COLLEGE OF PHYSICIANS & SURGEONS OF ALBERTA

IN THE MATTER OF
A HEARING UNDER THE *HEALTH PROFESSIONS ACT*,
R.S.A. 2000, c. C-7

AND IN THE MATTER OF A HEARING REGARDING
THE CONDUCT OF DR. MICHAEL GRAFF

DECISION OF THE HEARING TRIBUNAL OF THE COLLEGE OF PHYSICIANS & SURGEONS OF ALBERTA

I. INTRODUCTION

The Hearing Tribunal held a hearing into the conduct of Dr. Michael Graff ("Dr. Graff") on June 1, 2017. The members of the Hearing Tribunal were:

Dr. Randy Naiker of Edmonton as Chair, Dr. Betty Ross of Edmonton and Ms. Nancy Brook of Ryley (public member). Ms. Ayla Akgungor acted as independent legal counsel for the Hearing Tribunal.

In attendance at the hearing was Mr. Craig Boyer, legal counsel for the College of Physicians & Surgeons of Alberta (the "CPSA"), Dr. Michael Graff and Mr. James Heelan and Ms. Renee Gagnon, legal counsel for Dr. Graff.

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

II. ALLEGATIONS

The allegations to be considered by the Hearing Tribunal (the "Tribunal") were set out in the Notice of Hearing:

1. That on October 29, 2015, you were convicted of an offence under section 172.1(1)(a) of the Criminal Code of Canada relating to events on July 10, 2012 when you communicated by means of a computer with a person you believed to be a 14 year old girl; and

2. That on October 29, 2015, you were convicted of an offence under section 172.1(1)(b) of the Criminal Code of Canada relating to events on July 10, 2012 when you communicated by means of a computer with a person you believed to be a 14 year old girl.

The member acknowledged and admitted the allegations as set out in the Notice of Hearing.

III. PRELIMINARY MATTERS

There were no preliminary matters presented by the parties.

IV. EVIDENCE – EXHIBITS

By Agreement, the parties entered the Exhibit Book containing Exhibits 1 through 20, an Agreed Statement of Facts, dated June 1, 2017 entered as Exhibit 21 and the Joint Submission and Admission Agreement entered as Exhibit 25.

The Exhibit Book contained the following items:

Exhibit 1: Notice of hearing dated September 23, 2016
Exhibit 2: Dr. Heisler memo dated January 17, 2013 Re: telephone discussion with Dr. Graff
Exhibit 3: Dr. Graff undertaking to the College of physicians and surgeons of Alberta to voluntary withdraw from the practice of medicine in Alberta on January 18, 2013
Exhibit 4: Assessment report from Dr. Mark Nasca dated October 27, 2015
Exhibit 5: Agreed statement of facts, in the matter of R v. Michael Graff, dated October 29, 2015
Exhibit 6: Certificate of conviction dated October 29, 2015 related to section 172.1(1)(B) of the *Criminal Code of Canada*
Exhibit 7: Report from Comprehensive Occupational Assessment Program dated November 29, 2016
Exhibit 8: Curriculum vitae of Dr. J Wright
Exhibit 9: Updated report from Comprehensive Occupational Assessment Program dated May 15, 2017
Exhibit 10: Undated letter from Dr. Michael Graff
Exhibit 11: Letter from Christiana Hill dated October 18, 2015
Exhibit 12: Letter from Pastor Brent Riley dated October 6, 2015
Exhibit 13: Letter from Donalda Nelson dated October 7, 2015
Exhibit 14: Letter from Dr. Christopher Nelson dated October 23, 2015
Exhibit 15: Letter from James Carpenter dated October 25, 2015
Exhibit 16: Letter from Dr. George Pugh dated July 12, 2016
Exhibit 17: Letter from Dr. Cynthia Baxter dated March 15, 2017
Exhibit 18: Letter from Dr. Suzanne Lemieux dated April 12, 2017
Exhibit 19: Letter from Dr. William Friend dated May 10, 2017
Exhibit 20: CPSA Standard of Practice-Reentering Medical Practice or Changing Scope of Practice

Also by agreement, the parties submitted:

Exhibit 21: An Agreed Statement of Facts, dated June 1, 2017
Exhibit 22.1 Certificate of conviction dated October 29, 2015 relating to section 172.1(1)(A) of the *Criminal Code of Canada*
Exhibit 25: Joint Submission and Admission Agreement

Mr. Heelan entered the following exhibits:

Exhibit 22: A short curriculum vitae of Dr. Graff
Exhibit 23: The varied probation order in relation to Dr. Graff dated October 29, 2015
Exhibit 24: Email chain commencing with communication from Dr. Janet Wright to Mr. James Heelan, dated May 23, 2017

There was no witness testimony in this hearing.

The parties were in agreement that Exhibits 1 through 6 and 22.1 were evidence relevant to the admission of guilt at the unprofessional conduct phase of the hearing. The remaining exhibits were to be considered as evidence relevant for the sanction determination.

V. EVIDENCE RELEVANT TO ADMISSION OF GUILT

(a) Summary of Events

On January 17, 2013 the Complaints Director for the CPSA received information that criminal charges were laid against Dr. Graff. The charges arose as the result of an online chat exchange between Dr. Graff and an undercover Internet police officer posing as a 14-year-old female from Calgary. The exchange occurred on July 10, 2012 while Dr. Graff was 29 years of age.

On the following day January 18, 2013, Dr. Graff agreed to withdraw from practice and has remained out of practice since that time.

Dr. Graff pled guilty and was convicted of two counts under section 172.1 of the *Criminal Code of Canada* (the "Criminal Code") – one count of online luring to facilitate sexual contact with a child and one count of online luring to facilitate the making of child pornography. On October 29, 2015, he received a sentence of twelve (12) months incarceration followed by eighteen (18) months of probation. Dr. Graff was incarcerated from October 29, 2015 until June 2016.

Dr. Graff's date of birth is January 29, 1983.

Dr. Graff remains under the terms of probation.

Both parties agreed that, at all material times, Dr. Graff was a regulated member of the CPSA. Dr. Graff was served with the Notice of Hearing on September 23, 2016.

(b) Undertaking of Dr. Graff to the College of Physicians and Surgeons of Alberta

On January 18, 2013 Dr. Graff signed a written undertaking to College of Physicians and Surgeons of Alberta (the "CPSA").

Dr. Graff agreed to:

- Immediate voluntarily withdraw from the practice of medicine in Alberta;
- Forward to the CPSA a copy of the indictment listing the charges received;
- Permit the CPSA to disclose the particulars of this undertaking to Alberta Health Services and the University of Alberta; and
- Provide all required information within 10 days of signing of the undertaking to the Registration Department to enable the CPSA to issue a notice to specific parties of imposed conditions on Dr. Graff's practice permit.

(c) Assessment Report from Dr. Mark Nesca Dated October 27, 2015

After Dr. Graff pled guilty to the criminal charges he was referred for psychological assessment by Dr. Nesca.

Dr. Nesca outlined that Dr. Graff had no criminal record but incurred two breach charges while on interim release: one for accessing online pornography and the other for visiting an online dating site. Dr. Graff explained the latter as the product of loneliness giving him an opportunity to interact with somebody. Dr. Nesca viewed the online pornography access as a tendency to use sex as a strategy for coping with stress.

Dr. Graff's marriage had deteriorated to the point that it became literally devoid of emotional and physical intimacy and that he struggled to cope with his wife's increasingly harsh rejections. The marriage had broken down, leaving him emotionally and sexually frustrated by which he sought comfort in pornography and cybersex.

The specific event in question reportedly occurred when Dr. Graff was sexually engaged online with a 28-year-old woman. While sexually involved with this person, Dr. Graff received a link from an automated function known as a "bot" and followed it to an undercover police officer. He engaged both parties in simultaneous cybersex, moving back and forth between them while masturbating. Under the conditions of heightened sexual arousal, Dr. Graff sent pictures of his penis to the officer posing as a 14-year-old girl. He explained his behaviour as an ill-conceived attempt to solicit compliments, liking the idea of somebody being attracted to him and somebody finding him sexually attractive.

Dr. Graff accepted full responsibility for his behaviour and his clinical presentation included signs of intense anxiety with compelling expressions of shame and regret. He categorically denied a history of similarly inappropriate behaviour.

Dr. Nesca evaluated Dr. Graff's risk for reoffending online. He cited that the best available recidivism data indicates a re-offence rate of less than 5% over a period of up to six years for online offenders. Further analysis indicates that 2% of online offenders escalate to a physical offending and 3.4% reoffend online with most recidivism occurring within four years. He added that online offenders with a prior history of physical offending events have a higher rate of recidivism than the general sexual offender population.

The major risk variables identified for recidivism among online offenders fall into three categories:

1. sexual deviance-pedophilia, sexual sadism;
2. antisocial orientation - psychopathy, antisocial personality disorder; and
3. intimacy deficits-emotional identification with children, poor social skills.

Dr. Nesca felt that Dr. Graff posed a low risk for online re-offending. Furthermore, the personal and professional consequences of the arrest on these charges had produced a significant amount of personal deterrent effect in his case, further reducing the risk of re-offense.

In evaluating the risk for escalation to contact sexual offending, Dr. Nesca stated that the largest recidivism studies on sexual offenders that are available have identified a number of variables that are significant predictors of sexual recidivism. These variables can be grouped under the general categories of:

1. sexual criminal history;
2. sexual deviance;
3. lifestyle instability/criminal orientation;
4. intimacy deficits;
5. poor response to treatment or supervision; and
6. young age below 25.

Dr. Nesca concluded that Dr. Graff presented a low risk for online reoffending. He had the presence of only one nomothetic risk factor: violation of conditional release.

Dr. Nesca's clinical impression of Dr. Graff was that of a cooperative, but highly stressed patient struggling with the feelings of shame, fear and regret. He was unable to find indications of a potentially destabilizing mental illness, nor any personal history of personality disorder.

There was no indication of prior sexual interest in underage females and formal testing ruled out the presence of sexual deviance. Dr. Nesca viewed the index offenses as the product of an uncharacteristic lapse in judgment facilitated by sexual arousal and frustrated emotional needs. He viewed Dr. Graff's tendency to rely on sex to manage negative emotions as contributing to the events in question by leading Dr. Graff to online sexual activity that ultimately brought him into contact with the undercover officer.

Dr. Nesca recommended treatment with a clinical sex therapist focusing on psychotherapy to address Dr. Graff's maladaptive use of sex as a coping strategy and to reduce his excessive preoccupation with sex. He felt given the risk assessment results in the overall recidivism rates for these types of offenders, it was quite unlikely that Dr. Graff would sexually reoffend.

(d) Agreed Statement of Facts *R. v. Michael Graff*

Submitted to the Tribunal was the Agreed Statement of Facts used in the criminal proceedings against Dr. Graff. During the criminal proceeding, Dr. Graff admitted the following facts:

1. On July 10, 2012 the Accused [Dr. Graff] used his computer to enter an online chat room. The Accused used the screen name mcdermittsean. Purely by

coincidence, Detective CHARTRAND used an online persona named ashley_rules14. Detective CHARTRAND'S persona revealed no other information beyond her screen name.

2. The Accused noticed Det CHARTRAND's persona in the chat room and initiated an online, text-based conversation with her. The communication was started at 1459 hrs. and ended at 1625 hrs.: a total of one hour and 26 minutes.

3. During the chat Det. CHARTRAND identified himself as a 14-year-old female from Calgary when the Accused asked: "… Can I ask for your ASL?" "ASL" is an acronym frequently used on the Internet meaning "age, sex and location". The Accused told ashley_rules14 that he was a 29-year-old male from Calgary. The Accused sent two pictures of himself to Ashley.

4. During the 86 minute chat, the Accused made sexually explicit remarks to Ashley and asked her sexually explicit questions. The questions progressed from gathering a physical description of Ashley, to gauging her level of sexual experience and interest. During this portion of the chat, the Accused sent Ashley two pictures that he had previously made of his erect penis.

5. The first image of his erect penis was sent to Ashley 30 minutes into the chat.

6. After sending the image of his erect penis, the Accused asked Ashley numerous questions about sex.

7. In addition, after sending the first image of his erect penis, the Accused directed a few suggestions and comments of a highly sexual nature to Ashley.

8. In response to the Accused's remarks and questions, Det. CHARTRAND provided details about persona that indicated that her mother was not home and that her mother would get upset with her. In response, the Accused asked Ashley to show her vagina to him, and then following a brief exchange, asked Ashley to email him a picture of her vagina.

9. At 1604, the Accused sent Ashley a second image of his erect penis; 30 minutes after he sent the persona the first image of his penis. After the second image of the penis was sent, the Accused and Ashley continued to chat for 21 minutes. The Accused continued to ask her sexually explicit questions. The chat came to an end when Det. CHARTRAND's persona advised the Accused that her mom had come home.

10. The police then conducted investigations that lead to confirmation that the Accused was indeed Dr. Graff. On January 11, 2013, the Accused was arrested and interviewed by police. He admitted to being the person who had chatted with Ashley.

VI. SUBMISSIONS ON UNPROFESSIONAL CONDUCT

Mr. Boyer began his opening submissions by outlining the events leading up to Dr. Graff's criminal charges and subsequent incarceration.

He then proceeded to outline action the CPSA undertook upon Dr. Graff's release. Dr. Graff was served with his Notice of Hearing in September 2016 after he was released from his incarceration. He underwent a multidisciplinary assessment by the Comprehensive Occupational Assessment Program (the "COAP") at the direction of the CPSA in November 2016. At that time, the assessment indicated that further treatment was required as it was felt that Dr. Graff was not ready to be considered for return to practice at that time. He underwent the additional treatment recommended by the multidisciplinary team and was subsequently reassessed in May 2017.

Mr. Boyer advised the Tribunal that he and Mr. Heelan reached an agreement on an Exhibit Book and an Agreed Statement of Facts.

Mr. Boyer stated that the Exhibit Book was broken into two main sections one, dealing with the admission of guilt and, one dealing with the sanction determination. He referred to section 70 of the *Health Professions Act* (the "HPA"), which is the provision that deals with an admission of unprofessional conduct. Under this provision, an investigated member can make an admission, but the Tribunal must be satisfied that there is sufficient evidence to support this admission. Moreover, Mr. Boyer referred to section 1(1)(pp)(iii) of the HPA and the definition of unprofessional conduct.

He highlighted that one of those items is a contravention of another enactment that applies to the profession, such as the *Criminal Code of Canada* (the "Criminal Code").

Mr. Boyer stated that Dr. Graff has admitted the criminal charges and is before the Hearing Tribunal in this proceeding admitting the allegations in the Notice of Hearing on the record.

Mr. Boyer stated that the allegations were proven related to the online exchange between Dr. Graff and Detective Chartrand posing as Ashley, the 14-year-old girl from Calgary. He referred to the agreed statement of facts from the criminal proceedings labelled as Exhibit 5 as setting out the basis for the criminal conviction.

Mr. Boyer provided two examples where physicians have been charged and found guilty of unprofessional conduct because of a criminal conviction. The first was Dr. Cooper, in relation to the criminal conviction for the manslaughter of Dr. Doug Snyder. The second was Dr. Carl Nqumayo was convicted for four counts of sexual assault against his patients.

Mr. Boyer concluded that he feels that there is more than sufficient evidence before the Hearing Tribunal to find that the admission is reasonable and that the evidence certainly demonstrates that the convictions did occur.

Mr. Heelan noted that the curriculum vitae for Dr. Graff did not make its way into the Exhibit Book. This was accepted as Exhibit 22. Additionally, the varied probation order dated October 29, 2015 was accepted as Exhibit 23. Finally, an email exchange between Mr. Heelan and Dr. Wright was submitted and accepted as Exhibit 24.

Mr. Heelan did not have any additional comments on the issue of unprofessional conduct.

Dr. Graff confirmed that he is admitting to the allegations as set out in the Notice of Hearing.

VII. FINDINGS ON UNPROFESSIONAL CONDUCT

After the opportunity to hear from both parties and review the evidence presented as Exhibits 1-6 and 22.1 in the Exhibit Book, and the Agreed Statement of Facts submitted as Exhibit 21, the Hearing Tribunal accepts that there is sufficient evidence to support Dr. Graff's admission of Allegation 1 and Allegation 2 as set out in the Notice of Hearing. In accordance with section 70 of the HPA, the Tribunal accepts Dr. Graff's admission and agrees that Dr. Graff's conduct constitutes "unprofessional conduct" which is defined in s.1(1)(pp) of the HPA.

In particular, Dr. Graff's conduct contravenes the Code of Ethics, violates the *Criminal Code of Canada* and amounts to conduct that harms the integrity of the profession as contemplated in sections 1(1)(pp)(ii),(iii) and (xii) of the definition of unprofessional conduct in the HPA. Further, Dr. Graff's conduct violates section 7 of the Code of Ethics which requires physicians to resist any influence or interference that could undermine the physician's professional integrity.

VIII. EVIDENCE RELEVANT TO SANCTION DETERMINATION

(a) Report from the Comprehensive Occupational Assessment Program dated November 29, 2016

The CPSA referred Dr. Graff for an independent assessment to provide an opinion on his fitness to return to practice. This was conducted by the COAP on November 29, 2016.

The assessment team consisted of:

- Dr. Beverly Frizzle-clinical psychologist;
- Dr. Samantha Kelleher-psychiatrist;
- Dr. Janet Wright psychiatrist and former assistant registrar with the College of Physicians and Surgeons of Alberta; and
- Dr. William Friend - forensic psychiatrist.

Dr. Kelleher conducted a telephone interview with Dr. Graff on November 18, 2016. During this interview he identified one of the factors contributing to his behaviour was his “unsatisfactory” marriage in which he felt rejected and this led into the use of pornography and chat rooms to feel appreciated. He reports that he used pornography to self soothe and this had become a pattern of behaviour before the criminal offense.

He recognized the warning signs approximately five years prior to the offense that included a lack of engagement with his family as well as a lack of commitment to healthy life choices.

Specifically when asked about the offense, he stated that he was engaged with another person in sexual chat when he then engaged in online chat with “Ashley”. He denied that he was intentionally looking to connect with an underage female.

He reported significant shame and guilt prior to the offense which included his use of pornography. He described living a shadow life and that he did not tell others that he used pornography to self soothe and withdraw from the distress he experienced.

He believes he is on a new path and does not want to hide any longer. He has been involved in a Christian-based freedom group that he believes is helping him get rid of the drive to use pornography.

Dr. Graff trained as a carpenter while incarcerated, but does not consider this his career going forward. He wishes to return to the full spectrum of practice as a family physician but recognizes that he committed a crime. He recognizes that there may be limits placed on his practice and worries that those limits may be too much for him to be able to practice. Dr. Graff appreciates the CPSA is doing their due diligence to ensure that he will be safe to return to practice and states that his offense was a total aberration. In doing these assessments, if he is determined to be a low risk for future recurrence, he hopes the CPSA will respect the opinion and not impose significant restrictions.

Dr. Graff recognizes the potential challenges he could face if he returns to practice. He believes some patients may be turned off by his criminal record but others will see that he is a person who has made a mistake.

He recognizes that he suffered significant loss in life because of the criminal conviction including the loss of his marriage, friends and colleagues. He identifies that he has good social support particularly within his family however he could not identify any particular supports in the workplace that would be helpful. When asked specifically if a mentor would be helpful, he indicated that it would be reasonable.

The assessment also included a number of collateral interviews with people who know Dr. Graff.

Dr. Chris Nelson reported that he met Dr. Graff during the residency and they worked together in the same clinic after their residency. He recognized Dr. Graff’s marriage was not good and he was concerned about Dr. Graff becoming isolated. He did not observe Dr. Graff directly with patients but was aware that he had a good relationship with the

Medical Office Assistant in the office. He acknowledges that Dr. Graff's actions are embarrassing for the profession as it shakes people's confidence in the profession. He feels that patients are vulnerable and would be upset if they knew about these charges.

He stated Dr. Graff should not be allowed to see underage patients but instead work in a team where he supervised and not see patients one on one. He feels that Dr. Graff could work with the surgical team or do surgical assist, however does not feel he can work as a family physician.

Since the time of the charges, Dr. Nelson stated that Dr. Graff has become more thoughtful.

Mr. James Carpenter met Dr. Graff after his arrest but before trial. Over the years, he has seen Dr. Graff take more responsibility for his actions and has displayed remorse and regret for his actions. Being a registered sex offender is a big consequence but he describes Dr. Graff as willing and able and indicates that with programs and mentorship he could be in a good position again. He felt that there should be restrictions on Dr. Graff's practice in the short-term however he added that Dr. Graff will have a hard time building a practice after what has happened. He stated that the biggest victory for the medical field will be to help Dr. Graff rebuild his life.

Dr. Alex Mazurek has known Dr. Graff casually for several years, as he did his residency training with Dr. Graff. He describes him as being a better Christian for consistently attending prayer groups and working on his spiritual growth. Dr. Graff has a lot of remorse and embarrassment and is a broken, fallen man who is asking for redemption and forgiveness. He does not believe that there are any safety or trust issues with children and this was a one-time mistake. Dr. Mazurek does not believe Dr. Graff has a "chronic insidious secretive life" and is supportive of Dr. Graff returning to the practice of medicine.

Dr. Mazurek believes the CPSA can provide Dr. Graff with a practice that will also ensure the safety of the community. This includes working in group settings such as hospitals with teams, doing surgical assist, working with insurance companies and restricting any practice to working with adults. Dr. Mazurek does not think Dr. Graff is a risk, but the CPSA is duty bound to protect society. He would have no concerns about referring patients to Dr. Graff. Finally, he believes Dr. Graff should have ongoing contact with a counsellor and that the CPSA should have an obligation to take action to help him stay well.

The assessment also conducted a review of Dr. Graff's personal and family history.

Dr. Graff was the youngest of five children. His father is a family physician and his mother is a public health nurse. Dr. Graff indicated that he feels left out with his siblings describing himself as 'out of the loop'. He describes his mother as providing tender loving care but found it difficult to share things with her. His father is authoritarian with high demands and expectations. The family belongs to a Baptist church and he noted a lot of rules about what was allowed and what was not.

He described his childhood as unremarkable with strong involvement in school activities. He was also involved in sports including volleyball, basketball, and swimming he was also musically inclined playing the trombone and violin and was a Boy Scout. He was also involved with his church youth group. He was not allowed to date until the age of 16 or 17.

After high school, he took a year off to attend an ascent leadership program in Calgary and subsequently went to Australia to attend a Bible college. Upon return he attended Trinity Western University, a Christian-based University which prohibits alcohol and premarital sex.

Dr. Graff's first interest in pornography occurred in his early teens when a friend showed him some pictures of naked women. Because dating was forbidden in his family, the thought of kissing and touching girls was out of the question. Initially, he looked at pornographic sites on the family computer, but after realizing that the search history could be seen by others, he began to use chat lines and engage in sexual activity over these chat lines. This occurred approximately once per week when other family members were out of the house.

While attending Trinity Western University he continued to look at Internet pornography even though he was told that the school could monitor Internet use.

He began to use Internet chat rooms more often and would show people a photo of himself to see if he aroused that person. He felt he had no prospects at school and would likely be rejected so online connections were safer and if there was sexualized talk then he knew that they were attracted to him. This continued into medical school but with reduced frequency due to the time constraints.

When asked how he reconciled his conduct with his religious beliefs, he stated that he had many reasons including his low self-esteem and that he had no one in his real life that loved him. He felt desirable in the short-term sexual encounters.

The sex chatting and pornography online died down after Dr. Graff married. He stated his wife knew about the pornography and had asked him to stop and he was successful in doing so for a period of time.

He stated once they were engaged they were sexually active however after they were married things changed between them. He found his wife to be less willing to engage with him sexually and that he was only allowed sex a couple of times a month. He felt rejected and felt his attempts to let her know that she was beautiful and take her out and buy her things did not improve their sex lives. As his wife became busier with her studies she became even less available to him. Dr. Graff then returned to chat lines and pornography where he felt admired by the women he was in contact with.

On the afternoon that the convicted offense occurred, he was online with one woman who was 28 years old. He subsequently interacted with the second female who stated she was 14 years old. Because he was already aroused and despite knowing she was 14 he continued the interaction. He admitted a part of him just did not care.

After the arrest he and his wife separated and were subsequently divorced one year later.

Dr. Graff acknowledges that he broke his bail condition by returning to an online environment. He stated he was feeling lonely and scared and was concerned that people may even hurt him.

At the time of the offense, he felt that he was dragged down by his marriage. Following the charges he felt that he could be physically harmed and avoided contact with people as much as possible.

Dr. Graff saw a counsellor on two occasions after he was arrested, but felt that the counsellor was more interested in his defense then in helping him. Subsequently he became involved with Freedom Sessions at a church in Calgary. He reports this has been very helpful and he has learned to self-reflect and put into words what he is feeling. He stated that the sessions are three hours every week and consist of one hour of biblical teaching and then small group sessions with other men where they can tell their story.

He also connected with a therapist from the forensic outpatient clinic.

Dr. Graff also underwent psychometric testing including:

- Brief Symptom Inventory - this is an indication of individual symptoms, and intensity of the symptoms, at the specific time of the assessment.
- Minnesota Multiphasic Personality Inventory - a psychological test of psychopathology that aids in the assessment of mental disorders, identification of the specific problem area, and treatment planning across a variety of clinical populations.
- Millon Clinical Multiaxial Inventory IV - psychological test of personality patterns that helps provide clinical insight into behaviour and character and aid in making diagnosis and treatment recommendations.

Overall, the psychometric testing supported the clinical view that Dr. Graff was experiencing a moderate level of psychological distress, both in terms of acute depressive symptoms, as well as personality traits relating to feelings of self-doubt and inferiority, and passive and submissive behaviour in his relationships.

To evaluate Dr. Graff's risk of reoffending the STATIC-2002 and STABLE-2007 methods were utilized. STATIC-2002 is an instrument designed to assist in the prediction of sexual and violent recidivism for sex offenders. It demonstrates moderate to large accuracy in the prediction of sexual, violent, and general recidivism. It consists of 14 items and produces estimates of relative risk based upon the number of risk factors present in any one individual.

The risk factors included in the assessment are grouped into five domains:

- Age;
- Persistence of sex offending;
- Deviant sexual interests;
- Relationship to victims; and
- General criminality.

An offender is placed in one of five risk categories based on their total score ranging from 0 to 14:

- Low 0-2
- low-moderate 3,4
- moderate 5,6
- moderate-high 7,8
- high 9+

Dr. Graff scored in the moderate risk category. Compared to other male sexual offenders in Canada, his score fell into the 64.7 to 79.5 percentile. Factoring in the 95% confidence interval, this range could be as wide as 61.2- 82.3 percentile.

Dr. Graff demonstrated several features which would indicate that he is on the lower range of risk. These include:

- Dr. Graff does not display any evidence of antisocial behaviour.
- He has completed his sentence and there were no negative behaviours displayed in jail.
- Dr. Graff is complying with probation with the exception of using an Internet dating site once for which he was not charged.

However, there is one area which may indicate that Dr. Graff is in the more moderate to high risk range:

- Dr. Graff has not yet participated and completed an evidence-based sexual offender treatment program.

The team felt if he were to comply with this treatment, one would anticipate that his risk would be on the lower range of risk recidivism.

Furthermore to accurately complete the STATIC-2002, the evaluator must have an up-to-date copy of the offender's criminal record sheet. This was not available at the time of the scoring. Dr. Graff's own statement about his criminal record was used to score in the STATIC-2002. Accordingly the STATIC-2002 score may not be accurate and the evaluator agreed to provide a revised risk assessment upon receipt of the criminal record.

The factors currently used to predict long-term recidivism potential are mainly static, historical variables such as the number of prior sexual offenses and victim characteristics. Such unchangeable static factors cannot be used to measure changes in risk levels nor to determine how or when to intervene. To measure change, evaluators require knowledge of dynamic risk factors.

STABLE-2007 is a tool used to identify dynamic risk factors, which may be operating in the case of Dr. Graff. These include stable dynamic factors which are potentially changeable but endure for months or years (e.g. alcoholism, intimacy deficits), and acute dynamic factors, which can change over a period of weeks or even days signaling the timing of new offenses (e.g. drunkenness, acute distress). Overall, Dr. Graff's total score was nine out of 26 on the STABLE-2007. This placed him in the moderate range risk. This also identified areas for risk reduction.

Dr. Graff's development of a loving and sexual relationship with an adult woman may be of considerable benefit in helping him reduce his interest in Internet sex chat rooms. As time passes, the publicity associated with this offense grows more distant, he may feel himself more ready to engage in social interaction with friends. This too may serve as substantially reducing risk. Factors such as those cited above could be incorporated into the monitoring process if Dr. Graff were to be allowed to return to the practice of medicine.

Dr. Wright's group's overall assessment felt that although there was no evidence of an acute psychiatric disorder, Dr. Graff presented with dependent personality traits and ongoing difficulties in interpersonal relationships. He appeared to struggle with the understanding of the practice of healthy boundaries both professionally and personally. While he was engaged in a faith-based treatment, at no time before or after the offense has Dr. Graff attended, or even been referred to, professional therapy to deal with the offense or the underlying characterological patterns that have put him at risk.

The team was specifically asked six questions by the CPSA:

1. *Does Dr. Graff suffer from any condition that may have contributed to his criminal action?*

Dr. Graff does not suffer from any psychiatric or medical condition that would significantly have contributed to his criminal action. Although he denies any current clinical concerns, his presentation and psychometric testing suggest that he is experiencing some psychological distress over his current circumstances.

2. Is Dr. Graff currently fit to practice in his previous capacity as a family physician in community practice?

At the time of the assessment, Dr. Graff was not fit to return to practice. His scores on the STATIC-2002 and the STABLE-2007, validated Canadian risk assessment tools, indicated that he is at a moderate risk to reoffend. From this finding it warrants the conclusion that he was not fit to practice due to the risk that he could present to patients. Dr. Wright recommended reassessing his fitness to return to practice after a period of psychotherapy with a registered health professional that has experience working with persons with similar criminal charges.

3. Would you recommend any treatment to address the underlying cause(s) of his actions?

The team recommended that Dr. Graff engage in a period of psychotherapy with a registered health professional with experience in treating persons with similar criminal charges. Such treatment should include characterological patterns that appear to present ongoing problems for Dr. Graff in his personal as well as his professional life.

4. Would you recommend any conditions or restrictions to his practice? Specifically comment as appropriate with regard to the age and gender of his patients.

Dr. Wright could not comment on the conditions or restrictions at the time of the assessment as she did not find him fit to return to practice.

5. Would you recommend any ongoing monitoring of Dr. Graff?

The team recommended that Dr. Graff undergo a reassessment of his fitness to practice after a period of treatment.

6. In your opinion is Dr. Graff at risk to reoffend?

At the time of the assessment and using the specific wrist tools, it was the opinion of the team that Dr. Graff is at moderate risk of reoffending.

(b) <u>Comprehensive Occupational Assessment Program Reassessment May 15, 2017</u>

After the initial COAP assessment in November 2016, Dr. Graff completed several months of psychotherapy and presented for reassessment.

The reassessment was conducted on April 21 and 22, 2017. He met with Dr. Kelleher initially and then with the entire team to review the changes and progress over the previous six months. Legal counsel also provided a letter from his treating psychologist, Dr. Suzanne Lemieux, as well as a letter from Dr. Cynthia Baxter, a forensic psychiatrist, who challenged the findings of the risk instruments used in the previous assessments.

The assessment team included Dr. Beverly Frizzell, Dr. Samantha Kellerher and Dr. Janet Wright.

Dr. Kelleher met with Dr. Graff to review the following areas:

1. his impressions of the first assessment;
2. his current program of therapy and self-care;
3. any changes to his personal life and circumstances;
4. his own opinion of his risk of reoffending; and
5. his thoughts and desires regarding a potential return to practice

When asked to explain what his risk factors are, Dr. Graff identified the following factors:

1. Boredom - Dr. Graff noted that boredom leaves space for “other things to take hold”. He reported reconnecting with his prior interests, which included photography, bike riding, drones, and going to the gym. He reported that some of these activities were abandoned for his wife as she would tell him to stay home and he would interpret this as her desire to be with him. He acknowledged that he needs to maintain his own interest in things to be a full person, and this will allow him to give more in a relationship with another person.

2. Loneliness - Dr. Graff has started to reach out to people and establish some social contacts. He has been looking to develop deep and meaningful relationships rather than focusing on the number of relationships.

3. Low self-esteem - Dr. Graff notes that there have always been expectations placed on him and he strives to live up to them. In his relationship with his wife, he often felt put down by her comments and competitive nature. He has been able to look at how his feelings of rejection would lead him to pornography and chat rooms for release. He has been looking at different realms of self-esteem in his work with Dr. Lemieux, and has been trying to identify strengths that can boost his self-esteem. He has also been exploring his own faults and shortcomings and allowing for self-forgiveness.

When asked about returning to medical practice, Dr. Graff indicated that he would like to return to a full-service family practice in the future. He indicated that he would like to move to Calgary and have a fresh start in a new community where he is not so well known. He recognizes that the CPSA will impose restrictions but hopes that these restrictions will not be “oppressive”. He was able to appreciate the CPSA has a responsibility for protection of the public and that he would likely be required to have chaperones for female patients. He also notes that the CPSA would likely restrict him from seeing children as patients. Dr. Graff still believes that he poses little risk and pointed out that his offense did not occur in the context of patient care. He expressed some frustration with the need for restrictions but was prepared to meet any and all requirements of the CPSA.

Dr. Suzanne Lemieux, Clinical Psychologist, provided a written report dated April 12, 2017. This report provided an overview of the treatment with Dr. Graff. The interview was intended to follow up on a few issues and questions that arose during this reassessment.

In the course of treatment, Dr. Lemieux believes that Dr. Graff has made considerable gains in understanding how he came to be in his current situation. This has included developing more insight into his relationships, particularly with his family and his ex-wife. In terms of future work, Dr. Lemieux notes that self-esteem remains an area for growth.

Dr. Lemieux was asked if Dr. Graff has addressed his position of returning to full practice including seeing children, with a restriction only for a limited time and if he has considered the potential losses should he not be allowed to return to practice in the way he would like. Dr. Lemieux indicated that Dr. Graff has been grieving the past and potential losses to his career. Further, she believes that he appreciates that there will be restrictions and that he will be grateful for being allowed to return to work in any form. She stated that Dr. Graff sees himself as a low risk to reoffend, and finds it hard that others may not see him that way. She notes that the literature on online offenders does suggest that the recidivism risk is less and Dr. Graff sees this as further support of his position.

Dr. Graff's work with Dr. Lemieux appears to be very helpful to date. Dr. Lemieux stated that she would be able to continue seeing him every 2 to 3 weeks assisting him with his transition back into "his own life" and that this will involve work on his self-esteem, dealing with shame and the reactions of others, and putting some solid supports in place. Dr. Lemieux views Dr. Graff as very functional compared to her typical forensic clientele. Her willingness to continue therapy with him results more from the consideration and requirements of his desired return to practice rather than from an identified clinical need per se.

Professional scenarios that were used in the first assessment were revisited with Dr. Graff. In general, Dr. Graff gave more thoughtful and professionally appropriate responses than he did in the first assessment, indicating growth and self-reflection through therapy. However, two themes recurred throughout the course of these discussions. First, Dr. Graff struggled with professional versus personal boundaries particularly in the limits of self-disclosure. Second, he tended to view his interactions with patients from his own perspective and experience rather than from the perspective and presentation of the patient. These are certainly skills that can be developed further with experience, mentoring and ongoing professional and personal self-improvement.

Following the previous assessment, Dr. Graff did engage in therapy was a therapist who is experienced with working with sex offenders and has made some gains. He has a better understanding of the factors that led to his offense and has made concrete efforts to meet new friends and expand his social activities addressing directly some of his self-identified risk factors. Dr. Graff asserts that he would never reoffend as he both does not want to return to jail and continues to address the factors that led to his actions in the first place.

COAP felt that Dr. Graff is unlikely to reoffend with patients but given the seriousness of his offenses, the College will need to carefully weigh both the risk to the public and the impact of permitting a registered sex offender to practice medicine. There is no question that Dr. Graff was motivated to continue with the self-improvement and professional development, but the serious nature of the offense and the safety, well-being and perception of potential patients must be considered. On the basis of the reassessment, it was the opinion of COAP that Dr. Graff could return to practice with conditions and restrictions on its practice.

COAP recommended:

1. Dr. Graff practice in a multi-physician clinic and specifically connected to an experienced colleague who would provide mentoring and monitoring of the clinical practice. The mentor should assist Dr. Graff with a better understanding of the physician/patient relationship and professional boundaries. The mentor should be fully aware of the nature and reason for any restrictions on Dr. Graff's practice and should not be related to Dr. Graff.

2. Dr. Graff should not be permitted to practice alone in the clinic and it was recommended that at all times there should be another regulated health professional in the clinic when he is present. This person should also be aware of the conditions on his practice and the reasons for those restrictions.

3. Dr. Graff should have restrictions on the type of patients that he is allowed to treat. It is recommended that Dr. Graff be restricted to seeing only male adult patients.

    a) If the CPSA determines that he can see female patients, COAP would recommend that he be only allowed to see women over the age of 25 and that this restriction be in place for an indefinite period of time. Dr. Graff should have a chaperone present during any interaction with female patients, not solely during physical examinations. The chaperone should be aware of his restrictions and the reasons for those restrictions, and should report regularly to the CPSA on his compliance with his condition.

    b) Should Dr. Graff be seeing a male child with his female parent or guardian, a chaperone should be present for the interaction.

4. Dr. Graff will benefit from ongoing psychotherapy with an experienced therapist and COAP recommended that he continue to see Dr. Lemieux.

5. Dr. Graff's medical practice and his compliance with conditions should be regularly monitored by the CPSA.

(c) <u>Letter from Dr. Cynthia Baxter dated March 15, 2017</u>

Dr. Baxter is a psychiatrist with a subspecialty certification in forensic psychiatry, licensed to practice medicine in the province of Alberta. She serves as an Assistant Clinical Professor in the Faculty of Medicine at the University of Calgary. She has

provided expert psychiatric opinion and criminal matters to the provincial Court of Alberta and to the Court of Queen's Bench since 2002. She has completed over 500 psychiatric assessments for the Court and has been in private practice since 2013.

Her area of clinical focus is sex offender assessment and treatment. She was the primary psychiatrist at the Sex Offender group program at the Forensic Assessment Outpatient Services (the "FAOS) for approximately 10 years and continued to co-facilitate the sex offender maintenance group at the FAOS until August 2016 as an outside consultant. She is now the medical director/clinical lead in the development of a new provincial in-custody sex offender treatment program. She attends regular training to maintain up-to-date knowledge regarding sex offender risk assessment; most recently she recertified in the STATIC-99R, STABLE-2007 AND ACUTE-2007.

Dr. Baxter states that sex offender risk assessment has evolved greatly over the last 10 to 15 years. Previously, it was sufficient to simply read the manual on one's own, but the definition of various items has become less intuitively obvious and requires retraining to understand what authors mean. Given this, based on the information reviewed, Dr. Baxter recommended that the risk assessment for Dr. Graff be performed again.

Her first concern was that the STATIC-99R, not the STATIC-2002R should have been used in his assessment. Her reasoning is that the STATIC-99R is still the recommended instrument due to the larger validation in dozens of studies and in many more countries. More research is recommended before assessors use the STATIC-2002R in any situation with a legal context. Additionally, the 2016 STATIC-99R Coding Manual is the latest version that should be used.

The second issue Dr. Baxter has is that the STABLE-2007 may not have been coded correctly. She cites that Dr. Graff was coded as 2 under "General Social Rejection/Loneliness", but court records demonstrate numerous letters of support from friends and family along with comment at the bottom of page 4 of this COAP report that, "Dr. Graff reports that he has good social supports, particularly within his family."

Furthermore, the score range for the moderate risk category on the STABLE-2007 is quite broad from 4-11, so he may still fall into the moderate category on that instrument.

Given these points, Dr. Baxter respectfully recommended that the risk assessment for sexual recidivism be redone using the most up-to-date recommendations in the sex offender field, noting that recent training is recommended by the authors of the instruments at this point. She adds that the assessors at COAP may have recent training, but this is not noted in their report. She also suggested that the new risk assessment outline what percentage of offenders with the same score typically reoffend as individuals outside of the sex offender field often overestimate what low, moderate, or high risk means. Furthermore the risk assessment should also outline specifically what he is at risk for should he recidivate, in order to manage that risk appropriately.

Dr. Baxter also endorsed Dr. Lemieux who has treated hundreds of sex offenders in the community. She states Dr. Lemieux is current on the latest in sex offender assessments and treatments and suggests that any recommendations from her regarding risk management should be weighed heavily.

It should be noted that Dr. Baxter's letter was reviewed by the assessment team in their May 2017 assessment and by Dr. Friend. Dr. Friend provided an independent response to Dr. Baxter's letter, as set out below.

(d) Letter from Dr. William Friend dated May 10, 2017

Dr. Friend provided a response to Dr. Baxter's letter. In regard to the comment that training should be required to understand what the authors of the evaluation tools mean, Dr. Friend stated that it is important to recognize that these instruments are frequently completed by individuals lacking psychiatric or psychological training, such as parole officers and this is the basis for the recommendation for training. Both STATIC-2002 and the STATIC-99 coding rules are described in detail, in manuals with numerous examples. Dr. Friend has not taken the training however it is not his habit to simply read the item on the coding form and assume that he understands the scoring. He stated that he reviews the manual each time he codes an offender.

Dr. Friend served as the attending psychiatrist on unit 3-3 of Alberta Hospital which is the sex offender unit. While the authors of the STATIC instruments recommend training, it is important to note that they do not mandate it. Dr. Friend stated that he does not rely on his own intuition, but instead uses the supplied manuals.

Dr. Friend challenged Dr. Baxter's remark that the STATIC-99R should be used in preference to the STATIC-2002R by stating that he reviewed the Evaluator's Workbook dated October 19, 2016, one month before his assessment of Dr. Graff was completed, and that no statement was made that the STATIC-2002R should not be used.

Dr. Friend also reviewed his scoring on the STATIC-2002 and completed scoring on STATIC-2002R and STATIC-99R for Dr. Graff. For all three tests, the raw score was five. On the STATIC-2002 this translates into a five-year risk of 6.2%. On the STATIC-2002R this translates into a five-year risk of 13.8%. On the STATIC-99R this translates into a five-year risk of 15.2%. Therefore, of the three instruments, the one that was originally submitted by Dr. Friend, the STATIC-2002 produced the lowest estimate of risk for Dr. Graff.

Dr. Friend also addressed Dr. Baxter's uncertainty about whether the STABLE-2007 tool had been coded correctly. Specifically, she questions "general social rejection/loneliness" which was scored as a 2. She notes that the court records demonstrate numerous letters of support from friends and family and notes that the report states that "Dr. Graff reports that he has good social supports particularly within his family."

Dr. Friend responded by pointing out the numerous letters of support from friends and family came from individuals who in almost all cases, were friends and family at the time Dr. Graff committed his index offense. Their relationship to him at that time was not

effective in preventing him from offending in the first place. Dr. Friend further notes that Dr. Graff stated that loneliness led him to addictive behaviours and was a major factor in introducing Dr. Graff to sexual chat rooms. Dr. Graff was quite clear in indicating that he was emotionally isolated from his wife and because of that he felt the need to turn to these chat rooms. Therefore, Dr. Graff was coded as a 2 on this particular item.

Dr. Friend also rebutted Dr. Baxter's statement that individuals outside of the sex offender field overestimate what low, moderate, or high risk means. His determination of moderate risk comes directly from the STATIC 2002 scoresheet. Similarly, for the STATIC-2002R and STATIC-99R the description of above average risk is taken from the Evaluator's Workbook. Similarly, on the STABLE-2007, a score of nine is indicated to be a moderate score in the coding form.

Dr. Baxter also indicated "it would be helpful if the new risk assessment outlines what percentage of offenders with the same score typically re-offend." Dr. Friend was under the impression that the original report had indicated what percentage of sex offenders with the same score as Dr. Graff, reoffend. Further review of his submission indicates the following:

"For sexual recidivism, the range risk for a score of 5 on STATIC 2002 to 6.2 to 17.3% in five years and 7.1% to 24.5% in 10 years. The recidivism rates derived from the routine CSC and preselected high risk samples, are empirically based actuarial estimates. Given that the differences between samples are not fully known evaluators need to use the professional judgment in order to make statements about where in this range the risk of a particular offender is situated."

Dr. Friend acknowledged and apologized for accidentally omitting this information. However he has indicated a five-year risk for all three instruments STATIC-2002, STATIC-2002R and STATIC-99R.

Dr. Friend agreed with Dr. Baxter that Dr. Lemieux was an excellent choice for Dr. Graff's treatment. At the time of their initial assessment Dr. Graff was not seeing Dr. Lemieux, so their therapy or assessments could not have been incorporated into the initial assessment.

(e) <u>Letter from Dr. Suzanne Lemieux dated April 12, 2017</u>

Dr. Lemieux is a clinical and forensic psychologist working at the Forensic Assessment and Outpatient Services in Calgary. At the time of her letter Dr. Graff had attended a total of 11 individual therapy sessions averaging 90 minutes each.

At the time of intake the following treatment targets were identified with Dr. Graff:

a) improved self-esteem;

b) improved insight regarding his intimate relationship history and functioning;

c) increased clarity regarding "normal" or "typical" sexual behaviours and expectations;

d) improved coping (e.g. with feelings of loneliness, boredom, low self-esteem, sexual thoughts/urges); and

e) basic risk management planning.

Dr. Lemieux stated that Dr. Graff is an active participant in his treatment and has attended all of his scheduled appointments on time, completed all assigned homework tasks and meaningfully participated in sessions. In addition to the above-mentioned treatment targets, therapy sessions with Dr. Graff focused on:

a) processing his feelings of loss (loss of his profession/professional identity, his reputation, his independence);

b) increased grief resolution regarding the failure of his marriage;

c) his insecure attachment style and the behavioural expression of the same in his intimate relationships, as well as how to move towards a more secure attachment in his intimate relationships;

d) partner selection;

e) self-forgiveness (reduced feelings of shame);

f) increased insight regarding the origins and maintenance of his self-esteem struggles; and

g) the function of his past online sexual behaviours and alternate ways of getting his needs met.

Dr. Lemieux stated Dr. Graff presented as highly motivated and has made consistent progress throughout the course of his treatment. He was open, non-defensive and willing to explore difficult topics. His insight into the dynamic underpinnings of his offenses was solid from the start but continue to improve considerably. He developed a much more balanced/realistic view of his marriage and of healthy sexuality. Dr. Graff has also made steady gains in the areas of self-esteem and his insight into the origins of his self-esteem deficits has increased so that he is gradually learning to challenge negative self-perceptions and core beliefs. Dr. Graff also developed a clearer sense of what he's looking for in a romantic partner and is taking more self-disclosure (intimacy) risks in his relationships in general. In addition, Dr. Graff continues to develop improved coping skills and his risk management plans are progressing nicely.

At the time of her letter, it was Dr. Lemieux's expectation that Dr. Graff would complete the recommended (mandatory) part of his treatment within the next 2 to 3 months. Upcoming sessions would focus on further enhancing his self-esteem and elaborating on his risk management plans. She stated that Dr. Graff could continue in individual therapy to process issues as they arrive and he is welcome to do so at the FAOS.

Dr. Lemieux declared that in her capacity as Dr. Graff's treatment provider, she could not comment on his estimate a risk of future re-offense.

IX. SUBMISSIONS ON SANCTIONS

The Tribunal heard submissions from both Mr. Boyer and Mr. Heelan regarding sanctions for Dr. Graff. A joint submission on sanctions was presented and accepted as Exhibit 25.

The jointly submitted sanctions were:

a. Dr. Graff should receive a suspension of his practice permit for a period of eighteen (18) months, of which fifteen (15) months should be an active suspension and three (3) months held in abeyance pending fulfilment of the conditions imposed on its practice permit and the terms of his Continuing Care Agreement;

b. Dr. Graff should receive credit for the time he has been out of practice since January 18, 2013 such that the period of active suspension shall be considered fulfilled;

c. Dr. Graff should receive a practice permit to allow him to comply, at his own cost, with the Reentering Medical Practice Standards of Practice and with the condition that he only be allowed to provide surgical assist in an operating room, not to see patients alone in the pre-operative area, postoperative area or on the ward and to be in the operating room with the patient only when other staff are present, until such condition is removed or altered after further assessment by the College;

d. It is understood that Dr. Graff must also receive approval from Alberta Health Services, Covenant Health or any other operator of a surgical facility (collectively the "Facility Operator") to provide surgical assist in an operating room setting, and the Facility Operator may impose other terms and conditions in addition to the order of the Hearing Tribunal;

e. Dr. Graff shall, at his own cost, enter into and fulfil a Continuing Care Agreement with the Assistant Registrar responsible for the College's Physician Monitoring Program for Boundary Violators, the terms of which shall have consideration for the Agreed Facts and the Exhibit Book, and be for a period of at least five (5) years after the date the Agreement is signed and Dr. Graff should not be discharged from that Agreement without the approval of the Assistant Registrar having regard to any further assessment of Dr. Graff;

f. The Complaints Director would determine such further or other conditions to impose on Dr. Graff's practice permit after he has completed the requirements of Reentering Medical Practice and upon consideration of any further assessment of Dr. Graff's recovery through the Physician Monitoring Program;

g. In the event Dr. Graff disagrees with the nature, scope or duration of conditions determined by the Complaints Director, Dr. Graff, on notice to the Complaints Director, may request the Hearing Tribunal to determine the nature, scope or duration of the conditions to be imposed on his practice permit;

h. In the event the Complaints Director believes that Dr. Graff has not been compliant with the conditions on his practice permit or terms of the Continuing Care Agreement, the Complaints Director, on notice to Dr. Graff, may bring the matter back before the Hearing Tribunal to determine if all, or some of the three (3) months of suspension held in abeyance, should be served by Dr. Graff; and

i. Dr. Graff should be responsible for the costs of the investigation and the hearing before the Hearing Tribunal payable on terms acceptable to the Complaints Director.

(a) Submissions on Sanctions by Mr. Boyer

Mr. Boyer stated that Dr. Graff cooperated with the assessment that was undertaken at the direction of the CPSA by the COAP. The initial report was contained in the exhibit book dated November 29, 2016 with an updated report dated May 15, 2017.

Related to this, was a letter from Dr. Cynthia Baxter and a letter of response from Dr. William Friend. Dr. Friend was part of the assessment team and Dr. Baxter provided critical advice to Mr. Heelan on the risk assessment instruments that were utilized by that assessment team. This created professional debate between them as to scoring of assessments. Despite this, the conclusion is unchanged and the team feels that Dr. Graff has reached the point of recovery to be considered for return to practice.

Mr. Boyer also referred to the Standard of Practice for Reentering Medical Practice. This is applicable to any physician who has been out of practice for more than three years for any reason including illness administration. It outlines the process the CPSA has for upgrading and ensuring that skills and knowledge are current because of the passage of time. This is relevant to Dr. Graff who at the time of this hearing had been out of practice for approximately 4 ½ years.

Mr. Boyer also made reference to the case of *Jaswal v. Newfoundland (Medical Board)*, [1996] NJ No 50 at para 36 which provided a non-exhaustive list of factors that ought to be considered when imposing a proper penalty applicable to the case at hand. These factors are:

1. The nature and gravity of the proven allegations.
2. The age and experience of the offending physician.
3. The previous character of the physician and in particular the presence or absence of any prior complaints or convictions.
4. The age and mental condition of the offended patient.
5. The number of times the offense was proven to have occurred.
6. The role of the physician in acknowledging what had occurred.
7. Whether the offending physician had already suffered other serious financial or other penalties as a result of the allegations having been made.
8. The impact of the incidents on the offended patient.
9. The presence or absence of any 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.
11. The need to maintain the public's confidence in 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, and being the type of conduct that would fall outside the range of permitted conduct.

13. The range of sentences in similar cases.

Mr. Boyer assured the Tribunal that he and Mr. Heelan have considered all the relevant *Jaswal* factors. Mr. Boyer felt that the Tribunal could be confident that the factors listed have been considered in their joint submission.

Mr. Boyer also spoke to the issue of joint submissions. A joint submission should be considered very seriously because it is the result of discussion, negotiation, consideration and the balance of many interests. The test that must be applied by a Hearing Tribunal is to question whether or not the joint submission is unfit, unreasonable or contrary to the public interest.

The joint submission on its own is not binding on a Hearing Tribunal nor should it be suggested that it is binding. A Hearing Tribunal can reject the joint submission but prior to doing so it must provide the parties with an opportunity to address any of the Hearing Tribunal's concerns with the joint submission.

Mr. Boyer referred the *Anthony-Cook* case from the Supreme Court of Canada which states:

> *the public interest test is the proper legal test that trial judges should apply. Under the public interest test, a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or would otherwise be contrary to the public interest. For joint submissions to be possible the parties must have a high degree of confidence that they will be accepted. The public interest test, by being more stringent than the other tests proposed best reflects the many benefits that joint submissions bring to the criminal justice system and the corresponding need for a high degree of certainty in them.*

A second point that Anthony-Cook clarified was that if a joint submission is rejected, one of the options available to the accused is that they can withdraw their admission and proceed with a fully contested hearing. However, in this case, Mr. Boyer urged the Tribunal to accept the joint submission as fully protecting the public interest.

Mr. Boyer recognized that Dr. Graff voluntarily withdrew from practice long before any admission of the charges imposed by the CPSA and prior to any criminal conviction. He emphasized that during the period where an accused has a right to remain silent and a right to be considered innocent until proven guilty, Dr. Graff voluntary withdrew from practice and in effect addressed the public interest by taking that route. Given this, and given that Dr. Graff has been out of practice for 4 ½ years, Mr. Boyer felt that Dr. Graff should receive credit for that suspension and that he should have it be considered as served.

Mr. Boyer also proposed that Dr. Graff receive a practice permit so that he could re-enter medical practice and in doing so, allow for necessary upgrading and retraining, which the CPSA would oversee, and be allowed some opportunity to participate in the role of a physician. This would be limited to being a surgical assistant. This notion was supported by the COAP assessment dated May 15, 2017. This would also safeguard the public by having Dr. Graff in a situation where he would not have any unsupervised or lone interaction with patients preoperatively or postoperatively. During the procedures, the rest of the surgical team is there and in this very limited role there is much supervision and monitoring. This would give Dr. Graff an opportunity to re-enter the culture of medicine, which he has been out of for some time.

Mr. Boyer also emphasized that Dr. Graff was a relatively young physician, new to the profession of medicine, when he withdrew from practice. Part of rehabilitation is reintegrating a physician back into the medical community and to have positive interaction with mentors and role models to regain the moral compass that a person requires to be a physician.

Mr. Boyer stated that the joint submission recognizes that any surgical assist situation would also be subject to any conditions or terms that Alberta Health Services decides to impose or, if it was a private surgical facility, the medical director of that surgical facility. This implies additional, not lesser controls.

Mr. Boyer also proposed that Dr. Graff would enter into a Continuing Care Agreement with the CPSA in the Physician Monitoring Program, for at least a period of five (5) years. This would include continuous monitoring by the CPSA and a likely requirement for ongoing psychological therapy. This notion was supported by the comments of Dr. Lemieux outlining the progress that Dr. Graff has made in the course of his treatment.

Also proposed as outlined in paragraph (f) was flexibility for the Complaints Director to determine if such further, or other, conditions needed to be imposed on Dr. Graff's practice permit after he re-enters practice to ensure that he has current knowledge and skills for a family physician and to address any further assessment recommendations of his recovery. Mr. Boyer pointed out that in November 2016 the assessment team said that he was not ready for a return to practice. There was a period of therapy and further work that was done by Dr. Graff such that by the time of their reassessment in May 2017 they felt that he was now fit to return to practice. This type of recovery is a dynamic and continuing process and this is why this structure is being outlined to ensure that safeguards and controls are in place through this sanction.

Also noted by Mr. Boyer is the provision that if Dr. Graff disagrees with the nature, scope or duration of any conditions that the Complaints Director imposes on his practice permit, the matter can be brought back to the Hearing Tribunal for determination.

Mr. Boyer identified mitigating factors that are applicable to Dr. Graff's situation. Dr. Graff admitted his conduct, withdrew from practice and has cooperated throughout the entire proceedings. In this situation, where he has cooperated, acknowledged and been contrite there should be consideration given to a lesser sanction.

Mr. Boyer outlined cases of physicians who have been found guilty of sexual boundary violations with consenting adult patients over the past 5 to 10 years. While not ethically appropriate, the fact that they were consenting adults brought a period of active suspension typically in the 9-12 month range. Dr. Graff's 18-month suspension is more severe and recognizes the significance of the criminal charges and the gravity of that conduct.

Also for consideration is the fact that Dr. Graff was 29 years of age when the event occurred. By direct analogy to the *Jaswal* case, Dr. Jaswal was also a relatively newly licensed physician committing a boundary violation. The court recognized that this was a factor in imposing a sanction on a lower scale compared to a more experienced and senior physician who would be more well-grounded in the professional culture.

Mr. Boyer then moved to discussing monitoring of Dr. Graff and the many different elements of monitoring that are in place. There is monitoring by the Complaints Director, and there is monitoring by the Physician Health Monitoring Program, which includes regular reporting from the treating psychologist and other treating physicians.

He referred to the initial assessment by the COAP in which they stated:

"An offender's social network is one of the most well-established predictors of criminal behaviour.."

This would be applicable by analogy to unprofessional behaviour. Mr. Boyer stated that Dr. Graff being able to work as a surgical assistant would create a positive social network with other physicians and other healthcare professionals who could also monitor his behaviour.

He added that under the STABLE-2007 risk assessment tool:

"supervision can only reduce risk, however, when it monitors and addresses factors related to recidivism."

Mr. Boyer felt that by having monitoring in place there are controls that are required if there was concern about relapse or re-offence.

Mr. Boyer stated that by no means is the submitted joint sanction meant to be a slap on the wrist. Dr. Graff has suffered significant consequences in his life because of his conduct. He will continue to face significant consequences going forward. Dr. Graff has been registered as a sex offender, which carries a lifetime registration. There is also the five-year monitoring program, which is not insignificant.

Mr. Boyer stated that in the basic principles of sanction, there is both deterrence and rehabilitation and it is a balance between the two. The evidence presented shows that Dr. Graff is someone who has demonstrated that he should be considered for reentering practice, with conditions, with limitations, but he is not beyond rehabilitation. In the case of Dr. Cooper, his conduct was so egregious that the loss of licensure was appropriate. In the case of Dr. Nqumayo, he was under an undertaking that he was required to have a chaperone. At the time of the last assault he did not have a chaperone even though he was supposed to have one. The consequence was a loss of licensure.

While Dr. Graff's situation is serious, Mr. Boyer submitted that Dr. Graff's situation was not at the upper end of the egregious act spectrum, and submitted that the suspension and all of the conditions of the joint submission were appropriate in the circumstances.

(b) Submissions on Sanctions by Mr. Heelan

Mr. Heelan began his submission by stating that Dr. Graff engaged in conduct that society finds reprehensible and he is not asking anyone to accept or excuse his conduct. As reflected in the report of Dr. Nesca, Dr. Graff hates what he has done and acknowledges that what he did was wrong.

This acknowledgement began right at the start where he admitted to the police that he was the person who is engaged in this conduct, and rather than going through a criminal trial, he pled guilty to the charges against him. He also acknowledged his behavior to the Complaints Director and before this Hearing Tribunal.

This is an event that will follow Dr. Graff for the rest of his life. However, this need not be an event which will define Dr. Graff's life. Dr. Graff has worked hard on his rehabilitation, and has dedicated himself to getting into the position of being able to practice medicine again. He is seeking an opportunity to allow himself to carry on with the profession that he loves, and allow him to be a contributing member of society and a contributing member to the profession.

Mr. Heelan outlined that Dr. Graff has already been punished and suffered. He has lost his friends. His family has been put through profound collateral damage. His wife left him and his marriage fell apart. He has suffered incredible damage to his reputation, and he has spent eight months in jail. He read about himself on the front page of newspapers and has been out of medical practice since 2013.

However, rather than falling into further despair, Dr. Graff used this incident as an opportunity for self-reflection. He has taken this opportunity to turn his life around and plot a progressive path. He began by initially attending the Freedom Sessions - a 12 step program based out of his church. This has worked for Dr. Graff in understanding why he behaved in the manner that he did and how he can avoid engaging in this type of behaviour in the future. It also helped him to change his personal framework to ensure fulfilling and meaningful relationships into the future.

More significantly, Dr. Graff has engaged with Dr. Lemieux a well-respected psychologist working in this area. Dr. Lemieux writes about her sessions with Dr. Graff and comments on the progress that he has made outlining that he has become more open, less defensive, and more willing to explore difficult topics. Furthermore his insight into the dynamics underpinning his offences, while solid at the start, has improved considerably. He now has a much more balanced/realistic view of his marriage and of healthy sexuality. Dr. Graff has also made steady gains in the area of self-esteem and, his insight into the origins of his self-esteem deficits, has increased to the point where he is learning to challenge negative self-perceptions and core beliefs. Dr. Graff has further developed a clear sense of what he is looking for in a romantic partner and is taking more self-disclosure (intimacy) risks in his relationships in general. Dr. Lemieux further stated

that it was her expectation that Dr. Graff would complete her recommended portion of treatment within 2 to 3 months of her letter and that he may continue in individual treatment to process issues as they arise with her.

Mr. Heelan stated that as part of the joint submission on sanction, Dr. Graff will enter into the Physician Health Monitoring Program, and as part of that it should be expected that the CPSA will insist that there be a continuing period of psychotherapy well beyond the two or three months that Dr. Lemieux speaks of. Furthermore, Dr. Graff is more than willing to undertake this.

Mr. Heelan also added that Dr. Graff underwent two assessments with the COAP and it was concluded that Dr. Graff was unlikely to reoffend with patients. Additionally, Dr. Graff underwent an assessment with Dr. Nesca, a forensic psychologist who examined Dr. Graff presentencing and prior to his eight months of incarceration, who also concluded that Dr. Graff was quite unlikely to sexually reoffend. Furthermore, upon being released from jail, Dr. Graff underwent a risk assessment by Dr. Pugh who concluded that Dr. Graff's risk to returning to illegal sexual conduct was low and not at a level where the public should be warned regarding his release.

Mr. Heelan submitted that what is clear from all of these assessments is that Dr. Graff is at low risk for re-offense and has made significant progress in his psychological health. But given the seriousness of the offense, the CPSA needs to carefully weigh both the risk to the public and the impact of permitting a registered sex offender to practice medicine. The question for the Hearing Tribunal is whether or not Dr. Graff's rehabilitation is adequate to allow him to return to practice and whether or not the proposal made jointly with the CPSA is acceptable, or whether the proposed sanction would bring the administration of justice into disrepute or would otherwise be contrary to the public interest.

The task facing the Hearing Tribunal is to determine whether the joint submission on sanction is within the acceptable range, or whether it is unreasonable or contrary to the public interest.

Mr. Heelan urged the Tribunal to explore three concepts when considering the submissions on sanction. First, Mr. Heelan outlined sentencing factors that must be considered. The Tribunal should give consideration to the denunciation of the conduct of Dr. Graff and deterrence as the key factors which impact sentencing in this case. The Tribunal should also consider specific deterrence as it relates to Dr. Graff and general deterrence as it relates to the profession as a whole. The Tribunal should also give weight to the concept of rehabilitation as we do not live in a society where all we do is punish. There must be a balance between rehabilitation and protecting the public interest.

Second, Mr. Heelan submitted that the medical profession is a profession that embraces the idea of rehabilitation. Much of what physicians do day-to-day is to help people get back on their feet and this includes people who engage in poor choices and poor conduct. If a proper balance can be found between protecting the public in maintaining the reputation of the profession, an opportunity ought to be given to Dr. Graff to rehabilitate

by returning to his profession. Dr. Graff has clearly demonstrated that he has rehabilitated, and most significantly, that this rehabilitation will continue.

Third, Mr. Heelan addressed the public interest. The most important thing first and foremost is that the public must be protected. Dr. Graff will have significant restrictions on his ability to practice medicine, and the level of scrutiny and oversight on him will ensure that the public is protected. Dr. Wright's team concluded that Dr. Graff could return to family practice, albeit with very significant restrictions, but Dr. Graff through his discussions with the CPSA has decided for the moment to simply pursue the work of being a surgical assistant. He will work closely with the Complaints Director to address whatever restrictions may be required in the future in the hopes that he will one day return to family practice. Mr. Heelan submitted that it is in the public interest to allow a physician that our society has educated and who has rehabilitated, to serve. One event need not define an entire life.

Mr. Heelan presented case law to demonstrate that the joint submission on sanctions meets the acceptable range for similar offenses. In the case of Dr. Mario Fernandez Sandejas, the physician was convicted of a charge of sexual interference with a minor and the panel recognized that the behaviour which led to the criminal conviction in the proceedings before the College of Physicians and Surgeons of Ontario would be repugnant to the members of the public and to the members of the College. The panel balanced this with the evidence of remorse on the part of Dr. Sandejas. The panel also acknowledged Dr. Sandejas' response to therapy, and the effects of the criminal proceedings. Account was also taken of the fact that there was no physician-patient relationship. Family members also requested leniency in support of the healing process that had occurred. Dr. Sandejas was suspended for 18 months, with 6 months of the suspension to remain in abeyance as long as Dr. Sandejas remained compliant with treatment.

Like Dr. Sandejas, Dr. Graff has demonstrated remorse and responded well to therapy. Dr. Graff has also suffered the effects of a highly public proceeding. Similarly, there was no physician-patient relationship at issue in this case. Therefore, it was Mr. Heelan's submission that Dr. Graff's suspension of 18 months was appropriate.

Mr. Heelan also referred to the case of Dr. Kaplan before the College of Physicians and Surgeons of Ontario. Dr. Kaplan was charged with a number of citations of professional misconduct including pleading guilty to an assault of a prostitute contrary to the Criminal Code and failing to maintain the standards of practice of the profession. In this case, the panel carefully considered the facts giving rise to the findings and the joint submission, which was a 12 month suspension of Dr. Kaplan's certificate of registration amongst other things. The panel agreed that Dr. Kaplan's serious misconduct of violence against a prostitute and dishonesty when called on to report the offence were serious matters.

But the panel also took into account that notwithstanding the serious concerns and the serious misconduct, Dr. Kaplan had taken responsibility for his actions. He faced significant embarrassment and humiliation from excessive media coverage. He attended counselling and underwent numerous psychiatric assessments. He had no prior disciplinary history and there were lengthy periods where Dr. Kaplan did not practice. Mr. Heelan submitted that these factors were all similar to Dr. Graff's circumstances.

Mr. Heelan also outlined the Rea case, in British Columbia. This case did not involve a physician, but rather a lawyer who was found guilty of child pornography charges and spent time in jail for those charges. The Law Society panel in its decision recognized that the conduct was unbecoming. That panel also allowed Mr. Rea back into practice and he was suspended for six months. However his effective suspension because of the time away from practice was closer to three years.

Mr. Heelan submitted that it is clear that what the CPSA and Dr. Graff have proposed meets the acceptable range of what other colleges in similar circumstances, including a Law Society, considered to be reasonable for their members who engage in serious criminal misconduct. The cases demonstrate that the proposed sentencing is not unreasonable and is not contrary to the public interest. The penalties proposed denounce what Dr. Graff has done and will serve to deter both Dr. Graff and members of the profession in general from engaging in similar conduct in the future. A suspension of 18 months is a significant statement by this College and its denunciation of Dr. Graff's conduct is a significant message to the profession.

The joint submissions, however, also recognize and acknowledge the efforts of Dr. Graff in his rehabilitation and the importance of rehabilitation in our society and, more significantly, within the medical profession.

(c) Questions from the Hearing Tribunal

The Hearing Tribunal asked both parties to address how the joint submission on penalty will address point 11 in *Jaswal*, which is the need to maintain the public's confidence in the integrity of the medical profession.

Mr. Boyer responded first by stating in all the factors listed in *Jaswal*, there is no mathematical or formulaic weighting to the factors and that they must be balanced. In that case, it was recognized that Dr. Jaswal was a relatively inexperienced physician and the mistake he made associated with this inexperience was not to define him for life, in the sense that he was not thrown out, rejected or subject to cancelled licensure.

Mr. Boyer continued that in Alberta the medical training system is heavily supported by the Alberta taxpayer and it's a question of investment in the training of that physician. Physicians are human, they make mistakes and there is no question that this mistake was a significant one and that the consequences that have already been imposed on Dr. Graff, and are going to be imposed through this process, are not insignificant.

In order to reassure the public about the integrity of the profession, the whole context must be considered. The CPSA immediately took steps to protect the public after it became aware of the allegations. The CPSA asked Dr. Graff if he would voluntarily withdraw from practice. As such, the confidence should be very high that the role of the CPSA in protecting the public was taken very seriously and acted upon without any delay.

The fact that Dr. Graff was followed through his criminal proceedings should also instill confidence in the public. During criminal proceedings, a CPSA investigation is somewhat

in limbo because the CPSA cannot compel the physician to respond due to their right to remain silent. The Charter of Rights and Freedoms, and due process, must be respected.

However, as soon as the criminal process was done, the CPSA was advised and knew that there was a period of incarceration. Dr. Graff was released in July 2016 and was subsequently served with the Notice of Hearing for these proceedings in September 2016. The confidence that the public should have in the College should be very robust.

Then there is the process of having assessments in determining who can return to practice or identifying a reason for why that person should never come back to practice. For example, it is very clear in the CPSA's Standards of Practice that where a physician has been involved in psychotherapy with a patient in that, the power imbalance is significant, then a physician is never to return to practice. This was seen in the case of Dr. Roberts, a psychiatrist who had a sexual relationship with a patient and married that patient, but was subsequently struck from the registry and was never to return to practice.

In the case of Dr. Graff, the assessments identified the need for further treatment. This resulted in an adjournment in this hearing. The CPSA gave the physician an opportunity to demonstrate rehabilitation but also ensured that the public was protected because he remained out of practice during this time.

Subsequently an updated assessment was provided which contained a number of different psychological, psychiatric and medical perspectives that all indicated that Dr. Graff was at a low risk of reoffending. It should be made clear that one will never find an expert who will say that there is zero risk of reoffending and the courts are very clear that the best you can say is there is a high, moderate, or low risk.

Similarly, the CPSA also was interested in whether or not Dr. Graff would likely succeed in ongoing rehabilitation and whether society and its investment in Dr. Graff's training as a physician could result in him returning to a beneficial role in society.

The College has been very alive to its duty to protect the public's interest and the public should have great confidence that the regulator is very much focused on the protection of the public.

Mr. Heelan acknowledged that the message of someone who has committed a sex offense being reintroduced to the practice of medicine would cause anyone to pause. This alone would put into the question the integrity of the medical profession.

But it is important to look at the whole picture and not deal with just soundbites. Dr. Graff is a physician who has been evaluated twice by Dr. Wright's team. He has been deemed a low risk by Dr. Pugh. He has also been deemed a low risk by Dr. Nesca. He has undertaken psychotherapy and is under the care of a psychologist and will continue to be if the CPSA insists that he remain under the care of that psychologist. He will be introduced to the practice of medicine again in a place where no one, no patient will be alone with him. So if the public knows all of this, and understands the importance of rehabilitation as part of the sentencing in our society, then they should have confidence

that what is proposed at this hearing would maintain the integrity of the medical profession.

The Hearing Tribunal also asked both parties how the joint submission would be considered as a deterrent for others in the medical profession.

Mr. Heelan responded first by saying Dr. Graff has not practiced medicine for four years, spent eight months in jail, lost and alienated his family, and lost his wife all before the start of this hearing. On top of this, an 18 month suspension is to be applied which means about a year and a half of someone not being able to earn an income. So if a physician thinks that they can "get away with" something like this the answer is that they cannot. This is a very serious suspension and it is at the high end of suspensions issued by the CPSA.

A suspension exceeding 18 months gets into a significant time away from the profession and is approaching of physicians who have been struck from the register. The message to the profession is not only are they going to be suspended but there will be a restriction on the kind of practice they can engage in. Dr. Graff is returning to the world of the surgical suite, but at this moment is not returning to family practice. That is a discussion for another day. He is certainly not being allowed to roam the hospital or do whatever he wants. That is quite clear and to members of the profession, this is a significant restriction.

Furthermore, Dr. Graff does not have a job at this time. He needs to convince others to put confidence and trust in him so he can get back to work. As the submissions state whatever restriction those employers intend to put on him are part of the process as well.

So a member of the profession reading this will not think that Dr. Graff got away with something. Instead, it is quite the contrary. There is significant and serious punishment being imposed on him.

Mr. Boyer added in the case of *Matheson v. The College of Physicians and Surgeons of Prince Edward Island* there were a number of discipline processes and suspension on top of suspension added to the effect of 3 ½ years. The Court of Appeal said that a one year suspension is a really high water mark and there would need to be pretty egregious conduct to get beyond that. As Mr. Heelan says you're really talking about striking people from the College register so the idea of a two-year suspension or a five year suspension, as the courts have said, is in essence akin to being struck.

X. FINDINGS ON SANCTION

The Tribunal has carefully considered Dr. Graff's conduct in this matter, the factors listed in *Jaswal v. The Newfoundland Medical Board* and the Joint Submission and Admission Agreement.

The Tribunal recognizes the seriousness of the allegations and the consequences it has on the integrity of the profession and the public interest.

The Tribunal recognizes that Dr. Graff was a young and relatively inexperienced physician, early in his medical career, at the time of the incident in question. However, the Tribunal placed little weight on this factor in terms of any mitigating effect. The incident in question did not occur in the context of a physician-patient relationship and therefore experience in medicine has little bearing on the issue. Similarly, Dr. Graff's age has little bearing on the issue in that a physician at any age would recognize that the conduct engaged in by Dr. Graff was wrong.

The Tribunal accepts that Dr. Graff had no previous complaints or convictions of this or similar nature, or any professional misconduct in general. The Tribunal also accepts that the Dr. Graff had psychological and emotional conditions, including an unsatisfying marriage and intimacy deficits which resulted in him seeking attention and admiration online.

The use of Internet chat sites to fulfil these emotional needs on its own does not equate to professional misconduct. These encounters occurred in a nonclinical setting, in an environment outside of patient care. There is no evidence to support that Dr. Graff used his influence and status as a physician during these online chats.

However, the Tribunal recognizes that the specific allegations involving a minor clearly violate professional and ethical standards, and the *Criminal Code of Canada*. That being said, there is no evidence to indicate that online chatting of a sexual nature with a minor occurred on multiple, or a frequent basis.

Dr. Graff has suffered tremendously both personally and professionally. His marriage has fallen apart, his existing friendships have been compromised, new friendships will be hard to forge, and his family has carried the burden of these allegations as well. Formally, he will retain restrictions on his license as well as the conditions accepted in the Joint Submission on Sanctions. He will always remain a registered sex offender, which will carry significant public scrutiny as a citizen, but will also make his ability to be a community-based physician that much more difficult. He will always fall under public scrutiny through informal online physician reviews and evaluations.

Despite this, Dr. Graff has taken full accountability and responsibility for his actions. This is most evident in several facts presented. Dr. Graff voluntarily withdrew from practice. This included a period where he had the right to remain silent as he was subject to criminal proceedings. Dr. Graff was transparent and cooperative with the entire CPSA investigation and was willing and compliant in seeking the recommended treatment for his rehabilitation. Dr. Graff also pled guilty and served a period of incarceration. Dr. Graff has demonstrated insight into what he has done and understands the role the CPSA has in ensuring public safety. In assessing the appropriate order for sanctions in this case, the Tribunal placed significant weight on Dr. Graff's substantial rehabilitation efforts and willingness to take responsibility, be accountable, and cooperate in both the criminal and professional regulatory proceedings. But for these factors, the Tribunal may have been inclined to more serious penalties in light of the gravity of the conduct.

The Tribunal does recognize that Dr. Graff had a violation of his bail condition but this did not result in any charges or discipline. Further, in the opinion of the COAP assessors, he remains at a low risk to re-offend despite the violation of his bail condition.

While the 14-year-old female in question was portrayed by an undercover law enforcement officer, the Tribunal does not accept that this in any way lessens the seriousness of Dr. Graff's conduct. Dr. Graff was clearly aware at the time that he was engaged in a highly sexual exchange with an under aged girl. To use the words of Mr. Heelan, this is conduct that our society considers reprehensible.

With regard to specific deterrence, Dr. Graff will be faced with numerous restrictions on his ability to practice medicine. On top of this, he will also face ongoing scrutiny for the remainder of his career due to media coverage and informal online physician discussion accessible by the public. Dr. Graff also will remain a registered sex offender and will be subject to the terms and conditions of that label. The Tribunal feels that these will serve as adequate safeguards in preventing re-offence.

In terms of general deterrence to the members of profession as a whole, the Tribunal is satisfied that the sanctions of suspension, ongoing monitoring, and continued scrutiny by the CPSA are significant. Moreover, there will be ongoing scrutiny by the regulatory body of any jurisdiction that he chooses to establish practice in for the life of his career. This is a significant message to the members of the profession.

Considering all of the circumstances, the Tribunal is supportive of the notion of Dr. Graff returning to practice. There was no evidence presented that indicated that Dr. Graff had a habitual and frequent pattern of online sex chat with minors, and the Tribunal accepts that this was a poor decision that was made spontaneously during a period of heightened sexual stimulation.

Dr. Graff has undergone two significant multi-disciplinary assessments conducted by the COAP directed at assessing his risk of re-offending and his corresponding fitness to return to practice. While there appeared to be some professional disagreement between Dr. Friend of the COAP team and Dr. Baxter with respect to the assessment tools which should be used to assess recidivism risk, this disagreement was ultimately not germane to the consensus conclusion that Dr. Graff is at a low risk to re-offend. Dr. Graff also underwent a pre-sentencing assessment with Dr. Nesca as well as an assessment by Dr. Pugh. All experts were in agreement that Dr. Graff is at a low risk to re-offend and that he has made significant progress in his psychological health. The Tribunal accepts the conclusion that Dr. Graff is not likely to re-engage in the conduct at issue in these proceedings.

Further, Dr. Graff has undergone a significant course of psychotherapy with Dr. Lemieux where he made steady gains in self-esteem, risk management and coping skills. The Tribunal accepts that Dr. Graff has been engaged in significant efforts to rehabilitate and has demonstrated evidence of rehabilitation. The Tribunal respects Dr. Graff’s ownership, accountability and responsibility in these actions and his willingness to seek treatment for their root causes.

Accordingly, the Tribunal accepts that Dr. Graff's rehabilitation efforts have reached a point where he should be allowed to return to practice on a restricted basis. The Tribunal is satisfied that requiring Dr. Graff to be subject to ongoing treatment and assessment is significant in protecting the public interest.

Given that Dr. Graff has been out of practice for nearly 4 ½ years, the Tribunal supports the notion of a limited practice permit to reestablish and reenter the culture of medicine, through mentorship and leadership. It will also serve as an opportunity to regain his clinical skill set required for practice, but more so to have controls in place to monitor and address any increasing risk of relapse or re-offense.

However, the Tribunal must balance Dr. Graff's return to practice with the public's safety, interest, and confidence in the integrity of the medical profession. Ultimately, the Tribunal is satisfied that the proposed sanctions adequately strike this balance. Dr. Graff will be subject to a practice permit that will allow him to provide surgical assist only, in an atmosphere with numerous other health professionals in close proximity to the patient. Dr. Graff will not see patients alone in the preoperative or postoperative area, on the ward or in the operating room without other staff being present. Dr. Graff will also be required to adhere to any additional conditions imposed on him by the facility in which he performs the surgical assist work. These additional conditions will serve to enhance public protection.

Furthermore, Dr. Graff shall enter into a Continuing Care Agreement with the Assistant Registrar responsible for the CPSA's Health Monitoring Program for a period of five years and shall not be discharged from that Agreement without the agreement of the Assistant Registrar having regard to any further required assessments of Dr. Graff.

The CPSA will also retain the right to impose further conditions on Dr. Graff's practice permit after he has completed the requirements of reentering medical practice and upon consideration of any further assessment of his recovery through the physician monitoring program. Moreover, if the Complaints Director believes that Dr. Graff has not been compliant with the conditions on his practice permit, or the terms of the Continuing Care Agreement; the Complaints Director, on notice to Dr. Graff, may bring the matter back before the Tribunal to determine if all, or some, of three months of suspension held in abeyance should be served by Dr. Graff.

The Tribunal also feels that the public can be assured of the integrity of the medical profession. As outlined, the CPSA responded swiftly when the allegations came to light and followed Dr. Graff closely through his incarceration and release. In addition, with the sanctions proposed, the College will also retain the ability to monitor Dr. Graff's treatment, rehabilitation and well-being to ensure the delivery of safe, ethical patient care.

Mr. Heelan suggests that that it is in the public interest to allow a physician that our society has educated has rehabilitated and can continue to serve. The Tribunal does not view the sole fact that our society has educated Dr. Graff as a persuasive basis for a return to practice. Any physician in Alberta who has been trained in Alberta, who has engaged in unprofessional conduct and faces censure, will have been educated by our

society and accordingly this factor alone should not serve as a mitigating factor when assessing orders for penalty.

In the evidence presented, the range of active suspension for physicians who have been found guilty of sexual boundary violations with consenting adult patients has typically been in the range of 9 to 12 months. In the case of Dr. Graff, he will be subject to 18 months of suspension, recognizing the significance of the criminal charges and the gravity of his conduct. Balancing the severity of his actions and Dr. Graff's accountability, responsibility and remorse, the Tribunal accepts this as a sufficient period of suspension.

Given the evidence presented, the Joint Submission and Admission Agreement submitted, the Tribunal feels that public interest is best served by accepting the joint submission on sanction.

Taking these factors into consideration, the Hearing Tribunal has accepted the joint submission on sanction and makes the following orders:

a. Dr. Graff should receive a suspension of his practice permit for a period of eighteen (18) months, of which fifteen (15) months should be an active suspension and three (3) months held in abeyance pending fulfilment of the conditions imposed on his practice permit and the terms of his Continuing Care Agreement.

b. Dr. Graff should receive credit for the time he has been out of practice since January 18, 2013 such that the period of active suspension shall be considered fulfilled;

c. Dr. Graff should receive a practice permit to allow him to comply, at his own cost, with the Reentering Medical Practice Standards of Practice and with the condition that he only be allowed to provide surgical assist in an operating room, not to see patients alone in the pre-operative area, postoperative area or on the ward and to be in the operating room with the patient only when other staff are present, until such condition is removed or altered after further assessment by the CPSA;

d. It is understood that Dr. Graff must also receive approval from Alberta Health Services, Covenant Health or any other operator of a surgical facility (collectively the "Facility Operator") to provide surgical assist in an operating room setting, and the Facility Operator may impose other terms and conditions in addition to the order of the Hearing Tribunal;

e. Dr. Graff shall, at his own cost, enter into and fulfil a Continuing Care Agreement with the Assistant Registrar responsible for the CPSA's Physician Health Monitoring Program, the terms of which shall have Consideration for the Agreed Facts and the Exhibit Book, and be for a period of at least five (5) years after the date the Agreement is signed and Dr. Graff should not be discharged from that Agreement without the agreement of the Assistant Registrar having regard to any further assessment of Dr. Graff;

f. The Complaints Director would determine such further or other conditions to impose on Dr. Graff's practice permit after he has completed the requirements of Reentering Medical Practice and upon consideration of any further assessment of Dr. Graff's recovery through the Physician Monitoring Program;

g. In the event Dr. Graff disagrees with the nature, scope or duration of conditions determined by the Complaints Director, Dr. Graff, on notice to the Complaints Director, may request the Tribunal to determine the nature, scope or duration of the conditions to be imposed on Dr. Graff's practice permit;

h. In the event the Complaints Director believes that Dr. Graff has not been compliant with the conditions on his practice permit or terms of the Continuing Care Agreement, the Complaints Director, on notice to Dr. Graff, may bring the matter back before the Hearing Tribunal to determine if all or some of the three (3) months of suspension held in abeyance should be served by Dr. Graff; and

i. Dr. Graff should be responsible for the costs of the investigation and the hearing before the Hearing Tribunal payable on terms acceptable to the Complaints Director.

Dated: January 8, 2018

Signed on behalf of the Hearing Tribunal by the Chair

Dr. Randy Naiker