

IN THE MATTER OF THE *HEALTH PROFESSIONS Act*, R.S.A. 2000, c. C-7
REGARDING DR. HABEEB ALI

IN THE MATTER OF AN APPEAL FROM THE DECISION OF THE HEARING TRIBUNAL OF THE COLLEGE OF
PHYSICIANS & SURGEONS OF ALBERTA DATED NOVEMBER 26, 2015

**DECISION OF THE COUNCIL OF THE
COLLEGE OF PHYSICIANS & SURGEONS OF ALBERTA ON APPEAL**

[1] An appeal was held before Council of the College of Physicians & Surgeons of Alberta (the “College”) on May 26, 2016, at the offices of the College. In attendance were:

Council members:

Dr. J. Stone, President	Dr. J. Meddings
Dr. P. Alakija	Dr. T. Motan
Ms. J. Blayone	Ms. M. Munsch
Dr. J. Bradley	Dr. P.J. White
Dr. G. Campbell	Ms. K. Wood
Dr. A. Crabtree	Dr. N. Yee
Dr. L. Francescutti	
Dr. R. Martin	

Also in attendance were:

Dr. Habeeb Ali, investigated member
Mr. Craig Boyer, legal counsel for the College
Mr. Robert Thompson, legal counsel for Dr. Ali
Ms. Julie Gagnon, independent legal counsel to the Council

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

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

- Notice of Hearing, dated March 12, 2014;
- Amended Notice of Hearing, dated May 6, 2014;
- Transcript of Proceedings held before the Hearing Tribunal on September 30, 2014;
- Exhibit #1, Notice of Hearing, dated March 12, 2014;
- Exhibit #2, Amended Notice of Hearing, dated May 6, 2014;
- Exhibit #3, Order of Council dated December 4, 2008;
- Exhibit #4, Continuing Care Agreement dated October 1, 2009 with Schedules;
- Exhibit #5, Addendum to Agreement dated February 7, 2012;
- Exhibit #6, Bankruptcy records involving Dr. Habeeb Ali:

- Assignment for the General Benefit of Creditors dated August 24, 2011;
- Statement of Affairs (Non-Business Bankruptcy) date August 24, 2011;
- Monthly Income and Expense Statement of the Bankrupt dated August 24, 2011;
- Notice of Bankruptcy and Impending Automatic Discharge dated August 25, 2011;
- Office of the Superintendent of Bankruptcy Canada – Summary Administration filed April 26, 2012;
- Notice of Intended Opposition to Discharge of Bankrupt filed May 4, 2012;
- Notice of Hearing for Bankrupt's Application for Discharge filed May 4, 2012;
- Report of Trustee on Bankrupt's Application for Discharge filed May 4, 2012;
- Affidavit of Mailing filed May 4, 2012;
- Report of Trustee on Bankrupt's Application for Discharge filed May 4, 2012;
- Trustee's Supplementary Report filed June 11, 2012;
- Claims Register dated June 11, 2012;
- Order Compelling Bankrupt filed June 15, 2012;
- Exhibit #7, Dr. Janet Wright letter to Dr. Habeeb Ali dated February 28, 2013 with invoice for 2013 monitoring fees – Continuing Care Program;
- Exhibit #8, Dr. Habeeb Ali letter to Dr. Canniff dated March 10, 2013 regarding comments arising from assessment;
- Exhibit #9, Dr. Janet Wright letter to Dr. Habeeb Ali dated May 27, 2013 regarding 2013 monitoring fees – Continuing Care Program
- Exhibit #10, Dr. Janet Wright letter to Dr. Habeeb Ali dated June 3, 2013 regarding meeting;
- Exhibit #11, Email exchange between [REDACTED] [REDACTED] and Dr. Habeeb Ali dated June 6, 2013 to June 24, 2013 regarding meeting;
- Exhibit #12, Email exchange between Melissa Loy and [REDACTED] [REDACTED] dated July 16, 2013 regarding NSF cheque;
- Exhibit #13, Dr. Janet Wright letter to Dr. Habeeb Ali dated July 18, 2013 regarding meeting;
- Exhibit #14, Email exchange between Dr. Habeeb Ali and [REDACTED] [REDACTED] dated July 18, 2013 regarding NSF cheque;
- Exhibit #15, Email exchange between [REDACTED] [REDACTED] and Dr. Habeeb Ali dated July 29 to August 8, 2013 regarding telephone meeting;
- Exhibit #16, Dr. Janet Wright Memorandum to file dated August 13, 2013;
- Exhibit #17, Dr. Janet Wright letter to Dr. Habeeb Ali dated August 16, 2013 regarding meeting;
- Exhibit #18, Email exchange between Dr. Habeeb Ali and [REDACTED] [REDACTED] dated September 4 to 6, 2013 regarding meeting;
- Exhibit #19, Dr. Janet Wright letter to Dr. Habeeb Ali dated September 12, 2013 regarding meeting;

- Exhibit #20, Email exchange between Dr. Janet Wright and Dr. Habeeb Ali dated October 1, 2013 regarding meeting;
- Exhibit #21, Canada Post tracking result sheet dated October 1, 2013;
- Exhibit #22, Dr. Janet Wright, Assistant Registrar, Memorandum to Dr. Owen Heisler, Complaints Director, dated October 1, 2013;
- Exhibit #23, [REDACTED] letter to Dr. Habeeb Ali dated October 11, 2013;
- Exhibit #24, Photocopy of cashed cheque from Dr. Ali dated October 28, 2013;
- Exhibit #25, Canada Post tracking result sheet dated October 24, 2013 showing delivery of October 11, 2013 letter on October 18, 2013;
- Exhibit #26, Dr. Habeeb Ali letter to [REDACTED] dated November 19, 2013;
- Exhibit #27, Letter from [REDACTED] Alberta Health, to Dr. Karen Mazurek, Assistant Registrar, dated October 3, 2011 enclosing all billings claimed by Dr. Habeeb Ali between January 1, 2009 to September 30, 2011;
- Exhibit #28, Letter from [REDACTED] Alberta Health, to Ms. [REDACTED] dated February 25, 2014 enclosing all billings claimed by Dr. Habeeb Ali between January 1, 2012 to July 31, 2013;
- Exhibit #29, Agreed Statement of Facts;
- Exhibit #30, MNP Ltd. letter to Dr. Ali dated August 9, 2012;
- Exhibit #31, Email from [REDACTED] to Dr. Ali dated April 16, 2014;
- Exhibit #32, Procedure Card from Court Search;
- Exhibit #33, Dr. Heisler letter to Dr. [REDACTED] dated July 24, 2014;
- Exhibit #34, Dr. Heisler letter to Dr. [REDACTED] dated August 27, 2014;
- Exhibit #35, Email exchange between Dr. Heisler and Dr. [REDACTED] dated September 15 to 16, 2014;
- Exhibit #36, Addendum to Agreement dated March 15, 2013;
- Exhibit #37, Curriculum Vitae of Dr. [REDACTED];
- Exhibit #38, Report Prepared by Dr. [REDACTED] dated June 17, 2015;
- Exhibit #39, Photocopy of Procedure Card/Notes Relating to February 10, 2015 Hearing in Bankruptcy Proceedings of Habeeb Tunde Ali;
- Decision of the Hearing Tribunal, dated December 19, 2014;
- Transcript of Proceedings held before the Hearing Tribunal on June 25, 2015;
- Decision of the Hearing Tribunal, dated October 27, 2015;
- Letter from James Peacock to Dr. Reed (Notice of Appeal) dated November 26, 2015;
- Letter from Craig Boyer to James Peacock, dated November 26, 2015;
- Application of Dr. Habeeb Ali dated May 5, 2016;
- Brief of Law of the Appellant dated May 5, 2016;
- Brief in Support of Application to Adduce New Evidence dated May 5, 2016;
- Affidavit of Habeeb T. Ali, sworn May 4, 2016;
- Letter from Craig Boyer to [REDACTED] dated May 13, 2016;
- Brief of the Complaints Directors, dated May 13, 2016 and attachments:

- *Dunsmuir v. New Brunswick*, 2008 SCC 9;
- *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61;
- *Nelson v. Alberta Association of Registered Nurses*, 2005 ABCA 229;
- *Moll v. College of Alberta Psychologists*, 2011 ABCA 110;
- *College of Physical Therapists of Alberta v. J.H.*, 2010 ABCA 303;
- *Ho v. Alberta Association of Architects*, 2015 ABCA 68;
- *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11;
- *Arabian Muslim Association v. The Canadian Islamic Centre*, 2006 ABCA 152;
- *Dechant v. Law Society of Alberta*, 2000 ABCA 265;
- *Hoffinger v. Law Society of Alberta*, 2010 ABCA 302;
- *Frank v. The Town of Valleyview*, 2006 ABCA 131;
- *263657 Alberta Ltd. v. Banff (Town) Subdivision and Development Appeal Board*, 2003 ABCA 244;
- *1694192 Alberta Ltd. v. Lac La Biche (Subdivision and Development Appeal Board)*, 2013 ABCA 272;
- *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] SCJ No. 66;
- *Erdmann v. Complaints Inquiry Committee*, 2015 ABCA 147;
- *Fang v. College of Physicians and Surgeons of Alberta*, [1985] A.J. No. 1080;
- *Sazant v. College of Physicians and Surgeons of Ontario*, [2012] O.J. No. 5076;
- Affidavit of Michael Caffaro, sworn May 11, 2016;
- Reply Brief in Support of Submission of Reasonable Apprehension of Bias dated May 24, 2016 and attachments:
 - *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623;
 - *Canada (HRC) v. Taylor*, [1990] 3 SCR 892;
 - *Brand v. College of Physicians and Surgeons (Sask)*, 1990 CanLii 7711 (SKCA);
 - *Ziindel v. Canada (Human Rights Commission)*, 2000 CanLii 16575 (FCA);
 - *Rothsay Residents Association Inc. v. Rothsay Heritage Preservation & Review Board*, 2006 NBCA 61 (CanLii);
 - *Tepei v. ICBC*, 2007 BCSC 1694 (CanLii);
- Letter from Katrina Haymond to John Devlin dated May 10, 2016.

I. BACKGROUND

[4] A hearing was held on September 30, 2014 regarding the conduct of Dr. Ali. On December 19, 2014, the Hearing Tribunal issued a decision following a hearing into the conduct of Dr. Habeeb Ali. The Hearing Tribunal found Dr. Ali guilty of unprofessional conduct on the following allegations:

1. You did fail to pay in a timely manner the February 27, 2013 invoice from the College of Physicians and Surgeons of Alberta for the annual fees under your Continuing Care Agreement in the amount of \$1,800.00;
2. You did fail to cooperate with Dr. Janet Wright, of the College of Physicians and Surgeons of Alberta, in her monitoring role under the Continuing Care Agreement dated October 1, 2009, and in particular failing to meet with Dr. Wright as and when requested; and
3. In accordance with the determination by Justice J.L. Mason on June 13, 2012, you have failed to comply with your obligations as a bankrupt person, particulars of which include one or more of the following:
 1. you did fail to report to your Trustee in Bankruptcy income you have earned from the practice of medicine in Alberta since August of 2011,
 2. you did fail to provide to your Trustee in Bankruptcy your post-bankruptcy tax return information filed with the Canada Revenue Agency,
 3. you did fail to advise your Trustee in Bankruptcy that your income from the practice of medicine since entering bankruptcy has been sufficient to generate surplus income that could be used to satisfy unpaid creditors, and
 4. you did fail to aide and cooperate with your Trustee in Bankruptcy in the administration of your estate in bankruptcy.

[5] The hearing resumed on June 25, 2015 to hear evidence and submissions regarding sanction. At the hearing, then counsel for Dr. Ali, Mr. Peacock, made an application to have the Hearing Tribunal recuse itself on a reasonable apprehension of bias, and to remit the matter to a newly constituted Hearing Tribunal for a new hearing.

[6] The Hearing Tribunal found that there was no reasonable apprehension of bias and dismissed the application to recuse itself and remit the matter to a newly constituted Hearing Tribunal.

[7] The Hearing Tribunal heard additional evidence regarding penalty and made the following orders:

1. Dr. Ali shall receive a reprimand and the Hearing Tribunal's decision will serve as the reprimand;

2. Dr. Ali shall be required to pay costs of the hearing in the amount of \$39,000, representing approximately 2/3 of the total anticipated costs of the hearing.

II. GROUNDS OF APPEAL

[8] On November 26, 2015, Dr. Ali appealed the Decision on the following grounds:

1. The decision of the Hearing Tribunal that Dr. Ali's conduct in respect of the allegations set out in the Notice of Hearing was, in the circumstances, unprofessional conduct was unreasonable and failed to take into account all relevant factors;
2. The decision of the Hearing Tribunal with respect to the third allegation in the Notice of Hearing gives rise to a reasonable apprehension of bias having regard to a finding by the Hearing Tribunal that Dr. Ali incorrectly completed a form in relation to his bankruptcy, based on an inference it was asked to draw by counsel for the College in argument without having questioned Dr. Ali on that issue; and
3. The decision of the Hearing Tribunal with respect to the third allegation in the Notice of Hearing unreasonably found that Dr. Ali's conduct in relation to his bankruptcy fell within the scope of "unprofessional conduct" within the meaning of section 1(1)(pp) of the *Health Professions Act*.

III. PRELIMINARY ISSUES

1. Standard of Review

[9] The parties agree that the applicable standard of review in this appeal is reasonableness, except for issues of a reasonable apprehension of bias, where no deference will be given and Council must decide if the principles of fairness were met.

2. Application to Adduce Reply Brief

[10] At the commencement of the appeal, Mr. Thompson, Dr. Ali's counsel, brought an application to adduce a reply brief, in addition to the written materials previously submitted by the parties. Mr. Boyer did not object to the reply brief and Council allowed the reply brief to be submitted.

3. Application to Adduce New Evidence

[11] Dr. Ali's counsel also brought an application to adduce new evidence. There were two types of evidence at issue. The first was with respect to the role of independent legal counsel to the Hearing Tribunal at the hearing. The second type of evidence related to evidence regarding facts that arose after the hearing.

a) Evidence regarding role of independent legal counsel at the hearing

[12] Mr. Thompson advised that the grounds for making the application to adduce new evidence on the role of independent legal counsel at the hearing are on the basis of a claim of institutional bias that arose during the course of the hearing. Ms. Haymond acted as independent legal counsel to the Hearing Tribunal at the hearing and is a partner at Field LLP. Field LLP was listed as a creditor in one of the Exhibits in the hearing, the Claims Register, which is a listing of preferred and unsecured creditors in the bankruptcy.

[13] Mr. Peacock, who was counsel for Dr. Ali at the hearing, was provided with the proposed exhibits in advance of the hearing and was advised that Ms. Haymond would be independent legal counsel. Mr. Peacock took no objection to Ms. Haymond acting as independent legal counsel.

[14] Mr. Thompson submitted that, once he was retained, he investigated the matter further. He sought a response from independent legal counsel, who did provide a response dated May 10, 2016.

[15] Mr. Thompson noted that the new evidence would have been available in the public record at the time. However, Field LLP's response was not available at the time. He noted that the full extent of Field LLP's involvement only became known after the hearing.

[16] Mr. Thompson also submitted that the record showed that Field LLP was a creditor. In his submission, there was some obligation on the part of Ms. Haymond to have given some explanation of this. He noted that if she had disclosed the issue, it would be hard to imagine that she would not have been asked to recuse herself.

[17] Therefore, in his submission, the new information regarding the role of Field LLP should be admitted for the purpose of determining if there was bias.

[18] Mr. Boyer noted that section 89(4)(b) of the *Health Professions Act* allows Council to accept new evidence. The test for permitting new evidence is as set out in *R. v. Palmer*, which provides that new evidence must fulfill the following requirements:

1. It should not generally be admitted if, by due diligence, it could have been adduced at trial;
2. It relates to a decisive or potentially decisive issue in the trial;
3. It is credible, in the sense that it is reasonably capable of belief; and
4. It could, if believed and when considered with the other evidence adduced at trial, reasonably be expected to have an effect on the outcome of the trial.

[19] Mr. Boyer noted that the allegation of bias must be looked at in the context of the hearing. Ms. Haymond was independent legal counsel, her role is limited and she has no involvement in the decision.

[20] Mr. Boyer stated that he supported the new evidence on bias being admitted. However, Mr. Boyer noted that the new evidence was silent on the fact that the new information discovered by Mr. Thompson was unknown to Dr. Ali. The reasonable assumption is that there was a discussion between Dr. Ali and his legal counsel at the time. Mr. Boyer noted that there is no evidence of impropriety on the part of Ms. Haymond and that if she had given substantive advice to the Hearing Tribunal, it would be known to the parties.

[21] Mr. Boyer also took the position that if the new evidence proposed by Mr. Thompson was admitted, then the Affidavit of Michael Caffaro should also be admitted.

b) Post Hearing - Later in Time Evidence

[22] The second type of new evidence being adduced was information regarding Dr. Ali's bankruptcy proceedings. Mr. Thompson submitted that this evidence should be admitted. He further submitted that the evidence at the sanction hearing regarding Form 65 should be considered.

[23] With respect to this evidence, Mr. Boyer submitted that the decision must be read carefully. The findings are not that Dr. Ali lied, but rather that he had a duty to provide full and accurate information. There is no finding by the Hearing Tribunal of fraud or dishonesty. Mr. Boyer noted that it was later learned that Dr. Ali's generalized anxiety disorder was why he could not respond fully.

[24] Mr. Boyer urged Council to look at the full decision and the full record. In the hearing, Mr. Peacock asked Dr. Ali what his overhead was. He indicated 35% and then the evidence changed to 50%. The evidence cannot change. Mr. Boyer objected to the later in time evidence being admitted.

[25] With respect to the later in time evidence, Mr. Boyer submitted that it would not have affected the decision of the Hearing Tribunal. The test in *Palmer* was not met and the evidence should not be admitted.

4. Council Decision Respecting Application to Adduce New Evidence

[26] Council adjourned to deliberate on the issue of the new evidence. Council allowed the evidence to be admitted with respect to the allegation of a reasonable apprehension of bias. Council did not accept the post hearing/later in time evidence.

[27] Council allowed the evidence on the allegation of a reasonable apprehension of bias. Council found that because the issue of a reasonable apprehension of bias relates to the fairness of the proceedings, this weighed in favour of admitting this new evidence. Further, Council found that the new evidence met the *Palmer* test in that it related to a decisive or potentially decisive issue, was credible, and could be reasonably be expected to have an effect on the outcome of the hearing. Council found that the Affidavit of Dr. Ali respecting this issue, the Affidavit of Michael Caffaro and the letter of Ms. Haymond dated May 10, 2016 should be admitted as new evidence.

[28] With respect to the post hearing/later in time evidence, Council found that this evidence did not meet parts (2) or (4) of the *Palmer* test. The new evidence related to subsequent steps taken in the Court of Queen's Bench proceedings involving the bankruptcy. Council found that this evidence did not relate to a potentially decisive issue at the hearing and could not reasonably be expected to have affected the outcome of the hearing.

[29] With respect to the evidence in the sanction hearing, this evidence was already before the Hearing Tribunal and was therefore not considered to be new evidence. It is evidence in the record and was reviewed and considered by Council in the appeal.

IV. PARTIES' SUBMISSIONS

1. Dr. Ali's Submissions

[30] Mr. Thompson submitted that there is a clear conflict of interest by having Ms. Haymond act as independent legal counsel where her firm is also listed as a potential creditor of Dr. Ali. He recognized that if there is to be a claim of conflict of interest, it must be done at the earliest opportunity.

[31] Mr. Thompson submitted that if the new evidence regarding the apprehension of bias had been before the Hearing Tribunal, there is no reasonable basis for concluding that Ms. Haymond would have been allowed to continue.

[32] Mr. Thompson submitted that the appropriate remedy would be to have a new hearing. He noted that the courts have found that the appearance of bias is significant and is sufficient. He noted that Council must view this from Dr. Ali's point of view. Ms. Haymond should have raised an issue when she saw her firm's name in the Exhibits.

[33] Mr. Thompson submitted that the Hearing Tribunal found that Dr. Ali misreported his gross income to the Trustee in Bankruptcy in an income and expense form ("Form 65") filed with the Trustee in Bankruptcy. However, the Alberta Health Care Statements were not adduced in evidence and therefore, the Hearing Tribunal erred by concluding that the Form 65 numbers were incorrect, as there was no evidence upon which it could make such a finding.

[34] Further, the Hearing Tribunal's reasons for the apparent discrepancy are unsupportable on the record and had the effect of presuming that Dr. Ali had behaved in a discreditable way, shifting away from the College the burden of proving its own allegations. This tainted the proceedings and the decision should be set aside.

[35] With respect to Form 65 and the allegations of a lack of candour by Dr. Ali, Mr. Thompson noted that anyone reading the decision of the Hearing Tribunal would say the findings of the Hearing Tribunal go to a finding of a lack of integrity or candour by Dr. Ali.

[36] The finding of the Hearing Tribunal that Dr. Ali was not candid with the Trustee makes it hard to believe that this would not have affected the findings of the Hearing Tribunal.

[37] Mr. Thompson also submitted that the allegation related to the bankruptcy could not form the basis of a finding of unprofessional under the *Health Professions Act*. He submitted that the only nexus the Hearing Tribunal found between Dr. Ali's bankruptcy and his professional life is the fact that, like other physicians, he is paid by Alberta Health Care. There is no evidence of a direct or even an indirect relation between the profession and the bankruptcy and there is no evidence that the profession was harmed by Dr. Ali's conduct in bankruptcy.

[38] With respect to allegations 1 and 2, there was no evidence that the conduct was deliberate, which is the basis of the finding of unprofessional conduct. Mr. Thompson submitted that, with respect to allegation 1, Dr. Ali was aware of his obligation to pay, made efforts to pay and ultimately did pay and at worst, he was negligent. With respect to allegation 2, Mr. Thompson submitted that the Hearing Tribunal erred in finding that Dr. Ali failed to cooperate with Dr. Wright in arranging a meeting.

[39] Mr. Thompson noted that since one of the witnesses in the hearing participated by video conference, why could the meeting with Dr. Wright not also have proceeded by video conference. There is no evidence to support that Dr. Ali deliberately refused to meet with Dr. Wright. Mr. Thompson submitted that the decision should be set aside. Mr. Thompson also asked if this is the type of conduct that the College should be dealing with.

2. The Complaints Director's Submissions

[40] Mr. Boyer submitted that the standard of review in this matter is reasonableness with respect to the Hearing Tribunal's findings of fact and inferences of fact, the identification of the appropriate standard of conduct and the application of the facts against the standard of conduct. When dealing with allegations of procedural fairness, including an alleged reasonable apprehension of bias, Council must evaluate the fairness independently without any deference to the Hearing Tribunal.

[41] Mr. Boyer submitted that the appeal should be dismissed. He noted that Mr. Thompson had stated that an investigated member was entitled to a pristine hearing, but that this is not correct. A member is entitled to a fair hearing, not a pristine hearing. He further noted that issues of fairness can be waived.

[42] In Mr. Boyer's submission, Dr. Ali wants a do-over, but Mr. Peacock, a very experienced counsel, clearly stated that neither he nor his client had an objection to the proposed members of the Hearing Tribunal and its independent legal counsel, Ms. Haymond, after having received a copy of the documents that ultimately became the Exhibit Book. Further, Dr. Ali did not have a lack of knowledge of Field LLP's involvement, as page 25 of the Exhibit Book has Dr. Ali's signature and lists Field LLP as a creditor. Mr. Boyer stated that the failure to have a timely objection to Ms. Haymond's involvement in the hearing is a deemed waiver.

[43] There is no evidence of a timely objection to Ms. Haymond acting. There is no evidence of new information that was unknown to Dr. Ali, as required in the *Tepei* case. Further, the cases cited are with respect to decision-makers. Ms. Haymond had no personal knowledge of the matter, it was known by the parties that she was a partner at Field LLP and that Field LLP acted in the bankruptcy. The waiver is very clear and the allegation of bias is not supported on the evidence or in law. Further, Mr. Boyer noted that it was not clear what further disclosure would have been required.

[44] With respect to the allegation of bias based on the Hearing Tribunal's findings regarding Form 65, Mr. Boyer noted that the argument had been made at the sanction hearing. At the hearing, it was argued that the Hearing Tribunal had been wrong to conclude that a rough estimate of Dr. Ali's gross income after his clinic overhead could be determined by taking the information contained in Exhibits 27 and 28 (billings paid by the Alberta Health Care Insurance Plan to Dr. Ali) and deducting that percentage as the amount of Dr. Ali's overhead expenses for his medical clinic.

[45] Mr. Boyer noted that the hearing decision includes a summary of the evidence from [REDACTED] Dr. Ali's bankruptcy Trustee, where she described the basic monthly amounts claimable by a bankrupt person over which any additional income would be considered surplus income. Dr. Ali testified on September 30, 2014 that his overhead percentage was in relation to his billings paid by Alberta Health as outlined in Exhibits 27 and 28. Dr. Ali now asserts that it was wrong for the Hearing Tribunal to have taken his evidence and concluded that his income after clinic overhead expenses was calculable by using the Alberta Health figures and subtracting an overhead percentage of 30% or 35%.

[46] Mr. Boyer submitted that by his own evidence, Dr. Ali demonstrated that he had significant monthly income that was not reported to his Trustee and yet he now claims that has been denied procedural fairness because the Hearing Tribunal interpreted his evidence against him.

[47] Mr. Boyer submitted that the Hearing Tribunal did not make any finding that Dr. Ali had intentionally misstated his income only that he had an obligation to be accurate in reporting. He further submitted that there is no actual or reasonable apprehension of bias in the Hearing Tribunal's decision.

[48] With respect to the determination of what constitutes unprofessional conduct, Mr. Boyer submitted that Mr. Thompson's arguments are in essence arguing a standard of correctness. The reasonableness standard of review should be used and Council must consider whether the outcome was reasonable.

[49] Mr. Boyer stated that the Hearing Tribunal provided very clear reasons in the hearing decision as to why the conduct of Dr. Ali in failing to fulfill his obligations to the College and his obligations as an undischarged bankrupt physician amounted to unprofessional conduct. Mr. Boyer submitted that Dr. Ali has failed to demonstrate that the findings made by the Hearing Tribunal in relation to the allegations were unreasonable.

[50] Mr. Boyer noted that, on the standard of reasonableness, even if Council would have come to a different conclusion than the Hearing Tribunal, it is not permitted to interfere with the findings of the Hearing Tribunal if they are reasonable.

3. Reply Submissions by Dr. Ali

[51] In reply, Mr. Thompson stated that he accepted the standard of review put forth by Mr. Boyer.

[52] Mr. Thompson noted that at page 40 of the Exhibit, Field LLP is not in the list of proven creditors. Mr. Thompson stated that what Dr. Ali did or did not know is a matter of record, but what Dr. Ali understood is another matter.

[53] Mr. Thompson submitted that it is not a correctness issue, but rather an absence of any evidence of a deliberate attempt. He stated that there is no evidence it was deliberate on the part of Dr. Ali.

V. SUMMARY OF COUNCIL'S DECISION

[54] Council carefully reviewed and considered the Record of Proceedings, the written submissions of the parties and the oral submissions made at the appeal.

[55] Council finds that there is no reasonable apprehension of bias warranting a referral to a new Hearing Tribunal for a hearing. Council finds that the decision of the Hearing Tribunal is reasonable. The appeal by Dr. Ali is dismissed.

VI. FINDINGS AND REASONS

1. Standard of Review

[56] Council agrees with the parties that the reasonableness standard applies to the Hearing Tribunal's findings of fact and inferences of fact, the identification of the appropriate standard of conduct and the application of the facts against the standard of conduct. When dealing with allegations of procedural fairness, including an alleged reasonable apprehension of bias, Council agrees that it must evaluate fairness independently, without any deference to the Hearing Tribunal.

[57] A decision will only be unreasonable if it does not fall within the acceptable range of rational outcomes. Although the evidence must support the decision, findings in relation to the evidence must truly be outside the acceptable range to be overturned.

[58] On the issue of the allegation of a reasonable apprehension of bias, no deference will be given to the Hearing Tribunal and Council must assess fairness independently.

2. Grounds of Appeal

[59] In the Notice of Appeal, Dr. Ali enumerated the following grounds of appeal:

1. The decision of the Hearing Tribunal that Dr. Ali's conduct in respect of the allegations set out in the Notice of Hearing was, in the circumstances, unprofessional conduct was unreasonable and failed to take into account all relevant factors;
2. The decision of the Hearing Tribunal with respect to the third allegation in the Notice of Hearing gives rise to a reasonable apprehension of bias having regard to a finding by the Hearing Tribunal that Dr. Ali incorrectly completed a form in relation to his bankruptcy, based on an inference it was asked to draw by counsel for the College in argument without having questioned Dr. Ali on that issue, and
3. The decision of the Hearing Tribunal with respect to the third allegation in the Notice of Hearing unreasonably found that Dr. Ali's conduct in relation to his bankruptcy fell within the scope of "unprofessional conduct" within the meaning of section 1(1)(pp) of the *Health Professions Act*.

[60] Mr. Thompson also raised the issue of a reasonable apprehension of bias based on the role of Ms. Haymond as independent legal counsel to the Hearing Tribunal. New evidence was allowed to be adduced and was considered by Council on this issue. This issue is addressed first.

a) Ground of Appeal - Reasonable apprehension of bias

[61] Council carefully considered the submissions of the parties and the new evidence adduced. Council finds that the factors in this case do not support an allegation of a reasonable apprehension of bias.

[62] The following factors were considered by Council. Ms. Haymond was in the role of independent legal counsel to the Hearing Tribunal, she was not a decision-maker; Ms. Haymond had no personal knowledge of the matters in the bankruptcy; the counsel for Field LLP involved in the bankruptcy file practices in a different city than Ms. Haymond; and further, Field LLP's involvement in the matter ended in August 2010.

[63] Further, the record clearly listed Field LLP as involved in the bankruptcy in some capacity and that Ms. Haymond was a partner at Field LLP. The documents in the Exhibit Book were provided to Dr. Ali and his counsel in advance of the hearing, as Ms. Haymond was identified as independent legal counsel to the Hearing Tribunal. There was ample opportunity for Dr. Ali or his then counsel to raise a concern regarding bias, either before the hearing, or even during the hearing. Dr. Ali, who was represented by an experienced lawyer, Mr. Peacock, did not raise any concerns with Ms. Haymond's role as independent legal counsel.

[64] Council finds that a reasonable person reviewing this matter would not have a reasonable apprehension of bias regarding Ms. Haymond acting as independent legal counsel in these circumstances. Council finds that the procedural fairness requirements were met. There is no ground to refer the matter to a new Hearing Tribunal for a rehearing.

[65] Further, Council finds that since no objection was raised in a timely way, Dr. Ali is now estopped from raising the issue. The new evidence considered by Council does not affect the determination that Dr. Ali has waived his right to object. If Dr. Ali wished to object to the involvement of Ms. Haymond, he would have been able to do so prior to or at the hearing. He and his counsel chose not to object and there is no basis to refer this matter back for another hearing.

b) Ground of Appeal - The decision of the Hearing Tribunal that Dr. Ali's conduct in respect of the allegations set out in the Notice of Hearing was, in the circumstances, unprofessional conduct was unreasonable and failed to take into account all relevant factors

[66] Council applied the reasonableness standard to this ground of appeal. For both allegations 1 and 2, there was a combination of factors regarding Dr. Ali's conduct which occurred over a period of time. The Hearing Tribunal considered these factors in finding that the conduct constituted unprofessional conduct.

[67] With respect to allegations 1 and 2, the Hearing Tribunal found:

The Tribunal finds that it was Dr. Ali's responsibility to ensure that he paid the required fees within a reasonable period of time. Although payment was eventually made, there was a delay of approximately four and a half months between the time that Dr. Ali received the invoice (at the end of May, 2013) and the date that his payment cleared, in mid-October, 2013. This is of significant concern given that the Continuing Care Agreement, and the fees associated with the program, were a mandatory part of the Council's order, and participation in the program was not optional.

Dr. Ali testified during the course of the hearing that he was dealing with a variety of difficult circumstances, and that he was under a tremendous amount of stress in 2013. Dr. Ali's explanation that he was distracted by personal circumstances that prolonged the payments of these fees is not a legitimate excuse for failing to comply with the obligation to pay fees in a timely manner. Dr. Ali stated that he did not seek any physician family support during this period and did consult with both his family physician and his psychiatrist, who both felt he did not suffer from any mental illness at the time. Dr. Ali was fit to practice medicine during this period and consequently would be expected to

meet the obligation of paying his College fees within a reasonable period of time.

...

The Hearing Tribunal finds that Dr. Ali's actions demonstrated a lack of priority to the College in response to these requests. The Tribunal accepts that all members should be expected to comply with the College and this expectation is higher for a member that has been granted the privilege of re-entering practice under a continuing care agreement. The Tribunal accepts that the request to meet in Calgary was a courtesy, but not a requirement and does not accept revenue loss due to canceled clinic days or concerns about a patient complaint as an excuse for being unavailable for a face-to-face meeting.

The Hearing Tribunal also considered whether Dr. Ali's actions in relation to allegations #1 and #2 constitutes "unprofessional conduct" as defined in s. 1(1)(pp) of the HPA. "Unprofessional conduct" includes contravening an Order under Part 4 of the Act. The Council's Order, issued in 2008, required Dr. Ali to enter into a Continuing Care Agreement with the College. Dr. Ali did so, and pursuant to that Agreement, was required to participate in, and fully cooperate with, any monitoring program recommend [sic] by the College. In the circumstances, the Hearing Tribunal finds that Dr. Ali's failure to pay the fees for the monitoring program and failure to cooperate with Dr. Wright by failing to meet with her despite her many attempts to arrange a meeting breached the Council's Order, and is unprofessional conduct as contemplated by s. 1(1)(pp)(vii).

In addition, the Hearing Tribunal noted that the requirement to enter into the Continuing Care Agreement arose as a result of a serious boundary violation. Dr. Ali's failure to cooperate with Dr. Wright's attempts to schedule a meeting to follow up regarding the College's ongoing monitoring has the potential to harm the integrity of the regulated profession. Members are expected to comply with such orders and Dr. Ali's failure to respond appropriately reflects poorly on the College's ability to engage in self-regulation.

The Hearing Tribunal is aware that not every breach of the Continuing Care Agreement would be significant enough to constitute "unprofessional conduct", and specifically considered whether Dr. Ali's conduct was unprofessional, in light of his personal circumstances and the stress he was under. However, Dr. Ali's conduct in this case was significant. The conduct at issue in allegations #1 and #2 was not an isolated incident but occurred over a period of time. He was well enough to engage in the practice of medicine, and therefore was expected to

comply with the requirements of the Continuing Care Agreement. In the circumstances, Dr. Ali's conduct is sufficient to rise to the level of "unprofessional conduct".

[68] The Hearing Tribunal's findings are reasonable. It was within the Hearing Tribunal's jurisdiction to make findings of fact, identify the appropriate standard of conduct and to apply the facts against the standard of conduct. The Hearing Tribunal's findings of fact are based on the evidence before it and it was within the jurisdiction of the Hearing Tribunal to apply those facts to the standard of conduct. The decision outlines the reasons for the findings and there are no reasonable grounds to overturn the decision of the Hearing Tribunal.

[69] The findings with respect to allegation 3 are addressed in the next grounds of appeal.

- c) Ground of Appeal - The decision of the Hearing Tribunal with respect to the third allegation in the Notice of Hearing gives rise to a reasonable apprehension of bias having regard to a finding by the Hearing Tribunal that Dr. Ali incorrectly completed a form in relation to his bankruptcy, based on an inference it was asked to draw by counsel for the College in argument without having questioned Dr. Ali on that issue, and**

[70] Mr. Thompson submitted that the Hearing Tribunal's reasons with respect to Form 65 are unsupportable on the record and had the effect of presuming that Dr. Ali had behaved in a discreditable way, shifting away from the College the burden of proving its own allegations. Mr. Thompson submitted that anyone reading the decision of the Hearing Tribunal would say the findings of the Hearing Tribunal go to a finding of a lack of integrity or candour by Dr. Ali.

[71] Council has carefully reviewed the decisions of the Hearing Tribunal of December 19, 2014 and October 27, 2015. Council does not accept the submissions of Dr. Ali that there was a finding by the Hearing Tribunal of a lack of integrity or candour by Dr. Ali with respect to Form 65. The Hearing Tribunal found that a portion of Dr. Ali's gross income was not reported. The Hearing Tribunal also found that: "Dr. Ali submitted a Form 65 which did not accurately reflect his gross income."

[72] In its decision, the Hearing Tribunal found:

Ms. [REDACTED] testified that Dr. Ali was required to file monthly income and expense reports from the date of the bankruptcy onward, was required to attend counseling, to submit tax returns, and to provide proof that his computers and equipment were required as a tool of a trade. Dr. Ali did not comply with these duties as of the date that the Form 82 was filed (May 4, 2012). As a result, MNP applied to be discharged as Trustee, and the application was scheduled to be heard on June 13, 2012.

Prior to the hearing, MNP filed a Trustee's Supplementary Report, filed on June 11, 2012, confirming that Dr. Ali had by then completed 2nd stage counseling, and had forwarded the 2010 prior year tax information and the 2011 pre-tax information, but the post-bankruptcy tax return still needed to be completed. In addition, Dr. Ali had still not provided monthly income and expense reports. Ms. [REDACTED] explained that all of this information is required to be provided in accordance with the BIA.

As a result of these failures, MNP applied to be discharged as the Trustee, and on June 13, 2012, Justice Mason granted an Order requiring Habeeb Ali to comply with his obligations as a bankrupt person. In particular, he was required to take a number of steps within 60 days of service of the Order:

- File income and expense reports along with substantiation of income for August 2011 to May 2012 to determine surplus income;
- Provide proof that the computer and equipment were required tools of the trade and therefore exempt; and
- Proof of filing and payment (if applicable) of his 2011 post-bankruptcy tax return.

The Hearing Tribunal considered Dr. Ali's testimony regarding his understanding of his obligations in connection with the bankruptcy. Dr. Ali was aware that he was required to provide the requested information, but stated that he failed to comply with his obligations as a result of the stress he was under at the time. The Hearing Tribunal finds that Dr. Ali had a number of obligations as a bankrupt person, as outlined by Ms. [REDACTED] and as referred to in the Order of Justice Mason, and failed to comply with those obligations.

With respect to particular (a) of allegation #3, the Hearing Tribunal finds that Dr. Ali was obliged to accurately report the income he earned from the practice of medicine. The Tribunal carefully reviewed Form 65, which is the Monthly Income and Expense Statement of the Bankrupt, which was signed by Dr. Ali on August 24, 2011. The form states that Dr. Ali's gross self-employment was \$15,000 per month. The Tribunal also reviewed the monthly and yearly total claims paid to Dr. Ali by Alberta Health Care in 2011. In 2011, Alberta Health Care paid Dr. Ali \$212,998.61 between January, 2011 - August, 2011, meaning that his average gross monthly income from Alberta Health Care was \$26,624.82. When Dr. Ali completed Form 65, he indicated that his gross monthly income was \$15,000.00. This number is inconsistent with the information provided by Alberta Health Care, which clearly shows that the lowest amount Dr. Ali received from Alberta Health Care in any given month in 2011 was \$21,654.25 (August) with income as high as \$33,458.00 (June). Based

on the information provided to the Tribunal, Dr. Ali's gross monthly income was not \$15,000.00. On average, it was \$26,624.82. Based on this information, a portion of Dr. Ali's gross income was not reported.

With respect to particular (b), it is clear that Dr. Ali failed to provide the Trustee with post-bankruptcy tax return information filed with Canada Revenue Agency for 2011. This information was still outstanding as of June 13, 2012, the date when the Order Compelling Bankrupt was issued.

Particular (c) alleges that Dr. Ali failed to advise the Trustee in Bankruptcy that his income from the practice of medicine since entering bankruptcy was sufficient to generate surplus income. As indicated above, Dr. Ali submitted a Form 65 which did not accurately reflect his gross income. In addition, Form 65 indicates that Dr. Ali's net monthly income was \$5500.00. During the course of the hearing, Dr. Ali testified that by 2011, he was paying overhead in the amount of 30% of his monthly income. If that is the case, then his average monthly overhead was \$7,987.46. If his average monthly gross income was \$26,624.82, then his net monthly income was, on average, \$18,637.36, far in excess of the \$5,500.00 that is reported on the Form 65.

Ms. [REDACTED] explained how surplus income is calculated. Based on the information that was submitted into evidence at the hearing, it was more probable than not that if Dr. Ali had completed the Form 65 based on the information regarding the income that he earned from claims submitted to Alberta Health Care in 2011, he would have had surplus income available for distribution to creditors.

Regarding particular (d), the Hearing Tribunal finds that a bankrupt person is obliged to cooperate with the Trustee in Bankruptcy. Dr. Ali did not provide the required information to the Trustee, which resulted in the Trustee applying for discharge. This particular is also proven.

In considering whether allegation #3 was factually proven, the hearing Tribunal specifically considered Dr. Ali's evidence that Form 65, and the other documentation that was completed in August of 2011, was completed in consultation with Candace [REDACTED] and the submission that was made on Dr. Ali's behalf, that there is insufficient evidence to find that Dr. Ali failed to comply with his obligations under the BIA.

The Hearing Tribunal understands that the Complaints Director must prove the allegations, on a balance of probabilities. The information that was provided was sufficient to meet the required standard of proof. The testimony of Ms.

██████ in conjunction with the documentation that was submitted, was sufficient to establish that Dr. Ali had obligations as a bankrupt person and failed to comply.

While the Tribunal accepts that Ms. ██████ may have assisted Dr. Ali in completing the required documentation, Dr. Ali did not provide any evidence to suggest that Ms. ██████ counseled Dr. Ali to report only a portion of his gross income. In any event, it is incumbent on a bankrupt person to report gross and net income accurately, and that obligation exists regardless of any counseling that may have been provided by Ms. ██████. Moreover, Dr. Ali swore a declaration on August 24, 2011, confirming that the statement is to the best of his knowledge, a full, true and complete statement of his affairs.

Moreover, Dr. Ali did not provide any evidence to account for the discrepancy between the information provided in Form 65, and the Alberta Health Care billings. The Hearing Tribunal evaluated the evidence based on the testimony provided by all of the witnesses, including Dr. Ali. Dr. Ali did not provide an alternate explanation for the discrepancy. In the circumstances, the Tribunal found allegation 3, and all of the particulars, to be factually proven.

[73] The Hearing Tribunal made these findings on the basis of Dr. Ali's evidence, the evidence of Ms. ██████ and the Exhibits in the hearing. The Hearing Tribunal considered the evidence and made findings with respect to all four particulars in allegation 3.

[74] The Hearing Tribunal also considered the evidence introduced in the sanction hearing. The Hearing Tribunal held:

The Hearing Tribunal accepts Dr. Ali's evidence that he attempted to complete the Form 65 to the best of his ability and that he did not engage in intentional, dishonest behavior. Although the conduct was serious enough to rise to the level of unprofessional conduct, given that there is no evidence that patient care was compromised, and in light of some of the other factors referred to in this decision, including the mitigating factors surrounding Dr. Ali's mental health, the conduct is not on the most serious end of the spectrum.

[75] The Hearing Tribunal accepted Dr. Ali's evidence. On the basis of all of the evidence, the Hearing Tribunal found the allegation to be proven on a balance of probabilities. The Hearing Tribunal provides clear reasons for its findings and there is no basis for overturning the findings of the Hearing Tribunal. The decision of the Hearing Tribunal is reasonable.

- d) Ground of Appeal - The decision of the Hearing Tribunal with respect to the third allegation in the Notice of Hearing unreasonably found that Dr. Ali's conduct in relation to his bankruptcy fell within the scope of "unprofessional conduct" within the meaning of section 1(1)(pp) of the Health Professions Act.**

[76] The Hearing Tribunal held:

In the present case, there is a nexus between Dr. Ali's failure to comply with his obligations as a bankrupt person, and the practice of medicine. Dr. Ali submitted claims for services provided to Alberta Health Care, and in turn earned income from the publicly funded health system. However, when he submitted Form 65, the gross income that he reported was incorrect. There is a nexus between the conduct in issue and the practice of his profession, given that Dr. Ali failed to report income on the Form 65 that he had earned while practicing as a physician.

In addition, while the Hearing Tribunal understands that members of the profession may experience financial difficulty, and may end up filing for personal bankruptcy, the Hearing Tribunal believes that the public would expect members of the medical profession to act with the highest professional and personal integrity. If a member of the profession finds himself in financial difficulty, the member must take appropriate steps to comply with obligations established in the BIA and to be honest and thorough in their dealings with the Trustee in Bankruptcy.

...

In addition, the Hearing Tribunal finds that the conduct identified in allegation #3 also harms the integrity of the profession in the eyes of the public. The "public" which necessarily includes the Trustee in Bankruptcy. Although there is no evidence to suggest that the bankruptcy proceedings garnered any media attention, the bankruptcy proceedings are open to the public. Some of the documentation filed in the bankruptcy proceedings identifies Dr. Ali as a physician. Members of the public and members of the profession expect physicians to exercise sound judgment in their personal and professional affairs.

[77] A standard of reasonableness must be applied to the decision of the Hearing Tribunal. There are circumstances where conduct unrelated to the provision of professional services can constitute unprofessional conduct. It is for the Hearing Tribunal to apply the facts to the standards expected in the profession. The Hearing Tribunal clearly articulated the reasons why the conduct with respect to allegation 3 was unprofessional conduct and the decision of the Hearing Tribunal is reasonable. There is no basis to interfere with the decision of the Hearing Tribunal.

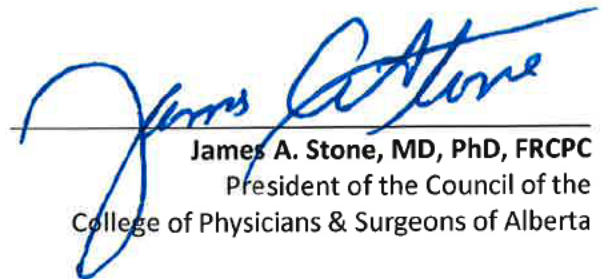
e) **Costs**

[78] The parties did not address costs in the appeal. The parties shall provide their written submissions on costs within 30 days of receipt of this decision.

VII. ORDERS OF COUNCIL

[79] Council confirms the Hearing Tribunal's decision. The appeal is dismissed. Council will consider the issue of costs of the appeal and issue a separate decision on costs, following receipt of the written submissions of the parties on costs.

Signed on behalf of Council this 10th day of August, 2016.



James A. Stone, MD, PhD, FRCPC
President of the Council of the
College of Physicians & Surgeons of Alberta