COLLEGE OF PHYSICIANS & SURGEONS OF ALBERTA

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

AND IN THE MATTER OF A HEARING REGARDING
THE CONDUCT OF DR. VICTOR TAYE FADAYOMI

DECISION OF THE HEARING TRIBUNAL OF THE COLLEGE OF PHYSICIANS & SURGEONS OF ALBERTA REGARDING SANCTION FEBRUARY 12, 2025

I. INTRODUCTION

1. The Hearing Tribunal held a hearing on July 9 and September 26, 2024, to hear submissions on sanction for Dr. Victor Taye Fadayomi. The members of the Hearing Tribunal were:

   Dr. Don Yee as Chair (and physician member);
   Mr. Douglas Dawson (public member);
   Ms. Shelly Flint (public member).

   Ms. Mary Marshall acted as independent legal counsel for the Hearing Tribunal.

2. Also present were:

   Ms. Stacey McPeek, legal counsel for the Complaints Director;
   Dr. Victor Taye Fadayomi;
   Mr. Philip Nykyforuk and Ms. Emily McCartney, legal counsel for Dr. Fadayomi.

II. PRELIMINARY MATTERS

3. There were no objections to the composition of the Hearing Tribunal or the jurisdiction of the Hearing Tribunal to proceed with the hearing.

4. The hearing was open to the public pursuant to section 78 of the *Health Professions Act*, RSA 2000, c. H-7 ("HPA"). There was no application to close the hearing.

III. BACKGROUND

5. In a decision dated December 11, 2023 ("Merits Decision"), the Hearing Tribunal found that the following Allegation was factually proven and that the conduct constituted unprofessional conduct:

   1. On or about September 18, 2021, you touched the breast of one of the medical office staff, without her consent, which:
      a. contravenes the CMA Code of Ethics and Professionalism;
      b. contravenes the Standard of Practice: Boundary Violations: Sexual; and
      c. is conduct that harms the integrity of the medical profession.

6. In the Merits Decision, the Hearing Tribunal requested that the parties discuss timing and method of providing submissions on sanction to the Hearing Tribunal. The parties jointly determined that oral submissions on sanction would be provided to the Hearing Tribunal.

IV. EVIDENCE

7. The following Exhibits were entered into evidence during the sanction hearing:

Exhibit 2: Joint Submission Agreement dated February 2, 2024

Exhibit 3: Impact Statement Form of [redacted] dated July 1, 2024

8. Counsel for the Complaints Director filed the following materials:

a. Brief of Law Regarding Joint Submissions dated June 17, 2024;

b. Written Submission of the Complaints Director dated September 11, 2024, with attached decisions:

i. *College of Physicians & Surgeons of Alberta v. Ovueni*, dated December 20, 2021;

ii. *College of Physicians & Surgeons of Alberta v. Chakravaty*, dated February 25, 2018;

iii. *CPSO v. Baird*, 2017 ONCPSD 45;

iv. *CPSO v. Al Abdulmoshin*, 2018 ONCPSD 4;

v. *CPSO v. Abawi*, 2014 ONCPSD 10;

vi. *Ontario (College of Physicians and Surgeons of Ontario) v. Mourcos*, 2018 ONCPSD 11;

vii. *College of Nurses of Ontario v Phillips*, 2016 CanLII 105647 (ON CNO);

viii. *Law Society of Upper Canada v. Neinstein*, 85 OR (3d) 446, 2007 CanLII 8001 (ON SCDC);

ix. *College of Physicians and Surgeons of Ontario v. Peirovy*, 2018 ONCA 420;

x. *Criminal Code*, RSC 1985, c C-46;

xi. *Hawkins v. R.*, 2008 NBCA 40;

xii. *Stevens v. Law Society of Upper Canada*, 55 OR (2d) 405, 1979 CanLII 1749 (ON SC);

xiii. *Constable A v. Edmonton (Police Service)*, 2017 ABCA 38;

xiv. *Horri v. The College of Physicians and Surgeons*, 2018 ONSC 3193;

xv. *R. v. Kane*, 2012 NLCA 53;

xvi. *R. v. Ipeelee*, 2012 SCC 13;

xvii. *R. v. Lacasse*, 2015 SCC 64;

xviii. *Timothy Edward Bradley v. Ontario College of Teachers*, 2021 ONSC 2303;

xix. *Rault v. Law Society of Saskatchewan*, 2009 SKCA 81;

xx. *R. v. Anthony-Cook*, 2016 SCC 43.

9. Counsel for the Regulated Member filed the following materials:

a. Written Submissions of Dr. Victor Fadayomi dated September 11, 2024 with attached decisions:

i. *Law Society of Alberta v Shane Smith*, HE20190272, July 22, 2024;

ii. PROBE Flyer;

iii. CPEP 2023 Impact Report;

iv. Abrams, Linda et al. Halsbury's Laws of Canada - Civil Procedure (2021 Reissue) (Toronto, Ontario: LexisNexis®, 2021);

v. *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65;

vi. *R v Lund*, 2008 CarswellAlta 1761;

vii. CPSO Doctor Details – Dr. M. Al Abdulmohsin;

viii. *The College of Physicians and Surgeons of Nova Scotia v Ezema*, 2018 CanLII 105365;

ix. *Ontario (College of Physicians and Surgeons) v Mourcos*, 2018 ONCPSD 11;

x. *College of Nurses of Ontario v Deonerain*, 2019 CanLII 62870;

xi. *College of Nurses of Ontario v Phillips*, 2016 CanLII 105647;

xii. *Jaswal v. Newfoundland (Medical Board)*, 1996 CarswellNfld 32;

xiii. *Ghobrial v Ontario College of Pharmacists*, 2019 ONSC 4776.

V. SUBMISSIONS

10. There were no witnesses called by either party. The parties presented the Hearing Tribunal with a Joint Submission Agreement that was agreed to on February 2, 2024. The Joint Submission Agreement states as follows:

1. Dr. Fadayomi and the CPSA will present an agreed Exhibit Book to the Hearing Tribunal.

2. Dr. Fadayomi and the CPSA will make the following joint submission on the issue of sanction and ask the Hearing Tribunal to order that:

a. Dr. Fadayomi shall receive a reprimand, with the Hearing Tribunal's written decision serving as that reprimand;

b. Dr. Fadayomi's practice permit shall be suspended for a period of three months, of which two months shall be served by

Dr. Fadayomi and one month held in abeyance pending fulfillment of the remaining orders of the Hearing Tribunal;

c. Dr. Fadayomi shall, at his own expense, participate in and unconditionally pass the PROBE Course (or similar course acceptable to the Complaints Director) within one year of the date of the Hearing Tribunal sanctions decision; and

d. Dr. Fadayomi shall be responsible for 60% of the costs of the investigation and the hearing before the Hearing Tribunal;

   i. Dr. Fadayomi shall pay the costs to the CPSA in 24 equal monthly installments by post-dated cheques or pre-authorized payments beginning one month after the two-month period of active suspension is completed or on terms mutually agreed-to by the Complaints Director and Dr. Fadayomi.

11. The Hearing Tribunal heard oral submissions from the parties on July 9, 2024. Written submissions were filed by both parties on September 11, 2024. The Hearing Tribunal heard further oral submissions from the parties on September 26, 2024.

Submissions on Behalf of the Complaints Director on July 9, 2024

12. Ms. McPeek submitted that the hearing was a continuation of the merits hearing that was held on October 24-25, 2023. During the merits hearing, the Allegation against Dr. Fadayomi was proven and the Hearing Tribunal rendered its decision December 11, 2023. On the balance of probabilities, it was proven that on or about September 18, 2021, Dr. Fadayomi touched the breast of [redacted], one of his medical office staff, without her consent and that the proven conduct was unprofessional conduct as it breached the Code of Ethics as well as the Standard of Practice and was conduct that harms the integrity of the regulated profession.

13. Ms. McPeek presented the Joint Submission dated February 2, 2024. The proposed sanction consists of a reprimand, a three-month suspension with two months being served, and a requirement to unconditionally pass at his own expense the PROBE course within one year of the sanction decision. Dr. Fadayomi will also be responsible for 60% of the costs of the investigation and hearing.

14. Ms. McPeek reviewed the Brief of Law regarding Joint Submissions. She stated the test used when considering a joint submission is derived from *R. v Anthony-Cook*, a 2016 Supreme Court of Canada decision. In this case, the public interest test is outlined whereby a decision-maker should not depart from a joint submission unless the proposed penalty would bring the administration of justice into disrepute or otherwise be contrary to the public interest.

15. Ms. McPeek stated that ultimately the Hearing Tribunal's task is to decide whether the proposed penalty would be significantly egregious that the public would be shocked by such a penalty. She suggested that the decision in *Anthony-Cook* was clear that it is a very stringent test and a high test to meet. Part of this is because, for a joint submission to be possible, the parties need a high degree of confidence that they will be accepted. The parties know their circumstances; Dr. Fadayomi's counsel knows the circumstances of the member best and Ms. McPeek knows those of the Complaints Director. Both parties know the strengths and weaknesses of their positions.

16. Ms. McPeek noted that *Anthony-Cook* was a criminal case. However, this test has been applied in professional regulation. She referenced the *Bradley v Ontario College of Teachers* decision that confirmed that the public interest test applies to professional discipline matters such as this hearing.

17. Ms. McPeek stated if the Hearing Tribunal had concerns with the joint submission, there is clear guidance from the court about the approach a decision-maker should take in this situation. These concerns should be brought to the parties to allow them to make further submissions. Ultimately if the panel remains unsatisfied, the parties would be given the opportunity to withdraw the joint submission and proceed in a contested manner.

18. Ms. McPeek referred the Hearing Tribunal to [redacted]'s Impact Statement and read the following portion relating to the emotional and other impacts suffered by the complainant, as requested by the Complainant:

> *This took a lot of courage to make. Speaking up isn't easy and this brings up a memory of what I've been through.*
>
> *Everyday I live with fear. I am afraid to be alone, I find myself not knowing who to trust. I have lost my sense of safety in my own environment, which makes me feel vulnerable and fear that I will be assaulted again.*
>
> *Even after the incident, I was and I am still experiencing anxiety and having flashbacks. I am angry and don't know who to blame. I wish I fought him back, I wish I have prevented the assault, I didn't know what to do. I felt like I would be judged for speaking up so I kept it until i had the courage to tell my dad, my co-worker and the people surrounded me.*
>
> *I am trying my best to get through everyday life without the incident destroying my insides. Although not much has been done for justice, this is my story and still learning to grow with the past.*

19. Ms. McPeek submitted that the Hearing Tribunal should consider this Impact Statement when considering the proposed sanction.

20. Ms. McPeek submitted that the purposes of a sanction include to protect the public, ensure the public has confidence and trust in the profession, provide both general and specific deterrence, and provide rehabilitation for the member. Specifically she stated the Hearing Tribunal is tasked with sending an appropriate message to other regulated members of the profession that the conduct was unacceptable (i.e., general deterrence). The Hearing Tribunal is also tasked with expressing the profession's abhorrence of unprofessional conduct to ensure the public has confidence in the profession. The Hearing Tribunal also is to ensure that the sanction is proportionate to the conduct to prevent the member from allowing the conduct to recur (i.e., specific deterrence).

21. Ms. McPeek submitted that the specifics of the cases must be considered including any mitigating or aggravating factors. She used the 13 factors summarized in *Jaswal v. Newfoundland Medical Board* to consider the specifics of this case with respect to mitigating and aggravating factors. She identified several aggravating factors including:

    a. *Nature and gravity of the proven conduct*: Ms. McPeek submitted that Dr. Fadayomi's proven conduct satisfied the definition of "sexual abuse" in the Standard of Practice – Boundary Violations: Sexual in the context of a colleague or staff, which is inherently serious professional conduct. She noted that had the Complainant been a patient, the same conduct would warrant a mandatory sentence of revocation, so the proven conduct is very serious and that is an aggravating factor. Ms. McPeek noted portions from the Merits Decision including that "unwanted sexual touching [of the Complainant] is an egregious betrayal of the trust committed against an individual who he serves as an employer and manager".

    b. *Degree to which the conduct falls outside the range of permitted conduct*: Ms. McPeek noted portions of the Merits Decision that highlighted how far Dr. Fadayomi's proven conduct fell outside of the range of acceptable conduct. This was a "complete egregious departure from what would be considered treating someone with dignity and respect".

    c. *Age and mental condition of the Complainant*: Ms. McPeek noted that there is no suggestion that the Complainant had a mental condition. However, the Complainant is significantly younger than Dr. Fadayomi, and there was a power imbalance between them given the employer-employee relationship. She submitted that this is an aggravating factor on the basis that Dr. Fadayomi was taking advantage of a situation.

    d. *The impact of the incident on the Complainant:* Ms. McPeek pointed out portions of the Impact Statement that outlined the Complainant still lives in fear, experiences anxiety and has flashbacks. The Complainant stated she has lost her trust completely, even in herself, and lost her

sense of safety. The Complainant repeated that she has been traumatized by the conduct and ended up leaving her job. Ms. McPeek submitted that there has been a significant impact on the Complainant and that this should be considered an aggravating factor.

22. Ms. McPeek stated while the merits hearing was contested, Dr. Fadayomi has cooperated since the Merits Decision was rendered to reach a Joint Submission, and that this factor is slightly mitigating.

23. Ms. McPeek indicated the remaining *Jaswal* factors are largely neutral.

    a. *Age and experience of the offending physician:* Ms. McPeek submitted that the age and experience of Dr. Fadayomi should not be seen as mitigating. He is a senior physician with over 30 years of clinical experience. He has practised in Nigeria, South Africa, Australia and Canada. Dr. Fadayomi has been in Canada since 2002 and in Alberta since 2003, and he had ample opportunity to understand that this type of conduct is unacceptable in Canada and in Alberta. He is not of an age or a level of experience where he simply did not know better or needed guidance. There is never an age or a level of experience where sexual touching is appropriate, and this cannot be considered a mitigating factor.

    b. *Previous character of the physician and in particular the presence or absence of any prior complaints or convictions*: Dr. Fadayomi has no prior discipline history, and normally that would be seen as a mitigating factor. However, one should never have a prior complaint or conduct that meets the definition of "sexual abuse". In this situation a lack of a complaint is more neutral than mitigating.

    c. *The number of times the offence was proven to have occurred*: Ms. McPeek submitted that the fact that the proven conduct was a single occurrence should not be seen as a mitigating factor, as even a single incident of sexual touching is inappropriate.

    d. *Whether the offending physician had already suffered other serious financial and other penalties as a result of the allegation having been made*: Ms. McPeek is unaware of any financial impact on Dr. Fadayomi, but the proposed suspension and payment to attend the PROBE course will bring him financial consequences.

24. Ms. McPeek reviewed the cited case law. Dr. Ovueni was a 2021 CPSA case involving a boundary violation with a staff member. He received a reprimand, $3,000 fine, three-month suspension with two and a half held in abeyance pending no further boundary conditions received for five years, payment of 100 percent of the costs and mandatory unconditional pass of the PROBE course within 12 months. She stated this case is analogous to Dr. Fadayomi's in that it involved a boundary violation between a physician and staff member who was not a patient. A distinguishing factor is that the Dr. Ovueni

case involved an admission and joint submission agreement. Overall the proposed sanction in the Joint Submission reflects the sanction in the Dr. Ovueni decision. There is a longer suspension that must be served, but there is no fine.

25. Dr. Al Abdulmoshin was a 2018 decision from the CPSO. Dr. Al Abdulmoshin was charged with inappropriately touching two staff members and submitting inappropriate billings. He received a reprimand, a three-month suspension with no abeyance, a requirement to complete two ethics courses and payment of costs. Ms. McPeek stated this case was analogous as it involved inappropriate touching of staff members. However, it is distinguishable as there was an aspect of inappropriate billing, and the conduct involved two staff members, which was an aggravating factor not present in Dr. Fadayomi's case.

26. Dr. Baird was a 2017 Ontario case where he plead no contest to making inappropriate comments to a staff member. He received a reprimand, a two-month suspension, an ethics course requirement and coaching, reimbursement for patient counselling and costs. This case involved inappropriate comments directed at a staff member but was distinguishable in that Dr. Baird plead no contest, and it involved inappropriate comments to a patient in addition to those made to a staff member.

27. Dr. Abawi was a 2014 CPSO case involving a regulated member making sexual advances towards a nurse. There was an element of confinement. Dr. Abawi received a four-month suspension, a reprimand, practice conditions including monitoring and education and payment of costs of about $27,000.00. This case also featured unwanted and inappropriate sexual advances with a colleague, but it is distinguishable as there was an element of confinement in the proven conduct. This case was a contested hearing where the complainant's version was preferred and the conduct proven. The decision was followed by a joint submission.

28. When considering the *Jaswal* factors taken together, they emphasize the importance of specific and general deterrence with that need to promote rehabilitation. Ms. McPeek suggested that the reprimand and the suspension proposed will serve both the roles of specific and general deterrence.

29. Ms. McPeek submitted the proposed three-month suspension is on the high end of the range of suspension in similar cases cited. She stated that a suspension was the most significant sanction available apart from cancellation and that this will send a message both to Dr. Fadayomi as well as the medical community that the CPSA takes these types of issues seriously.

30. Ms. McPeek stated the PROBE course seeks to achieve the goal of rehabilitation. It is conducted over a weekend and is individually tailored to an individual's proven conduct so that they understand what happened and why it was unprofessional. There is a requirement of submission of an essay

to be graded, and the course comes at a significant financial cost to a participant.

31. With respect to costs, Ms. McPeek stated the *Jinnah* matter does not contemplate its application where there is a joint submission. She suggested that its principles have little application to this matter and therefore *Jinnah* has limited value here. She understands that recently there has been successful application to reconsider the *Jinnah* matter, which is an indication that the Court of Appeal intends to clarify aspects of this decision. She suggested that the Hearing Tribunal should exercise caution when considering its tenets in light of that.

32. Ms. McPeek submitted that even if the *Jinnah* decision is applied, this matter falls well within compelling reason number one to order costs, as the conduct is serious unprofessional conduct that the member ought to have known was inappropriate. Therefore, it is not unfair or unprincipled for Dr. Fadayomi to pay a portion of the costs.

33. Ms. McPeek reviewed other factors considered outside of *Jinnah* to determine costs. She referenced the factor set out in *Jaswal* regarding the degree of success in resisting the charges. The Complaints Director was successful in proving the single charge and all three particulars. She stated all witnesses who testified at the merits hearing were needed and that it was a relatively efficient use of the time. She stated even though it was a contested merits hearing, there is no indication that Dr. Fadayomi was uncooperative with the complaints process. At the same time no admissions were made. She reiterated she was unaware of any financial impact suffered by Dr. Fadayomi to date. Overall, the parties agreed that payment of 60% of the costs was appropriate in this circumstance with the costs being at approximately $55,000 to date. She stated the costs aspect is not intended to be punitive and also not meant to create a crushing blow for the individual.

34. To summarize, Ms. McPeek stated the parties are asking that the Hearing Tribunal accept the Joint Submission.

Submissions on Behalf of Dr. Fadayomi on July 9, 2024

35. Mr. Nykyforuk submitted that *Anthony-Cook* confirms the legal test for a decision-maker when considering a joint submission. This test is the public interest test that requires that the joint submission should only be rejected if it brings the administration of justice into disrepute or is contrary to the public interest, a very high standard. He explained that for joint submissions to be possible, the parties must have a high degree of confidence that the joint submission will be accepted. He stated subsequent case law makes clear that the Supreme Court's test in *Anthony-Cook* should be applied to disciplinary panels such as Hearing Tribunals in addition to courts. He pointed out that Hearing Tribunals of this College have consistently followed the Supreme Court of Canada's direction in *Anthony-Cook* when considering joint submissions.

36. Mr. Nykyforuk summarized that the relevant case law regarding joint submissions, including the case law in Ms. McPeek's brief, sets forth important principles relating to joint submissions. These include that joint submissions should be encouraged, are in the public interest and allow for avoidance of a lengthy hearing with increased costs. He stated certainty is an important element of the process.

37. Mr. Nykyforuk stated that Dr. Fadayomi fully accepts the December 11, 2023, decision of the Hearing Tribunal. Dr. Fadayomi graduated from medical school in Nigeria in 1991 and proceeded to complete a one-year internship in Nigeria and then practiced for five years in Nigeria. During this time, he had no regulatory complaints.

38. Dr. Fadayomi then practised in South Africa from 1997 to 2002 with no regulatory complaints. Following this he practised in Australia from April 2002 to December 2002 with no regulatory complaints. He has practised in Alberta since January 2003. This includes practising in northern Alberta from January 2003 to December 2007, followed by relocating his practice to Calgary in December 2007. He has consistently maintained his family medicine practice in Calgary during this time period and also worked as an ICU outreach physician at the Peter Lougheed Hospital from 2008 to 2012. He has also provided emergency room medicine services in rural hospitals through the Alberta Medical Association rural medicine locum program.

39. In total, Dr. Fadayomi has been a full-time physician in Alberta for over 21 years. During this time he has had no prior College complaints related to sexual misconduct or boundary violations. Mr. Nykyforuk stated that, as per the *Jaswal* Factor 3, this is a mitigating factor. He stated that since the complaint about Dr. Fadayomi was submitted November 3, 2021, there have been no further complaints submitted about him including any related to boundary violations.

40. Mr. Nykyforuk submitted that this demonstrates that the proven conduct is an isolated event and uncharacteristic for Dr. Fadayomi and that this period of subsequent conduct is a relevant factor in considering a relevant penalty.

41. Mr. Nykyforuk summarized that the proposed sanction in the Joint Submission consists of a reprimand, three-month suspension with two months served and one month held in abeyance. He stated Dr. Fadayomi would request that his suspension start August 1, 2024, to assist in ensuring continuity of care for his patients during his active suspension. To assist in personal insight, learning and improvement, Dr. Fadayomi must pass the PROBE course at his own expense within a year of the sanction decision. Mr. Nykyforuk described this course as an intensive three-day course with a significant registration fee. There are hundreds of pages of pre-course reading, requirement for in-class participation and interaction and submission of a minimum 1500-word essay. Certified ethics and professionalism coaches

evaluate the essay along with an individual's course performance to consider each participant for an unconditional pass.

42. Mr. Nykyforuk pointed out Dr. Fadayomi would be responsible for 60 percent of the costs of the investigation and hearing. He submitted that the sanction imposes significant consequences for Dr. Fadayomi, satisfies the goals of general and specific deterrence, and serves to maintain the public confidence in the integrity of the medical profession. He submitted that the proposed sanction and overall penalty are consistent with prior sanctions for similar boundary issues in Canada which he summarized as:

    a. Dr. Ovueni was a 2021 decision from a CPSA hearing involving unwanted touching of a medical office assistant. Dr. Ovueni received a three-month suspension with 2.5 months held in abeyance, and a requirement to pass the PROBE course.

    b. Dr. Al Abdulmoshin was a 2018 decision from a CPSO hearing involving intrusive touching of two nurses. Dr. Al Abdulmoshin received a three-month suspension, educational components, and payment of $16,500 in costs. This case was more severe as there were two separate touching incidents along with proven billing misconduct for personal gain.

    c. Dr. Abawi received a four-month suspension, but his proven conduct was arguably more egregious and included an element of confinement.

43. Mr. Nykyforuk stated that if the Joint Submission was accepted, Dr. Fadayomi would serve an active suspension of two months with no practice of medicine and during this time would experience a complete loss of his professional income while still incurring ongoing expenses to operate his clinic and pay his staff salaries.

44. Mr. Nykyforuk stated the financial consequences for Dr. Fadayomi are not insignificant as he would have to pay for the registration for the PROBE course and pay ongoing operational costs for his clinic while suspended from practice for two months. He submitted payment of 60 percent of the costs of the investigation and hearing is consistent with prior CPSA decisions.

45. Mr. Nykyforuk reiterated that there is no evidence of prior or subsequent similar offences committed by Dr. Fadayomi, that Dr. Fadayomi cooperated with the CPSA investigator, responded in writing in a timely manner, and cooperated with his interview. There is no evidence of hearing misconduct and while contested, the hearing was conducted in a cooperative and efficient manner.

46. Mr. Nykyforuk stated that thus far the costs are approximately $55,000.00, but this amount will increase from the sanction hearing. There are significant financial consequences for Dr. Fadayomi. He concluded that it is an accepted principle that the costs aspect of the sanction ought not be punitive, and that

the other sanctions imposed, including a period of suspension and other financial consequences, ought to be considered.

47. Mr. Nykyforuk submitted that the proposed penalty is reasonable, is in the public interest and protects the integrity of the medical profession and should therefore be accepted by the Hearing Tribunal.

Questions from the Hearing Tribunal

Is the public interest test from Anthony-Cook applicable when there has been a contested merits hearing?

48. Counsel for the Complaints Director submitted that the recent Saskatchewan Court of Appeal decision in *Xiao-Phillips v. Law Society of Saskatchewan,* 2024 SKCA 44 deals with case law that would tend to call into question the applicability of *Anthony-Cook* in these circumstances. The parties in *Xiao-Phillips* did not provide submissions on the applicability of a less stringent test, and the Saskatchewan Court of Appeal left the question of its applicability to a future appeal. Counsel for the Complaints Director submitted that there is no case law to suggest that there is a less stringent test based on *Anthony-Cook*, *Bradley,* and the previous line of cases.

49. Counsel for Dr. Fadayomi submitted that the Saskatchewan Court of Appeal expressly declined to consider whether a less stringent test may be applied in these circumstances. *Xiao-Phillips* represents a relatively rare situation where a hearing tribunal rejected a joint submission. There are far more situations where joint submissions are accepted as presented by both hearing tribunals and courts and are not subject to further review.

How was the Impact Statement from the Complainant taken into account when negotiating the Joint Submission when the Impact Statement was signed in July 2024 and the Joint Submission was signed in February 2024?

50. Counsel for the Complaints Director submitted that it would have been impossible to consider the Impact Statement when negotiating the Joint Submission because of timing. However, there was evidence about the impact on the Complainant when she gave extensive testimony at the merits hearing. Her feelings and what she had felt were not completely unknown in February 2024, and the Impact Statement was all very expected. The considerations regarding what the impact would be on the Complainant included evidence that the parties anticipated would be entered and has now been entered in this hearing.

51. Counsel for Dr. Fadayomi submitted that the Impact Statement was completely consistent with the Complainant's evidence at the merits hearing. An Impact Statement is not the controlling or dominant factor to be considered when arriving at a penalty and is merely one of the many factors to be taken into account.

52. Counsel for the Complaints Director further submitted that it would greatly impede the ability to start negotiations on sanction if they were obliged to wait for an impact statement.

This situation involves a breach of the Sexual Boundary Violation Standard that applies to patients and staff. How was this considered when determining the sanction?

53. Counsel for the Complaints Director submitted that there are aspects of the negotiation that are under settlement privilege. The definition of "sexual abuse" applies to conduct between a regulated member and a patient. The Hearing Tribunal found that Dr. Fadayomi's breach of the standard dealing with a sexual boundary violation was unprofessional conduct. The range of penalties in similar cases does not suggest cancellation. They do not suggest a lengthier suspension than four months.

54. Counsel for Dr. Fadayomi submitted that the facts of this case do not meet the definition of "sexual abuse" in the HPA. There is discretion afforded to both parties when negotiating a Joint Submission, and it is very important to refer to analogous cases. The Hearing Tribunal has been presented with a sample of four cases that counsel believe involve similar circumstances and these cases establish a range of penalties. The Joint Submission is neither at the low end nor the high end of the range. It cannot be a marked departure from the expectations of a reasonable member of the public if a sanction falls in the middle of a range established by previously decided cases.

Further Questions from the Hearing Tribunal

55. The Hearing Tribunal adjourned to consider the responses provided by the parties to the questions and then reconvened to advise the parties about the process going forward. The parties were advised that the Hearing Tribunal was not prepared to accept the Joint Submission at this time, although the Hearing Tribunal was not precluding acceptance. The Hearing Tribunal requested submissions from the parties regarding the following issues: details about the PROBE course; recent decisions from Alberta or other jurisdictions that are more similar to the one before the Hearing Tribunal; information about how the serious impact on the victim as set out in the Impact Statement has been taken into account for the proposed penalty; and information about the range of sanctions that are available for similar boundary violations. The hearing will be adjourned, and the parties will be given some time to prepare written and oral submissions. The Hearing Tribunal requested that written submissions be provided two weeks in advance of the resumption of the hearing.

VI. SEPTEMBER 26, 2024, RESUMPTION OF HEARING

56. The parties filed written submissions on September 11, 2024. The hearing resumed on September 26, 2024. Both parties made oral submissions.

Submissions on Behalf of the Complaints Director on September 26, 2024

57. Ms. McPeek summarized the purpose of the resumed sanction hearing is to determine the appropriate sanction. The proven charge is that on or about September 18, 2021, Dr. Fadayomi touched the breast of one of his medical office staff without her consent. The parties have reached an agreement on sanction, and Ms. McPeek summarized the details of the Joint Submission.

58. Ms. McPeek summarized her written submissions that address the questions the Hearing Tribunal had regarding details of the PROBE course, considerations made towards the Impact Statement when negotiating the Joint Submission, and other cases similar to Dr. Fadayomi's.

59. The PROBE course is a 16-hour program including a 2-hour evening session. The course involves discussion groups with assignments that are designed to probe into why the professional went astray and to understand how their conduct has affected others. The course is interactive and at the end, there is a final essay required where a participant reflects on what occurred and demonstrates that they understand the impact of their actions. The course is intensive and highly rated by participants and regulators. The pass rate is 70 to 72 percent for an unconditional pass.

60. Regarding the Impact Statement, Ms. McPeek submitted that there was evidence from the Complainant about the effect of the proven conduct at the merits hearing. The Hearing Tribunal's written decision also highlighted the effect on the Complainant. She pointed out that the parties did consider this effect as it represents one of the *Jaswal* factors but that the Complaints Director took all of the *Jaswal* factors into consideration when negotiating the Joint Submission.

61. While indicating there are no cases identical to Dr. Fadayomi’s, Ms. McPeek presented three additional cases that are similar but again do have their own distinguishing features. The *Chakravarty* decision involved touching of a medical student learner on more than one occasion and requesting the student sleep with Dr. Chakravarty. The result was a 6-month suspension, monitoring for five years, restrictions on being involved with any learners, and the full cost of a COAP assessment that was done to assess whether he could continue with the profession, and if so, how he could continue and comply with the recommendations in the COAP assessment. Dr. Chakravarty was also ordered to pay 75 percent of the costs. The distinguishing features of this case include there was a prior sexual boundary violation with two students that pre-dated the complaint, and the complaint was resolved by an admission and joint submission. Ms. McPeek stated that this sanction would represent the higher end of the range for similar cases.

62. The *Mourcos* case from Ontario involved touching of a medical receptionist with unclasping her bra, coaxing her into a massage, touching her breast during the massage, and then helping her clasp her bra back up without being asked to do so. Dr. Mourcos received a six-month suspension, a

reprimand, terms and conditions on his licence as well as costs. While this case also involved touching of a medical office assistant, the touching was more involved and involved a level of coercion not present in this case. The decision supports that the range of sanction is 2 to 6 months. This was a no-contest hearing, which meant that Dr. Mourcos did not contest the charges.

63. The *Phillips* decision involved a pattern of sexual harassment of various co-workers resulting in a reprimand, a five-month suspension, and terms and conditions on his registration. It is similar in that it involved co-workers under his supervision. The case is distinguishable because it is from nearly a decade prior to the current matter and involved five different co-workers. The case is also from a different profession.

64. Ms. McPeek cited the *Hawkins* decision. This is a New Brunswick Court of Appeal decision that indicated if cited case law is not identical, it does not diminish its value to a decision-maker. The focus of the Hearing Tribunal should be on whether a case provided appears less or more serious in comparison to the matter before them. Ms. McPeek submitted that if the Hearing Tribunal looks at a case and feels that it is less serious, that would inform what the lower range of the sanction should be. If the case is more serious, that would inform what the upper range would be. Ultimately the Hearing Tribunal will establish what the range of sanction is and order an appropriate sanction.

65. Ms. McPeek submitted that there is no dispute that a reprimand should be part of the sanction. There should be a remedial component, and the PROBE course accomplishes that. The cited case law suggests an appropriate suspension would fall in the range of two to six months. She indicated that the length of suspension seems to be the point of contention. On this point, the cited cases suggest a two- to six-month range of suspension. This and the guidance from *Anthony-Cook* suggests the proposed sanction is within that range. As such it is reasonable and should be accepted. She stated the parties do not believe it to be unhinged as such to warrant something beyond that.

Submissions on Behalf of Dr. Fadayomi on September 26, 2024

66. Mr. Nykyforuk highlighted specific details of the proposed PROBE course. He indicated the subject matter of the course is highly relevant to Dr. Fadayomi as it pertains to boundary violations, sexual misconduct, and respect violations. The tuition for the course would cost Dr. Fadayomi about $3,000 CDN. The course involves a 16-hour program including intensive small group sessions with pre- and post-program assignments. A final essay is graded and is expected to show the physician has an appropriate level of understanding of both the program content and the reasons giving rise to the referral. He pointed out that approximately 25 percent of participants will fail to obtain an unconditional pass final grade, showing that the course participants are scrutinized for their participation, performance, and insight.

The written submissions provide information directly from CPEP regarding the PROBE course.

67. Mr. Nykyforuk acknowledged that the Impact Statement was provided after the Joint Submission was negotiated but indicated its contents were well known and anticipated in advance of the Impact Statement being made available to the parties. He indicated the Impact Statement elaborates on feelings and issues that were already well-known to the parties. The Complainant had provided evidence about the effect of Dr. Fadayomi's conduct on her, including her fear and trauma. The Complainant's father also provided evidence to this point. Mr. Nykyforuk submitted that the Complainant's feelings were not disregarded in any way as the impact on the victim is one of the 13 *Jaswal* factors. He pointed out case law establishes that no particular factor or factors should get disproportionate weighting.

68. Mr. Nykyforuk indicated similar case authorities will always have unique features. He suggested the initial case authorities presented to the Tribunal are relevant and applicable. He indicated that professionals have a right to contest charges made against them without reprisal in the sanction phase, and the courts have established that a contested hearing is not an aggravating factor.

69. The Ontario Superior Court made clear in the *Ghobrial* case that it is an error of law for a discipline committee to characterize a contested hearing as an aggravating factor.

70. Mr. Nykyforuk indicated Dr. Al Abdulmoshin received a three-month suspension for repeated touching incidents. There was also an element of inappropriate OHIP billings. He elaborated on the nature of the touching in this case. There was no breast-touching, but the conduct occurred at least 20 times and did involve touching that was called intimate and inappropriate, as it did make both nurses feel very uncomfortable. The suspension related to the touching and inappropriate billing, and Mr. Nykyforuk indicated if the suspension were to address the touching only, it would have been less than three months.

71. Dr. Baird received a two-month suspension for making sexualized comments with no touching. Mr. Nykyforuk stated an aggravating feature of this case was that Dr. Baird was proven to have made sexualized comments towards a vulnerable patient within a year of making an inappropriate comment towards a nurse. He stated that the two-month suspension reflects the absence of physical touching.

72. Mr. Nykyforuk submitted the *Abawi* case was not out of date. The case is from 2014, but at that time the elements of confinement, intimidation and assault that were proven in this case were still considered inappropriate.

73. Mr. Nykyforuk summarized four additional case authorities provided in his written submission. The *Deonarain* case involved a registered nurse who

made sexualized comments toward and touched the breast and buttocks of a registered practical nurse co-worker under his supervision and received a suspension. He submitted this conduct was more severe than Dr. Fadayomi's.

74. Dr. Ezema was found to have sexually harassed a nurse and social worker. He made sexualized comments, held a nurse and ran his tongue on her bottom lip. Mr. Nykyforuk suggested running one's tongue along someone's lip without their consent is highly intrusive, potentially exchanges body fluids and has an element of confinement. This was not an isolated incident, as Dr. Ezema was found to have engaged in a persistent pattern of sexual harassment. Dr. Ezema received a four-month suspension, and Mr. Nykyforuk submitted that this conduct was more severe in nature and involved two co-workers.

75. The *Phillips* case involved a registered nurse who committed multiple acts of sexual misconduct and harassment over three years. The registered nurse received a five-month suspension. Mr. Nykyforuk submitted the proven conduct was more severe than Dr. Fadayomi's, as it involved multiple victims and multiple incidents committed over a prolonged period of time.

76. *Mourcos* was a CPSO case involving a physician who persuaded his young medical receptionist to allow him to give her a massage. The clinic was closed for the day. He brought the receptionist into an exam room and had her lay face down on the table. Dr. Marcous tried to put his hand inside the waistband of her pants. He put his hands inside of her shirt, unclasped her bra, and placed his fingers on the side and upper part of her right breast. He asked her to kiss him and leaned in to her. When she turned her head, Dr. Mourcos kissed her on the cheek. He asked her questions of an inappropriate sexual nature. The receptionist reported the incident to the police, left the clinic, and never returned. The hearing committee accepted a joint submission on penalty including a 6-month suspension. Mr. Nykyforuk submitted that this conduct was much more serious than Dr. Fadayomi's.

77. Mr. Nykyforuk submitted Dr. Chakravarty's proven conduct was more serious than Dr. Fadayomi's.

78. Mr. Nykyforuk submitted that the Hearing Tribunal now has nine cases to consider. These nine cases establish a range of suspension between two to six months. Some of these cases involve multiple victims and conduct that occurred over a lengthy period of time. In contrast, Dr. Fadayomi's case involved one victim and no previous pattern of similar conduct.

79. Mr. Nykyforuk stated the governing case regarding joint submissions is *Anthony-Cook* that provides the public interest test. Subsequent case law makes clear that the Supreme Court of Canada's test in *Anthony-Cook* should be also applied to disciplinary panels. He indicated this test should be applied to Hearing Tribunals, and the CPSA Hearing Tribunals have consistently followed the guidance from *Anthony-Cook*. He stated that *Xiao-Phillips* does not stand for the proposition that a more lenient test than *Anthony-Cook* can

be applied when the parties present a joint penalty recommendation after a contested merits hearing. The Saskatchewan Court of Appeal declined to comment, but the parties still agreed that *Anthony-Cook* applied. Nothing in *Xiao-Phillips* changes the applicability of *Anthony-Cook*.

80. Mr. Nykyforuk submitted that the decision of the Law Society of Alberta regarding Shane Smith shows the stringent nature of the *Anthony-Cook* test. In this decision the hearing committee determined that the range of time for a suspension was between 14 days to 45 days. The Law Society hearing committee made clear that if it were up to them, it would have imposed a much longer suspension. They concluded that a 14-day suspension did fall within the range and accepted the joint submission. The hearing committee concluded that it would not cause an informed and reasonable public to lose confidence.

Questions from the Hearing Tribunal

81. The Hearing Tribunal had received advice from independent legal counsel regarding the level of deference for joint submissions. The Hearing Tribunal requested submissions from the parties after advice from independent legal counsel was on the record. Ms. Marshall read legal advice she had provided to the Hearing Tribunal regarding the appropriate test for a joint submission on sanction that follows a contested merits hearing. She referred to the reasons set out in *Anthony-Cook* regarding why there needs to be a high degree of certainty that a joint submission will be accepted and concluded that many of these reasons do not apply when there has been a contested merits hearing. Her opinion was that the very high bar set out in *Anthony-Cook* and confirmed in *Bradley* may not need to be overcome. She referred the Hearing Tribunal to the decision of the *Law Society of Ontario v. McCallum*, 2024 ONLSTH 103, on CanLII, to illustrate the way that this works in practice when there has been a contested merits hearing and a joint submission on sanction:

> [4] *The parties submit that the "public interest" test applies and that we may only reject the joint penalty and costs submission if we conclude that the proposed penalty is so "unhinged" from the circumstances of the case that it must be rejected. The parties submit that this is the applicable test on the authority of Bradley v. Ontario College of Teachers, 2021 ONSC 2303. We disagree.*
>
> *[5] In Bradley, the Divisional Court applied R. v. Anthony-Cook, 2016 SCC 43, to the professional discipline context. Consistent with Bradley, the Tribunal has repeatedly accepted that Anthony-Cook applies in Tribunal proceedings.*
>
> *[6] However, Anthony-Cook addresses cases in which a joint penalty submission is made following a guilty plea or, in our context, an admission and resulting finding of professional misconduct: R. v. Nahanee, 2022 SCC 37 at para. 25.*

> *[7] In this case, there was no admission of professional misconduct. There was a contested merits hearing after which we found professional misconduct.*
>
> *[8] In submissions, the Lawyer acknowledged that Anthony-Cook is not directly applicable but submitted that the same logic and principles apply. We disagree.*
>
> *[9] In Nahanee, Justice Moldaver, writing for the majority of the Supreme Court of Canada, explained the rationale for Anthony-Cook as follows at para. 26:*
>
> > *This test sets a very high bar by design. It is meant to encourage agreement between the parties, which saves court time at sentencing. The test also incentivizes guilty pleas, sparing victims and the justice system the need for costly, time-consuming trials (Anthony-Cook, at paras. 35 and 40). Accused persons benefit because they have a very high degree of certainty that the sentence jointly proposed will be the sentence they receive; and the Crown benefits because it is assured of a guilty plea on terms it is prepared to accept (paras. 36-39). Both parties also benefit by not having to prepare for a trial or a contested sentencing hearing.*
>
> *[10] This rationale does not apply here as a merits hearing was not avoided because there was no admission of misconduct. The Law Society did not benefit by an admission of misconduct that it was prepared to accept. A "very high bar" was not required to provide sufficient comfort in negotiation that a joint penalty submission would likely be accepted, following an admission of misconduct that could not be withdrawn.*
>
> *[11] We reject the submission that the Anthony-Cook "public interest" test applies directly, or by analogy, where misconduct is found after a contested hearing and not as a result of an admission of misconduct.*
>
> *[12] However, we do acknowledge that the fact that there is a joint penalty submission should be taken into account. A joint penalty submission following a contested merits hearing carries weight, but the "very high bar" articulated in Anthony-Cook need not be overcome.*

Independent legal counsel also advised the Hearing Tribunal that if they intend to depart from a joint submission in these circumstances, they should notify the parties and give them an opportunity to comment on the penalty.

82. The Hearing Tribunal invited submissions from the parties regarding this advice.

83. Ms. McPeek submitted that the *McCallum* decision is from September 2024 and is a hearing tribunal decision from another jurisdiction. She stated it is not binding on this Hearing Tribunal, and there is currently no indication this decision has been tested by a court, and it is likely not to be tested as ultimately they did accept the joint submission. The panel in *McCallum* recognized the joint submission clearly had weight and was ultimately accepted by the panel.

84. Ms. McPeek submitted that *McCallum* may provide a test less than *Anthony-Cook,* but the Joint Submission still should be afforded weight. There is guidance from the Court of Appeal in several decisions including *Jinnah* that collaboration between regulators and regulated members is to be encouraged in the interest of administration of justice.

85. Ms. McPeek submitted that whatever test the Hearing Tribunal ultimately decides to apply, the parties have met it. Both parties have provided case law to help determine what the range of sanction is. The parties suggest that it provides clear guidance that a reprimand, three-month suspension, a remedial course and costs fall in that range. The case authorities establish a suspension range of two to six months, and the Joint Submission should not be rejected absent some sort of significant reason for doing so.

86. Mr. Nykyforuk acknowledged that the *McCallum* decision rejected *Anthony-Cook* but submitted it is important to consider the totality of the decision. The case involved a joint submission after a contested hearing. The joint submission was ultimately accepted, as the tribunal placed significant weight on the joint proposal.

87. Mr. Nykyforuk reviewed the Supreme Court of Canada decision in *Nahanee.* The issue in *Nahanee* was whether or not *Anthony-Cook* applied to contested sentencing hearing after a guilty plea. Here there was a guilty plea followed by a contested sentencing hearing. The Court held that *Anthony-Cook* and the test it articulated did not apply to a contested sentencing hearing.

88. The Hearing Tribunal advised the parties that it is considering a suspension of four months with one month held in abeyance and invited submissions from the parties on this point.

89. Ms. McPeek submitted that if the Hearing Tribunal is considering four months with one month held in abeyance, then three months is within the range of sanction. The Hearing Tribunal should accept the original Joint Submission as it falls within the reasonable range of sanction.

90. Mr. Nykyforuk stated a suspension of four months with one month held in abeyance falls within the range established by the case authorities. He stated that regardless of the application of *Anthony-Cook*, there is no dispute that a Joint Submission, even after a contested hearing, should be given careful consideration. This was made clear by the Law Society of Ontario tribunal in *McCallum*. The *McCallum* decision referred to the Law Society of Ontario

appeal panel decision in *Cooper.* This was a disciplinary hearing where the tribunal rejected a joint submission calling for a two-and-a-half-month suspension and imposed a four-month suspension. The decision was appealed. The appeal panel stated that a hearing panel should not tinker with a joint submission as long as it is not contrary to the public interest, by substituting another penalty that is also within a range of reasonableness.

91. Mr. Nykyforuk acknowledged that it has been clear that the Hearing Tribunal is contemplating a longer period of suspension, but the public interest in promoting joint submissions remains a primary consideration. Adjustments to a jointly submitted sanction within the range of reasonable outcomes deviates from this principle.

92. Mr. Nykyforuk respectfully pointed out that a three-month suspension with two months served and one month held in abeyance is not materially different and does not warrant disregarding a Joint Submission. Alternatively, if the Hearing Tribunal decides it is not going to accept the Joint Submission, he submitted that two months of the four-month suspension ought to be held in abeyance pending fulfillment of the other conditions imposed by the Hearing Tribunal.

VII. DECISION OF THE HEARING TRIBUNAL ON SANCTION

93. Following submissions the Hearing Tribunal adjourned to deliberate.

94. The Hearing Tribunal carefully considered the submissions of the parties. The Hearing Tribunal determined that it would not accept the Joint Submission presented by the parties for the reasons that follow.

VIII. REASONS AND FINDINGS OF THE HEARING TRIBUNAL ON PENALTY

95. The Hearing Tribunal first determined what considerations would apply when assessing the Joint Submission, and then applied those considerations to the proposed penalty in the Joint Submission.

Determination of Applicable Test

96. The Brief of Law on Joint Submissions submitted on behalf of the Complaints Director sets out the test for the assessment and rejection of joint submissions. The Supreme Court of Canada in *Anthony-Cook* examined different tests to measure the acceptability of the joint submission, including the fitness test and the public interest test. The Supreme Court of Canada concluded that the most stringent test, the public interest test, should apply to joint submissions. The public interest test as set out in *Anthony-Cook* has been applied to professional disciplinary decisions.

97. The Divisional Court of Ontario emphasized the stringent nature of the public interest test that applies to discipline panels that consider rejecting a joint submission in *Bradley*:

> ***13*** *In this case, the Discipline Committee referred to the Anthony-Cook decision as the guiding authority on the issue of whether it could reject the joint submission on penalty, but it misunderstood the stringent nature of the public interest test and thereby misapplied it. In particular, the Discipline Committee did not find that or articulate any basis for finding that serving the two month penalty in the summer was so "unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down".*
>
> *[…]*
>
> ***14*** *The public interest test in Anthony-Cook applies to disciplinary bodies. Any disciplinary body that rejects a joint submission on penalty must apply the public interest test and must show why the proposed penalty is so "unhinged" from the circumstances of the case that it must be rejected. In this case, the Discipline Committee clearly misunderstood the stringent public interest test, and impermissibly replaced the proposed penalty with its own view of a more fit penalty.*

98. There are sound reasons for the stringent nature of the public interest test and why there needs to be a high degree of certainty that a joint submission will be accepted. They have been articulated and examined in various decisions that have applied *Anthony-Cook* and *Bradley*.

- Joint submissions are a proper and necessary part of the system and benefit the administration of justice and all participants including the licensee, complainants, witnesses, and counsel.
- A joint submission helps the College as prosecutor and the public interest, since an admission makes a finding of misconduct certain. The prosecution avoids the risk that flaws in its case, such as weaknesses in witness testimony, the unwillingness of a witness to testify, or evidence that is not admissible will affect whether a finding is made.
- Witnesses and complainants may prefer to avoid the stress of testifying, and may appreciate the acknowledgement of responsibility that comes from an admission.
- The regulated member likely obtains a penalty that is more lenient than he or she might expect after a contested hearing. The costs and stress associated with contested hearings are minimized and certainty is maximized.
- Joint submissions play an essential role in saving the system time, resources and expenses.
- The College and member representatives are highly knowledgeable about the circumstances and the strengths and weaknesses of their respective positions. The College representatives put forward the public

interest and member representatives focus on their clients' interests. They are together well-placed and can be relied upon to arrive at a joint submission that reflects both interests.

99. The Hearing Tribunal carefully considered advice from independent legal counsel that the public interest test may not apply in the same way following a contested merits hearing. The Hearing Tribunal concluded that many of the reasons for the stringent nature of the public interest test do not apply here. The Complainant, her father, and her former co-workers were not able to avoid the stress of testifying. The merits hearing was conducted over two days: October 24 and 25, 2023. October 24, 2023, was required for the examination and cross-examination of the Complainant and her father, as well as Dr. Fadayomi. A portion of October 25, 2023, was required for the examination and cross-examination of staff members of the clinic. There was no admission to make the finding of unprofessional conduct certain. The Hearing Tribunal is not disputing that a regulated member has a right to contest the allegations and is simply noting that these reasons for the application of the public interest test do not apply here.

100. The Hearing Tribunal also considered recent case law from the Saskatchewan Court of Appeal in *Xiao-Phillips*. The Saskatchewan Court of Appeal stated that there is case law that would tend to call into question the applicability of the public interest test in a case like this one, when the parties have only presented their joint penalty recommendation after there has been a contested hearing on the merits. The *Xiao-Phillips* decision refers to a recent decision of the Alberta Court of Appeal which states that one of the essential components of an *Anthony-Cook* joint submission is that there must be a guilty plea. The Hearing Tribunal also considered a recent decision of the Law Society of Ontario in *McCallum* that applied *Anthony-Cook* and *Bradley* in a situation where there was a joint submission following a contested hearing. The tribunal in *McCallum* concluded that the rationale for the public interest test does not apply as a merits hearing was not avoided because there was no admission of misconduct. The Law Society did not benefit by an admission of misconduct that it was prepared to accept. A "very high bar" was not required to provide sufficient comfort that a joint penalty submission would likely be accepted following an admission of misconduct that could not be withdrawn.

101. The Hearing Tribunal agrees with submissions by counsel that the decision in *McCallum* does not form a binding precedent. However, it does illustrate how the decisions in *Anthony-Cook* and *Bradley* may be interpreted and applied following a contested hearing.

102. After considering all submissions and the case law, the Hearing Tribunal determined that the Joint Submission did not satisfy the public interest test. As such it was not necessary to determine whether a less stringent test applies. The Hearing Tribunal concluded that the proposed penalty was "so markedly out of line with the expectations of reasonable persons aware of

the circumstances of the case that they would view it as a breakdown in the proper functioning" of the College's professional discipline process.

Procedure Used by the Hearing Tribunal

103. The sanction hearing commenced on July 9, 2024. The Hearing Tribunal determined that it was not provided with sufficient information to do an assessment of the proposed sanctions in the Joint Submission and advised the parties that it required further information. Although the Joint Submission Agreement stated that the Hearing Tribunal would be provided with an Exhibit Book, the only exhibit provided to the Hearing Tribunal during the course of the hearing on July 9, 2024, was the Impact Statement dated July 1, 2024. There was no oral evidence.

104. The PROBE course was the only component of the Joint Submission that addressed remediation and rehabilitation. However, the information provided to the Hearing Tribunal in oral submissions on July 9, 2024, was insufficient to assess how the PROBE course would address remediation and rehabilitation in these particular circumstances. The Hearing Tribunal notes that there is an obligation to bring information and evidence forward to the Hearing Tribunal in order to assist with the assessment of the Joint Submission. In the criminal context *Anthony-Cook* provides that:

> *[54] Counsel should, of course, provide the court with a full account of the circumstances of the offender, the offence, and the joint submission without waiting for a specific request from the trial judge. As trial judges are obliged to depart only rarely from joint submissions, there is a "corollary obligation upon counsel" to ensure that they "amply justify their position on the facts of the case as presented in open court" (Martin Committee Report, at p. 329). Sentencing — including sentencing based on a joint submission — cannot be done in the dark. The Crown and the defence must "provide the trial judge not only with the proposed sentence, but with a full description of the facts relevant to the offender and the offence", in order to give the judge "a proper basis upon which to determine whether [the joint submission] should be accepted" (DeSousa, at para. 15; see also Sinclair, at para. 14).*
>
> *[57] A thorough justification of the joint submission also has an important public perception component. Unless counsel put the considerations underlying the joint submission on the record, "though justice may be done, it may not have the appearance of being done; the public may suspect, rightly or wrongly, that an impropriety has occurred" (C. C. Ruby, G. J. Chan and N. R. Hasan, Sentencing (8th ed. 2012), at p. 73).*

105. Similarly, there should be a thorough justification of any Joint Submission put before the Hearing Tribunal. Counsel for the Complaints Director submitted that aspects of the negotiations between counsel are subject to

settlement privilege. However, an assessment of sanctions by a Hearing Tribunal "cannot be done in the dark", and there must be sufficient information to give the Hearing Tribunal a proper basis to determine whether the Joint Submission should be accepted. As well, there is an important public perception component. The Hearing Tribunal notes that this is not a situation where the Joint Submission was signed just before the hearing. Instead, it was signed more than five months prior to the commencement of the sanction hearing, leaving sufficient time to put together an Exhibit Book for the Hearing Tribunal that included information about the PROBE course.

106. The only part of the proposed penalty that speaks to remediation and rehabilitation is the PROBE course. The Hearing Tribunal asked for further information about the PROBE course, and further information was contained in the Investigated Member's written submission dated September 11, 2024.

107. There is a mandatory minimum penalty for sexual abuse involving patients that is revocation of a physician's licence. Dr. Fadayomi's conduct does not involve a patient. However, a thorough justification of the Joint Submission is required to show why it is sufficient to protect the public.

108. *Xiao-Phillips* is a recent decision at the appellate level that sets out how questions about joint submissions should be brought forward during a hearing. The Hearing Tribunal considered submissions by the parties and the process outlined in *Xiao-Phillips* in order to allow the parties an opportunity to address the questions that it had about the Joint Submission submitted by the parties. The parties were given an opportunity to address the questions orally and in writing.

109. After assessing all of the further information provided by the parties in writing on September 11, 2024, and orally on September 26, 2024, the Hearing Tribunal informed the parties that it was considering a suspension of four months. The parties had an opportunity to provide further oral submissions at that stage. The Hearing Tribunal finds that this was a sufficient opportunity for the parties to be notified that the Hearing Tribunal had questions about the proposed penalty in the Joint Submission and to provide submissions.

Determination of Penalty

110. The Hearing Tribunal considered the thirteen factors set out in the *Jaswal* decision when determining the appropriate penalty.

1. The nature and gravity of the proven allegation:

The proven Allegation is that Dr. Fadayomi touched the breast of the Complainant without her consent. The conduct breaches the CPSA Standard of Practice pertaining to sexual boundary violations and satisfies the definition of sexual abuse in the Standard. The Hearing Tribunal found the Complainant's version of events credible and proven, which included that

Dr. Fadayomi intentionally touched her left breast with his hand and then walked away and said, "succulent breast" after the Complainant said, "what are you doing?" The Hearing Tribunal found that the unwanted sexual touching of the Complainant was an egregious betrayal of trust committed against an individual who Dr. Fadayomi serves as an employer and manager. This behaviour is at the serious end of the spectrum, and this is an aggravating factor.

2. The age and experience of the offending physician:

Dr. Fadayomi is a senior physician with over 30 years of clinical experience, and he had ample opportunity to understand that unwanted sexual touching is not appropriate. The Hearing Tribunal finds that this is an aggravating factor.

3. The previous character of the physician and in particular the presence or absence of any prior complaints or convictions:

Dr. Fadayomi has no prior discipline history. The Hearing Tribunal agrees with submissions by counsel for the Complaints Director that one should never have a prior complaint or conduct that meets the definition of "sexual abuse" and that this factor is neutral.

4. The age and mental condition of the Complainant:

The Complainant was a very young person who was just starting her first job as an MOA. It had been difficult for her to find work as an MOA, given her level of experience. Dr. Fadayomi is the owner and manager of the clinic, and any concerns went to Dr. Fadayomi. At the time of the incident the Complainant was still on probationary status three months into her first MOA job. The Hearing Tribunal found that the touching incident was an action borne out of perceived opportunity and exploitation of a clear power imbalance between a business owner and his most junior employee. The vulnerability of the Complainant in this situation is an aggravating factor.

5. The number of times the offence was proven to have occurred:

The Allegation relates to one instance. The Hearing Tribunal agrees with submissions on behalf of the Complaints Director that the fact that the proven conduct was a single occurrence should not be seen as a mitigating factor, as even a single incident of sexual touching is inappropriate.

6. The role of the physician in acknowledging what occurred:

The Hearing Tribunal finds that Dr. Fadayomi was entitled to contest the charges against him. This is a neutral factor.

7. Whether the offending physician had already suffered other serious financial or other penalties as a result of the Allegation having been made:

There was no evidence before the Hearing Tribunal that Dr. Fadayomi had suffered serious financial or other penalties. There will be financial implications in the future related to costs of the PROBE program and loss of income during the suspension.

8. The impact of the incident on the Complainant:

The Complainant provided testimony during the merits hearing describing her feelings of shock and trauma. She also testified that in the weeks after the touching incident she remained traumatized. The Impact Statement describes the long-term effects of the incident on the Complainant. She lives with fear every day and is afraid to be alone. The Complainant has lost her sense of safety, which makes her feel vulnerable and fearful that she will be assaulted again. The Complainant experiences anxiety and has flashbacks. She wishes that she would have fought back and that she could have prevented the assault. The incident occurred on September 18, 2021, and the Complainant's Impact Statement is dated July 4, 2024. It is clear that the incident has had a highly detrimental and significant long-term effect on the Complainant, and this is an aggravating factor.

9. The presence or absence of any mitigating circumstances:

The Hearing Tribunal is unaware of any additional mitigating circumstances.

10. The need to promote specific and general deterrence and, thereby, to protect the public and ensure the safe and proper practice of medicine:

The need for specific deterrence and to protect the public is a paramount consideration in this situation. This was an unexpected and intentional sexual touching in an isolated setting that has had significant long-term implications for a very young staff member. Dr. Fadayomi is the owner of the clinic with female staff members as medical office assistants. The decision of this Hearing Tribunal should act as both a specific and general deterrent for future similar conduct.

11. The need to maintain the public's confidence in the integrity of the medical profession:

In the Merits Decision the Hearing Tribunal found that that physicians have a place of trust and respect, and that the proven conduct harms the integrity of the medical profession.

12. The degree to which the offensive conduct that was found to have occurred was clearly regarded, by consensus, as being the type of conduct that would fall outside the range of permitted conduct:

The proven intentional and unwanted sexual touching was a completely egregious departure from what would be considered treating staff with

dignity and respect. This type of conduct clearly falls outside the range of permitted conduct, and this is an aggravating factor.

13. The range of sentence in similar cases:

In support of the proposed penalty in the Joint Submission, counsel for the Complaints Director cited four decisions during the hearing on July 9, 2024. The decision involving Dr. Ovueni is a decision of the CPSA Hearing Tribunal in 2021. The other three are decisions of the Discipline Committee of the College of Physicians and Surgeons of Ontario involving Dr. Abawi, Dr. Baird, and Dr. Al Abdulmoshin in 2014, 2017, and 2018 respectively.

111. Dr. Ovueni's hearing proceeded by way of an admission of unprofessional conduct and a joint submission on penalty. Dr. Ovueni agreed that he hugged and air-kissed one of the medical office staff without her consent on or about January 21, 2020. The medical office staff had complained about the conduct, and a further complaint was made by the clinic's lead physician. Dr. Ovueni had signed an undertaking requested by the College that included a requirement that he not work with singular female office staff. The Hearing Tribunal ordered that Dr. Ovueni shall receive a reprimand, and within 12 months provide evidence of an unconditional pass of the CPEP PROBE course. If Dr. Ovueni failed to satisfy the Complaints Director that he had received an unconditional pass within 12 months, his practice permit would be suspended until an unconditional pass was received. Dr. Ovueni was fined $3,000 and ordered to pay the full costs of the hearing. The Hearing Tribunal also imposed a period of suspension as follows:

> *d) Dr. Ovueni's practice permit shall be suspended for a period of 3 months, with*
>
> *i. 2 weeks to be served on dates acceptable to the Complaints Director and completed within 6 months of the date the Hearing Tribunal issues its written decision; and*
>
> *ii. 2.5 months held in abeyance on the condition that no further boundary concerns come to the attention of the Complaints Director and are referred to an investigation for a period of 5 years after the date the Hearing Tribunal issues its written decision.*
>
> *If further boundary concerns come to the attention of the Complaints Director and are referred to an investigation within 5 years from the date the Hearing Tribunal issues its written decision, the Complaints Director shall be at liberty to impose the remaining 2.5 months suspension on Dr. Ovueni's practice permit. If no further boundary concerns come to the attention of the Complaints Director and are referred to an investigation within 5 years from the date the Hearing Tribunal issues its written decision, the remaining 2.5-month suspension shall expire.*

112. The Hearing Tribunal found that although the period of suspension not held in abeyance was on the shorter side, the period of abeyance would lead to

Dr. Ovueni being under some probational elements for a period of the next five years, emphasizing the importance of deterrence and protection of the public. When considering the *Jaswal* factors and the mitigating circumstances, the Hearing Tribunal concluded that Dr. Ovueni admitted the allegation, cooperated with the College, signed the undertaking requested by the College prior to the hearing that included a requirement that he not work with singular female office staff, and sought counselling. Submissions on behalf of Dr. Ovueni were that he had engaged a therapist, as well as a psychiatrist, to understand the appropriate boundaries in the workplace and to ensure that the conduct would never take place again.

113. The Hearing Tribunal finds that Dr. Ovueni's conduct was less serious than Dr. Fadayomi's conduct. Dr. Ovueni hugged and air-kissed a medical office staff. Further, there are significant mitigating factors that are not present regarding Dr. Fadayomi.

114. Dr. Abawi was a general surgeon, and the complainant was a nurse at the same hospital. Dr. Abawi guided the nurse into a bathroom, blocked her exit, tried to hug and kiss her, and asked her if she wanted an affair. The decision stated as follows:

> *The Committee was unclear about Dr. Abawi's motivation for the misconduct. No prior history of similar behaviour was present, yet his actions were very aggressive, intimidating and he blamed the complainant for them. Because of the circumstances and the power and control inherent in the incident, the Committee paid particular attention to any residual risk the doctor may pose. The nature of the incident and the uncertainty regarding motivation were aggravating factors.*

115. Dr. Abawi received a reprimand; a four-month suspension of his certificate of registration; individualized instruction in professionalism and medical ethics by a College-approved instructor; workplace monitoring by a regulated health professional approved by the College for a minimum of 18 months until Dr. Abawi's conduct was deemed satisfactory; and regular reporting to the College by the practice monitor regarding Dr. Abawi's professionalism. The committee's decision stated as follows:

> *The Committee considers that the significant period of suspension of Dr. Abawi's certificate of registration and the significant monitoring period will serve as a specific deterrent to Dr. Abawi. The penalty will also serve as a general deterrent to others within the profession as an indication of what they may face if they engage in similar behaviour.*
>
> *The public will be protected in that Dr. Abawi is prevented from practicing for a period of time and will be monitored for a lengthy period of time. The Committee reviewed similar cases involving physicians who engaged in unprofessional and inappropriate sexual*

behaviour in the workplace and determined that the suspension of four months is in line with previous cases.

The reprimand part of the joint submission is appropriate and expresses the Committee's denunciation of Dr. Abawi's behaviour on behalf of the profession.

The education and monitoring part of the joint submission is also appropriate. The completion of the individualized instruction in professionalism and medical ethics should assist in Dr. Abawi's rehabilitation. Any residual risk issues will be addressed by a period of monitoring at his workplace to ensure that he maintains behaviour that is appropriate.

116. The Hearing Tribunal considers that Dr. Abawi's conduct was serious because of the element of confinement, and the decision provides a useful comparison regarding the period of suspension. The Hearing Tribunal also notes all of the steps that were taken to ensure protection of the public, including workplace monitoring for a lengthy period of time and regular reports to the College. There are no similar protections in the Joint Submission for Dr. Fadayomi.

117. While Dr. Al Abdulmoshin was a surgical resident, he placed his hands on the small of two nurses' backs. He also massaged a nurse's shoulders and caressed her wrist. Dr. Al Abdulmoshin also inappropriately submitted OHIP clinical billing during his residency program.

118. Dr. Al Abdulmoshin received a reprimand, a three-month suspension, individualized instruction in professionalism/ethics satisfactory to the College with an instructor selected by the College, and completion of a program on Understanding Boundaries in Managing the Risks Inherent in the Doctor-Patient Relationship.

119. The Hearing Tribunal found that Dr. Al Abdulmoshin's behaviour was less serious. It is also unclear what aspects of the penalty were related to OHIP billings. For these reasons, the Hearing Tribunal found that this decision was not helpful in assessing penalties applied in similar cases.

120. Similarly, the Hearing Tribunal found that the Discipline Committee decision regarding Dr. Baird was not a helpful comparison. Dr. Baird told a nurse in front of a patient and nursing staff: "Nurse A come and sit on my lap so that I can spank you." Dr. Baird's misconduct did not include touching of a sexual nature. The Hearing Tribunal found that the decision involving Dr. Baird does not help to establish the lower end of the range. The Hearing Tribunal rejects submissions that the *Baird* decision establishes that the range of sanctions begins at two months. There is a significant difference between making inappropriate remarks in a public setting and intentionally touching the breast of a vulnerable staff person in an isolated setting.

121. In response to questions from the Hearing Tribunal, the parties referred the Hearing Tribunal to five additional decisions. The decision involving

Dr. Chakravarty is a 2018 CPSA Hearing Tribunal decision. The decision involving Dr. Mourcos is a 2018 decision of the College of Physicians and Surgeons of Ontario. The decision involving Dr. Ezema is a 2017 decision of the College of Physicians and Surgeons of Nova Scotia. The *Phillips* and *Deonarian* decisions are 2016 and 2019 decisions of the College of Nurses of Ontario.

122. The 2016 decision of the College of Nurses of Ontario in *Phillips* involved a nurse sexually harassing a number of co-workers. The nurse had resigned his certificate of registration prior to the Discipline Committee decision. The penalty included a reprimand, a five-month suspension, meetings with a Nursing Expert within six months of the date of the order, and notice to future employers. The 2019 decision of the College of Nurses of Ontario in *Deonarain* involved a nurse making sexually harassing comments to a female co-worker and touching her breasts and buttocks while working in a long-term care home. The penalty included a reprimand, a five-month suspension, meetings with a Nursing Expert within six months of the date of the order, and notice to future employers.

123. In the CPSA decision involving Dr. Chakravarty, he admitted that he inappropriately touched [redacted] and requested that she sleep in a bed with him when he knew that she had been drinking alcohol and that she was a medical student. As part of the CPSA investigation Dr. Chakravarty underwent a Comprehensive Occupational Assessment Program (COAP). The penalty included a six-month suspension, a Continuing Care Agreement with the CPSA for at least five years that incorporated the recommendations in the COAP assessment report, and a restriction on Dr. Chakravarty's practice permit that he have neither academic oversight nor involvement with any learners until he had demonstrated that he was safe to be trusted in the role of instructor. The decision stated as follows the Continuing Care Agreement

> *5. The Continuing Care Agreement is to incorporate the recommendations set out in the December 14, 2018 COAP assessment report which include:*
>
> *a. A recommendation that Dr. Chakravarty not engage in a community based family medicine practice due to the relative lack of structure and more potential for miscommunication.*
>
> *b. A recommendation that Dr. Chakravarty engage in some intensive educational activities to assist him in addressing conditions where lapses in judgement could occur.*
>
> *c. A recommendation that Dr. Chakravarty have a workplace monitor and that consideration be given to conducting regular 360 degree evaluations so that Dr. Chakravarty is given direct feedback about his interactions and how he is perceived by others. The Tribunal considers the ongoing*

> *monitoring to be very important given the history and all the circumstances.*

124. The 2019 decision regarding Dr. Chakravarty involved a previous complaint of sexual boundary violations with interns in addition to the complaint that was under consideration. For those reasons the Hearing Tribunal has determined that the decision involves more serious conduct. The Hearing Tribunal notes the restrictions that were imposed in order to protect learners and members of the public, including workplace monitoring.

125. The 2018 decision of the Hearing Committee of the College of Physicians and Surgeons of Nova Scotia regarding Dr. Ezema involved inappropriate comments to colleagues, and putting his arms around a colleague and running his tongue along her bottom lip. The penalty was a four-month suspension, and Dr. Ezema was also ordered to pay costs in the amount of $75,000. The College requested that the hearing committee revoke Dr. Ezema's licence to reflect the seriousness of sexual harassment in the workplace, and the hearing committee's decision included the following observations:

> *Specific deterrence is an important consideration here. If we concluded that it was unlikely that a suspension would deter Dr. Ezema from repeating acts of professional misconduct, the College's requests for revocation of his license could be the appropriate disposition. If we were convinced that Dr. Ezema was unlikely to repeat his professional misconduct, a disposition other than revocation could be appropriate.*

126. The 2018 decision regarding Dr. Mourcos involved a situation where he persuaded his medical receptionist to allow him to give her a massage. His behaviour included placing his fingers on the side and upper part of her right breast, asking her to kiss him, and asking inappropriate questions. Dr. Mourcos pleaded no contest to the facts. The penalty included a six-month suspension, a reprimand, and workplace monitoring in all practice locations by a regulated health professional approved by the College for a minimum of two years with specific details of the monitoring outlined in the order. There were significant mitigating factors including that the plea of no contest and joint submission spared the complainant from testifying at a contested hearing, and that Dr. Mourcos voluntarily attended a boundaries course and underwent an individualized preceptorship in ethics and professionalism. The committee concluded that a six-month suspension sends a very strong message to the profession that boundary violations of this nature are completely unacceptable and will not be tolerated. The committee agreed with the imposition of "rigorous terms, conditions and limitations" on his certificate of registration, including the minimum of two years of monitoring to help ensure that the workplace conduct was not repeated.

> *The Committee notes that the proposed penalty takes into account present day societal concerns with respect to this type of professional misconduct. All employees are entitled to work in an environment that is free from harassment. Dr. Mourcos' professional misconduct was indeed very serious and demonstrated a significant lack of judgement. He exploited his position of power over a new young vulnerable employee. Today, there is an increasing sense in society that the public will no longer turn a blind eye and tolerate this sort of exploitation in the workplace.*

127. The Hearing Tribunal considers that this decision deals with similar conduct. In both cases the physician intentionally touched the breast of an employee. Both employees left their workplace as a result of the conduct. However there were significant mitigating factors that were not present for Dr. Fadayomi, including steps already taken by Dr. Mourcos to complete coursework and an individualized preceptorship in ethics and professionalism. The committee also imposed monitoring for at least two years to deter the conduct.

128. The Hearing Tribunal rejects the penalty proposed in the Joint Submission for the reasons that follow. First, the Hearing Tribunal rejects the approach suggested by counsel for the parties that the cases submitted for comparison purposes suggest a range of two months to six months for a suspension, and that the Hearing Tribunal must accept any Joint Submission that falls within that range. The Hearing Tribunal finds that the appropriate range for the suspension is four to six months. The Standard of Practice Boundary Violations: Sexual states as follows regarding staff members:

> *If a regulated member engages in the type of behaviour set out in the definition of sexual abuse or sexual misconduct with a person who is not his or her patient (such as colleagues, staff, or others) then this conduct may still be considered unprofessional conduct by the regulated member, but the mandatory sanctions for sexual abuse and sexual misconduct would not apply. If a Hearing Tribunal found that this conduct constituted unprofessional conduct, then a Hearing Tribunal would have the discretion to impose the type of orders that it considers appropriate up to and including suspension and cancellation of registration and practice permit.*

In this situation Dr. Fadayomi's behaviour involves intentionally touching the Complainant's breast and, as such, he engaged in the type of behaviour set out in the definition of sexual abuse. The Hearing Tribunal has determined that cases that deal with the type of behaviour set out in the definition of sexual abuse should be submitted and considered for comparison purposes.

129. Second, the monitoring components of many of the decisions cited by the parties support rehabilitation and remediation, have a specific deterrent effect on the member, provide general deterrence for the profession at large,

and protect the public including staff members. They also send a clear message to the public that this type of conduct will not be tolerated by the profession. There is no surveillance or monitoring proposed in the Joint Submission. The Hearing Tribunal finds that the lack of any monitoring makes comparisons to the other cases more complex because the Joint Submission is missing a key component that is found in other orders. Each aspect of the sanction should not be taken out of context. Decisions issued by other disciplinary bodies show how important the monitoring components were when they accepted the joint submission, including the length of the suspension.

130. The only part of the proposed penalty in the Joint Submission that speaks to remediation and rehabilitation is the PROBE course. The Hearing Tribunal asked for further information about the PROBE course, and further information was contained in the written submissions dated September 11, 2024. The Hearing Tribunal carefully reviewed the materials that were provided regarding the PROBE course. The Hearing Tribunal notes that it is an online program that is offered on the Zoom platform for 16 hours. The PROBE course is interdisciplinary and covers a variety of topics, including boundary violations. The goal of the PROBE course is set out as follows: "Intensive discussions and case analysis facilitate the participant 'probing' into their ethical misstep and recommitting to professional ideals". The Hearing Tribunal determined that the PROBE course was an appropriate part of the Joint Submission to address Dr. Fadayomi's rehabilitation. The Hearing Tribunal notes that there is no further monitoring or oversight after the member passes the course. As well Dr. Fadayomi is given one year to complete the PROBE course. As such, he will be practising for a significant period of time without having the benefit of remediation and rehabilitation provided by the PROBE course.

131. Third, the decisions cite significant mitigating factors that were taken into account when accepting a joint submission, such as course work already undertaken and counselling. Similar to the *Abawi* decision, this Hearing Tribunal is unclear about Dr. Fadayomi's motivation for the unprofessional conduct. His actions were aggressive and intimidating, and the Hearing Tribunal is concerned about the ongoing risk, especially with the lack of any monitoring.

132. Fourth, the impact on the Complainant is an aggravating factor. She was a very young person in a new role and job. This is not a situation where an employee had a human resources department to assist her. She was in a vulnerable position for many reasons. Counsel for the Complaints Director submitted that the parties were aware of the impact on [redacted] when they put forward the proposed penalty in the Joint Submission, and that the considerations regarding what the impact would be on the Complainant included evidence that the parties anticipated would be entered and was entered in the hearing. The Joint Submission was signed by the parties on February 2, 2024. The Impact Statement was signed by [redacted] on July 1, 2024.

The Impact Statement describes the long-lasting impact of Dr. Fadayomi's conduct in detail, and this information was not provided when [redacted] gave evidence on October 24, 2023. Although the impact on the Complainant is just one of the *Jaswal* factors, the Hearing Tribunal finds that there was insufficient consideration given to the extremely negative impact that this type of conduct has on the workplace, especially when a regulated member engages in the type of behaviour set out in the definition of sexual abuse.

133. When assessing the penalties in the decisions brought to the Hearing Tribunal's attention by the parties, the Hearing Tribunal notes that a number of them dealt with orders that were issued as a result of a joint submission. As noted in *Anthony-Cook* and subsequent decisions, the individual who makes an admission and joint submission may expect a lesser penalty. The decision in *R. v. Kane*, 2012 NLCA 53 provides helpful guidance and states as follows:

> *[29] However, this is not to say that a decision based on a joint submission is of no value for particular purposes. For example, a joint submission may be indicative of an appropriate range of sentence (R. v. Johnson, 2010 ABQB 546, at paragraph 28, appeal dismissed, 2010 ABCA 392, 265 C.C.C. (3d) 443, referenced in the Johnston decision at paragraph 58). Most often, the sentence will indicate the lower end of the range since the defendant would have no reason to accept a sentence that did not provide him with a quid pro quo for his agreement to forego a trial, plead guilty, and agree to a particular sentence. (See: R. v. Druken, 2006 NLCA 67, 261 Nfld. & P.E.I.R. 271, at paragraph 19.) Indeed, for this reason, a joint submission may, depending on the circumstances, fall below the lower end of the ordinary range. Such a sentence would be of little assistance. Nonetheless, sentences based on a joint submission may prove useful where the trial judge has provided reasons for accepting the submission, and in so doing gives valuable guidance for future courts. (See, for example, R. v. Bremner, 2005 NSSC 163, 234 N.S.R. (2d) 95.)*

134. As set out in this decision, the Hearing Tribunal has concluded that other disciplinary panels have given helpful reasons and guidance when considering the penalties that were imposed.

135. For these reasons the Hearing Tribunal concluded that the proposed penalty in the Joint Submission was so markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a breakdown in the proper functioning of the College's professional discipline process.

136. Although the Hearing Tribunal rejected the proposed penalty in the Joint Submission, it was influential in deciding what would be an appropriate penalty. If not for the Joint Submission, the Hearing Tribunal would have imposed a longer period of suspension and would have considered six

months to be more in line with the *Jaswal* factors and the aggravating factors at issue in this decision.

137. The Hearing Tribunal finds that a reprimand is appropriate and that Dr. Fadayomi should bear a portion of the costs.

138. Finally, in this situation the Hearing Tribunal has a reasonable belief that a criminal offence has been committed in accordance with section 80(2) of the HPA. Although the Complainant has already reported this matter to the police, the Hearing Tribunal has an obligation under section 80(2). In accordance with section 80(2) of the HPA, the Hearing Tribunal hereby directs the Hearings Director to send a copy of the written decision under section 83 to the Minister of Justice and to send a copy of the record of the hearing, if requested by the Minister of Justice.

IX. ORDERS

139. The Hearing Tribunal hereby orders pursuant to section 82 of the HPA:

a. Dr. Fadayomi shall receive a reprimand, with the Hearing Tribunal's written decision serving as that reprimand;

b. Dr. Fadayomi's practice permit shall be suspended for a period of four months, of which three months should be served by Dr. Fadayomi and one month held in abeyance pending fulfillment of the remaining orders of the Hearing Tribunal;

c. Dr. Fadayomi shall, at his own expense, participate in and unconditionally pass the PROBE Course (or similar course acceptable to the Complaints Director) within one year of the date of the Hearing Tribunal sanctions decision; and

d. Dr. Fadayomi shall be responsible for 60% of the costs of the investigation and the hearing before the Hearing Tribunal;

   i. Dr. Fadayomi shall pay the costs to the CPSA in 24 equal monthly installments by post-dated cheques or pre-authorized payments beginning one month after the three-month period of active suspension is completed or on terms mutually agreed to by the Complaints Director and Dr. Fadayomi.

Signed on behalf of the Hearing Tribunal by the Chair:

Dr. Don Yee

Dated this 12th day of February, 2025.