

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

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

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

[1] An appeal was held before a panel of the Council Review Panel (“the Panel”) of the College of Physicians & Surgeons of Alberta (the “College”) on October 5, 2021, via ZOOM. In attendance were:

Council members:

Dr. Louis Hugo Francescutti of Edmonton as Chair
Dr. Richard Buckley of Calgary
Dr. James Arthur Stone of Calgary
Ms. Linda McFarlane of Canmore
Ms. Levonne Louie of Calgary and
Mr. M. Tyler White of Siksika

Also in attendance were:

Mr. Craig Boyer, legal counsel for the Complaints Director
Dr. Keith Martin, investigated person
Ms. Barbara Stratton and Mr. Matthew Riskin, legal counsel for
Dr. Keith Martin
Ms. Mary Marshall, independent legal counsel to the Panel

[2] The appeal was conducted in accordance with sections 87 and 89 of the *Health Professions Act* (“HPA”). The appeal is with respect to the Hearing Tribunal’s decision dated February 25, 2021.

I. PRELIMINARY MATTERS

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

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

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

1. Decision of Hearing Tribunal dated February 25, 2021
2. Notice of Appeal dated March 24, 2021
3. Record of Hearing dated June 3, 2021, including the following documents:
 - a. Transcript dated December 9, 2020 (**page 1-247 of the Record**)
 - b. Transcript dated December 10, 2020 (**page 248-472 of the Record**)
 - c. Transcript dated December 18, 2020 (**page 473-556 of the Record**)
 - d. Exhibit Book Index (**page 557 of the Record**)

- e. Exhibit Book dated March 9, 2020:
- Exhibit 1a: Notice of Hearing dated January 31, 2020, Complaint Reporting Form from Patient A dated May 9, 2018, Dr. Keith Martin letter to College of Physicians & Surgeons of Alberta, Ms. Katherine Damron, dated September 12, 2018, Slave Lake Healthcare Centre, Ms. Connie Schmidt, letter to College of Physicians & Surgeons of Alberta, Katherine Damron, enclosing emergency records dated August 22, 2018 (**page 558-560 of the Record**)
 - Exhibit 1b: Complaint Reporting Form from Patient A dated May 9, 2018 (**page 561-565 of the Record**)
 - Exhibit 1c: Dr. Keith Martin letter to College of Physicians & Surgeons of Alberta, Ms. Katherine Damron, dated September 12, 2018 (**page 566-568 of the Record**)
 - Exhibit 1d: Slave Lake Healthcare Centre, Ms. Connie Schmidt, letter to College of Physicians & Surgeons of Alberta, Katherine Damron, enclosing emergency records dated August 22, 2018 (**page 569-586 of the Record**)
 - Exhibit 2: Written Statement of Nurse Freda Silvius, dated May 24, 2018 (**page 587 of the Record**)
 - Exhibit 3: Code of Ethics and Standards of Practice dated June 18, 2008 Published by the College of Licensed Practical Nurses of Alberta (**page 588-591 of the Record**)
 - Exhibit 4: Alberta Health Services Corporate Directive, dated May 28, 2012, Keeping Patients Safe from Abuse (**page 592-595 of the Record**)
 - Exhibit 5: Written Statement of Nurse Carolyn Sloat, dated May 19, 2018 (**page 596-597 of the Record**)
 - Exhibit 6: Curriculum of Kathy Sinclair (**page 598-603 of the Record**)
 - Exhibit 7: Expert Report of Kathy Sinclair, dated August 17, 2019 (**page 604-606 of the Record**)

Exhibit 8: Written Statement of Nurse Caroline Garratt,
Undated (**page 607 of the Record**)

4. Written Appeal Submissions of the Complaints Director dated August 24, 2021, including List of Authorities:
 - Tab 1: *Yee v. Chartered Professional Accountants of Alberta*, 2020 ABCA 98;
<https://www.canlii.org/en/ab/abca/doc/2020/2020abca98/2020abca98.html>
 - Tab 2: *Braile v. Calgary (City) Police Service*, 2018 ABCA 109;
<https://www.canlii.org/en/ab/abca/doc/2018/2018abca109/2018abca109.html>
 - Tab 3: *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 SCR 41;
<https://www.canlii.org/en/ca/scc/doc/2008/2008scc53/2008scc53.html>
 - Tab 4: *Council for Licensed Practical Nurses v. Walsh*, [2010] N.J. No. 61; 2010 NLCA 1;
<https://www.canlii.org/en/nl/nlca/doc/2010/2010nlca11/2010nlca11.html>
 - Tab 5: *Stefanov v. College of Massage Therapists of Ontario*, [2016] O.J. No. 731; 2016 ONSC 848;
<https://www.canlii.org/en/on/onscdc/doc/2016/2016onsc848/2016onsc848.html>
 - Tab 6: *Assn. of Professional Engineers of Ontario v. Rew*, [2020] O.J. No. 4572; 2020 ONSC 6018.
<https://www.canlii.org/en/on/onscdc/doc/2020/2020onsc6018/2020onsc6018.html>

5. Written Submissions on Behalf of the Respondent dated September 7, 2021, including Book of Authorities and Evidence:
 - Tab 1: *Yee v Chartered Professional Accountants of Alberta*, 2020 ABCA 98
 - Tab 2: *Zuk v Alberta Dental Association and College*, 2018 ABCA 270
 - Tab 3: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65
 - Tab 4: *Braile v Calgary (Police Service)*, 2018 ABCA 109
 - Tab 5: *F.H. v McDougall*, 2008 SCC 5
 - Tab 6: *R v Starr*, 2000 SCC 40
 - Tab 7: *R v Handy*, 2002 SCC 56

Tab 8:	Transcript of Hearing
Tab 9:	Canadian Medical Association, CMA Code of Ethics and Professionalism
Tab 10:	<i>R v HC</i> , 2009 ONCA 56
Tab 11:	<i>Ahmed v College of Registered Nurses</i> , 2017 MBCA 121
Tab 12:	<i>Karkanis v College of Physicians and Surgeons</i> , 2014 ONSC 7018
Tab 13:	<i>Faryna v Chorny</i> , 1951 CanLII 252 (BC CA)
Tab 14:	<i>Telus Communications Inc v Telecommunications Workers Union</i> , 2014 ABCA 199
Tab 15:	<i>Stefanov v College of Massage Therapists of Ontario</i> , 2016 ONSC 848
Tab 16:	Chart of Certain Evidentiary Inconsistencies
Tab 17:	<i>R v SP</i> , 2019 ONSC 6783

II. BACKGROUND

[6] The hearing dealt with Patient A’s visit to the hospital following a slip and fall on April 6, 2013. Patient A was seen by Dr. Keith Martin before being transferred to a hospital in Edmonton. The College received a complaint on July 10, 2018. A hearing was held on December 9, 10, and 18, 2020. The hearing dealt with the following allegation (“the Allegation”):

On or about April 6, 2013, you did inappropriately strike your patient, Patient A, on the head, during her attendance at the emergency room while she was being assessed and treated for head trauma from a slip and fall.

[7] The Hearing Tribunal was composed of two physician members, Dr. Vonda Bobart and Dr. Erica Dance, and a public member, Ms. June MacGregor. The Hearing Tribunal issued a decision on February 25, 2021 and found that the Allegation was not proven. The Complaints Director issued a Notice of Appeal dated March 24, 2021 (“Notice of Appeal”), and the appeal was heard on October 5, 2021.

III. GROUNDS OF APPEAL

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

YOU ARE HEARBY NOTIFIED that the Complaints Director is appealing the decision of the Hearing Tribunal dated February 25, 2021 and issued to the parties on February 26, 2021, pursuant to Section 87 of the *Health Professions Act* on the following grounds:

1. The Hearing Tribunal erred in its application of the test of credibility.
2. The Hearing Tribunal erred in its application of the standard of proof on a balance of probabilities.
3. The Hearing Tribunal reached an unreasonable conclusion when it found the allegation against Dr. Martin was not proven on a balance of probabilities.
4. Such further and other grounds as the Complaints Director set out in writing and the Council may permit.

IV. PARTIES' SUBMISSIONS

Submissions of the Complaints Director

- [9] The appeal is focused on the Hearing Tribunal's application and understanding of the standard of proof being on a balance of probabilities. There are a number of errors that are evident from the written decision that demonstrate a misapplication and a misunderstanding of the standard of proof.
- [10] The decision in *R v HC* shows that reliability is separate from credibility. The decision in *Ahmed v College of Registered Nurses* deals with the importance of corroborating evidence when assessing the totality of the evidence. When there have been errors in the application of the assessment of the evidence, then there should be a new hearing before a different panel (*Ahmed v College of Registered Nurses* and *Karkanis v College of Physicians and Surgeons*).
- [11] Counsel for the Complaints Director submitted that there were some fundamental errors in the assessment of the evidence. The Hearing Tribunal concluded that Patient A did not have an independent recollection of the event. However, Patient A approached the nurse to start the conversation. Patient A questioned her memory, but it was not a situation where a patient was approached by a nurse. Patient A is the central witness, and her evidence is corroborated by two nurses. The Hearing Tribunal determined that there were reliability issues, and that the three witnesses did not conspire to fabricate a story. The Hearing Tribunal stated that it was possible that Patient A mistook an examination of the wound and the pain resulting from the examination as being struck. Patient A was not asked about this possibility during her testimony. Dr. Martin stated that this was a possibility, but the Hearing Tribunal made the decision to place little weight on his evidence because it differed from his earlier statements to the College.
- [12] Counsel for the Complaints Director submitted that three witnesses described the same event. The patient was struck by Dr. Martin, although there are differences in the details. It is the totality of the evidence that must be considered when assessing whether the balance of probabilities has been

satisfied and, in effect, the Hearing Tribunal is applying the higher standard of proof. Statements in the decision of the Hearing Tribunal that it is possible that the witnesses have influenced each other's evidence, and that it is possible that the patient mistook the palpation of the wound for being struck, show that the Hearing Tribunal applied the test of beyond a reasonable doubt. The central issue is whether Dr. Martin struck Patient A, and all three witnesses state that is what occurred.

- [13] The application of the standard of proof should be reviewed on the standard of correctness, and no deference should be given to the Hearing Tribunal.
- [14] Counsel for the Complaints Director submitted that *Canada (Minister of Citizenship and Immigration) v Vavilov* is not relevant to the internal standard of review. *Canada (Minister of Citizenship and Immigration) v Vavilov* dealt with the standard of review when the matter was before the court. The *Braile v. Calgary (City) Police Service* and *Yee v Chartered Professional Accountants of Alberta* decisions deal with the internal standard of review.

Submissions by Counsel for Dr. Martin

- [15] Counsel for Dr. Martin submitted that there were three issues on appeal: that the Hearing Tribunal erred in its application on the test of credibility; that the Hearing Tribunal erred in its application of the standard of proof on a balance of probabilities; and whether the Hearing Tribunal reached an unreasonable conclusion when it found that the Allegation against Dr. Martin was not proven on a balance of probabilities.
- [16] The Complaints Director and Dr. Martin agree on a number of points of law. The standard of review for the Panel is reasonableness. The burden is on the Complaints Director, as the party challenging the decision, to show that it is unreasonable. There are some narrow exceptions where the less deferential standard of correctness applies and that is on a question of law, such as the use of the incorrect standard of proof. The correct standard of proof at the Hearing Tribunal level was the balance of probabilities. The onus was on the Complaints Director to prove on a balance of probabilities the essential elements of the Allegation. The proper standard of proof was articulated in the written decision of the Hearing Tribunal.
- [17] Counsel for Dr. Martin submitted that there are areas of disagreement with the submissions of the Complaints Director. The Hearing Tribunal was considering that there could be other reasons why Patient A made the complaint, but the musings of the Hearing Tribunal did not form the basis for the decision.
- [18] The Hearing Tribunal understood the differences between credibility and reliability, and applied them properly. The Hearing Tribunal did not improperly accept and consider character evidence. The Hearing Tribunal heard evidence concerning other mistakes made by Dr. Martin, and "did not

place any weight on these incidents in determining if it was more likely than not that the allegation was proven" (paragraph 270).

- [19] Counsel for Dr. Martin submitted that the Hearing Tribunal did a thorough examination of the evidence and concluded that the Allegation had not been proven on a balance of probabilities. As such, the standard of review for the Panel is reasonableness. The Hearing Tribunal was in the best position to hear the witnesses, observe their demeanour, and weigh the evidence. Deference must be given to their decision. Counsel for Dr. Martin reviewed discrepancies among the testimony of the witnesses, and the findings of the Hearing Tribunal relating to their testimony. The Hearing Tribunal's primary reasons for concluding that the evidence was insufficiently reliable were: over five years had passed since the patient encounter; the only contemporaneous records of the patient encounter did not reflect any inappropriate conduct of Dr. Martin; the Complaints Director's witnesses had significant inconsistencies with one another; and there was evidence that the witnesses had spoken to each other about the incident which created the probability that one witness's faulty memory influenced the memories of other witnesses.
- [20] The ground of appeal that the Hearing Tribunal reached an unreasonable conclusion when it found that the Allegation was not proven is a collateral attack on the decision itself. The decision met all of the requirements set out in *Canada (Minister of Citizenship and Immigration) v Vavilov* in that it was justifiable, intelligent and transparent.

V. SUMMARY OF THE PANEL'S DECISION

- [21] 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.
- [22] The Panel has reviewed all the material and considered the submissions of the parties. The Panel has the jurisdiction under section 89(5) of the HPA to:
- a. make any finding that, in its opinion, should have been made by the hearing tribunal,
 - b. quash, confirm or vary any finding or order of the hearing tribunal or substitute or make a finding or order of its own,
 - c. refer the matter back to the hearing tribunal to receive additional evidence for further consideration in accordance with any direction that the council may make, or
 - d. refer the matter to the hearings director to schedule it for rehearing before another hearing tribunal composed of persons who were not members of the hearing tribunal that heard the matter, to rehear the matter.

- [23] The Panel finds that the appropriate standard of review is reasonableness. A decision will be reasonable if it falls within a range of possible acceptable outcomes that are defensible in terms of the facts and the law. The Panel finds that the Hearing Tribunal's decision that the Allegation has not been proven on a balance of probabilities is reasonable.
- [24] The Panel dismisses the Complaints Director's appeal and confirms the Hearing Tribunal's decision.
- [25] This appeal is therefore dismissed for the reasons that follow.

VI. FINDINGS AND REASONS

1. Standard of Review:

- [26] Counsel for Dr. Martin submitted that the Complaints Director had the onus to show in the words of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov* that there are sufficient shortcomings in the decision such that it could not be said to exhibit the requisite degree of justification, intelligibility and transparency (page 27). Counsel for the Complaints Director submitted that the *Canada (Minister of Citizenship and Immigration) v Vavilov* decision dealt with the standard of review when a matter was before a court, and that the Panel should consider decisions of the Alberta Court of Appeal dealing with the internal standard of review.
- [27] The Panel concurs with the submissions of counsel for the Complaints Director that *Canada (Minister of Citizenship and Immigration) v Vavilov* deals with the standard of review when the matter is before a court, and that appropriate guidance is found in decisions that set out the internal standard of review. The Panel notes that the Alberta Court of Appeal decision in *Yee v Chartered Professional Accountants of Alberta* was issued after the decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*. This is an internal appeal, as was the case in *Yee v Chartered Professional Accountants of Alberta*. In *Yee v Chartered Professional Accountants of Alberta*, Justice Slatter set out the following guideline at paragraph 35 of his reasons:

[35] When reviewing the decision of a discipline tribunal, the appeal tribunal should remain focused on whether the decision of the discipline tribunal is based on errors of law, errors of principle, or is not reasonably sustainable. The appeal tribunal should, however, remain flexible and review the decision under appeal holistically, without a rigid focus on any abstract standard of review: Halifax (Regional Municipality) v. Anglican Diocesan Centre Corporation, 2010 NSCA 38 at para. 23, 290 NSR (2d) 361. The following guidelines may be helpful:

- (a) *findings of fact made by the discipline tribunal, particularly findings based on credibility of witnesses, should be afforded significant deference;*

- (b) *likewise, inferences drawn from the facts by the discipline tribunal should be respected, unless the appeal tribunal is satisfied that there is an articulable reason for disagreeing;*
- (c) *with respect to decisions on questions of law by the discipline tribunal arising from the profession's home statute, the appeal tribunal is equally well positioned to make the necessary findings. Regard should obviously be had to the view of the discipline tribunal, but the appeal tribunal is entitled to independently examine the issue, to promote uniformity in interpretation, and to ensure that proper professional standards are maintained;*
- (d) *with respect to matters engaging the expertise of the profession, such as those relating to setting standards of conduct, the appeal tribunal is again well-positioned to review the decision under appeal. The appeal tribunal is entitled to apply its own expertise and make findings about what constitutes professional misconduct: Newton at para 79. It obviously should not disregard the views of the discipline tribunal, or proceed as if its findings were never made. However, where the appeal tribunal perceives unreasonableness, error of principle, potential injustice or another sound basis for intervening, it is entitled to do so;*
- (e) *the appeal tribunal is also well-positioned to review the entire decision and conclusions of the discipline tribunal for reasonableness, to ensure that, considered overall, it properly protects the public and the reputation of the profession;*
- (f) *the appeal tribunal may also intervene in cases of procedural unfairness, or where there is a reasonable apprehension of bias.*

In this case, the Appeal Tribunal erred in applying a universal standard of review of reasonableness, resulting from its overreliance on Dunsmuir. With respect to matters such as the appropriate standard of professional conduct, and the integrity of the discipline process, it should have engaged in a more intensive review.

[28] The Panel was guided by the standard of review set out in *Yee v Chartered Professional Accountants of Alberta* when considering the appeal. The Panel has considered the authorities cited by the Complaints Director in support of the submission that the Panel should apply the correctness standard of review. The Panel determined that the appropriate standard of review was reasonableness for the reasons set out below, and that the standard of review of correctness did not apply.

2. Standard of Proof:

[29] The parties agreed that the onus of proof was on the Complaints Director at the hearing, and that the standard of proof was on a balance of probabilities. However, they disagreed about whether the Hearing Tribunal made the decision based on a balance of probabilities, or whether it mistakenly applied the criminal law standard of proof beyond a reasonable doubt. Both parties referred to the Supreme Court of Canada decision in *F.H. v. McDougall* as setting out what proof on a balance of probabilities means in practice. The decision in *Assn. of Professional Engineers of Ontario v. Rew* explains the application in the context of disciplinary proceedings, and that evidence “must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test” (at paragraph 46 of *F.H. v. McDougall*):

[70] In F.H. v. McDougall, 2008 SCC 53, [2008] 3 S.C.R. 41, the Supreme Court of Canada confirmed that there is only one standard of proof in civil proceedings – proof on a balance of probabilities.

[...]

[71] The Court rejected all of the “intermediate approaches” identified in para. 39, and held that “it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities” (at para. 40). The Court went on to discuss the reasons why the criminal standard could not be imported into civil proceedings and why any suggestion of an intermediate standard presents practical problems. The criminal standard of beyond a reasonable doubt is linked to the presumption of innocence and, “in civil cases, there is no presumption of innocence” (at para. 42). Further, “suggesting that the standard of proof is ‘higher’ than the ‘mere balance of probabilities’ inevitably leads one to inquire: what percentage of probability must be met? This is unhelpful because while the concept of ‘51 percent probability’ or ‘more likely than not’ can be understood by decisionmakers, the concept of 60 percent or 70 percent probability cannot” (at para. 43, citation omitted). Finally, to somehow suggest that a higher level of scrutiny applies to the evidence in a civil case involving serious allegations implies that in less serious cases the evidence must be scrutinized with less care. Evidence “must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test” (at para. 46).

[30] The parties agree that the mistaken articulation and application of a standard of proof would be reviewed on the grounds of correctness.

- [31]** The Panel noted that the Hearing Tribunal referred to submissions by counsel regarding the onus and standard of proof, and stated at several points in the decision that it was making the decision on a balance of probabilities as follows:

[214] Mr. Boyer concluded that the evidence was clearly persuasive and more than enough to demonstrate on a balance of probabilities that Dr. Martin hit the Complainant as alleged.

[217] Regarding the burden of proof, Ms. Stratton submitted that the burden lies on the College to prove that all the elements of the allegation on a balance of probabilities. She argued that this meant that if the Hearing Tribunal was not more certain than not that the events occurred, the College had not met its burden.

[236] Ms. Stratton concluded that when all the witness evidence along with the contradictions and inconsistencies, the well-known problems with memory, that a person's memories and perceptions can be affected by their view of someone, is considered, the Hearing Tribunal should find that the College had not met its burden on a balance of probabilities and that the charge ought to be dismissed.

[240] The Hearing Tribunal considered all of the evidence and the submissions of the parties. The Hearing Tribunal finds that the allegation has not been proven on a balance of probabilities.

[242] The Hearing Tribunal considered the onus of proof and standard of proof. The Hearing Tribunal accepts that the Complaints Director bears the onus of proof and that the Complaints Director must establish, on the balance of probabilities, that the conduct in the allegation occurred.

[281] In considering all of the above, the Hearing Tribunal does not find that the allegation has been proven on a balance of probabilities.

- [32]** Counsel for the Complaints Director submitted that other comments in the decision showed that the Hearing Tribunal applied the wrong standard of proof, which is an error in law and should be reviewed by the Panel on the grounds of correctness.
- [33]** Counsel for the Complaints Director submitted that the Hearing Tribunal used character evidence to add doubt that Dr. Martin did what was alleged, and that this is an example of the Hearing Tribunal applying the higher criminal standard of proof. The Panel agreed with the submissions of counsel for Dr. Martin that the Hearing Tribunal did not use character evidence when making the decision, and instead addressed evidence and arguments that were raised by counsel for the Complaints Director during the hearing. Given this determination, it is not necessary for the Panel to consider whether use of character evidence would show that the Hearing Tribunal applied the wrong standard of proof.

- [34] Counsel for the Complaints Director submitted that the Hearing Tribunal failed to make a finding of fact about whether or not Dr. Martin struck Patient A, and that in the absence of a finding that the witnesses had convinced each other that Dr. Martin had struck Patient A, the Hearing Tribunal effectively applied the wrong standard of proof. As stated in *Council for Licensed Practical Nurses v Walsh*, the role of professional discipline tribunals is to make findings of fact.
- [35] Counsel for the Complaints Director further submitted that the Hearing Tribunal disregarded Patient A's testimony for reasons that were not supported by the evidence and that the Hearing Tribunal in effect looked for reasonable doubt. The Hearing Tribunal stated that Patient A did not have an independent recollection of the events on April 6, 2013 when the evidence showed that it was Patient A who first approached one of the nurses to ask if her recollection that she had been struck by Dr. Martin was an accurate memory. The Hearing Tribunal's statement that it was plausible that Patient A may have been remembering a painful physical examination is another example of an error in the application of the standard of proof.
- [36] The Panel carefully considered the submissions as well as the authorities cited by the Complaints Director regarding the standard of proof and determined that the Hearing Tribunal identified and applied the standard of proof on a balance of probabilities. The fact that the Hearing Tribunal considered other possibilities but did not come to a conclusion about what actually occurred in the circumstances does not mean that the Hearing Tribunal applied the higher criminal law standard of proof beyond a reasonable doubt. If that had occurred, the Panel would have agreed with the submissions of the parties that the Panel should review the Hearing Tribunal's decision for correctness. Instead, the Hearing Tribunal determined that the Allegation was not proven on a balance of probabilities. The applicable standard of review is the more deferential standard of reasonableness.

3. Reasonableness of conclusion that the Allegation was not proven:

- [37] During the hearing, there was agreement that Patient A was at the hospital on the night in question and that she was examined by Dr. Martin. The central issue in the Allegation was whether the patient was struck during examination by Dr. Martin. A review of the reasons of the Hearing Tribunal shows that the Hearing Tribunal considered the credibility and reliability of all of the witnesses and made a number of conclusions relating to those factors. There were four witnesses who were present during the examination on April 6, 2013: Patient A, Dr. Martin, and two nurses. The Hearing Tribunal made findings based on the credibility and reliability of all four witnesses that were in the room on April 6, 2013. Specifically, the Hearing Tribunal made the following findings regarding credibility and reliability:

[243] The Hearing Tribunal carefully considered the evidence in the Exhibits and the testimony of the witnesses, in particular the

testimony of the Complainant, Ms. Silvius, Ms. Sloat and Dr. Martin, who were the only witnesses present on April 6, 2013 when the incident is alleged to have occurred. The credibility of each of the witnesses was considered.

[244] In assessing credibility, the Hearing Tribunal considered both the aspect of veracity, that is whether the witness is telling the truth as well as the aspect of reliability, that is whether the witness's version of events is accurate. The following passage from Faryna v Chorny on assessing credibility was reviewed (paragraph 11):

The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

[245] The Hearing Tribunal believes the Complainant was trying to tell the truth to the best of her recollection. The Hearing Tribunal accepts that the Complainant believes that the incident happened.

[246] However, the Hearing Tribunal must also consider whether the Complainant's evidence was reliable. The Complainant was extremely vulnerable on April 6, 2013. She had been drinking alcohol and had suffered a head injury.

[255] The Hearing Tribunal finds that while the Complainant was trying to be truthful in giving her evidence and the Complainant truly believes that she was struck by Dr. Martin, her evidence is not reliable. She did not have an independent recollection of the events of April 6, 2013 and there were significant discrepancies in her evidence and that of the other witnesses, as well as the patient record.

[262] The Hearing Tribunal also considered that Ms. Silvius' memory may have been influenced by her discussions with Ms. Sloat several

years after the incident. The Hearing Tribunal found that Ms. Silvius' evidence was not reliable.

[264] Ms. Sloat indicated that she probably should have filled out an incident report, but she "took the coward's way out". She decided not to pursue it because the Complainant was not pursuing it, and she did not want a confrontation. The Hearing Tribunal did not consider this explanation for not filling out an incident report to be credible. It would be extremely unlikely for a vulnerable patient with a head injury who is transferred to another facility after an incident happened to pursue a complaint at the time of the incident. The incident report should have been completed at the time of the incident and should be completed regardless of whether or not the patient plans to pursue a complaint.

[267] The Hearing Tribunal considered Ms. Sloat's evidence that she only asked other nurses about Dr. Martin after her interview with the investigator in late 2018. This was inconsistent with the evidence of Ms. Sieben who noted that it was in late 2017 or early 2018 that she was asked about any concerns with Dr. Martin by Ms. Sloat. Given the concerns with Ms. Sloat's evidence, the Hearing Tribunal did not find her evidence to be reliable.

[268] The Hearing Tribunal considered the evidence of Dr. Martin. In his testimony, Dr. Martin had a very specific recollection of events of April 6, 2013. However, in his written response to the College dated September 12, 2018, he indicated that it was an uneventful evening and that he did not have a specific recollection of the case. Because of this, the Hearing Tribunal placed less weight on Dr. Martin's testimony.

[280] To be clear, the Hearing Tribunal does not believe that the Complainant, Ms. Silvius and Ms. Sloat conspired to lie about the incident. However, it is possible that their memories were affected by each other and by the passage of time. It is also clear that certain assumptions were made by witnesses with respect to the events described in the allegation.

[281] In considering all of the above, the Hearing Tribunal does not find that the allegation has been proven on a balance of probabilities.

- [38]** The Panel is mindful of the guidance in *Yee v Chartered Professional Accountants of Alberta* that significant deference is owed on questions of credibility. The Hearing Tribunal showed that it understood the distinction between credibility and reliability, and made a number of findings directly related to credibility and reliability. The Hearing Tribunal had the benefit of hearing the testimony of the witnesses.
- [39]** The Panel is also mindful that it should not substitute its opinion simply because it may have decided another way. In other words, just because it is possible that another Hearing Tribunal, with the same information, may have come to a different conclusion does not mean that the decision is not reasonable. Reasons are the means by which a decision-maker

communicates the rationale for its decision. The Hearing Tribunal's reasoning process was apparent. The central issue during the hearing was the credibility and reliability of the witnesses. The Hearing Tribunal carefully articulated the conclusions relating to credibility and reliability when finding that the Allegation was not proven. After reviewing the entire decision and conclusions of the Hearing Tribunal, the Panel concluded that the decision was reasonable.

VII. ORDERS OF THE PANEL

[40] Council confirms the Hearing Tribunal's decision.

[41] The appeal is dismissed.

Signed on behalf of the Panel this 20th day of December, 2021.



Dr. Louis Hugo Francescutti, Chair