director suggested that it is clear, based on the wording of the HPA, that the Panel is in a better position to assess whether Dr. Maritz is worthy of maintaining his membership in the College, as compared with the Hearing Tribunal. Accordingly, there is no reason to defer to the Hearing Tribunal's assessment of that aspect of the penalty imposed on Dr. Maritz, and the decision should be reviewed on a correctness standard.
- [55] The Panel notes that in the decisions cited in the Sanction Decision, Hearing Tribunals have previously ordered cancellation of a physician's registration. These cases provide precedent that Hearing Tribunals are capable of determining the appropriateness of this sanction. Further, the Panel does not agree that Council is in a better position to assess the appropriate penalty as compared with the Hearing Tribunal. Although the Panel are members of Council who have expertise in governing the College's affairs, including establishing entry-to-practice requirements and Standards of Practice applicable to the profession, Council has no particular expertise in assessing an applicant's or a member's suitability for membership on an individual basis. In fact, this is better assessed by a Hearing Tribunal, able to observe and assess the member and those witnesses making allegations against him/her during a hearing.

- [56] The Panel does not agree that the issue should be characterized in the manner suggested by the Complaints Director. The issue was not whether Dr. Maritz had the necessary good character and reputation to maintain his membership with the College. Rather, the issue was what orders the Hearing Tribunal should impose as a result of its findings, in order to adequately protect the public.
- [57] In Alberta, the courts have held that decisions regarding penalty should be afforded a significant amount of deference. This issue was considered recently by the Alberta Court of Appeal in *Zuk v. Alberta Dental Association and College*. In that case, the Appellant appealed the Hearing Tribunal's decision finding him guilty of unprofessional conduct, and the Hearing Tribunal's decision on penalty. Although the Appellant submitted that Council should review the Hearing Tribunal's decision based on the correctness standard, the Council rejected that argument and applied the reasonableness standard of review. The Alberta Court of Appeal confirmed that the Council correctly applied the reasonableness standard of review when considering Dr. Zuk's appeal.
- [58] The decision in *Zuk* is consistent with other decisions issued in the professional discipline context in Alberta, where internal appellate bodies have applied a "reasonableness" standard of review when considering appeals with respect to penalty.
- [59] Although in *Newton v. Criminal Trial Lawyers' Assn.*, the Alberta Court of Appeal noted a number of factors that ought to be considered to determine the internal standard of review, the Panel does not believe that it is necessary to consider the factors referred to in *Newton* (or to conduct a pragmatic and functional analysis as set out in *Dunsmuir*), given that the Alberta Court of Appeal has already specifically addressed this issue in the context of an appeal pursuant to the HPA.
- [60] Nevertheless, the factors referred to in *Newton* suggest the reasonableness standard is applicable in any event. As was the case in *Newton*, the respective roles of the Hearing Tribunal and the Panel, the nature of the question, the relevant statutory provisions, and the need to preserve the economy and integrity of the proceedings all suggest that Panel ought to apply the reasonableness standard of review.
- [61] The Panel does not agree that the scheme of the HPA suggests that the standard of review should be correctness, particularly given the role of the Hearing Tribunal as the decision-maker in the first instance, who had the benefit of hearing the evidence first-hand.
- [62] The Panel has specifically considered the authorities cited by the Complaints Director in support of the submission that the Panel should apply the correctness standard. Although in *Harding v. Law Society of British Columbia* the British Columbia Court of Appeal upheld the Law Society Review Board's decision to apply the correctness standard, there are differences between the HPA and the statutory scheme governing the Law Society in British Columbia. More importantly, the Court's decision in *Harding v. Law Society of British Columbia* is inconsistent with Alberta authority, including *Newton v. Criminal Trial Lawyers' Assn.* and *Zuk v. Alberta Dental Association and College*, which is binding on this Panel.

- [63] Accordingly, the Panel finds that it should apply the reasonableness standard of review when considering the issues raised in the appeal on behalf of the Complaints Director, and when considering the issues raised on the cross-appeal with respect to costs.
- [64] A decision will be reasonable if it falls within a range of possible acceptable outcomes that are defensible in terms of the facts and the law.

Decision to Order a Suspension Rather than Cancellation

- [65] During the course of the hearing, Mr. Boyer submitted, on behalf of the Complaints Director, that Dr. Maritz's conduct demonstrated a consistent pattern of disregarding the directions of the College. In particular, after Dr. Maritz was allowed back into practice in May of 2016, after signing an Undertaking, he breached the Undertaking by treating a patient outside the confines of the agreed parameters. The Complaints Director submitted that the proven facts demonstrated a long pattern of unprofessional conduct and deception, that Dr. Maritz was ungovernable, and that cancellation of his registration was warranted.
- [66] Ms. Prather submitted, on behalf of Dr. Maritz, that a period of suspension, rather than cancellation, was appropriate. Ms. Prather stated that the evidence of Dr. Gabbard, Dr. Sara and Ms. Hinton all established that Dr. Maritz was a low risk to commit future boundary violations. Moreover, she submitted that there was strong evidence that Dr. Maritz demonstrated remorse for his past conduct, and that there was insufficient evidence to suggest that he was ungovernable. Accordingly, Ms. Prather submitted that cancellation was not an appropriate sanction in this case.
- [67] The Hearing Tribunal considered the submissions of both parties. The Hearing Tribunal found that Dr. Maritz has shown significant remorse for his sexual boundary violations and intends to avoid similar conduct in the future. The Hearing Tribunal also found that Dr. Maritz is not ungovernable, as he has not demonstrated that he is incapable or unwilling to address or correct his behaviour. On that basis, the Hearing Tribunal found that cancellation of Dr. Maritz's registration was not warranted.
- [68] The Panel has carefully considered the Hearing Tribunal's decision and the submissions of the parties. The Hearing Tribunal had the advantage of hearing the testimony of the witnesses, including Dr. Maritz. After hearing the evidence of the witnesses, the Hearing Tribunal concluded that Dr. Maritz was not ungovernable. Although a regulated member can be found to be ungovernable even in the absence of a prior disciplinary history, the Panel has reviewed the evidence, and finds that the Hearing Tribunal's decision on this point is reasonable. Dr. Maritz admitted responsibility for Allegation #1, #2 and #3, and the evidence of Dr. Maritz and the other witnesses who testified confirmed that he was at a low risk to re-offend. In fact, both Dr. Caffaro and Dr. Beach confirmed that he was making good progress and complying with all treatment recommendations.
- [69] The Hearing Tribunal found that Dr. Maritz breached the restrictions on practice by providing treatment to Mr. S. Even though his actions constituted a breach of the Undertaking he voluntarily entered, this was also insufficient to suggest that he was ungovernable.

- [70] Given the Hearing Tribunal's finding that Dr. Maritz was not ungovernable, and given that he was at a low risk of re-offending, the Hearing Tribunal concluded that an 18 month suspension, together with the imposition of conditions on Dr. Maritz's practice permit, was sufficient to adequately protect the public. Accordingly, the Hearing Tribunal held that cancellation was not warranted.
- [71] Although the Panel does not believe that it is necessary for a member to have a prior disciplinary history in order to be found to be ungovernable, the Hearing Tribunal's finding that Dr. Maritz was not ungovernable in this particular case was reasonable, in light of the evidence that was considered.
- [72] In addition, the Panel does not believe that it is necessary to find that a regulated member is ungovernable before ordering cancellation. Even if a regulated member is not ungovernable, cancellation may still be appropriate and necessary to protect the public, depending on the nature and seriousness of the conduct, and other relevant factors.
- [73] Although the Panel finds that the Hearing Tribunal's decision to order an 18 month suspension, rather than cancellation, is reasonable, the Panel recognizes that society's tolerance and expectations regarding sexual boundary violations has changed considerably. These changes are reflected in Bill 21: *An Act to Protect Patients*. Effective April 1, 2019, regulated members who engage in a sexual relationship with a "patient" (as defined in the College's Standards of Practice) will be found to have committed "sexual abuse" and will face mandatory cancellation of their registration and practice permit.
- [74] Although pursuant to Bill 21, Dr. Maritz's registration and practice permit would be subject to mandatory cancellation, both parties agreed that Bill 21 is not in force and therefore is not applicable to Dr. Maritz. Accordingly, it would be a legal error to apply the mandatory cancellation provision to Dr. Maritz. Although not mandatory, it was still within the Hearing Tribunal's discretion to consider permanent revocation of Dr. Maritz's registration as an appropriate sanction, and this was specifically requested by the Complaints Director. However, the Hearing Tribunal decided not to order cancellation and instead ordered an 18 month suspension. The Panel must decide whether that decision was reasonable having regard to all of the circumstances.
- [75] The Panel notes that the Hearing Tribunal's decision is consistent with previous decisions where regulated members have committed boundary violations by engaging in sexual relationships with their patients. In the decisions cited, the orders imposed have consisted of suspensions, ranging from a period of 6 to 9 months. The 18 month suspension ordered by the Hearing Tribunal is greater than the period of suspension ordered in previous cases, which may be seen to reflect the changing attitude towards offences of this nature.
- [76] Although, given the nature of the conduct, and the change in societal expectations, as previously noted, the Hearing Tribunal could have reasonably concluded that cancellation of Dr. Maritz's practice permit was warranted, the Hearing Tribunal determined that cancellation was not appropriate in this particular case. The reasonableness standard of review recognizes that there is not one right answer. As long as the decision falls within

a range of acceptable responses, it will be reasonable. The decision to order an 18 month suspension, together with the imposition of additional conditions designed to protect the public, is reasonable.

- [77] Although the Panel finds that the decision is reasonable, the Panel did not agree with the suggestion that Dr. Maritz's transgressions were the result of the "human condition", or that his conduct was less serious because the relationships he entered into were "consensual". Due to the inherent power imbalance between a physician and their patient, it is not possible for a physician and a patient to enter into a truly consensual relationship. Accordingly, such relationships are inappropriate and are prohibited. The conduct at issue constitutes a serious ethical transgression, and an 18 month suspension, together with conditions, was fully warranted.

Decision to Order Dr. Maritz to Pay 100% of the Costs

- [78] During the course of the hearing, Mr. Boyer submitted on behalf of the Complaints Director that Dr. Maritz should pay 100% of the costs of the investigation and hearing. Since all of the charges were proven, Dr. Maritz should bear 100% of the costs.
- [79] Ms. Prather submitted to the Hearing Tribunal, on behalf of Dr. Maritz, that he should only be required to pay 50% of the costs. Ms. Prather submitted that he was incorrectly diagnosed as having a sex addiction in 2003, and this should be taken into account when assessing costs. In addition, she submitted that the Hearing Tribunal should consider the College's actions in failing to provide Dr. Maritz with notice before imposing an interim suspension on him. Additionally, Dr. Maritz had already suffered a significant financial burden as a result of the suspension he already served, and the fact that Dr. Maritz had admitted some of the conduct should be taken into account.
- [80] Although the Hearing Tribunal recognized that it has significant discretion with respect to costs, the Hearing Tribunal found that where a member is found guilty of unprofessional conduct with respect to all of the allegations before the Hearing Tribunal, it is appropriate for the member to bear 100% of the costs, unless mitigating factors are present. The Hearing Tribunal held that there was no reason to depart from that principle in this case.
- [81] During the course of the appeal, Ms. Prather provided the Panel with a copy of a document titled "College of Physicians and Surgeons of Alberta Complaint Expenses", which outlined costs of the hearing in the amount of \$104,038.00. Both parties confirmed that they did not have access to this information when making submissions on costs, and that this information was not presented to the Hearing Tribunal. The parties agreed that this was "new evidence" that should be put before the Panel for the purposes of the appeal.
- [82] While normally an appeal proceeds based on the record that was before the Hearing Tribunal, the Panel agreed that the costs information was relevant, and accepted the new information submitted with respect to costs.
- [83] The Panel then considered whether the Hearing Tribunal's decision to order Dr. Maritz to pay 100% of the costs was reasonable, in light of the new information.

- [84] Both parties submitted that the decision of the Hearing Tribunal on costs was unreasonable, although the parties did not agree on the amount of costs that should be ordered.
- [85] Although the Hearing Tribunal recognized that costs orders are discretionary, the Hearing Tribunal did not specifically consider all of the factors that are relevant when ordering costs, including those established by the Courts in decisions such as *C.K. v. College of Physical Therapists of Alberta*, and *Hills v. Nova Scotia (Provincial Dental Board)*. The factors that are relevant include:
1. The seriousness of the charges;
 2. The degree of success or failure;
 3. The conduct of the parties; and
 4. The reasonableness of the amounts.
- [86] The Panel notes that the Hearing Tribunal issued its decision with respect to costs without having any information provided regarding the amount of costs in issue. Although where the parties are in agreement with respect to costs, such information may not be required to be provided. Where there is a dispute regarding whether costs should be ordered or the amount of costs, it is necessary for the Hearing Tribunal and the parties to have access to information regarding the amount of costs at issue, in order to assess the reasonableness of the amounts.
- [87] In this case, information about costs was not provided to the parties or to the Hearing Tribunal. Accordingly, it was not possible for the Hearing Tribunal to properly assess the reasonableness of the amounts incurred. Where there is a dispute regarding costs, an estimate of costs should be provided to the parties and the Hearing Tribunal, so that the reasonableness of the amounts can be considered.
- [88] Having reviewed the costs information, Ms. Prather now submits on behalf of Dr. Maritz that the amounts incurred are not reasonable. In particular, the costs associated with an application for judicial review that was initiated by Dr. Maritz following the imposition of an interim suspension, but was ultimately lifted after an agreement with the Complaints Director was reached, should not be part of the overall assessment. Accordingly, costs in the amount of \$7,000 should be subtracted from the total amount of costs incurred by the College, and should not be assessed as part of the investigation and hearing costs.
- [89] Ms. Prather further submitted that, if the Complaints Director wished to pursue costs associated with that application, the appropriate venue to do so was in Court.
- [90] The Panel notes that the authority to order costs is found in s. 82 of the HPA. The Hearing Tribunal has broad latitude to order costs “related to the investigation, or hearing, or both.” The Panel finds that the costs associated with the judicial review application were related to the College’s investigation. Although the matter was ultimately resolved by agreement of the parties, the College is entitled to recover the costs associated with the application. The Panel does not believe it is appropriate to reduce the total amount of costs by \$7,000.

- [91] Although the Panel finds that, given the seriousness of the allegations, and the complexity of the issues, the amount of costs incurred was not unreasonable, the Panel finds that the Hearing Tribunal's decision to require Dr. Maritz to pay 100% of the costs was unreasonable. While the Panel agrees that members should bear a significant portion of the costs in most circumstances, each case must be looked at to determine whether a member should be responsible for all, none, or some of the costs.
- [92] Although Dr. Maritz was found guilty of all of the allegations, including Allegation #4 which he disputed, a significant portion of the time in the hearing was spent on the issue of sanction. For example, the witnesses called on behalf of Dr. Maritz were called primarily to provide evidence regarding whether he had been compliant with the restrictions on his practice permit, and to provide evidence regarding whether he was at risk to re-offend. This evidence was important and necessary, given that the Complaints Director was seeking cancellation.
- [93] Although all of the allegations against Dr. Maritz were proven, he was successful in his position that cancellation should not be ordered, which consumed a significant portion of the hearing. Given the mixed success of the parties, it is inappropriate for Dr. Maritz to bear responsibility for 100% of the costs of the hearing.
- [94] However, given the seriousness of the conduct, and the fact that it was Dr. Maritz's conduct that necessitated the hearing, the Panel believes that Dr. Maritz should bear a significant portion of the costs of the investigation and the hearing. The Panel believes that Dr. Maritz should pay 60% of the costs of the hearing, which would amount to a costs order of \$62,423.37.
- [95] Although the Panel recognizes that Dr. Maritz's financial position was impacted as a result of the suspension that he has already served, the Panel nevertheless believes that a significant costs order is warranted. Otherwise, members of the medical profession will ultimately bear the costs through the payment of their fees.
- [96] Moreover, the impact of the costs order can be mitigated, since the costs are payable pursuant to a payment schedule agreed to with the Complaints Director. Accordingly, the costs order is not seen by the Panel as excessive nor unmanageable by Dr. Maritz.

VII. ORDERS OF THE PANEL

- [97] The Panel hereby makes the following orders pursuant to section 89(5) of the HPA:
1. The Panel denies the Sanction Appeal, and affirms the Hearing Tribunal's decision to order that Dr. Maritz serve an 18 month suspension;
 2. The Panel allows Dr. Maritz's Costs Appeal, and varies the order of the Hearing Tribunal requiring Dr. Maritz to pay 100% of the costs of the investigation and hearing as follows:

- a) Dr. Maritz is hereby ordered to pay 60% of the costs of the investigation and hearing, in the amount of \$62,423.37. The terms of payment shall be at the discretion of the Complaints Director, acting reasonably.
- b) If there are any disputes regarding the terms of payment of costs, the matter may be remitted to a hearing tribunal for consideration.

Signed on behalf of the Panel this 20th day of March, 2019.

A handwritten signature in blue ink, appearing to read "John Bradley", is written above a horizontal line.

Dr. John SJ Bradley, Chair