

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

IN THE MATTER OF AN APPEAL FROM THE DECISION OF THE HEARING TRIBUNAL  
OF THE COLLEGE OF PHYSICIANS AND SURGEONS OF ALBERTA  
DATED APRIL 15, 2019  
REGARDING DR. DAVID ODUGBEMI

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

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An appeal was held before a Council Review Panel (the “**Panel**”) of the College of Physicians & Surgeons of Alberta (the “**CPSA**”) on October 4, 2019 at the offices of the CPSA in Edmonton, Alberta. In attendance were:

Council members:  
 Dr. Luke Savage (Chair)  
 Dr. Tarek Motan  
 Dr. Pauline Alakija  
 Ms. Stacey Strilchuk, Public Member  
 Ms. Levonne Louie, Public Member

Also in attendance were:  
 Mr. Craig Boyer, legal counsel for the Complaints Director of the CPSA  
 Dr. David Odugbemi, Applicant  
 Ms. Tari Hiebert, legal counsel for Dr. Odugbemi  
 Ms. Marie Dussault, legal counsel for Dr. Odugbemi  
 Ms. Julie Gagnon, independent legal counsel to the Panel

A former summer student from Ms. Hiebert and Ms. Dussault’s office and a student-at-law from Ms. Gagnon’s office were also present as observers.

[1] The appeal was conducted in accordance with sections 87 and 89 of the *Health Professions Act*, RSA 2000, c H-7 (“**HPA**”). The appeal is with respect to the Hearing Tribunal’s decisions dated November 22, 2018, and April 15, 2019.

## **I. PRELIMINARY MATTERS**

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

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

1. Request for appeal from Dr. Odugbemi dated May 9, 2019;
2. Hearing Materials as follows:
  - a. Adjournment Decision dated January 24, 2018;
  - b. Decision regarding charges dated November 22, 2018;
  - c. Sanction decision dated April 15, 2019;
  - d. Transcript dated January 19, 2018;
  - e. Transcript dated June 25 and 26, 2018;
  - f. Exhibits 1 to 44.

3. Written Submissions on behalf of Dr. David Odugbemi received August 23, 2019 enclosing:

- Tab A: Notice of Hearing to Dr. David Odugbemi dated October 25, 2017;
- Tab B: Decision of the Hearing Tribunal of the College of Physicians and Surgeons of Alberta dated November 22, 2018;
- Tab C: Decision of the Hearing Tribunal of the College of Physicians and Surgeons of Alberta Concerning Sanctions dated April 15, 2019;
- Tab D: Letter from Dr. Susan Ulan to Dr. David Odugbemi dated April 16, 2019;
- Tab E: Terms of Resolution Agreement between Dr. David Odugbemi and Dr. Owen Heisler, Complaints Director, dated February 27, 2015 with attachments;
- Tab F: Letter from Dr. Owen Heisler to Dr. David Odugbemi dated April 1, 2014;
- Tab G: Affidavit of Elizabeth Iverson sworn on August 23, 2019 with attached exhibits;
- Tab H: Letter from Dr. Odugbemi to the Deputy Registrar dated April 24, 2016;
- Tab I: Spreadsheet of CPSA Physician Discipline Committee sanction decisions.

Book of Authorities:

- 1-69 Summaries of 68 cases also addressed in the spreadsheet at Tab I;
- 70. *Torbey v College of Physicians and Surgeons of Alberta*, 2018 ABCA 285;
- 71. *Dunsmuir v New Brunswick*, 2008 SCC 9;
- 72. *Palmer v The Queen*, [1980] 1 SCR 759, 106 DLR (3d) 212;
- 73. *Health Professions Act*, RSA 2000, c H-7;
- 74. *Physicians, Surgeons and Osteopaths Professional Regulation*, Alta Reg 350/2009;
- 75. *McKee v College of Psychologists of British Columbia* (1994), 116 DLR (4th) 555, 47 BCAC 189 (BC CA);
- 76. James T Casey, *The Regulation of Professions in Canada*, loose-leaf (Toronto: Thomson Reuters, 2016);
- 77. *College of Physicians and Surgeons of Saskatchewan v Ali*, 2016 SKQB 42;
- 78. *Ahluwalia v College of Physicians and Surgeons of Manitoba*, 2017 MBCA 15;
- 79. *Litchfield v College of Physicians and Surgeons (Alberta)*, 2008 ABCA 164;
- 80. *Jaswal v Newfoundland (Medical Board)* (1990), 138 Nfld & PEIR 181, 42 Admin LR (2d) 233 (Nfld Sup Ct (TD));
- 81. *College of Physicians and Surgeons of Ontario v Porter* (2003), 174 OAC 126 (Ont SC (TD)).

4. Written Submissions on behalf of the Complaints Director dated September 20, 2019, enclosing:

- Tab 1: *Arabian Muslim Association v The Canadian Islamic Centre*, [2006] AJ No 507;
- Tab 2: *Dechant v Law Society of Alberta*, [2000] AJ No 1163;
- Tab 3: *Hoffinger v Law Society of Alberta*, [2010] AJ No 1194;
- Tab 4: *Torbey v College of Physicians and Surgeons of Alberta*, [2018] AJ No 1053;
- Tab 5: *Nelson v Alberta Association of Registered Nurses*, [2005] AJ No 821;
- Tab 6: *MM v College of Alberta Psychologists*, [2011] AJ No 368;
- Tab 7: *College of Physical Therapists of Alberta v JH*, [2010] AJ No 1186;
- Tab 8: *College of Physicians & Surgeons of Alberta v Ali*, [2017] AJ No 1419;
- Tab 9: *Dunsmuir v New Brunswick*, [2008] 1 SCR 190;
- Tab 10: *Health Professions Act*, RSA 2000 Chapter H-7, Section 3(1)(a);
- Tab 11: *Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, [2019] OJ 2515;
- Tab 12: *Pearlman v Manitoba Law Society Judicial Committee*, [1991] 2 SCR 869;
- Tab 13: *Law Society of New Brunswick v Ryan*, [2003] 1 SCR 247;
- Tab 14: *Fang v College of Physicians and Surgeons of Alberta*, [1985] AJ No 1080;
- Tab 15: *Lameman v Alberta*, [2012] AJ No 180;
- Tab 16: *College of Physicians and Surgeons of Saskatchewan v Ali*, [2016] SJ No. 56;
- Tab 17: *Ahluwalia v College of Physicians and Surgeons of Manitoba*, [2017] MJ No 25;
- Tab 18: *Litchfield v College of Physicians and Surgeons (Alberta)*, [2008] AJ No 482;
- Tab 19: *Toy v Edmonton (City) Police Service*, [2018] AJ No 101; and
- Tab 20: *Health Profession Act*, RSA 2000, Chapter H-7, section 82(1)(j).

5. Further submissions on behalf of Dr. Odugbemi including:

- Letter from Ms. Tari Hiebert to the Hearings Director dated October 3, 2019;
- Affidavit of Nikki Ebberts sworn October 3, 2019 with attached exhibit, a redacted report titled “Odugbemi, David VCAP Evaluation Report” dated September 20, 2019;
- Excerpts of the *Health Professions Act*, RSA 2000, c H-7;
- Excerpts of the Decision of the Hearing Tribunal of the College of Physicians and Surgeons of Alberta in the matter of Dr. Brian McAlpine;
- *Burkosky v Grey Goose Corp*, 1999 ABQB 183, 248 AR 236.

- [4] In addition, the Panel reviewed an unredacted copy of “Odugbemi, David VCAP Evaluation Report” dated September 20, 2019 presented by Dr. Odugbemi’s counsel during the course of the hearing.
- [5] Dr. David Odugbemi had two preliminary applications to put before the Panel. Although in his written submissions of October 3, 2019, he advanced three preliminary applications, at the in person hearing, he withdrew the application to close the appeal for the application to introduce new evidence because no members of the public were present, and proceeded only with the following two applications:
- a. To introduce new evidence;
  - b. If the first application to introduce new evidence is granted, to adjourn the appeal hearing, on a without costs basis, to allow for further [REDACTED] testing of Dr. Odugbemi.

## II. BACKGROUND

- [6] Dr. Odugbemi appeals the decision of the Hearing Tribunal finding that he is an ungovernable physician and sanctioning him by cancelling his registration and practice permit with the CPSA and ordering him to pay 100% of the costs of the investigation and hearing.
- [7] Dr. Odugbemi has been a registered member of the CPSA since December 1, 2004.
- [8] The Complaints Director opened five complaints against Dr. Odugbemi between August 4, 2013 and February 20, 2014 following complaints by fellow physicians and members of the public. Four additional complaints were received during this period, but were resolved without reference to the formal discipline process.
- [9] On February 27, 2015, Dr. Odugbemi signed a Terms of Resolution Agreement (“TORA”) with the Complaints Director. The TORA required Dr. Odugbemi to undertake a number of steps to address the CPSA’s concerns including that he:
- a. attend for an assessment as determined in consultation with the Assistant Registrar Wellness and comply with reasonable recommendations arising from the assessment;
  - b. pay costs as agreed under the Terms of Resolution;
  - c. pursue further education acceptable to the CPSA relating to weight loss programs and provide a report to the CPSA within 3 months of the date of the TORA including written approval from a dietician who is acceptable to the CPSA;
  - d. improve the quality of his charting;
  - e. improve the quality of his care provided to patients for chronic disease management; and
  - f. limit clinical work hours to a maximum of 50 patients per day; and no more than 250 patients per week.

- [10] The Complaints Director issued a Notice of Hearing on October 25, 2017 setting out a charge that Dr. Odugbemi had demonstrated a pattern of ungovernable behaviour by failing to fulfil the terms of the TORA.
- [11] The Hearing was set for December 15, 2017, but was adjourned to January 19, 2018 as Dr. Odugbemi was out of the country and to give him time to retain counsel.
- [12] At the hearing on January 19, 2018, Dr. Odugbemi was granted a second adjournment to retain and instruct counsel. The Hearing Tribunal directed the hearing to continue on June 25 to 27, 2018, regardless of whether or not Dr. Odugbemi had retained counsel.
- [13] The hearing proceeded on June 25 and 26, 2018 and the Hearing Tribunal issued a written decision on November 22, 2018 finding that Dr. Odugbemi's conduct was unprofessional and that he demonstrated aspects of ungovernable behaviour.
- [14] Following this decision, the Hearing Tribunal invited submissions on sanction, and issued a sanction decision on April 15, 2019 that cancelled his practice permit and registration, and directed Dr. Odugbemi to pay for the costs of the investigation and hearing.

### **III. GROUNDS OF APPEAL**

- [15] Dr. Odugbemi raises two issues in his appeal, as follows:
- a. First, was the Hearing Tribunal's determination that Dr. Odugbemi is "ungovernable" reasonable?
  - b. Second, was the sanction imposed, being permanent cancellation of his registration and practice permit and 100% costs of the investigation and hearing reasonable?
- [16] However, in submission to the Panel, the parties addressed only the preliminary issues as follows:
- a. Dr. Odugbemi's application to introduce new evidence;
  - b. Dr. Odugbemi's application to adjourn the appeal hearing to allow for further [REDACTED] testing of Dr. Odugbemi.

### **IV. PARTIES' SUBMISSIONS**

#### **Submissions of the Applicant**

- [17] In relation to Dr. Odugbemi's preliminary applications, Ms. Hiebert advised the Panel that when she was retained, it was clear that Dr. Odugbemi had not complied with the requirements of the TORA.

- [18] As the facility mentioned in the TORA no longer exists in the same form, Ms. Hiebert engaged with the CPSA to determine another facility that would meet the requirements of the TORA.
- [19] Dr. Odugbemi attended at the Vanderbilt University Comprehensive Assessment Program (“Vanderbilt”) for evaluation on August 19 and 20, 2019. Ms. Hiebert received the Vanderbilt report on September 20, 2019. A redacted copy of the Vanderbilt report was provided to the Panel in advance of the appeal.
- [20] The Vanderbilt report indicated [REDACTED] issues that prompted Dr. Odugbemi to voluntarily withdraw from practice effective September 30, 2019, in consultation with the Assistant Registrar, Physician Health Monitoring Program, pending further analysis and more comprehensive evaluation.
- [21] Ms. Hiebert submitted that the report from Vanderbilt on Dr. Odugbemi’s [REDACTED] [REDACTED] and information on further testing would meet the test for new evidence as set out in *Palmer v The Queen*, [1980] 1 SCR 759 at 775, 106 DLR (3d) 212 [Palmer].
- [22] The first Palmer criteria is that evidence should not generally be admitted if, by due diligence, it could have been adduced at the hearing. Ms. Hiebert acknowledged that if Dr. Odugbemi had undergone the testing as required by the TORA, he would not be making this application. However, she argued that based on the preliminary Vanderbilt results, it appeared that Dr. Odugbemi might not have been able to comply with the TORA, until he had counsel to assist him.
- [23] Under the second Palmer criteria, the proposed evidence must bear upon a decisive or potentially decisive issue in the hearing. Ms. Hiebert argued that the Vanderbilt report fulfills this requirement. Ms. Hiebert argued that the Panel needs to know whether Dr. Odugbemi is ungovernable and the results of the Vanderbilt report and further assessment could bear on the issue. She argued that further testing is important both to understand Dr. Odugbemi’s past conduct, as well as to determine whether he will ever be able to return to practice. Ms. Hiebert noted that the accompanying application for adjournment would allow Dr. Odugbemi to undergo the additional testing recommended by the Vanderbilt report and required by the CPSA.
- [24] Under the third branch of the Palmer test, the evidence must be credible in the sense that it is reasonably capable of belief. Ms. Hiebert argued that the Vanderbilt report was obtained through a referral by [REDACTED]. She argued that the evidence is credible in the sense that it was organized through normal channels and in conjunction with the CPSA itself.
- [25] The fourth branch of the Palmer test is whether the evidence, if believed, could, when considered with the other evidence adduced at the hearing, be expected to have affected the result. Ms. Hiebert argued that the preliminary report indicates [REDACTED] issues that potentially affect Dr. Odugbemi’s ability to comply with the TORA.

## Submissions of the Complaints Director

- [26] On behalf of the Complaints Director, Mr. Boyer agreed that the Palmer test was the appropriate analysis to determine if new evidence should be admitted, but asked the Panel to keep a number of issues in mind.
- [27] Regarding whether the evidence in question could not, with due diligence, have been obtained earlier, Mr. Boyer asked the Panel to consider why Dr. Odugbemi did not follow the requirements of the TORA even though he signed it.
- [28] However, in fairness to Dr. Odugbemi, Mr. Boyer also directed the Panel to certain provisions of the HPA. Specifically, s 89(3) of the HPA indicates that certain sections of the HPA apply to proceedings before an appeal panel. One of these sections is s 79(5), which indicates that the rules of evidence do not apply to appeal panels and that the Panel may receive evidence in any way it sees fit. He argued that in this context, Palmer is a guideline, but not proscriptive.
- [29] Mr. Boyer argued that the redacted report presented to the Panel is insufficient for the Panel to make a determination. He argued that decision makers decide the weight and relevance of a document as a whole, not based on excerpts.
- [30] Mr. Boyer acknowledged that the Panel could order the matter to go back before the Hearing Tribunal, but that the hearing would then only consider the issue of sanction, as that is the only issue on appeal.
- [31] If the Panel were to refer the matter back to the Hearing Tribunal, Mr. Boyer asked that the Panel keep a fairness component in mind, and allow the Complaints Director to challenge the evidence. One area of challenge would relate to the limited documentary records provided to the Vanderbilt assessment team. Mr. Boyer noted that typically the CPSA Registrar would provide a fulsome documentary record to a team assessing a doctor, and Mr. Boyer argued that the report before the Panel did not refer to relevant documents, such as the TORA.
- [32] Mr. Boyer argued that the Panel could not send the matter back for reconsideration based on the redacted report available. He argued that both the Panel and the Complaints Director needed to view the whole report. Only with the unredacted Vanderbilt report could the Panel decide whether to accept the report and send the matter back to the Hearing Tribunal on the issue of sanction. The Hearing Tribunal could then consider further evidence on the issue of sanction and determine if Dr. Odugbemi's [REDACTED] issues played a role in the behaviour that led to the finding that Dr. Odugbemi was ungovernable four and a half years previously.
- [33] Mr. Boyer submitted that there were many factors for the Panel to consider, including that the Complaints Director has an obligation to protect the public. Mr. Boyer submitted that the Panel and the Hearing Tribunal need the evidence to be properly tested, and need a full and objective record.



- [34] Mr. Boyer suggested that perhaps the best practical outcome would be to direct the matter back to the Hearing Tribunal, but with a full, unredacted copy of the Vanderbilt report.

### **Reply Submissions of the Applicant**

- [35] In reply, Ms. Hiebert commented on the quality of the documentation that went to Vanderbilt in preparing the report. She argued that the CPSA, in the form of the [REDACTED], had input on the information and questions that went to Vanderbilt.
- [36] Ms. Hiebert disagreed that the Panel required the entire Vanderbilt report to decide the next steps. She argued that the unredacted portion of the Vanderbilt report was sufficient to show that further testing was required.

### **Questions from the Panel**

- [37] After discussion in camera, the Panel confirmed with the parties that Dr. Odugbemi had indeed withdrawn from practice, effective the week of September 30, 2019, as confirmed by a letter from Dr. Jeremy Beach, Assistant Registrar, Physician Health Monitoring Program.
- [38] The Panel also asked the parties for their submission on whether, if the Panel accepted the new evidence, the HPA compelled the Panel to return the matter to the Hearing Tribunal.
- [39] On behalf of the Complaints Director, Mr. Boyer submitted that although the HPA does not compel this course of action, it would appear to be the practical option. Mr. Boyer submitted that if further evidence was called, and witnesses were required, the best forum for this would be the Hearing Tribunal. In addition, the Hearing Tribunal is best positioned to consider issues like deficits in the evidence and how to address them.
- [40] On behalf of Dr. Odugbemi, Ms. Hiebert agreed that the HPA does not make it completely clear whether new evidence requires the matter to go back to the Hearing Tribunal. She submitted that this decision was in the discretion of the Panel.
- [41] The Panel also asked the parties if the Complaints Director has to be made aware of all the new evidence, even if the matter is not returned to the Hearing Tribunal.
- [42] Mr. Boyer submitted that in fairness, both sides would need to know the evidence so that they could properly respond to it.
- [43] Ms. Hiebert agreed and provided an update as to Dr. Odugbemi's position, in that he had now consented to provide the unredacted Vanderbilt report to the Panel.

- [44] Legal counsel to the Panel advised that her advice to the Panel had been that even if the HPA contained no specific provision, both parties should be provided with all the evidence.
- [45] The Panel again returned to an in-camera discussion to consider the unredacted Vanderbilt report.
- [46] When the Panel returned with a proposed order, the parties were given a chance to speak to it, but had no further comment.
- [47] Both parties were also given the chance to speak to the timing of a return to the Hearing Tribunal for reconsideration, and agreed that six months would be reasonable.

## V. SUMMARY OF THE PANEL'S DECISION

- [48] The Panel carefully reviewed and considered the Hearing Tribunal decision, exhibits, transcripts, written submissions and case authorities of the parties and the oral submissions made at the appeal hearing
- [49] The Panel has reviewed all the material and considered the submissions of the parties. The Panel has the jurisdiction under the HPA as follows. Under HPA section 89(4) to:
- a. grant adjournments of the proceedings or reserve the determination of the matters before it for a future meeting of the council but no adjournment may be granted without the consent of the investigated person if that person's practice permit is suspended or cancelled;
  - b. on hearing an application for leave to introduce new evidence, direct the hearing tribunal that held the hearing to hear that evidence and to reconsider its decision and quash, confirm or vary the decision; and
  - c. draw inferences of fact and make a determination or finding that, in its opinion, should have been made by the hearing tribunal.
- [50] The Panel also has the authority under HPA section 89(5) to:
- a. make any finding that, in its opinion, should have been made by the hearing tribunal;
  - b. quash, confirm, or vary any finding or order of the hearing tribunal or substitute or make a finding or order of its own;
  - c. refer the matter back to the hearing tribunal to receive additional evidence for further consideration in accordance with any direction that the council may make; or
  - d. refer the matter to the hearings director to schedule it for rehearing before another hearing tribunal composed of persons who were not members of the hearing tribunal that heard the matter, to rehear the matter.

[51] The Panel has decided to refer the matter back to the original Hearing Tribunal for reconsideration in light of the new evidence to be adduced.

## **VI. FINDINGS AND REASONS**

[52] The Panel reviewed the full, unredacted Vanderbilt report and accepted the submissions of the Applicant regarding the Palmer test for the admission of new evidence.

[53] Regarding the first Palmer consideration, the Panel found that based on the preliminary results in the Vanderbilt report, it was reasonable to find that Dr. Odugbemi's [REDACTED] situation might have prevented him from complying with the requirements of the TORA. Therefore, even with due diligence, it is possible that Dr. Odugbemi could not have put this evidence before the Hearing Tribunal.

[54] Regarding the second Palmer factor, the Panel found that the Vanderbilt report and results from additional testing may be relevant in the sense that it may speak to decisive issues addressed by the Hearing Tribunal.

[55] Addressing the third branch of the Palmer test, the Panel found that the evidence is credible in the sense that it is reasonably capable of belief because the CPSA was involved in selecting an acceptable institution to conduct the testing.

[56] Under the fourth branch of the Palmer test, the Panel found that, when considered with the other evidence adduced at the hearing, the unredacted Vanderbilt report and further testing could be expected to have affected the result of the Hearing Tribunal's finding that Dr. Odugbemi is ungovernable and the sanction and costs imposed.

[57] Therefore, the Panel accepted the new evidence and directed that the matter go back to the original Hearing Tribunal for reconsideration.

## **VII. ORDERS OF THE PANEL**

[58] For all the above reasons, the Panel makes the following order:

1. The Panel has reviewed the additional information and is allowing the Appellant's application to introduce fresh evidence.
2. The Panel directs the matter back to the Hearing Tribunal who initially heard and decided this matter, pursuant to section 89(5)(c) of the HPA, to be heard within six months from the date of this written decision, with the provision that this deadline can be adjusted by agreement between the parties.
3. The Panel directs that the unredacted Vanderbilt report be provided to the Hearing Tribunal along with any further information arising from further testing done pursuant to the Vanderbilt Report. The Complaints Director will have the

opportunity to present new evidence to the Hearing Tribunal in response to the new evidence provided by the Appellant.

## VIII. COSTS

### Submissions

- [59] On behalf of Dr. Odugbemi, Ms. Hiebert submitted that there ought to be no costs awarded against him.
- [60] Although it was gracious of the Panel to admit the evidence, and she appreciated that everyone had to convene to make this decision, Ms. Hiebert submitted that there is a concern that Dr. Odugbemi's career will be at an end and she was anxious to reduce costs.
- [61] Mr. Boyer submitted that some recognition ought to be given to the circumstances, Dr. Odugbemi launched the appeal and the Complaints Director was responsible for preparing submissions and filing materials. He argued that there were costs to responding to the appeal and the applications, which Dr. Odugbemi had only raised a day earlier, and that some responsibility for these costs properly rested with Dr. Odugbemi.

### Findings on Costs

- [62] The Panel considered the submissions of both parties and found that because Dr. Odugbemi had largely been successful in his applications before the Panel, there ought to be some recognition of that success.
- [63] The Panel also considered that Dr. Odugbemi had withdrawn from practice and was therefore not earning his professional income.
- [64] However, the Panel also found that Dr. Odugbemi had been late in providing information to the Panel for its consideration. The first notification provided to the Complaints Director and the Panel about these new submissions was late in the process. The Complaints Director incurred costs in preparing for the full appeal, including preparing written submissions. Therefore, the Panel found it appropriate that Dr. Odugbemi should bear some responsibility in costs for the preparation and proceedings of the appeal.
- [65] Therefore, the Panel directs that Dr. Odugbemi shall pay fifty percent (50%) of the costs of this appeal hearing up to a maximum of \$7,500.00.

Signed on behalf of the Panel this 21<sup>st</sup> day of November, 2019.



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Dr. Luke Savage, Chair