

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. HABEEB ALI

**DECISION OF THE HEARING TRIBUNAL OF
THE COLLEGE OF PHYSICIANS
& SURGEONS OF ALBERTA REGARDING SANCTION**

I. INTRODUCTION

In its written decision dated December 19, 2015 (“Decision on the Merits”) the Hearing Tribunal described its findings with respect to the allegations of unprofessional conduct as set out in the Amended Notice of Hearing dated May 6, 2014, against Dr. Habeeb Ali. The Hearing Tribunal found that allegations #1, #2 and #3 were proven.

Based on the findings of “unprofessional conduct”, the Hearing Tribunal met in person at the CPSA offices in Edmonton on June 25, 2015 to hear submissions with respect to sanctions.

The following persons were in attendance at the hearing: Dr. Randy Naiker of Edmonton as Chair, Dr. Don Yee of Edmonton and Mr. Lloyd Hickman of Lethbridge (public member). Ms Katrina Haymond acted as independent legal counsel for the Hearing Tribunal.

Also in attendance at the hearing was Dr. Habeeb Ali and Mr. James Peacock, legal counsel for Dr. Ali and Mr. Craig Boyer, legal counsel for the Complaints Director.

II. PRELIMINARY APPLICATION

At the outset of the sanction hearing, Mr. Peacock indicated that Dr. Ali was making an application to have the Hearing Tribunal recuse itself based on a reasonable apprehension of bias, and to remit the matter to a newly constituted Hearing Tribunal for a new hearing.

Mr. Peacock submitted that the Hearing Tribunal made a number of reviewable errors with respect to its decision. He submitted that the Hearing Tribunal inappropriately found that Dr. Ali had incorrectly reported his gross income to the Bankruptcy Court when he completed the Form 65. This required the Hearing Tribunal to draw an inference that the information contained in the Alberta Health Care statements reflected Dr. Ali’s gross income, as he understood it. Mr. Peacock submitted that if that was the position the College was taking, it ought to have been put to Dr. Ali directly. Since it was not put to Dr. Ali directly, it was a reviewable error for the Hearing Tribunal to make an inference. In addition, the Hearing Tribunal wrongly looked at the Alberta Health Care Statements and deducted the 35 or 30 percent the Tribunal chose to deduct. Mr. Peacock submitted that there was no evidence before the Hearing Tribunal which would enable it to draw the conclusion that Dr. Ali incorrectly reported his gross or net income.

In addition, he submitted that the Hearing Tribunal, in effect, reversed the burden of proof.

Mr. Peacock suggested that these errors were reviewable errors that were subject to appeal. In addition, he submitted that these errors demonstrated a reasonable apprehension of bias on the part of the Hearing Tribunal, because the Hearing Tribunal wrongly inferred from the evidence before it that Dr. Ali acted dishonestly. In addition, he submitted that the Hearing Tribunal’s references to the circumstances that led to the Continuing Care Agreement also gave rise to a reasonable apprehension of bias.

Mr. Peacock referred to several cases including the Alberta Court of Appeal's decision in *Walton v. Alberta Securities Commission*, *Misra v. College of Physicians and Surgeons*, and *Huerto v. College of Physicians and Surgeons*. He also referred to *Beaverhild v. Thorhild (County No. 7)*, which establishes the test for reasonable apprehension of bias as:

...whether an informed person viewing the matter realistically and practically would have a reasonable apprehension of bias. The grounds must be serious and substantial; a real likelihood or probability is necessary, not a mere suspicion. The burden of proof is on the party alleging a real or apprehended breach of impartiality
[.]

Mr. Boyer made submissions in reply. He submitted that the Court's decisions in *Walton v. Alberta Securities Commission*, *Misra v. College of Physicians and Surgeons*, and *Huerto v. College of Physicians and Surgeons* were distinguishable. In addition, he submitted that the Hearing Tribunal interpreted the evidence that was before it, which included the Order from the Bankruptcy Court, Dr. Ali's own evidence, and the Alberta Health Care Information. In assessing the evidence, the Hearing Tribunal carried out its role.

The Hearing Tribunal considered the submissions of the parties, and after deliberating, provided an oral decision to the parties finding that there was no reasonable apprehension of bias. The Hearing Tribunal indicated that it would provide written reasons for its decision, together with its decision with respect to penalty.

The test for reasonable apprehension of bias is set out in *Beaverhild v. Thorhild (County No. 7)*. The test is an objective test. It is whether a reasonable person, viewing the matter realistically and practically, would have a reasonable apprehension of bias. The Hearing Tribunal does not believe that a reasonable person would have a reasonable apprehension of bias, taking into account the entirety of the record of the hearing, and the Decision on the Merits.

Dr. Ali submits that the Hearing Tribunal made several reviewable errors, as outlined above. As noted in the Decision on the Merits, the Hearing Tribunal based its findings on the totality of the evidence available to it at the time of its deliberations. The evidence that was available included documentary evidence from the bankruptcy proceedings, including Justice Mason's Order dated June 13, 2012, as well as the sworn testimony of both Dr. C [redacted] and Dr. Ali.

The Hearing Tribunal did its best to consider the evidence that was submitted on behalf of both parties at the hearing on June 25th, the arguments of both parties, and to consider, whether in light of the evidence, the allegations were proven. After reviewing the evidence, the Hearing Tribunal found that the allegations were proven, on a balance of probabilities. If Dr. Ali believes that the Hearing Tribunal has erred, then Dr. Ali has the right to appeal the Hearing Tribunal's findings to Council. The arguments advanced on Dr. Ali's behalf regarding the Hearing Tribunal's alleged errors will be considered by Council, in the event that Dr. Ali chooses to appeal the Decision on the Merits.

Even if the Hearing Tribunal erred as alleged on behalf of Dr. Ali, the alleged errors would not give rise to a reasonable apprehension of bias. The Hearing Tribunal accepted Dr. Ali's evidence with respect to allegations #1 and #2 in its entirety, including his testimony with respect to the dates when he received or became aware of certain documents. Given that the Hearing Tribunal accepted Dr. Ali's evidence, a reasonable person would not conclude that the Hearing Tribunal had an apprehension of bias in these circumstances.

Dr. Ali also alleged that the Hearing Tribunal demonstrated a reasonable apprehension of bias by referring to the seriousness of the conduct that gave rise to the Continuing Care Agreement. The Hearing Tribunal does not see how such references could give rise to a reasonable apprehension of bias. The Order of Council that was included in the Agreed Exhibits refers to the facts giving rise to those findings, as does the Agreed Statement of Facts. The Hearing Tribunal's reference to the facts that were in evidence by agreement of the parties does not constitute a reasonable apprehension of bias.

The Hearing Tribunal considered the case law presented on behalf of Dr. Ali, including the decision in *Walton v. Alberta Securities Commission*. In *Walton*, the Alberta Court of Appeal held that the Securities Commission made inappropriate findings in relation to one of five appellants, Walton, who had been convicted of insider trading. The Commission held that Walton was lying under oath, and that it was "beyond belief" that an accounting professional could operate under this sort of misapprehension about tax rules. The Court of Appeal overturned the conviction against Walton, finding that it was unfair because she had never been cross-examined with respect to whether she was being dishonest in her evidence, or whether her professed ignorance was unreasonable.

Walton explains the rule in *Browne v. Dunne*, which Dr. Ali has referred to in support of his position that the Hearing Tribunal erred in its findings in its Decision on the Merits. However, the decision does not refer to reasonable apprehension of bias, and is therefore of limited assistance in the context of the application for recusal based on reasonable apprehension of bias.

The other authorities provided on Dr. Ali's behalf are also of limited assistance, since they are factually distinct from this case.

The Hearing Tribunal finds that there is no reasonable apprehension of bias. The Hearing Tribunal dismisses the application to recuse itself and remit the matter to a newly constituted Hearing Tribunal, for the reasons set out above.

III. SUMMARY OF EVIDENCE

Mr. Boyer confirmed that he did not intend to call any evidence at the sanction phase of the hearing. Mr. Peacock indicated that he was calling Dr. H[REDACTED] B[REDACTED], who would testify by video conference, and that Dr. Ali would also be testifying.

Dr. H■■■■ B■■■

Dr. H■■■■ B■■■ graduated from University of Manitoba Medical School in 1965, and has been a Psychiatrist since 1972. He is currently an Associate Professor of Psychiatry at the University of Ontario, and has a private practice which includes providing treatment to physicians. Dr. B■■■ stated his practice consisted of doing individual psychodynamic psychotherapy, approximately once or twice a week in order to help them understand their interpersonal problems that limit their success. He also pursued an academic aspect of his professional career, involved with teaching residents, as well, he has written a small textbook on psychotherapy. He stated he had about 2000 papers written on psychotherapy in peer-reviewed journals.

Dr. B■■■ confirmed that he wrote a report regarding Dr. Ali, dated June 17, 2015, which was entered as exhibit 38. He testified that he had been seeing Dr. Ali since 2008. He initially began seeing him in twice a week psychotherapy sessions. He stated that continued for a while, and then diminished to approximately once per week until approximately 2011. At this point, the frequency of the psychotherapy sessions diminished. The frequency of their sessions increased again in March 2015 when Dr. B■■■ began to see Dr. Ali more intensely related to both the difficulties of this hearing and to carry out the evaluation as requested by Mr. Peacock.

Dr. B■■■ stated he reviewed his own psychotherapy notes to refresh his memory and conducted a fairly extensive evaluation of Dr. Ali over 16 sessions and 40 hours of psychotherapy, which took place the between March 15 and June 15, 2015.

Dr. B■■■ concluded that Dr. Ali met the DSM-IV criteria for Generalized Anxiety Disorder (GAD) He stated that this casts some light on his behaviour which led to the charges that Dr. Ali was subsequently found guilty for. He felt that Dr. Ali's behaviour is understandable if we take into account not just the description of his behaviour, but some of the concealed issues that played a role in priming him to behave that way.

Dr. B■■■ testified that in a usual GAD, the predominant symptom is anxiety. In Dr. Ali's case this symptom went into the background and what was most prominent was the cognitive effects of the GAD. He explained cognitive symptoms were difficulty focusing, concentrating and attending to the material he was studying. These symptoms got in the way of him doing certain paperwork for example, in getting his finances in order. As he prepared forms for his journey into bankruptcy, he was hoping that once he became bankrupt, the disaster of handling all this paperwork would go away. But actually it got worse because there was even more paperwork that he had to do. As a result of the GAD the executive function of his brain that organizes these things started to falter.

Dr. B■■■ further outlined that this showed itself primarily when he was doing things that had to do with finances, studying, or dealing with the College. This GAD interfered with his getting that work done.

Dr. B [REDACTED] also testified that Dr. Ali's uniqueness individualized his presentation of this GAD. He further stated that Dr. Ali's GAD did not arise spontaneously. There were certain predisposing factors that were laid down in his childhood that made him vulnerable for developing GAD. He felt that existing frailties, weaknesses and limitations intercepted with four precipitating stressful events that brought forth this GAD with a very unique colouring.

Dr. B [REDACTED] further explained that Dr. Ali had an overdeveloped conscience. Having an overactive conscience meant that Dr. Ali had very high standards, that he was very altruistic and put other people's needs ahead of his own. The roots of this over developed conscience are probably related to his mother's frequently physically abusive response over what seem to be minor infractions. Dr. Ali's internalization of such severe punishment at the hands of his mother resulted in developing an overly punitive conscience, which ensures that he puts others needs ahead of his own, lest they judge himself selfishly or behave in self sabotaging ways. This was part of the reason why Dr. Ali became a physician.

Dr. Ali also was limited in his self-awareness. This came from his relationship with his father who believed that men don't cry or do not show feelings of weakness. This resulted in compartmentalization of emotions and feelings that could not be identified, labeled addressed, or resolved. This left him at risk for thinking, behaving, and being primarily influenced by these unrecognized emotions, vulnerable for planning thoughtlessly and impulsively.

Dr. B [REDACTED] also outlined that Dr. Ali suffered for what was described in psychiatric literature as a parentified child. That is, his parents delegated to him roles that were inappropriate for a child but more appropriate for an adult. As a deputy parent, which reinforced his idea of putting others needs in front of his own, he paid no attention to what he may be feeling or what he may be needing. This dynamic played a role in developing a harsh conscience where he advocates for others, regardless of the cost to himself.

Dr. Ali also lacked what was described as mentalizing. This was explained as being the capacity to recognize the way you see yourself in any given situation that may be quite different than the way others see you in that same situation. This may create some confusion between the intent of the person and the perception of those observing that person. Dr. B [REDACTED] stated; for an example, that Dr. Ali viewed himself as an advocate for his patients ensuring the care they received was excellent, however the College would see him as being haughty, demanding, self-serving and subservient insubordinate.

Furthermore, Dr. B [REDACTED] reiterated that the cognitive aspects of his GAD, his not being able to focus, concentrate, attend, mind going blank, feeling fatigue all interfered with his ability to respond in a timely manner to the financial difficulties and to the bankruptcy process. He also suspected that this may have had something to do with his tardiness in paying his fees on time. Dr. B [REDACTED] also felt that this cognitive slowness inhibits him from responding to the danger signals relating to meeting in a timely fashion with Dr. Wright.

Dr. B█████ further explained that while these psychosocial aspects predisposed Dr. Ali to GAD they did not in themselves promote the GAD. He further explained that four precipitating stresses - his marital discord, children witnessing this discord as manifested by behavioural and academic difficulties, the bankruptcy itself and the shame of the bankruptcy combined with the after mentioned predisposing factors are what precipitated Dr. Ali's mental state.

Dr. B█████ stated that despite the GAD diagnosis, he had no concerns regarding Dr. Ali's fitness to practice. His practice is a haven for him because it gratifies Dr. Ali's need to behave in an altruistic way, and is an indirect way of looking after himself.

Under cross-examination, Dr. B█████ outlined that he saw Dr. Ali regularly, at least once a week in 2008, 2009, 2010. By November 2011, he indicated that he had 215 sessions with Dr. Ali. Sometime after November 2011 Dr. B█████ acknowledges that the frequency the visits dropped off. He stated there were only 30 sessions in 2011 and a total of 20 sessions in 2012. By 2013 there was an noticeable drop off with a total of 8 ½ sessions (this included what was probably a session and a half), Each session was described as being 46 minutes in length. Dr. B█████ stated that these sessions were typically done via videoconferencing which, in his experience, works. He still preferred personal interaction over video conference.

Dr. B█████ also stated that he had received several documents in advance of preparation of his June 17, 2015 report to Mr. Peacock. Included in this were pages 100 to page 153 of the Hearing Transcript and the September 30, 2014 Hearing Report of the CPSA Tribunal. More specifically, Dr. B█████ indicated that he had underlined pages 100 to page 116 of the transcript and then on page 117 the underlining stops. Consequently he admitted that he could not say for sure that he read the whole report. Additionally, he acknowledges that he did not see the exhibits other than the Continuing Care Agreement.

Dr. B█████ stated he recalled providing in his opinion to the College in November 2011 that Dr. Ali demonstrated a robust ability to mentalize. He stated that he continued to monitor his capacity for mentalization throughout 2012 and 2013. At this point he felt that it started to become a problem again and continued to be a problem into 2015.

Dr. B█████ stated Dr. Ali's problems arose after Dr. Ali started to diminish the frequency of his psychotherapeutic treatments. He felt that Dr. Ali would benefit from ongoing therapeutic psychotherapy without any specific end date in mind.

Upon questioning from the Hearing Tribunal, Dr. B█████ testified that he viewed Dr. Ali's GAD was severe, as it was manifested by a panic attack. He felt that the uniqueness of Dr. Ali's presentation would limit his anxiety being noted by the public and by other physicians including psychiatrist or psychologist.

Under re-examination Dr. B [REDACTED] also stated that Dr. Ali's ability to mentalize was fluid and not static. Therefore, this was not inconsistent with his opinion of November 2011 where he stated Dr. Ali had a robust ability to mentalize at that time. Dr. B [REDACTED] felt that under certain pressure, a person's ability to mentalize can wane.

Dr. Habeeb Ali

Dr. Ali testified that in regard to Charge one, he was undergoing a lot of stress and was hoping that this would carry some weight in terms of explaining his intention to pay his annual fees for his Continuing Care Agreement in a timely fashion. He did acknowledge that it was his responsibility to pay it and acknowledges that he did not pay it on a timely basis.

Dr. Ali also stated that it was never his intention to refuse to cooperate or to meet with Dr. Wright. He understands and acknowledges how the correspondence and exchanges that took place with Dr. Wright might have been viewed as a failure to cooperate. He testified that he has never refused to meet with her.

Dr. Ali also testified that on Form 65 of the bankruptcy documents (Exhibit 6), that he declared a gross income of \$15,000. This amount came as payment from the Alpen Medical Clinic directly, after they had received payment from Alberta Health. He stated that the clinic would deduct expenses which included overhead, practice management fees, and his costs for the chaperone. He stated that he provided documentation from the clinic to the bankruptcy trustee confirming this. He declared a net income of \$5,500 after he split income with his wife, covered rental car costs and paid for flights back and forth to Ontario to visit his family.

He testified that when he completed the Form 65 it was his intention to honestly disclose his income at that time.

Dr. Ali acknowledged that he did not comply with all of the obligations under the *Bankruptcy Act*. He further testified that he is now taking steps to fulfill his obligations. He stated that he has started to work with an accountant and has completed and filed his outstanding tax returns. He has received an assessment for tax year 2014 and is awaiting CRA assessment for 2009, 2012 and 2013. Submitted as exhibit number 39, was a Court Of Queen's Bench of Alberta Bankruptcy Registrar List document dated February 9, 2015, declining the discharge application. Handwritten on this document was instructions for the bankrupt to get documentation in order, file tax returns, go back to trustee and reapply, and if MNP was not willing to help, look for another trustee. Dr. Ali testified he has found another bankruptcy trustee and is working towards getting the bankruptcy discharge.

Dr. Ali finally stated that he is continuing to see Dr. B [REDACTED] on a regular basis.

Under cross-examination, Dr. Ali was questioned as to whether or not he has provided his now filed tax returns to the trustee. Dr. Ali stated that the trustee did not request this and is only requesting the assessments from CRA. He further identified his new trustee as B [REDACTED] N [REDACTED].

The Hearing Tribunal asked Dr. Ali to clarify how he came up with the figures submitted on the Form 65. He stated that his Alberta Health billings would be approximately \$30,000 and the Alpen Clinic would subtract his overhead and would pay him approximately \$15,000 per month on average. This figure was declared as gross income on the Form 65. From this he would pay approximately \$7000 to his wife, and anywhere between \$2,000 to \$5,000 per month on airfare. He further stated that he was not able to buy a car and subsequently would rent them which accounted for another cost. Specifically, the Tribunal asked Dr. Ali why on the section that stated monthly nondiscretionary expense, child support was declared at \$1,800, and spousal support was declared at zero dollars. Dr. Ali testified that he did not feel that the approximate \$7,000 that he paid to his wife was spousal support.

IV. SUBMISSIONS REGARDING SANCTION

Mr. Boyer made submissions on behalf of the Complaints Director with respect to sanction. Mr. Boyer submitted that the appropriate sanction was a six-month suspension, and an order requiring Dr. Ali to be responsible for the costs of the investigation and the hearing. He submitted that when dealing with sanctions, there are two general factors that are relevant. First, is the one of dealing with deterrence - both specific to the individual and deterrence to the profession at large. The second factor is rehabilitation.

Mr. Boyer made reference to the Decision on the Merits, where the Hearing Tribunal stated that Dr. Ali's actions demonstrated a lack of priority to the College and the Tribunal did not accept Dr. Ali's claim that he was too overwhelmed by paperwork as an excuse due to the fact that he was not deemed to have any mental illness at the time and was still fit to practice medicine.

Mr. Boyer made reference to the *Jaswal v. Newfoundland (Medical Board)* case, specifically paragraph 36 which provided a non-exhaustive list of factors that ought to have been considered when imposing a proper penalty applicable to the case at hand. These factors were:

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.

In relation to these points, Mr. Boyer submitted that Dr. Ali was charged, and subsequently found guilty of, offenses that were serious and of significant gravity enough to amount to unprofessional conduct. This fulfilled the requirement for point number one.

He also outlined that Dr. Ali had practiced in many jurisdictions and had come to Canada in 2006 after leaving medical School in 1992. Thus, he was a physician at the middle of his career when these allegations occurred and not new to the profession.

Dr. Ali had also been found guilty of the previous boundary violation and was in the process of meeting the orders and conditions that were imposed on him from that Hearing Tribunal.

Mr. Boyer further outlined that points numbered four and number eight were not applicable in that there was not a specific patient or group of patients that were affected by Dr. Ali's unprofessional conduct.

Mr. Boyer submitted that Dr. Ali demonstrated the general repetitive pattern in the sense of minimal or lack of response to the College and also to the trustee in his obligations under the bankruptcy legislation.

Mr. Boyer made reference to the testimony of Dr. B [REDACTED] regarding Dr. Ali's mental health during this period. While, Dr. B [REDACTED] felt that Dr. Ali was suffering from GAD, he was also of the opinion that this did not affect Dr. Ali's fitness to practice medicine and by inference aware of his obligations to the College and to the bankruptcy trustee.

Mr. Boyer also submitted that while Dr. Ali remains as an undischarged bankrupt, there is no evidence that he has paid any financial penalty.

In regards to the presence of mitigating circumstances, Mr. Boyer stated that Dr. B [REDACTED] was a treating psychiatrist, trying to build a therapeutic relationship that was built on trust and was not in a position to challenge the statements made by Dr. Ali. Dr. B [REDACTED]'s role was more supportive, trying to help Dr. Ali identify and understand his actions and reactions to others. However Dr. B [REDACTED] stated that he did not read the entire hearing transcript, did not review any of the exhibits that were in evidence and, although receiving the Continuing

Care Contract, did not read it in its entirety. This brought into question the amount of weight the Hearing Tribunal should place on Dr. B■■■■'s opinion of general anxiety being a mitigating circumstance.

Mr. Boyer submitted that there is a need for specific and general deterrence to protect the public. While there was no specific issues in relation to patient care, Dr. Ali's interactions with the regulator for the College does affect the public because of the trust placed by the public in the self-regulated profession and the regulator to enforce that situation. Mr. Boyer presented the case of *Anhang v. Law Society of Manitoba* which emphasized the importance of the integrity and trust placed in the profession by the public and the reputation of the profession at large that is negatively affected when members fall below the expected level of conduct, eroding public confidence in the profession.

With respect to the allegations falling outside the range of permitted conduct, Mr. Boyer made reference to the decision of this Hearing Tribunal that all three allegations were of sufficient gravity to constitute unprofessional conduct.

Finally, Mr. Boyer provided numerous case law examples of whether or not private conduct or conduct outside of the professional clinical practice can be unprofessional conduct and sanctions that were imposed in those cases. He outlined that there are very serious consequences for physicians and other regulated members of various professions when they breached restrictions on their practice or violate laws of general application. For Dr. Ali, this would be his second disciplinary hearing that he was found guilty of allegations.

Mr. Boyer was clear that he was not making submissions on what conditions by way of further treatment obligations by Dr. B■■■■ should be imposed.

Consequently, Mr. Boyer submitted that the appropriate sanction was a six-month suspension, and an order requiring Dr. Ali to be responsible for the costs of the investigation and the hearing.

Mr. Peacock then made submissions on behalf of Dr. Ali. Mr. Peacock submitted that the appropriate sanction was a reprimand.

Mr. Peacock submitted that Dr. B■■■■'s evidence was that until November of 2011 there has been approximately 250 treatments, with the vast majority being in the first three years. In 2013, there were 8 ½ treatments, therefore Mr. Boyer's submissions regarding the lack of efficacy of treatments is not supported by Dr. B■■■■'s evidence.

Mr. Peacock agreed that the *Jaswal* decision cites appropriate factors for the Hearing Tribunal to consider when determining what, if any, sanction should be imposed in a case like this.

Mr. Peacock submitted that the unprofessional conduct that Dr. Ali was found guilty of fell on the less serious end of the range of the spectrum of unprofessional conduct. There were no patients harmed by his actions. Additionally, there has been no finding that Dr. Ali

committed any bankruptcy offence or that there has been any unlawful conduct on the part of Dr. Ali. In terms of the nature and gravity of the proven allegations, Dr. Ali acknowledged that he had a responsibility toward the College, but failing to meet this responsibility is on the less serious end of the scale.

In regards to Dr. Ali's previous character, it was acknowledged that Dr. Ali had a previous matter before the College that involved the boundary violation, but the current charges are of a much different nature.

Mr. Peacock also spoke to the generalized pattern of behaviour outlining that the incidence with respect to the College took place over a relatively combined period of time of approximately 2 to 3 months. Dr. Ali acknowledged it was never his intention not to pay or comply with the College, bankruptcy trustee or to engage in any type of dishonest behaviour in the context includes his disability arising from his GAD as set out by Dr. B[REDACTED]

In regards to whether or not Dr. Ali had suffered any serious financial or other penalties as a result of the allegations, Mr. Peacock stated that Dr. Ali has had to pay CRA a \$5,000 deposit and has lost approximately \$33,000 to creditors from earlier in 2015. This was accepted as fact by Mr. Boyer. Additionally, Dr. Ali also remains under his Continuing Care Contract. Mr. Peacock states that there have, indeed, been significant consequences for Dr. Ali and he will continue to have to face these matters both in dealing with bankruptcy and with the Continuing Care Contract.

Mr. Peacock also outlined Dr. B[REDACTED]'s testimony in regards to Dr. Ali having GAD which served as a mitigating factor in these charges.

On the issue of specific deterrence, Mr. Peacock stated that Dr. Ali did not need any further reminder of the importance of meeting his obligations under his continuing care contract and still remains under the restrictions of this contract. This in addition to this hearing process, which serves as very poignant messages to him of the importance of complying with his obligations.

On the issue of general deterrence, the public would understand why this is not an appropriate case for a lengthy suspension given Dr. B[REDACTED]'s diagnosis and testimony.

With respect to the degree to which the conduct falls outside the range of permitted conduct Mr. Peacock referred to Dr. B[REDACTED]'s testimony with respect to the medical condition that Dr. Ali was operating under.

Mr. Peacock submitted that Dr. Ali did not engage in serious intentional dishonest conduct. Nor did he engage in any behaviour that put his patients in jeopardy.

Mr. Peacock stated that Dr. Ali has a medical condition that he needs to address. He has committed to doing just that. At no point in time have there been any concerns raised with respect to the quality of patient care provided by Dr. Ali. It would be unreasonable to

conclude that he is unwilling to accept the terms of his Continuing Care Contract and otherwise comply with it. Nothing would be served by suspending Dr. Ali and; in fact, it would make it more difficult for him to carry on; which would be unreasonable, but also not in the best interests of the public or in the best interests of the College.

Mr. Peacock confirmed that he had not seen an itemized statement of costs, and therefore was not in a position to make submissions with respect to the proportion of costs, if any, Dr. Ali should be required to pay. Mr. Boyer agreed to provide Mr. Peacock with an estimate of the costs. The Hearing Tribunal confirmed that Mr. Peacock would be provided the opportunity to make written submissions with respect to costs after receiving the information from Mr. Boyer, and both parties would provide the information to independent legal counsel, who would forward it to the Hearing Tribunal.

Mr. Boyer subsequently provided Mr. Peacock with an itemized breakdown of the costs incurred to date, totaling \$42,212.74. The costs include *per diems* paid to the public member of the Hearing Tribunal (\$840.00) and to the physician members (\$2,061.96) fees paid to the court reporter (\$2,300.00), photocopying, courier, and conference call charges (\$260.00), fees paid to legal counsel for the Complaints Director (\$26,518.00) and fees paid to independent legal counsel (\$8,218.00).

Mr. Boyer advised that he had just billed the College \$6,715.00 for preparation and attendance at the sanction hearing, and that he estimated the costs for the Hearing Tribunal and its legal counsel for the sanction hearing would be \$10,800.00, for total anticipated costs of \$59,000.00.

Mr. Peacock requested that Ms Haymond and Mr. Boyer provide him with un-redacted copies of the accounts that were issued to the College.

Ms Haymond advised that the accounts she had issued to date totaled \$9,321.19 (which did not include the fees for attending at the penalty hearing or assisting the Hearing Tribunal in reviewing its written decision). Of the total that was billed to date, \$4,374.00 was for attending at the hearing and a conference call with the Hearing Tribunal, and the remainder was for correspondence with the Hearing Tribunal and the College with respect to scheduling and preparation of the written decision, reviewing the draft decision prepared by Dr. Naiker, and providing comments on the draft decision. Ms Haymond indicated that she would seek instructions from the Hearing Tribunal regarding Mr. Peacock's request to provide actual copies of the accounts submitted.

Mr. Boyer indicated that his accounts contained very detailed descriptions of activities for his client, which are protected by solicitor-client privilege. He explained that his accounts consisted of work done between January, 2014 and the end of June, 2015, made up of fees of \$30,700.00, disbursements of about \$1,000.00, and taxes of about \$1,600.00. He explained that the hearing lasted for two days, and there were a number of complex and unusual issues, including whether the bankruptcy conduct constituted unprofessional conduct. In order to address that issue, he submitted a Brief of Law.

Mr. Peacock was asked whether he wished to make an application to the Hearing Tribunal for production of the accounts, and what details, in addition to the information already provided, Dr. Ali needed to make submissions. Mr. Peacock indicated that the general description provided is probably sufficient for his submissions, but he may submit that full details should be provided, particularly if the Hearing Tribunal directs that the legal accounts be paid in full.

Mr. Peacock provided a written submission, dated July 13, 2015, in relation to costs. Mr. Peacock submitted that the approximate cost of the investigation and hearing was \$59,000. Of this amount, approximately \$47,000 was made up of legal fees and disbursements (inclusive of GST) billed by counsel for the College and counsel for Hearing Tribunal. Mr. Peacock indicated that Dr. Ali had no basis to suggest that the accounts themselves were excessive or that any of the charges were inappropriate, but if the College is seeking full indemnity, the respondent should have the opportunity to review the legal accounts and the Hearing Tribunal shall question whether all of these accounts should be passed on to the physician. Specifically, substantial fees were incurred in connection with the review and editing of the written decision of the Hearing Tribunal. These costs should not be borne by the respondent. Additionally, the *Health Professions Act* only permits the Hearing Tribunal to direct that the investigated person pay all or part of the expenses of an investigation or hearing or both, including travelling expenses and a daily allowance, as determined by the Council, for the Complaints Director, the investigator and members of the tribunal who are not public members. Consequently, the costs incurred by the public member should not be included.

Furthermore, the cost set out in the Summary Of Costs provided by counsel for the College, apart from the costs incurred by the public member, fall within the scope of costs of which the Hearing Tribunal has the power to direct to be paid by an investigated person. Nonetheless this does not mean that they must be ordered in every case as costs are discretionary, with the discretion to be exercised judiciously. The Hearing Tribunal should consider such factors as the seriousness of the charges, the conduct of the parties and the reasonableness of the amounts. Costs are not a penalty and should not be awarded on that basis. When the magnitude of the cost award delivers a crushing financial blow, it deserves careful scrutiny.

Mr. Peacock submitted that given the factors set out above, the Hearing Tribunal should direct Dr. Ali not pay any costs of the investigation or hearing. The following factors were relevant:

- a) Dr. Ali's conduct was not deliberate and significantly contributed to the medical condition as described by Dr. B [REDACTED]
- b) Dr. Ali cooperated fully with the College with its investigation of the first two charges; however, he was not informed of any investigation with respect to the third charge and was not aware this was a matter of concern to the College until he was served with a notice of hearing.
- c) Dr. Ali facilitated proof of the facts underlying all three charges by the way of an agreed statement of facts and agreed exhibits.

- d) Dr. Ali still faces significant financial burdens and obligations related to his bankruptcy.
- e) Dr. Ali acknowledges his responsibility for complying with the direction of the College including the payment of any fees and, as he testified, it was never his intention to fail to comply with these obligations. Due to his medical condition, Dr. Ali simply did not appreciate how his conduct was being perceived by others.
- f) The charges against Dr. Ali fall on the less serious side of the scale. There is no basis to suggest that Dr. Ali is an ungovernable physician and is continuing to take steps to address his outstanding bankruptcy obligations.

It was submitted that in exercising its discretion, the Hearing Tribunal should consider Dr. Ali's financial circumstances and his full cooperation with the College in the admission of evidence and records. Given that Dr. Ali faces the prospect of at least a reprimand and, possibly, a period of suspension, an award of costs against Dr. Ali would in effect be an additional penalty.

In the alternative, it is submitted that if the Hearing Tribunal directs the payment of any costs by Dr. Ali, the amounts directed should be substantially less than the full amount set out in the Summary Of Costs and the Hearing Tribunal should direct that Dr. Ali be given time to pay the cost over an extended period of time.

Mr. Boyer provided a reply, dated July 15, 2015. Mr. Boyer submitted that case law is clear that the contents of a solicitors account to his or her client is covered by privilege. Dr. Ali is entitled to keep his legal accounts private and to suggest that the Complaints Director does not have the same privilege is not accurate.

Furthermore the amounts of costs awarded and upheld by Courts is not insubstantial in recent years. In *Osif v. College of Physicians and Surgeons of Nova Scotia*, the Court ordered costs in the amount of \$200,000 which represents about 80% of the total costs incurred.

Dr. Ali was given proper notice of all the allegations that he was facing. To suggest that the hearing would have been shorter, and the costs lower, if the investigation had started with the bankruptcy issues being known is not accurate.

Mr. Peacock submitted a further reply by email, dated July 15, 2015. Mr. Peacock submitted that a Hearing Tribunal must reasonably exercise its authority to award costs given the reasons and factors submitted previously. Furthermore, the costs incurred by Dr. Ali in relation to his defence are not in issue. In contrast, the costs incurred by the College are, and Hearing Tribunal must determine if those costs are reasonable.

V. ORDERS

The Hearing Tribunal has carefully considered the submissions of both Mr. Boyer and Mr. Peacock, and makes the following orders pursuant to s. 82 of the *Health Professions Act*:

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, which represents approximately $\frac{2}{3}$ of the total anticipated costs of the hearing. The costs will be payable in accordance with a schedule to be agreed to by the College and Dr. Ali. If the parties cannot come to an agreement with respect to an appropriate payment schedule, the matter may be remitted to a Hearing Tribunal who retains jurisdiction regarding the terms of the payment schedule.

VI. REASONS FOR ORDERS

The Hearing Tribunal considered the parties' submissions regarding the factors that should be considered in determining the appropriate orders in light of the Hearing Tribunal's findings, including the factors referred to in *Jaswal v. Newfoundland (Medical Board)*. The Hearing Tribunal finds that the following factors are relevant when considering what orders should be imposed pursuant to s. 82 of the HPA.

1. Nature and gravity of the proven allegations:

Dr. Ali was found guilty of three charges that amounted to unprofessional conduct. The Tribunal recognized that while there was no compromise of patient care, there was an aspect of professionalism that he is required to maintain. Although members such as Dr. Ali may find themselves in difficult financial circumstances leading to bankruptcy, members are obliged to comply with their obligations in the context of those processes. Dr. Ali was expected to cooperate with the College in respect of the Continuing Care Contract. The failure to cooperate with Dr. Wright and the failure to pay the invoice in a timely manner demonstrates a lack of priority to the College which is not acceptable. 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.

2. Age and experience of the member:

Dr. Ali has practiced medicine since January 1993 in several jurisdictions. He has practiced in Canada since January 2006. The Hearing Tribunal viewed him as an

experienced physician who would be expected to understand the importance of cooperating with the College to ensure that he complied with all aspects of the Continuing Care Contract.

3. Previous character of the member and presence or absence of any prior convictions:

Dr. Ali had been involved in the disciplinary hearing concerning a boundary violation previously. He was found guilty of the charges related to that hearing and was currently in the rehabilitation portion of his return to full practice when these new charges occurred. Although the previous finding precipitated the Continuing Care Contract and is related to the present proceedings because it gave rise to allegations #1 and #2, the conduct at issue in the previous hearing was significantly different than what occurred here, and was far more serious.

4. Number of times the offence was proven to have occurred:

The Hearing Tribunal felt that Dr. Ali had a pattern of sloppy/inattentive behaviour that occurred over the time frame surrounding the payment of his Continuing Care Contract. He also exhibited similar sloppiness when dealing with his bankruptcy trustee. However, despite the pattern of sloppy/inattentive behavior, the Hearing Tribunal notes that allegation #1 relates to one discrete allegation of failure to pay the invoice in a timely manner, and there is no evidence of repeated occurrences of non-payment.

5. Role of the member in acknowledging what occurred:

Dr. Ali acknowledged that he had not complied with the bankruptcy requirements and indicated that he was still taking steps to deal with those issues. He also acknowledged his obligation toward the College and his submissions in that regard must be taken into account when determining the appropriate penalty. Dr. Ali submitted at the hearing was that his conduct did not amount to unprofessional conduct. The penalty cannot be increased due to the fact that Dr. Ali chose to proceed to a contested hearing.

6. Whether the member has suffered other serious financial or other penalties as a result of the allegations:

The Hearing Tribunal accepts that Dr. Ali is bankrupt and is still working through the bankruptcy process. He has had to pay CRA a \$5,000.00 deposit and had he lost approximately \$33,000 to creditors in 2015 from claims. However, during this time he has not been suspended by the College and still retained the privilege of practicing medicine and earning a living in Alberta. Consequently, although there is some evidence of Dr. Ali's ongoing financial difficulties, there is no evidence that Dr. Ali suffered financial penalties as a result of the allegations at issue in this hearing being made.

7. The presence or absence of any mitigating circumstances:

The Tribunal accepts [REDACTED] testimony that Dr. Ali suffered from GAD. It also accepts that this may have impacted his ability to realize how his actions could be perceived negatively. While Dr. Ali's mental health condition is a mitigating factor that is relevant to the issue of penalty, the Tribunal also carefully considered Dr. [REDACTED] evidence that he was capable of practicing medicine during the relevant period of time. While the GAD may serve to explain the reason, in part, for his behavior and is therefore a mitigating factor, Dr. Ali was still competent to practice medicine and continued to practice. Accordingly, although the fact that he was diagnosed with GAD is a mitigating factor with respect to penalty, it does not exonerate Dr. Ali from the obligations that he owed as a bankrupt person or his obligations to the College arising from the Order of the Council of the College in the previous hearing.

8. Need to promote specific and general deterrence:

The Tribunal accepted that given this hearing, Dr. Ali did not need any further reminder of the importance of meeting his obligations to the College and his expectations as a professional. Furthermore, the circumstances are somewhat unusual given Dr. Ali's diagnosis of GAD. Given this diagnosis, general deterrence was not a significant factor.

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

The Hearing Tribunal accepted the notion of maintaining the public's confidence in the integrity of the profession; however, the public's confidence in the integrity of the profession would not be significantly affected in this case given the mitigating factors, including Dr. Ali's mental health condition.

10. The degree to which the offensive conduct was outside the range of permitted conduct:

The charges that Dr. Ali faced met the standard for unprofessional conduct. While patient care may not have been compromised, Dr. Ali failed to meet his obligations to the College and as directed by the bankruptcy court, and failed to comply with the aspects of the Continuing Care Contract as outlined in allegations #1 and #2.

11. The range of sentences in similar cases: Mr. Boyer provided the Hearing Tribunal with a number of decisions involving physicians and other professionals who were found guilty of unprofessional conduct, where the penalty included a period of suspension.

One of the cases referred to by Mr. Boyer was *College of Physicians and Surgeons of Ontario v. Cheng*. In that case, Cheng admitted responsibility for two allegations relating to cosmetic surgery procedures he performed on a number of patients. The evidence was that Dr. Cheng breached restrictions on his certificate of registration by

performing 15 surgeries on the head after undertaking not to do so, and performing 16 surgical procedures after being ordered not to do so. The College and Dr. Cheng jointly submitted that his certificate of revocation should be revoked, and the Discipline Committee accepted the joint submission.

Mr. Boyer also referred to *Maytham v. College of Physicians and Surgeons of Ontario*. In that case, a physician was suspended for four months after appearing before the Discipline Committee three times over a four year period in relation to the College's concerns about his narcotic prescribing practices. He was required to maintain a log to facilitate supervision of his prescribing practices, and failed to comply. The Ontario Superior Court of Justice upheld the period of suspension.

In *Anhang v. Law Society of Manitoba*, a lawyer was disbarred after an audit revealed issues with the handling of trust funds, and irregularities regarding the payment of fees. His application for reinstatement was denied.

The Hearing Tribunal considered these cases but did not find the circumstances to be similar. The conduct in the cases referred to above was at the most serious end of the spectrum, appeared to be deliberate, and was repetitive. As noted above, Dr. Ali's conduct in relation to allegations #1 and #2 was not a deliberate attempt to ignore the College's authority, but rather occurred as a result of Dr. Ali's carelessness and lack of diligence in following through with the requirements of the Continuing Care Contract. Moreover, in the cases referred to above, there was no evidence to indicate that the member was suffering from an illness that may have been a contributing factor. Although Dr. Ali's conduct is serious enough to constitute "unprofessional conduct", it is not as serious as the conduct referred to in the cases that were provided.

After considering the submissions made on behalf of the parties, and the factors referred to above, the Hearing Tribunal considered whether a suspension was appropriate, or whether a reprimand was sufficient.

A suspension is a very serious order, since it deprives the member of the ability to earn a livelihood as a physician during the period of suspension. Given the serious consequences, suspensions should be reserved for the most serious cases. The Hearing Tribunal finds that a suspension is not appropriate given the unique circumstances in this case. In particular, the Tribunal accepted Dr. B■■■■'s testimony that Dr. Ali suffered from GAD which rendered him inattentive to administrative matters. This however, did not impair his ability to practice medicine and no evidence was presented to indicate that Dr. Ali failed to serve, or provided poor quality or even harmful care to his patients and community. Consequently, the value of a suspension was deemed to be of no value and was unnecessary to achieve specific and general deterrence.

The Hearing Tribunal also considered the submissions on behalf of the parties with respect to costs. Mr. Boyer submitted that Dr. Ali should be responsible for 100% of the costs of the hearing, whereas Dr. Ali submitted that he should not bear any of the costs.

The Hearing Tribunal is mindful of the Court of Appeal's comments in *C.K. v. College of Physical Therapists of Alberta*. Costs are discretionary, and the discretion must be exercised judicially. Full indemnity should not be the default, and costs should not be a straight mathematical calculation based on the number of convictions divided by the number of charges.

In *C.K. v. College of Physical Therapists*, the Court of Appeal held that the following factors were relevant in determining costs:

1. *The reasonableness of the amounts*
2. *The seriousness of the charges*
3. *The conduct of the parties*

In *Van Hee, Re*, a hearing panel appointed pursuant to the Bylaws of the Investment Dealers Association considered the decision in *C.K.*, and elaborated upon the relevant factors in assessing costs. Many of these factors are also discussed in the *Jaswal* decision, referred to above.

The Hearing Tribunal has considered a number of factors that are relevant in ordering costs, and finds that an order requiring Dr. Ali to pay a portion of the costs in the amount of \$39,000, over a period of time agreed to with the College, is appropriate. The factors considered by the Hearing Tribunal are set out below.

1. Reasonableness of the amounts

Although neither the Hearing Tribunal nor Dr. Ali were provided with copies of the actual accounts issued by independent legal counsel and counsel for the Complaints Director, an itemized statement of costs was provided. Independent legal counsel and counsel for the Complaints Director provided additional detail regarding their legal fees. The Hearing Tribunal felt that it had sufficient information to assess the reasonableness of the costs and that Dr. Ali was provided with sufficient information to make submissions on costs.

Although the costs are significant in this case, the Hearing Tribunal determined that the amount of costs was reasonable, with the exception of the *per diems* paid to the public member. Section 82(j) permits the Hearing Tribunal to order costs for travelling expenses and daily allowances to members of the hearing tribunal who are not public members. Therefore, *per diems* paid to the public member should be subtracted from the total costs. Once the *per diems* to the public member in the amount of \$1,730.00 are subtracted, the total anticipated costs of the hearing that may be ordered pursuant to s. 82(j) of the HPA are \$57,270.00.

The hearing occurred over two days. Four witnesses testified over the course of a full day on September 30, 2014, and two witnesses testified at the sanction hearing on June 25, 2015.

Although the parties did attempt to streamline the proceedings by submitting an Agreed Statement of Facts and Agreed Exhibit Book, the proceedings were nevertheless relatively complex in light of the legal issues that were addressed by both parties, including submissions regarding whether the bankruptcy proceedings constituted “unprofessional conduct”, the application for recusal based on a reasonable apprehension of bias at the sanction hearing, and the submissions with respect to costs. When legal issues arise, it necessarily makes the proceedings more complex and increases the costs. This is especially true in context of a professional discipline hearing, where the members of the Hearing Tribunal do not have legal training.

Mr. Peacock submitted that there were substantial fees incurred in connection with the review and editing of the written decision of the Hearing Tribunal, and submits that these expenses should not be borne by Dr. Ali. Section 82(j) of the *Health Professions Act* establishes that the Hearing Tribunal can order costs and fees for legal expenses and legal fees provided to the College, the Complaints Director, and the Hearing Tribunal. The statute permits a costs order to include the fees incurred for independent legal counsel. As noted above, the parties raised a number of legal issues. In *Fitzpatrick v. College of Physical Therapists of Alberta*, the Alberta Court of Appeal held that it was appropriate to take into account the sum paid to independent counsel, and that the presence of independent counsel was appropriate, since “one can never safely predict the legal issues that may arise during the course of a hearing.”

The Hearing Tribunal was appreciative of independent counsel and found their guidance and insight invaluable

The Hearing Tribunal finds that the amounts incurred for expenses associated with the hearing, including fees charged by independent legal counsel, are reasonable.

2. Seriousness of the Charges

There is no evidence suggesting any patient safety issues or negligence. Dr. Ali’s behaviour - while unprofessional – related entirely to administration rather than to patient care. While the conduct is not on the most serious end of the spectrum, the conduct at issue in allegations #1 and #2 was nevertheless significant enough to constitute “unprofessional conduct.” The College must be able to implement the orders issued by a Hearing Tribunal, and must be able to rely on members to cooperate with the College in its attempts to implement those orders, including Continuing Care Contracts.

3. Conduct of the Parties

Dr. Ali was cooperative with the College’s investigation into the first two charges. The parties were cooperative and neither of the parties increased the costs unnecessarily. Dr. Ali facilitated proof of the facts underlying all three charges by way of an Agreed Statement of Facts and Agreed Exhibit Book.

4. Other factors

The Hearing Tribunal also considered that Dr Ali was suffering from GAD which may have contributed to his behavior. As testified by Dr. B [REDACTED], Dr. Ali acknowledges his condition and is continuing to seek the appropriate psychotherapeutic treatment for it.

During the sanction portion of the hearing, Dr. Ali testified regarding the amount of income that he disclosed on the relevant bankruptcy form. The Hearing Tribunal accepts that there was no deliberate attempt on Dr. Ali's part to not disclose or to hide income.

In addition, while there was no specific evidence about Dr. Ali's current earnings, there was evidence that he was still in bankruptcy and had made payments to his creditors in the amount of \$33,000. The Hearing Tribunal accepts that he has had financial difficulties, which would have given rise to the bankruptcy.

In ordering costs, the Hearing Tribunal also considered the impact of the other orders imposed, as set out above. The orders did not include any period of suspension. Accordingly, Dr. Ali will be able to continue to earn a livelihood on an uninterrupted basis, and therefore will be in a better position to pay a portion of the costs in accordance with a Schedule agreed to with the Complaints Director.

As noted in *C.K. v. College of Physical Therapists of Alberta*, the ordering of costs is discretionary, and is not a straight mathematical calculation. Given the specific factors in this case, including Dr. Ali's medical condition, and his ongoing bankruptcy proceedings, the Hearing Tribunal determined that it was not appropriate to order Dr. Ali to pay 100% of the costs of the hearing. However, the Hearing Tribunal did not agree with the submissions on behalf of Dr. Ali that he should not bear any of the costs, since the costs were only incurred as a result of Dr. Ali's conduct. The Hearing Tribunal believes that regulated members who are found guilty of unprofessional conduct should, in appropriate cases, contribute to the costs of the investigation and hearing, in an amount determined to be appropriate.

The Hearing Tribunal considered and weighed all of these factors, and ultimately determined that a costs order in the amount of \$39,000, representing approximately $\frac{2}{3}$ of the costs of the investigation and hearing, was appropriate.

Signed on behalf of the Hearing Tribunal
by the Chair



October 27, 2015

Dated: _____

Dr. Randy Naiker

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. HABEEB ALI

**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. Habeeb Ali. The members of the Hearing Tribunal were:

Dr. Randy Naiker of Edmonton as Chair, Dr. Don Yee of Edmonton and Mr. Lloyd Hickman of Lethbridge (public member). Ms. Katrina Haymond acted as independent legal counsel for the Hearing Tribunal.

In attendance at the hearing was Mr. Craig Boyer, legal counsel for the Complaints Director. Also present was Dr. Owen Heisler, the Complaints Director for the College, Mr. James West, Associate Complaints Director, Dr. Habeeb Ali and Mr. James Peacock, legal counsel for Dr. Ali.

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 at the hearing were set out in Exhibit 1 and were:

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;
 - a. 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,
 - b. you did fail to provide to your Trustee in Bankruptcy your post-bankruptcy tax return information filed with the Canada Revenue Agency,
 - c. 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
 - d. you did fail to aide and cooperate with your Trustee in Bankruptcy in the administration of your estate in bankruptcy.

III. SUMMARY OF EVIDENCE

The following was entered as an Exhibit during the course of the hearing.

- 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
- 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 CH and Dr. Habeeb Ali dated June 6, 2013 to June 24, 2013 regarding meeting
- Exhibit 12. Email exchange between ML and CH 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 CH dated July 18, 2013 regarding NSF cheque
- Exhibit 15. Email exchange between CH 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 CH 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. KJ 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 KJ dated November 19, 2013
- Exhibit 27. Letter from VF, 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 MV, Alberta Health, to KI 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 CB letter to Dr Ali dated April 16, 2014.
- Exhibit 32. Procedure card from court search.
- Exhibit 33. Dr Heisler letter to Dr. B dated July 24, 2014.
- Exhibit 34. Dr. Heisler letter to Dr. B dated August 27, 2014.
- Exhibit 35. Email exchange between Dr. Heisler and Dr. B dated September 15 to 16, 2014.
- Exhibit 36. Addendum to Agreement dated March 15, 2013.

In addition, a number of witnesses were called to testify. Set out below is a summary of the key testimony provided by each witness.

DC

DC is a partner and Senior Vice-President at MNP Ltd. She was the responsible trustee in bankruptcy on Dr. Ali's bankruptcy assignment.

Although Dr. Ali's bankruptcy was supposed to be automatically discharged on May 25, 2012, MNP Ltd. filed a Notice of Intended Opposition opposing the discharge of the bankruptcy. DC testified that Dr. Ali failed to meet the requirements set out by the trustee. In particular, he did not submit the following documents to the trustee: monthly income and expense reports from the date of Bankruptcy to May 2012 to determine surplus income, proof that computer and equipment were required as tools of the trade and proof of filing of the 2011 post bankruptcy tax returns.

Consequently, DC testified that a compelling order requiring Dr. Ali to provide this information was issued. This Order was granted by the Court of Queen's Bench of Alberta. It stated that Dr Ali was required to do the following within 60 days of service of the Order:

1. File Income and expense reports along with substantiation of income for August 2011 to May 2012 to determine surplus income.
2. Provide proof that the computers and equipment were required as tools of the trade and therefore exempt, or alternatively, make arrangement with the Trustee to have them liquidated.
3. Proof of filing and payment (if applicable) of his 2011 post-bankruptcy tax return.
4. Pay into the Estate a minimum outstanding balance of \$2944 (\$1944 toward administration cost, \$1000 towards court costs) in minimum monthly payments of \$250 commencing in June 2012, subject to adjustment once all monthly income and expense reports are received and subject to the number of court appearances.

DC testified that Dr. Ali was served with this Order on August 9, 2012. He did not comply with its terms and MNP Ltd. was discharged as trustee on October 31, 2013.

On cross-examination, DC stated that she never met Dr. Ali. CD was the person who assisted Dr. Ali in completing the forms, and he also met with KB, a licensed trustee.

DC also indicated that Dr. Ali had contacted MNP on May 17, 2012. On that date, Dr. Ali spoke to CB (formerly named CD).

DC also confirmed that although the Order Compelling Bankrupt was granted on June 13, 2012, and filed on June 15, 2012, it was not sent to Dr. Ali until August 9, 2012.

DC also acknowledged that creditors have been free to pursue Dr. Ali since MNP was discharged as trustee on October 31, 2013.

DC was also asked whether Dr. Ali had any further contact with MNP since MNP was discharged as trustee. DC testified that Dr. Ali sent an email to CB on April 13, 2014.

Dr. Owen Heisler

Dr. Heisler is Assistant Registrar and the Complaints Director for the College. He testified that Dr. Wright brought forth information outlining Dr. Ali was not compliant with the term of his Continuing Care Agreement, including the request for meeting with Dr. Wright and payment of required fees. Dr. Heisler referred the matter for investigation. Upon receiving the investigation report, and additional information indicating Dr. Ali was not compliant with the requirements in the bankruptcy proceedings and directed the matter to a hearing.

Dr. Heisler testified that he attempted to contact two physicians, Dr. O and Dr. B, who were named as creditors to determine whether or not they had received payment. Dr. B sent Dr.

Heisler an email, dated September 16, 2014, confirming that he had provided Dr. Ali with an interest free loan and although he had not received payment he was hopeful that he would receive payment later. Dr. O did not respond.

On cross-examination, Dr. Heisler confirmed that Dr. Ali was ordered to pay costs in a previous hearing, and that those costs have been paid in full.

Dr. Heisler also confirmed that the existence of the June 13, 2012 order in bankruptcy came to his attention through Mr. Boyer. In addition, he confirmed that there have not been any complaints from members of the public about Dr. Ali's bankruptcy, or Dr. Ali's failure to comply with the terms of the order.

Dr. Heisler also confirmed that Dr. Ali had not been asked about the issues concerning the bankruptcy during the course of the investigation.

Dr. Janet Wright

Dr. Wright is the Assistant Registrar for the College. In her role, she was responsible for research ethics, physician prescribing and health issues. She oversaw Dr. Ali's compliance in a five-year Continuing Care Agreement which he entered into after making admissions of unbecoming conduct in relation to a separate discipline matter relating to a boundary violation. Dr. Wright explained that the College sent Dr. Ali an invoice for \$1800 dated February 27, 2013 to Dr. Ali's Hamilton, Ontario address. This was the address provided by Dr. Ali for College correspondence. The Invoice was to cover the portion of the costs associated with the Continuing Care Program.

By May 27, 2013, the invoice was still outstanding. A follow up reminder was sent, again to Dr. Ali's Hamilton address.

Dr. Ali issued a cheque for \$1800 to the College on June 20, 2013. This cheque was submitted to accounting and deposited on June 28, 2013. It was returned as insufficient funds (NSF) on July 16, 2013.

Dr. Wright indicated that the College had received an email from Dr. Ali on July 18, 2013 asking the College not to deposit the cheque, explaining that he had issued the cheque from the wrong cheque book. In the email he stated he would send another cheque soon. However, the email was received after the cheque had already been deposited.

Dr. Wright also outlined that Dr. Ali sent another cheque dated October 1, 2014 (wrong year) and then finally paid the outstanding amount via cheque on October 17, 2013.

Dr. Wright also testified she would meet Dr. Ali on a quarterly basis.

She received a letter dated March 10, 2013 from Dr. Ali to Dr. Canniff, the psychologist who was also involved in Dr. Ali's monitoring. The content of the letter indicated some deficiencies in fulfilling the Continuing Care Agreement and Dr. Wright felt that a face-to-face meeting involving herself, Dr. Canniff, and Dr. Ali was warranted. There was also a suggestion from Dr. Ali to the same effect. A date of July 9, 2013 was set, however Dr. Ali informed the College he would be out of the country at that time. He had also confirmed he would be available for most of August or September of that month and suggested a video call.

Dr. Wright preferred a face-to-face meeting as it would allow an assessment of subtleties that could be missed in a video call. Furthermore she explained that there were difficulties in arranging a time when both she and Dr. Canniff could be in Calgary. Although attempts were made to schedule the meeting in Calgary (which would be more convenient for Dr. Ali), this just did not work out. A letter was sent to Dr. Ali on July 18, 2013 asking Dr. Ali to meet in Edmonton in September 2013. Several proposed dates were sent by the College and Dr. Ali was not able to make any of them.

Dr. Wright states she had a telephone conversation with Dr. Ali on August 13, 2013. She explained to him that the meeting needed to be face-to-face and there were issues with schedules. She also explained that the fees for participation in the Continuing Care Agreement were still outstanding. Dr. Ali explained he thought his wife had sent a new cheque and would follow up with this. She also discussed an outstanding amendment to the Continuing Care Agreement that was awaiting Dr. Ali's signature.

Another letter with proposed September meeting dates was sent to Dr. Ali on August 16, 2013. No response was received. On September 4th, the College sent a follow up email requesting a response. On September 6th Dr. Ali was advised that one of the two available dates was no longer available. Dr. Ali responded the same day indicating he was not available on the remaining date.

A letter dated September 12, 2013 was sent via registered mail to Dr. Ali's clinic address. In it there were three proposed meeting dates for October 2013. Tracking indicates it was signed for on September 20, 2013 however, in an email Dr. Ali indicated he did not open it until September 30, 2013. He also advised he would not be able to make any of the proposed meeting dates.

Given the difficulty in arranging the meetings with Dr. Ali, and the outstanding fees for his Continuing Care Agreement, Dr. Wright prepared a Memorandum to Dr. Heisler, dated October 1, 2013, referring the matter to the Complaints Director.

On cross-examination, Dr. Wright confirmed that she is not aware of any formal complaints against Dr. Ali or complaints about his competency or quality of care since he entered into the Continuing Care Agreement.

She also confirmed that Dr. Ali sought to remove several conditions from his practice starting in 2010. Some but not all of the conditions were removed.

Dr. Wright stated that she met with Dr. Ali on a quarterly basis, and the meetings always occurred in Calgary. Dr. Wright understood that Dr. Ali's family was in Ontario but he was practicing in Cochrane, and that there were financial constraints.

She also acknowledged that she generally corresponded with Dr. Ali by email. Dr. Wright stated that the purpose of arranging a meeting with him was to discuss his letter to Dr. Canniff dated March 10, 2013, and concerns identified by Dr. Wright and Dr. Canniff. Initially Dr. Wright was trying to accommodate Dr. Ali by scheduling the meeting in Calgary. However, in September of 2013, Dr. Wright indicated that the meeting would be in Edmonton because they were unable to find a suitable date when both Dr. Canniff and Dr. Wright could attend a meeting in Calgary.

Dr. Wright acknowledged that she sent the letter dated September 12, 2013, requesting a response within one week via registered mail, and did not consider sending the letter to him by email.

Dr. Wright received Dr. Ali's email reply on October 1, 2013, in which he stated that he had not received the registered letter until September 30th. Dr. Wright said that she initially doubted his explanation, given that the registered letter was signed for on September 20, 2013. Subsequently, she accepted his explanation that his staff had signed for the letter, but he did not see the letter until September 30th.

After October 1, 2013, Dr. Wright did not make any further attempts to meet with Dr. Ali, and did not follow up with Dr. Ali regarding the quarterly meetings.

Dr. Wright indicated that although she communicated with Dr. Ali regularly by email, he had requested that correspondence be sent to his address in Hamilton. Therefore, correspondence regarding payment for the Continuing Care Agreement was forwarded to the Hamilton address.

Dr. Wright indicated, in response to a question from the Hearing Tribunal, that the Hamilton address is the address that Dr. Ali provided to the College when completing his annual renewal form.

Dr. Habeeb Ali

Dr. Ali testified that he immigrated to Canada in 2006 and began practice immediately. In 2007, he was disciplined by the College for a boundary violation. He returned to Practice in 2009 in Cochrane, Alberta. He financially supports his wife, their three children, an adopted child who resides in Nigeria, the child he fathered in 2007, his parents and his grandfather.

He testified that when he started working at the Alpen Medical Clinic in 2009, his portion of the overhead was 35%, which was reduced to 30% sometime in 2011 until he left that clinic in February 2013. He presently practices at the Oasis Medical Clinic, and his overhead is 25%.

Dr. Ali was under the care of [REDACTED] and [REDACTED], as part of the Continuing Care Agreement. The requirement to see the psychiatrist was lifted but Dr. Ali maintained contact with him frequently. He also attended a monthly boundaries aftercare group run by Dr. Canniff. He stated he attended and participated regularly.

He reported he met with Dr. Wright quarterly, typically in Calgary. This was his preference as travelling to Edmonton would cost him a day of missed clinic billing in addition to travel. He also reported that many patients complained when he was away.

Dr. Ali spoke to Dr. Wright in 2010 about removing or revising some of the practice restrictions. Dr. Ali understood that if he wanted the practice conditions removed, he would have to attend with Dr. Gabbard for re-assessment, or address the issue with the Council. Dr. Ali did not pursue those avenues for business reasons, including the costs. Dr. Ali did not pursue having the practice conditions removed after January of 2013.

Dr. Ali confirmed that he provided the Hamilton address, and his clinic address, to the College when he renewed his registration.

Dr. Ali testified he did not see the February 2013 invoice for his Monitoring fees. He did acknowledge that he received the subsequent May 27, 2013 reminder letter at the end of May or the beginning of June and issued a cheque. This cheque was drawn on a US dollar account and it was not until another cheque written on the same account was returned, that he realized this error and notified the College. This cheque had already been returned NSF.

Dr. Ali stated that during this time period he was under a tremendous amount of stress and distraction. He cited marital issues, behavioral issues with his children and health issues with family members in Nigeria. He left Canada to visit Nigeria in July of 2013, and had instructed his wife to send a replacement cheque to the College. Upon his return to Canada and by August 13, 2013, he realized that this had not been done.

Dr. Ali states he was distracted and did not send a replacement cheque until October 1, 2013. However, this cheque was inadvertently dated 2014. A third cheque was then issued on October 17, 2013 paying the amount outstanding from the February invoice.

Dr. Ali acknowledged that he expects this invoice every year and it was his responsibility to pay those fees in a timely basis.

In regards to the letter to Dr. Canniff (which was forwarded to Dr. Wright), Dr. Ali was under the impression that Dr. Wright was requesting to meet to follow up with Dr. Ali's request for a meeting, as outlined in Dr. Ali's letter to Dr. Canniff (faxed on March 11, 2013). He saw no urgency in the matter from his perspective and consequently was not able to meet the proposed dates for meetings. He declared his preference for a video teleconference and meeting closer to his practice, not requiring travel time. He was concerned about being absent from his practice given that he was already required to be away sometimes to visit his family in Ontario. He also noted that his regular quarterly meeting was overdue.

Dr. Ali testified he filed for personal bankruptcy due to marital strain requiring time off and a slow practice. Upon retaining MNP as the bankruptcy trustee he filed an initial statement of monthly income, but was unable to file monthly reports. He stated he was overwhelmed with paperwork and having difficulty doing this on a monthly basis. Even upon receiving the court order, Dr. Ali stated he was unable to sit down and do the paperwork required.

Dr. Ali said that the only person he met with at MNP was CB (formerly CD), and that he never met with the trustee.

Dr. Ali said that he received the order from the bankruptcy judge in August of 2012 setting out what needed to occur to get discharged from bankruptcy. He was unable to sit down and do the paperwork even though he realized the difficulties caused by being in bankruptcy.

Dr. Ali stated he has reconnected with MNP and began to get his paperwork in order to discharge his bankruptcy. Dr. Ali is taking steps to get his financial statements from his accountant so that he can file his tax returns.

He confirmed that none of his creditors are his patients, and he has never borrowed money from his patients.

On cross-examination, Dr. Ali acknowledged that the return address in his letter to Dr. Canniff dated March 10, 2013 was his Hamilton address and his email address.

Dr. Ali stated that although he understood that the September 30th letter from Dr. Wright was serious, he assumed that the meeting she was requesting previously was the meeting he had requested in his March 11, 2013 correspondence to Dr. Canniff. He did not realize until receiving the October 30, 2013 letter that there were other issues that she wanted to meet about.

Dr. Ali stated that his practice slowed down in 2011, but his practice picked up in 2012.

Dr. Ali also testified that he submitted forms to CB in the spring of 2012. However, the forms were rejected because she had requested further detail. As of that date, Dr. Ali had not completed his 2011 tax returns.

When questioned by the Hearing Tribunal, Dr. Ali stated that between February 2013 and October 2013, he was not under the care of any physician supports through the Alberta Medical Association or other Agencies. He did speak via telephone to [REDACTED] and his family physician. Neither of them felt he was depressed or anxious or that he had any other mental health issues.

Credibility of the Witnesses

The Hearing Tribunal considered the testimony of DC, Dr. Heisler, and Dr. Wright. The Hearing Tribunal found each of these witnesses to be credible. The Hearing Tribunal found these witnesses to be honest and forthright in their testimony. In general, they had a good recollection of the events involving Dr. Ali, and their evidence was consistent with the documentary evidence that was submitted.

Dr. Ali also provided his evidence in a straightforward manner and appeared to have a good recollection of the events giving rise to the allegations. In some instances, Dr. Ali's evidence was uncontroverted. For that reason, the Hearing Tribunal accepted Dr. Ali's explanation that he did not receive Dr. Wright's letter dated February 28, 2013 until the end of May or beginning of June, and that he did not receive Dr. Wright's letter dated September 12, 2013 until September 30, 2013. The Hearing Tribunal's findings on this issue and how this information impacted the Tribunal's analysis regarding allegations #1 and #2 is set out in further detail below.

Dr. Ali also testified that he did not believe that the meeting that Dr. Wright was trying to arrange was mandatory, since it was his understanding that Dr. Wright was arranging a meeting to discuss his March 10, 2013 letter to Dr. Canniff. The Hearing Tribunal rejects Dr. Ali's testimony in this regard, since it is not consistent with the objective evidence that exists, which demonstrates that the purpose of the meeting was two-fold: to discuss the issues raised by Dr. Ali in his letter dated March 10, 2013, and to discuss his participation in the aftercare program. The Hearing Tribunal's findings on this issue, and how this information impacted the Tribunal's analysis regarding allegation #2, is set out in further detail below.

Dr. Ali also testified that when he completed the forms in relation to the bankruptcy in August of 2011, he was assisted by CD. He further testified that he met with CD in April of 2012. Although CD was not called to testify at the hearing, the Hearing Tribunal accepts Dr. Ali's evidence on both of these points. The Hearing Tribunal's evidence regarding how this information impacted the Hearing Tribunal's analysis of allegation #3 is explained below.

IV. SUBMISSIONS

Mr. Boyer made submissions on behalf of the Complaints Director. He indicated that the Complaints Director must prove the allegations on a balance of probabilities.

Mr. Boyer stated that Dr. Ali acknowledges that the payment of fees he was required to pay in February of 2013 did not get paid until October 2013. He submitted that the Hearing Tribunal must decide whether the failure to pay this amount for this many months is conduct that is unbecoming or unprofessional conduct, because it is a failure to comply with the terms of the Continuing Care Agreement and the terms of the Order of Council.

Mr. Boyer reviewed the evidence regarding Dr. Wright's attempts to meet with Dr. Ali and the evidence regarding the communications between the College and Dr. Ali regarding the fees for the aftercare program.

Mr. Boyer also suggested that there is also an issue of credibility in Dr. Ali's dealings with Dr. Wright and the bankruptcy trustee. The bankruptcy documents indicate declared income far less than the Alberta Health billings.

The *Health Professions Act* states that unprofessional conduct is the contravention of another enactment that applies to the profession. The *Bankruptcy and Insolvency Act* ("BIA") is an enactment that applies to the profession and can be breached by members of the profession. Section 158 of the BIA describes the duties of the bankrupt and a breach of the section is an offence under the BIA.

Mr. Boyer also pointed out that the public would be unlikely to support a physician who has gone into bankruptcy and continues to earn a very substantial income from the profession, while disregarding his obligations to his creditors. Professionals are expected to act with integrity and high professional and personal standards.

Mr. Boyer also presented a Brief of Law addressing whether a professional's "off-duty" conduct constitutes "unprofessional conduct". Mr. Boyer referred to a number of authorities addressing this issue, including the Alberta Court of Appeal's recent decision in *Erdmann v. Institute of Chartered Accountants of Alberta*, *Squires v. College of Physicians and Surgeons of Saskatchewan*, and *Rathe v. College of Physicians and Surgeons*.

Mr. Peacock then made submissions on behalf of Dr. Ali. Mr. Peacock submitted that the Hearing Tribunal should draw a clear distinction between the first two charges and the third charge, and submitted that the third charge was only added to buttress the first two charges.

Mr. Peacock noted that he had not asked Dr. Ali about a conversation with Dr. Wright in March of 2013 regarding the fees for the Continuing Care Agreement, but stated that Dr. Ali provided this information in response to a question from Mr. Boyer. Similarly, Dr. Ali was questioned about a conversation with the Trustee about whether he had completed the forms, however those questions were asked by Mr. Boyer and Mr. Peacock did not raise these issues.

Mr. Peacock noted that the forms completed for the bankruptcy were completed with the assistance of CD. He did not know what discussions took place between Dr. Ali and CD or how the figures in Exhibit 6 were arrived at. Therefore, the Hearing Tribunal does not have the evidence to come to any conclusions regarding whether the numbers represented in the initial statement are correct or not. The College has not led any evidence to prove that there is anything inaccurate in the monthly statement that was filed in August of 2011.

Regarding the first allegation, Dr. Ali did not become aware of the outstanding amount until the end of May of 2013. He made arrangements to pay that invoice with a cheque that was written on the wrong account. Further to that, he assumed that his wife had paid the amount, and in September of 2013 when he became aware that the amount was still outstanding, he took steps to pay the amount owing. It was never his intention not to pay and he dealt with it on a reasonable basis, however, he was absorbed with other personal matters.

In regard to the first allegation, it is reasonable to conclude that Dr. Ali intended to comply with the obligation to provide the cheque, and it was dealt with on a reasonable basis as soon as he became aware that the cheque had not been paid at the end of September.

With respect to the second allegation, it is clear that Dr. Ali did not refuse to meet with Dr. Wright. In regard to meeting with Dr. Wright, Mr. Peacock outlined that there was no sense of

urgency to the meetings until the letter of September 12, 2013. From that point on, no further attempts to meet with Dr. Ali were made notwithstanding the fact that Dr. Ali continues to be monitored under the Continuing Care Agreement. Dr. Ali was not refusing to meet with Dr. Wright, but was attempting to come to terms with an appropriate date and location. Furthermore, the Continuing Care Agreement does not speak to meetings necessarily having to be arranged for the convenience of Dr. Canniff and Dr. Wright, and the practice up to that point was to have the meetings in Calgary.

In the circumstances, it would be unreasonable for the Hearing Tribunal to conclude that Dr. Ali was refusing to meet with Dr. Wright, or that his refusal was an indication of a failure to cooperate, or that in the circumstances his conduct was unprofessional.

Regarding the bankruptcy, documents were completed with the assistance of the MNP personnel. There is no evidence to come to any conclusion on whether the numbers are correct or not.

There has also been no finding by a bankruptcy court that Dr. Ali has committed any bankruptcy offences, as he has not been charged under the BIA. Furthermore, unprofessional conduct includes contravention of another enactment that applies to the profession. The bankruptcy does not apply to Dr. Ali as a doctor, or how he carries out his profession. There is no evidence of any direct harm to the profession as a result of Dr. Ali's conduct. Dr. Ali's conduct in respect of the bankruptcy cannot be related to what he does as a physician. There has been no evidence of controversy or evidence of the matter being made public to bring harm to the profession. The only person that suffers from not complying with the requirements of bankruptcy is Dr. Ali. He is liable to the creditors that pursue him.

Mr. Peacock submitted that although in certain circumstances private conduct can constitute unprofessional conduct, the bankruptcy is a private matter that is not "unprofessional conduct" as contemplated by the HPA. Moreover, the cases referred to by Mr. Boyer in support of his submission that the conduct is "unprofessional" are all distinguishable. In those cases, there was a more direct link between the member's role as a professional and the nature of the conduct in issue. In this case, there is no link between the bankruptcy and Dr. Ali's activities as a physician.

V. FINDINGS

Allegation #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 \$1800.00

The Hearing Tribunal finds that this allegation is factually proven on a balance of probabilities.

On February 28, 2013, Dr. Wright forwarded a letter to Dr. Ali enclosing the invoice for participation in the continuing care program, in the amount of \$1800.00. A similar invoice had been provided to Dr. Ali annually, representing the portion of costs Dr. Ali was required to pay for mandatory participation in the continuing care program arising from the Council's 2008 decision

finding Dr. Ali guilty of conduct unbecoming. The letter was forwarded to Dr. Ali's address in Hamilton, Ontario, which is the address he provided to the College when he renewed his practice permit.

Dr. Ali did not pay the invoice, and a reminder letter was sent to Dr. Ali on May 27, 2013, which was also forwarded to the Hamilton address.

On June 20, 2013, Dr. Ali submitted a cheque for the full amount of \$1800.00. On July 18, 2013, Dr. Ali forwarded an email to the College requesting that the College not deposit the cheque, because it was from the wrong account. However, the cheque had already been processed and returned NSF. On July 18, 2013, CH, Executive Assistant to Dr. Wright, requested that Dr. Ali issue a replacement cheque.

On August 13, 2013, Dr. Wright spoke to Dr. Ali, and advised he still needed to pay the outstanding fees. Dr. Ali said that he thought his wife had sent a new cheque, but he would check with his wife and get back to Dr. Wright.

On September 12, 2013, Dr. Wright sent Dr. Ali a letter by registered mail, addressed to the Oasis Medical Clinic. Dr. Wright requested a meeting with Dr. Ali to address a number of issues, including fee payment. Dr. Ali testified that although a staff member at the clinic signed for the letter on September 20, 2013, he did not see the letter until September 30th. He responded on October 1, 2013, apologizing for not having sent the cheque, and indicating that it was pure oversight and not unwillingness to pay. He confirmed that he would send in the cheque.

Dr. Ali subsequently submitted a cheque in the amount of \$1800.00 on October 1, 2013. However, he was distracted and dated the cheque for October 1, 2014, instead of 2013. CH pointed out the error and he sent another cheque dated October 17, 2013.

The fees for 2013 were paid as of that date, and Dr. Ali subsequently paid his 2014 fees without an issue.

Section 11 of the Continuing Care Agreement states that "the physician agrees to be responsible for, and shall promptly pay, the costs set out in Schedule D, which forms part of this Agreement, as those costs become due."

Schedule "D" of the Continuing Care Agreement states that Dr. Ali agrees to pay fees as determined by the College for participating in the Continuing Care Program.

The Hearing Tribunal finds that there was a delay of approximately eight months between the date that the College issued the invoice, and the date on which Dr. Ali submitted a cheque to the College that could be cashed. While some of the delay is explained by the fact that Dr. Ali did not receive certain correspondence from the College or there was a delay in receiving it, the Tribunal finds that this is not an adequate excuse and that even when the delays are taken into account, Dr. Ali did not pay the invoice in a "timely" manner as alleged.

Dr. Ali explained that he did not receive the initial letter from Dr. Wright dated February 28, 2013, until he received the reminder letter at the end of May, 2013. While that may be the case, the Hearing Tribunal finds that it was reasonable for the College to send the correspondence and the invoice and a further reminder via registered mail to Dr. Ali's Hamilton, Ontario address. This was the address that Dr. Ali had provided to the College in his annual renewal. Moreover, it is

the return address listed on Dr. Ali's letter to Dr. Wright, dated March 10, 2012. Dr Ali stated that he did return to this address monthly and also issued a cheque with this address on it.

The Tribunal finds that the College did send the letter in February to the appropriate address, as listed in the College's records. It is unclear why Dr. Ali did not receive the February 28, 2013 letter until the end of May, 2013.

While the Hearing Tribunal accepts Dr. Ali's explanation that he did not see the letter until the end of May, once he saw the letter, and realized that his payment was now two months overdue, it was incumbent on Dr. Ali to take immediate steps to ensure that payment was submitted and received. The obligation to ensure that payment was made promptly was especially important, given that the fees were being charged for participation in the Continuing Care Program, arising from the Council's order in 2008. The 2008 Order outlined a very serious boundary violation by Dr. Ali, and permitted him to return to practice subject to compliance with certain conditions, including participating in the Continuing Care Program.

However, Dr. Ali did not take steps to submit a cheque until June 20, 2013, nearly three weeks after becoming aware that the invoice was outstanding. When he did submit the cheque, due to an error, the cheque was drawn on the wrong account and was returned NSF.

Dr. Ali was aware, as of July 18, 2013, that his cheque had not cleared. However, he did not take steps to personally ensure that a new cheque was issued for a number of months, and assumed that his wife had submitted the payment. In fact, despite additional communications with the College, he did not re-issue a new cheque to the College until October 1, 2013. That cheque was incorrectly dated, and a third cheque was then issued on October 17, 2013.

The Hearing Tribunal considered that Dr. Wright's September 12, 2013 letter was forwarded by registered mail to the Oasis Medical Clinic, rather than to the Hamilton address, and accepts that Dr. Ali did not receive the September 12th letter until September 30th. While that may be the case, once Dr. Ali knew that the cheque he submitted in July had been drawn on the wrong account, it was incumbent on Dr. Ali to follow up with the College immediately to ensure that payment was received. Dr Ali should have submitted his payment well before the September 12th letter was issued.

The Hearing Tribunal also considered Dr. Ali's evidence, in response to a question posed by Mr. Boyer, that in one of his quarterly meetings on March 15, 2013, he advised Dr. Wright that he had not yet received an invoice for the fees. Although Dr. Wright was not cross-examined in relation to this conversation, this evidence arose in response to questions that were asked by Mr. Boyer. Therefore, there was no obligation on Dr. Ali's counsel to question Dr. Wright regarding whether such a conversation occurred, and the Hearing Tribunal accepts Dr. Ali's evidence in this regard. However, Dr. Ali's query to Dr. Wright demonstrates that he was aware that his payment was due. Therefore, once he received the re-issued invoice at the end of May, 2013, he ought to have realized that for some reason he had not received the correspondence dated February 28, 2013, and that there was now some urgency in ensuring the matter was dealt with properly.

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.

Allegation #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

The Hearing Tribunal finds this allegation to be factually proven on a balance of probabilities.

On December 4, 2008, Council met to consider the findings and recommendations of the Investigating Committee under the *Medical Profession Act*. The matter involved a sexual boundary violation by Dr. Ali with a patient while practicing as a family physician in High Level, Alberta. The patient became pregnant and gave birth to Dr. Ali's child in July of 2007. Dr. Ali admitted the boundary violation, and Council found that Dr. Ali was guilty of unbecoming conduct.

Council imposed a number of orders. Dr. Ali's registration was suspended for 18 months, he was required to undergo psychotherapy, and to take a boundaries course. Once Dr. Ali re-entered practice, the Council ordered that he shall, at his own expense, enter into a Continuing Care Agreement with the College for participation in the College's After Care Program for boundary violators.

On October 1, 2009, Dr. Ali entered into the Continuing Care Agreement with the College. Relevant excerpts of the Agreement are set out below:

3. The Physician further agrees to take, and will fully cooperate in, any treatment or therapy program recommended as a result of the evaluation of the Ailment or as required by the College.

4. The Physician shall participate in, and will fully cooperate with, any monitoring program recommended as a result of evaluation of the Ailment or as required by the College to ensure the Physician's safe and competent continuing practice of medicine and the safety of the public, which monitoring may include attendance at PMG meetings and collection and testing of the physician's blood or urine on a regular or irregular basis for the period of time, definite or indefinite, the College determines is necessary to ensure the Physician's safe and competent practice of medicine and the safety of the public (collectively hereinafter referred to as the "Monitoring").

8. The Physician further agrees, and shall fully cooperate in any practices recommended by the College to ensure the continued medical, psychological and psychiatric health of the Physician, including, but not limited to practices set out In Schedule B, which form part of this Agreement.

Schedule “B” indicated that Dr. Ali must regularly attend boundary aftercare group meetings, and must meet with Dr. Canniff to review progress.

In reviewing the Continuing Care Agreement, it is clear that the Registrar has a significant role in monitoring Dr. Ali’s progress and ensuring protection of the public. Given the significance of the Council’s findings, Council’s order, and the Continuing Care Agreement, the Hearing Tribunal finds that it was Dr. Wright’s role to implement the After Care program and monitor Dr. Ali’s ongoing compliance with the program. Paragraph 4 of the Continuing Care Agreement specifically requires Dr. Ali to fully cooperate with the monitoring program.

Dr. Wright had been involved in previous meetings with Dr. Ali as part of her monitoring role. Although Dr. Ali was entitled to return to practice after serving his suspension, the Council’s Order clearly stated that when he returned to practice, he must comply with the terms set out in the Council’s Order. The Hearing Tribunal finds that Dr. Ali had an obligation to participate in quarterly meetings and other meetings deemed necessary by Dr. Wright and/or Dr. Canniff, as part of the After Care program.

The Hearing Tribunal heard a significant amount of evidence and reviewed a number of exhibits relating to Dr. Wright’s attempts to arrange a meeting with Dr. Ali. Dr. Wright made such attempts after receiving Dr. Ali’s letter to Dr. Canniff dated March 10, 2013. Dr. Ali expressed concerns about Dr. Canniff’s representations during previous meetings, and the perception being left with the College that he lacked insight, was missing meetings, and was uncooperative. Dr. Ali stated in his letter that “I am hoping that we could both have a meeting with Dr. Wright on this matter.”

Dr. Wright wrote to Dr. Ali on June 3, 2013 indicating that she and Dr. Canniff wished to meet with him to discuss his letter of dated March 10, 2013, and requested that Dr. Ali contact her assistant to schedule a time to meet in Edmonton. The letter was addressed to Dr. Ali at the Alpen Medical Clinic and was also sent via email.

On June 6, 2013, CH wrote to Dr. Ali confirming that Dr. Wright and Dr. Canniff were available to meet with him on July 9th at 1 p.m. Dr. Ali replied indicating that he would be out of the country in July and requested other times for the meeting. CH responded the same date asking whether he was available in August or September. Dr. Ali stated that he may be in Ontario for 1 or 2 weeks, but was mostly available, and asked about attending via videoconference.

On June 20, 2013, CH replied, indicating that Dr. Wright would like to meet in person, and she was canvassing dates when they could meet in Calgary in August and September. Dr. Ali then responded that he was unable to come for a physical meeting in Edmonton but could meet with Dr. Wright in Calgary, hopefully during one of the group meetings in August/September. Dr. Ali’s email also stated that he had requested a meeting with Dr. Canniff in the spring, but there is nothing urgent about that request. On June 24, 2013, CH responded indicating she would confirm a date for a meeting in Calgary for August or September.

In July of 2013, Dr. Ali and CH exchanged several emails regarding the NSF cheque for payment of the fees for the Continuing Care Agreement, and Dr. Ali requested the date for the meeting and whether it would be held in Calgary. On July 18, 2013, CH forwarded a letter to Dr. Ali via email from Dr. Wright, which was received by him the same day. The letter stated that she and Dr. Canniff wanted to meet with him to discuss Dr. Ali's "ongoing monitoring" and requesting that he contact CH to arrange a time to meet in Edmonton, given that they are only in Calgary infrequently.

Dr. Ali then requested an opportunity to speak with Dr. Wright via teleconference. A teleconference was scheduled for August 13th at 4:30 p.m. Dr. Wright testified that she spoke to Dr. Ali on August 13, 2013, and on that date she explained that she needed to meet with him within one month, and the meeting needed to be face-to-face. She told Dr. Ali that she would be in Calgary on August 26th, and if he is not there at that time she would provide some meeting dates in Edmonton. This information was summarized in Dr. Wright's Memorandum of the same date. Dr. Ali testified that the information referred to in Dr. Wright's Memorandum was reflective of their conversation; however he did not recall her stating that the meeting must occur within one-month.

On August 16, 2013, Dr. Wright wrote to Dr. Ali, confirming that she and Dr. Canniff would not be able to meet in Calgary, and provided two potential dates for a meeting in Edmonton (September 10th and September 13th). The letter (sent via email and to the Oasis Medical Clinic) stated that Dr. Ali had raised several issues over the past year, and also that "we would like to jointly review your involvement with the Continuing Care Program so there should be an opportunity to discuss both issues." Dr. Wright requested that Dr. Ali contact CH at his earliest convenience. The letter was sent via email and was also mailed to Dr. Ali at Oasis Medical Clinic.

Dr. Ali did not contact the College, and on September 4th, CH wrote to Dr. Ali requesting that he indicate whether he could meet on September 10th or 13th. On September 6th, CH sent another email to Dr. Ali, who had not yet responded, advising that the September 10th date was no longer available. Later the same day, Dr. Ali replied by email to advise that he would not be able to see Dr. Wright on September 13th either. Dr. Ali did not explain why he could not meet, and did not offer any proposed alternative dates.

Dr. Wright then sent a letter via registered mail to the Oasis Medical Clinic, dated September 12, 2013. The letter indicated that it was "essential" that a meeting occur, and provided three potential dates when Dr. Canniff and Dr. Wright were available: October 3, October 11th or October 18th. Dr. Wright requested that Dr. Ali choose one of the dates and notify her within one week of receiving the letter.

The registered letter was signed for on September 20, 2013. However, Dr. Ali did not see it until September 30, 2013. On October 1st, he sent an email to Dr. Wright responding to the letter, and expressed surprise at the tone of the letter. The email stated that the meeting was in response to Dr. Ali's request to meet, and stated that he "opted to stay off the meeting because of your insistence for me to come to Edmonton." Dr. Ali expressed concerns about taking time away from his practice and the loss of income. He also indicated that he hoped to meet for the College mandated meetings in Calgary, but did not indicate any dates when he was available to meet in Edmonton.

During the course of the hearing, Dr. Ali testified that the October dates referred to in Dr. Wright's letter dated September 12, 2013 did not work for him. He did not receive the letter until

September 30th. He was scheduled to write the fellowship exam in family medicine on October 23rd or 24th, and had already booked time off for the exam. In addition, he had anxiety about taking time off from his practice in case he received complaints from his patients.

On October 1, 2013, Dr. Wright forwarded a Memorandum to Dr. Heisler outlining the efforts that Dr. Wright had taken to arrange a meeting with Dr. Ali. This Memorandum resulted in a complaint being initiated by the Complaints Director pursuant to s. 56 of the HPA.

During the course of the hearing, Dr. Ali testified that he did not believe that the meeting that Dr. Wright was requesting was mandatory, since the meeting was being initiated at his request as a result of his concerns regarding comments made by Dr. Canniff.

Although Dr. Ali stated that he assumed that the meeting was not mandatory, the Hearing Tribunal has considered the testimony of the witnesses, including Dr. Ali, and the documentary evidence. The Hearing Tribunal finds that Dr. Ali's belief was not reasonable, in light of provisions of the Continuing Care Agreement, and the nature of the communications between Dr. Wright and Dr. Ali over time.

Dr. Wright's letter dated June 3, 2013 stated that Dr. Wright and Dr. Canniff would like to meet with Dr. Ali to discuss his March 10, 2013 letter. Although the initial correspondence appeared to suggest that the purpose of the meeting was to discuss Dr. Ali's letter, the emails that followed from CH in June, 2013 clearly indicated that Dr. Wright wished to meet with Dr. Ali in person. These emails do not specifically refer to Dr. Ali's March 10th letter.

In any event, in her July 18, 2013 letter, Dr. Wright clearly stated that she wanted to meet with Dr. Ali to discuss his "ongoing monitoring." That letter does not refer to Dr. Ali's letter of March 10th, 2013 at all. Even if Dr. Ali was confused in June of 2013 about the purpose of the meeting that was being proposed by Dr. Wright, it should have been clear to him, when he received Dr. Wright's letter dated July 18, 2013, that the meeting was not restricted to discussing the issues he raised in his earlier correspondence, and related to his monitoring more generally. As such, the meeting was not optional, but was mandatory as contemplated by the Continuing Care Agreement.

Dr. Ali also confirmed in his testimony that when he spoke to Dr. Wright on August 13th, she insisted on scheduling a face-to-face meeting. He stated, however, that as of that date he still thought the meeting she was proposing was to discuss the issues raised in his letter dated March 10th. This understanding is not supported by the letter dated July 18th, which clarifies the purpose of the meeting. Moreover, it is not consistent with Dr. Wright's subsequent letter dated August 16, 2013, which identifies the purpose of the meeting as follows:

You have raised several issues over the past year and we would like to jointly review your involvement with the Continuing Care Program so there should be an opportunity to discuss both issues.

The letter clearly states that the purpose of the meeting was to discuss the issues raised by Dr. Ali, as well as Dr. Ali's involvement in the Continuing Care Program more generally.

The Hearing Tribunal also considered Dr. Wright's letter dated September 12, 2013, where she explicitly advised Dr. Ali that she had been trying to meet with Dr. Ali for some time to address outstanding issues, and to review progress. The letter clearly requests that Dr. Ali choose a date for the meeting, and notify Dr. Wright within one week, failing which she will refer the matter to

the Complaints Director. Despite the clarity of Dr. Wright's correspondence, Dr. Ali indicated in his response, dated October 1, 2013, that he would not be able to make any of the dates suggested in the letter, and offered to meet in Calgary for the "usual discussion on my progress." Dr. Ali did not advise why he was unable to meet on the proposed dates, and he did not propose any alternatives.

The Hearing Tribunal has reviewed the documentation and considered the evidence of the parties. The Hearing Tribunal finds that Dr. Wright made repeated attempts to try to schedule a meeting at a time and location that was convenient for Dr. Ali. Unfortunately, she was unable to find a date and time in Calgary when both Dr. Wright and Dr. Canniff could attend in Calgary. However, she provided Dr. Ali with a number of potential meeting dates and times when both she and Dr. Canniff could meet with him in Edmonton (July 9th, September 6, September 10, October 3, October 11th or October 18th) and requested that he provide her with some potential dates on a number of occasions. Dr. Ali indicated that he was unable to meet on each of the proposed dates, but did not explain why he could not attend. Moreover, he did not suggest any alternative dates when he was available.

The Hearing Tribunal finds that Dr. Ali had an obligation to meet with Dr. Wright and Dr. Canniff, at their request, in accordance with the provisions of the Continuing Care Agreement. Dr. Ali's belief that the meeting being requested was optional was not reasonable, given the nature of the communications with Dr. Ali, and the repeated attempts to schedule a face-to-face meeting. Although Dr. Ali did not, at any time, state that he was refusing to meet with Dr. Wright, he clearly did not make the required efforts to clear his schedule to attend the meeting on the dates proposed. Moreover, he did not provide Dr. Wright with other proposed alternative dates, but continued to insist that Dr. Wright arrange a meeting in Calgary.

Dr. Ali suggested that it was unreasonable for the College to require him to attend the meeting in Edmonton, since the meetings had always been held in Calgary, and requiring him to attend the meeting in Edmonton was extremely inconvenient. In addition, he was concerned about taking additional time off from his practice. The College made a number of attempts to try to schedule the meeting in Calgary, but Dr. Wright and Dr. Canniff were unable to coordinate their schedules. As a result, Dr. Wright notified Dr. Ali that the meeting was to occur in Edmonton. Although the Continuing Care Agreement does not specify the location of the meetings, the Hearing Tribunal does not believe that Dr. Wright's request that Dr. Ali attend a meeting in Edmonton was unreasonable or inconsistent with the Agreement, which imposes a broad obligation on Dr. Ali to comply with the program. The Hearing Tribunal believes that Dr. Wright was entitled, pursuant to the Continuing Care Agreement, to require Dr. Ali to meet. She was also entitled to choose a meeting location and schedule the meeting on a date that was convenient for Dr. Canniff and the College. While the College attempted to canvass Dr. Ali to determine his availability and tried to schedule the meeting in Calgary, this was a courtesy and was not required.

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 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.”

Allegation 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;

- a. 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,***
- b. you did fail to provide to your Trustee in Bankruptcy your post- bankruptcy tax return information filed with the Canada Revenue Agency,***
- c. 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***
- d. you did fail to aide and cooperate with your Trustee in Bankruptcy in the administration of your estate in bankruptcy.***

The Hearing Tribunal find that allegation #3 is factually proven on a balance of probabilities, and that the evidence establishes that Dr. Ali failed to comply with his obligations as a bankrupt person.

DC testified regarding the obligations of a bankrupt person. An individual filing for personal bankruptcy is obligated to submit a number of forms. DC explained the importance of each of the forms, which were included in Exhibit 6.

DC testified that the information that is provided by the bankrupt is used to determine whether there is any “surplus income”, which is income that can be distributed to creditors in accordance with a directive issued each year by the Office of the Superintendent of Bankruptcy. In 2011, there would be surplus income if the bankrupt earned more than \$1926 per month, and in 2012

surplus income would be generated if earnings were in excess of \$1980 per month, subject to any monthly non-discretionary expenses.

DC 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. DC 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 DC 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 \$7987.46. If his average monthly gross income was \$26,624.82, then his net monthly income was, on average, \$18,637.36, well in excess of the \$5,500.00 that is reported on the Form 65.

DC 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 CD, 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 DC, 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 CD may have assisted Dr. Ali in completing the required documentation, Dr. Ali did not provide any evidence to suggest that CD 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 CD. 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.

The Hearing Tribunal also considered that Dr. Ali met with CD in April of 2012. While this establishes that Dr. Ali had a discussion with MNP at that time, he was still not compliant with his obligations as a bankrupt.

The Hearing Tribunal also considered whether the conduct in issue constitutes “unprofessional conduct” pursuant to s. 1(1)(pp). The Hearing Tribunal finds that Dr. Ali’s conduct is “unprofessional” because it contravenes the BIA, and is conduct that harms the integrity of the profession.

In considering this issue, the Tribunal carefully considered the submissions of both parties, and the legal authorities that were submitted.

The Tribunal accepts that not all breaches of the law or inappropriate conduct that occurs in a professional’s private life is necessarily unprofessional conduct. The Hearing Tribunal specifically considered the Court’s decision in *Fountain v. British Columbia Teachers’ College*, in which the Court overturned a decision finding a teacher guilty of conduct unbecoming, after a teacher was convicted of careless use of a firearm. The Court held that there was no evidence that the matter had been made public, or that there was harm to the school system, and that the decision finding that the “off-duty” conduct was conduct unbecoming was unreasonable.

The Hearing Tribunal also considered a number of other cases where the courts have found that “off-duty conduct” may be unprofessional conduct, depending on the circumstances.

The Alberta Court of Appeal recently considered, in *Erdmann v. Institute of Chartered Accountants of Alberta*, whether an allegation of misconduct against a Chartered Accountant, arising from emails she sent while embroiled in a dispute with her Condo board, was unprofessional conduct. The Court of Appeal held that the test for professional misconduct is:

If the conduct, however, though reprehensible in anyone is in the case of the professional man so much more reprehensible as to be defined as disgraceful, it seems to me that it may, depending on the circumstances, amount to conduct disgraceful to him in a professional respect in the sense that it tends to bring disgrace on the profession which he practices.

I would paraphrase those words by saying that reprehensible conduct outside actual practice of the profession may render a professional person liable to disciplinary action if it can be said to be significantly more reprehensible in someone of his particular profession than in the case of others.

The Court of Appeal upheld the finding of unprofessional conduct against the member, since she sent emails that were veiled threats which were not justified.

Ms. Erdmann had signed her emails using her C.A. designation. As noted by Mr. Peacock in his closing submissions, there was a nexus between the unprofessional conduct and the accounting profession, given her use of the C.A. designation in making veiled and inappropriate threats.

The Hearing Tribunal also considered a number of decisions where physicians were found guilty of unprofessional conduct for breaching the *Income Tax Act*. In some cases, there was evidence that the physician had engaged in irregularities in billing practices.

In addition, the Tribunal considered the decision in *Rathe v. College of Physicians and Surgeons of Ontario*. Dr. Rathe was found guilty of conduct unbecoming after engaging in rude, inappropriate and hostile behavior at a school concert, after having a loud verbal altercation with another parent. Although the physician's actions occurred outside of the practice of his profession, the Court nevertheless upheld the Discipline Committee's finding of conduct unbecoming. The Court recognized that a family physician is held to a higher standard, and has a responsibility to control his anger so as not to subject members of the public to verbal abuse.

The Hearing Tribunal agrees with the submissions on behalf of Dr. Ali, that not all off-duty conduct is "unprofessional conduct." However, where there is a connection between the practice of the profession and the conduct in issue, or where the conduct is more reprehensible in the professional as compared with other members of the profession, it may be "unprofessional conduct" depending on the specific circumstances.

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.

The Tribunal does not accept Dr. Ali's claim that he was too overwhelmed by paper work, as an excuse due to the fact that he was not deemed to have any mental illness at the time and still fit to practice medicine.

The Hearing Tribunal agrees with the submissions on behalf of the Complaints Director that the public would be unlikely to support a physician who has gone into bankruptcy and continues to earn a very substantial income from the profession, while disregarding his obligations to his creditors. Professionals are expected to act with integrity and high professional and personal standards.

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.

Although there are a number of reasons why Dr. Ali found himself in financial difficulty, once he filed for bankruptcy, he was required to fulfill his obligations as a bankrupt person in a timely, thorough and candid manner. Engaging in the practice of medicine is a privilege, and members of the profession are expected to comply with all applicable laws. Dr. Ali failed to do so. Although

the conduct was not directly related to the practice of the profession, it is nevertheless “unprofessional conduct” as contemplated by the HPA.

VI. ORDERS / SANCTIONS

The Hearing Tribunal has not considered what orders to impose pursuant to s. 82 of the HPA. The Hearing Tribunal will make arrangements to hear submissions from the parties on that issue and will issue a separate decision with respect to sanction after considering the parties’ submissions.

Signed on behalf of the Hearing Tribunal by
the Chair

A handwritten signature in black ink, appearing to read "Naiker", written over a horizontal line.

Dated: December 19, 2014

Dr. Randy Naiker