

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

IN THE MATTER OF AN APPEAL FROM THE DECISIONS OF THE HEARING  
TRIBUNAL OF THE COLLEGE OF PHYSICIANS AND SURGEONS OF ALBERTA  
REGARDING DR. IAN GEBHARDT

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

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1. An appeal was held before a Council Review Panel ("the Panel") of the College of Physicians & Surgeons of Alberta (the "College") on November 13, 2024, at the College's office. In attendance were:

Council members:

Dr. Ian Walker as Chair;  
 Dr. Richard Buckley;  
 Ms. Laurie Steinbach;  
 Mr. Patrick Etokudo.

2. Also in attendance were:

Mr. Craig Boyer, legal counsel for the Complaints Director;

Dr. Ian Gebhardt, investigated person;  
 Ms. Samara Sector and Ms. Cori Singer, legal counsel for Dr. Gebhardt;

Mr. Gregory Sim, independent legal counsel to the Panel.

3. The appeal was conducted in accordance with sections 87-89 of the *Health Professions Act* ("HPA"). The appeal was with respect to the Hearing Tribunal's merit decision dated June 27, 2023 (the "Merits Decision"). The cross-appeal was with respect to the sanction decision dated February 12, 2024 (the "Sanctions Decision").

## **I. PRELIMINARY MATTERS**

4. The parties confirmed that there were no objections to the composition of the Panel or any preliminary matters to be addressed.

## **II. DOCUMENTS REVIEWED**

5. The Record of Hearing before the Panel consisted of the following:
  1. Amended Notice of Hearing dated May 27, 2022
  2. Exhibit 1 – Agreed Exhibit Book
  3. Exhibit 2 – Dr. Gebhardt Notes
  4. Exhibit 3 – Dr. S██████ Notes
  5. Exhibit 4 – Photo of Exam Room
  6. Exhibit 5 – Photos of Exam Room
  7. Exhibit 6 – Eyewitness Article
  8. Exhibit 7 – Lie Telling Behavior Article
  9. Exhibit 8 – Exploring the Ability to Deceive Article
  10. Transcript October 18-21, 2022 (merits)
  11. Hearing Tribunal Merits Decision June 27, 2023
  12. Written Submission by Complaints Director re Interim Suspension

13. Written Submission by Dr. Gebhardt re Interim Suspension
14. Reply Submission by Complaints Director re Interim Suspension
15. Hearing Tribunal Decision re Interim Suspension
16. Exhibit 9 – Patient Impact Statement
17. Exhibit 10 – Combined Letters of Character Reference for Dr. Gebhardt
18. Transcript February 7, 2024 (sanctions)
19. Hearing Tribunal Sanction Decision February 12, 2024

### **III. BACKGROUND**

6. In its June 27, 2023 Merits Decision, the Hearing Tribunal found the following allegation of unprofessional conduct proven against Dr. Gebhardt:
  1. That on or about June 6, 2017, you did act inappropriately with your patient, particulars of which include one or more of the following:
    - a. place your patient's hand on your penis,
    - b. have your patient stroke your penis,
    - c. place your mouth on your patient's penis,
    - d. ask your patient to place his mouth on your penis,
    - e. have your patient place his mouth on your penis.
7. The Hearing Tribunal received submissions from the parties and on September 5, 2023 declined to impose or recommend an interim suspension of Dr. Gebhardt's medical practice pending its determination of sanctions. The Tribunal held that Dr. Gebhardt had practiced with a chaperone since 2019 and the duty to protect the public was satisfied by the continuation of the chaperone arrangement.
8. The Hearing Tribunal issued its Sanctions Decision on February 12, 2024. In the Sanctions Decision the Tribunal made the following orders:
  - a. Dr. Gebhardt's practice permit is suspended for a period of 20 months, with 17.5 months deemed to have been served, leaving a further period of suspension of 2.5 months.
  - b. The further period of 2.5 of suspension shall be held in abeyance pending Dr. Gebhardt successfully complying with the orders of the Hearing Tribunal. Should Dr. Gebhardt fail to abide by these orders, his period of suspension shall be served at a time determined by the Complaints Director.
  - c. Dr. Gebhardt's practice permit shall be subject to an indefinite condition that a College approved chaperone (who is a regulated health professional) must be present throughout all attendances (in-person or online video) with any patient whether or not the patient's parent/legal guardian/caregiver are also present.

- d. Dr. Gebhardt shall at his own cost participate in a multidisciplinary assessment by an assessment program approved by the Complaints Director, and that Dr. Gebhardt's practice be subject to any conditions or restrictions arising out of that assessment.
  - e. If there are disagreements about nature, scope, duration, application or interpretation of any of the orders of the Hearing Tribunal, the Hearing Tribunal retains jurisdiction to resolve those issues.
  - f. Dr. Gebhardt shall be required to pay two-thirds of the actual costs of the investigation and hearing within 60 months of the date of the decision of the Hearing Tribunal, on payment terms deemed acceptable by the Complaints Director, acting reasonably.
9. The Hearing Tribunal also directed the Hearings Director to provide a copy of the Merits Decision and the Sanctions Decision to the Minister of Justice pursuant to section 80(2) of the HPA.

#### **IV. GROUNDS OF APPEAL/CROSS APPEAL**

10. Dr. Gebhardt raised the following grounds of appeal in his written and oral submissions:
- a. The Hearing Tribunal erred with respect to the Complainant's evidence:
    - i. in admitting the Complainant's evidence when he was not competent to testify;
    - ii. in failing to consider the Complainant's reliability;
    - iii. in relying on evidence elicited from leading questions in direct examination, in misapprehending the Complainant's evidence by finding that his evidence had been consistent when it was not; and
    - iv. in concluding that the Complainant's prior statements made his in-court testimony more believable.
  - b. The Hearing Tribunal erred with respect to the expert evidence:
    - i. in admitting expert evidence that was irrelevant, oath-helping, and biased;
    - ii. in placing undue weight on the expert evidence, without addressing the frailties in the College experts' evidence or reconciling conflicting expert evidence; and in relying on inadmissible expert evidence to bolster the Complainant's credibility.

- c. The Hearing Tribunal erred with respect to the fairness and reasonableness of its process and reasoning:
    - i. in denying Dr. Gebhardt the ability to test the Complainant's direct evidence through cross-examination;
    - ii. in selectively relying on hearsay to compensate for the lack of direct evidence; and
    - iii. in applying undue scrutiny to Dr. Gebhardt's evidence.
  - d. The Hearing Tribunal's ultimate conclusion was unfair and unreasonable.
11. The Complaints Director raised the following issues in his written and oral submissions for the cross-appeal:
- a. The Hearing Tribunal's failure to impose cancellation was unreasonable given its findings on the gravity of Dr. Gebhardt's conduct, ■■■'s vulnerability and the need to ensure good character and reputation and public confidence in the College.
  - b. The Hearing Tribunal failed to provide responsive justification for its decision to impose a suspension over cancellation.

## **V. SUBMISSIONS AT REVIEW**

### **Standards of Review**

12. The internal standards of review to be applied by the Panel to the Hearing Tribunal's decision are as described in *Yee v. Chartered Professional Accountants of Alberta*:<sup>1</sup>
- a. findings of fact made by the Hearing Tribunal, particularly findings based on the credibility of witnesses, should be afforded significant deference;
  - b. inferences drawn from the facts by the Hearing Tribunal should be respected, unless there is an articulable reason to disagree;
  - c. for questions of law arising from the interpretation of the governing statute, the Panel is equally well-positioned to make the necessary findings and can independently examine the issue, but regard should be had to the Hearing Tribunal's view;
  - d. for questions engaging the expertise of the profession, such as setting standards of conduct, the Panel is entitled to apply its own expertise and make findings about what constitutes unprofessional conduct,

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<sup>1</sup> *Yee v. Chartered Professional Accountants of Alberta*, 2020 ABCA 98 at paras. 34-35

though it should not disregard the views of the Hearing Tribunal or proceed as if its findings were never made;

- e. the Panel is also well-positioned to review the entire decision and conclusions of the Hearing Tribunal for reasonableness, to ensure that, considered overall, it properly protects the public and the reputation of the profession;
  - f. the Panel may also intervene in cases of procedural unfairness, or where there is a reasonable apprehension of bias.
13. Questions of mixed fact and law where the decision results from a consideration of the evidence as a whole are given deference, but the Panel can intervene to address errors in the statement of a legal test or where there is an extricable question of law.<sup>2</sup>
  14. The standard of review for evidentiary rulings varies depending on the issue. A refusal to admit or consider relevant and material evidence might amount to a breach of natural justice or procedural fairness, resulting in an unfair hearing and entitling the Panel to intervene. Rulings on the admissibility of evidence that do not threaten hearing fairness generally invite a reasonable standard of review.<sup>3</sup> The reasonableness standard of review applies to questions about the admissibility of expert evidence for example.<sup>4</sup>
  15. A decision will be unreasonable if the decision-maker has fundamentally misapprehended or failed to account for the evidence, if the reasons contain a fundamental gap or an unreasonable chain of analysis, if the reasons do not “add up”, if there is no line of analysis that could reasonably lead from the evidence to the conclusions reached, or if the decision does not respect the statutory scheme.<sup>5</sup>

### **Submissions of Dr. Gebhardt**

16. Dr. Gebhardt first addressed his arguments that the Hearing Tribunal made an error in dealing with the Complainant’s evidence:
  - i. in admitting the Complainant’s evidence when he was not competent to testify;
  - ii. in failing to consider the Complainant’s reliability;

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<sup>2</sup> *Zuk v. Alberta Dental Association and College*, 2020 ABCA 162 at para. 15

<sup>3</sup> *Wright v. College and Association of Registered Nurses of Alberta (Appeals Committee)*, 2021 ABCA 267 at paras. 31-33

<sup>4</sup> *Lana v. University of Alberta*, 2013 ABCA 327 at paras. 17-18

<sup>5</sup> *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras. 96-126

- iii. in relying on evidence elicited from leading questions in direct examination, in misapprehending the Complainant's evidence by finding that his evidence had been consistent when it was not; and
  - iv. in concluding that the Complainant's prior statements made his in-court testimony more believable.
- 17. Dr. Gebhardt submitted that ■■■ was not a competent witness and his testimony should not have been admitted. Not all individuals with autism spectrum disorder ("ASD") or developmental delays lack testamentary capacity, but ■■■ did. ■■■ was unable to meaningfully communicate his evidence because he was unable to understand and respond to questions about contentious parts of his evidence with some independence, in any way that was helpful.<sup>6</sup>
- 18. The Hearing Tribunal believed that it was giving voice to the historically voiceless when it stated:<sup>7</sup>

The Hearing Tribunal recognized that testimony by people with challenges to their ability needs to be tailored to support their delivery of testimony, not disregarded because it is not mainstream. In this way the voice of a challenged witness can be heard and the decision-maker can then decide if the information is reliable.
- 19. Rather than ask itself whether ■■■ was competent to testify, the Hearing Tribunal focused instead on how it could rectify historical disadvantages for people with challenges. The Supreme Court of Canada has confirmed that the fact a complainant has a disability "does not lower the standard of proof or absolve [the trier of fact] of his responsibility to explain how he reconciled the complainant's difficult testimony."<sup>8</sup> The Hearing Tribunal's decision to admit ■■■'s testimony and rely on it denied Dr. Gebhardt a fair hearing.
- 20. Dr. Gebhardt said that ■■■ had admitted in the criminal trial that he was easily confused and had a poor memory. The Complaints Director's own experts gave evidence that ■■■ was vulnerable to suggestion and would default to acquiescing, i.e. saying "yes", when he did not understand something. At the hearing, ■■■ gave conflicting evidence between his direct and cross-examination, meaning he was either lying, or he was unable to understand and respond to the questions put to him. The Hearing Tribunal decided to "dismiss" all of ■■■'s evidence in cross-examination and thereby implicitly found that he was unable to understand and respond to the questions.
- 21. Dr. Gebhardt also submitted that the Hearing Tribunal failed to consider the reliability of ■■■'s testimony in light of multiple, significant inconsistencies.

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<sup>6</sup> *R v. DAI*, 2012 SCC 5 at para. 82; *R. v. Tracey*, 2018 ONSC 1721 at para. 17

<sup>7</sup> Hearing Tribunal Merits Decision, para. 353

<sup>8</sup> *R. v. Dinardo*, 2008 SCC 24 at para. 35

The Tribunal did not address inconsistencies in ■■■'s evidence over the course of years, or the evidence of his poor memory and that he is easily confused. The Tribunal purported to address some of the contradictions in ■■■'s testimony by deciding to "dismiss" all of his cross-examination testimony. It therefore ignored ■■■'s testimony that he had a poor memory, that it was hard for him to remember as far back as June 6, 2017 and that he is not always certain if he is telling the truth. ■■■ had also agreed that he was confused about what happened with Dr. Gebhardt and that he could be confusing it with other sexual events in his life. ■■■ also testified that he was lying about the allegations against Dr. Gebhardt.

22. Dr. Gebhardt next submitted that the Hearing Tribunal erred by placing "significant weight" on ■■■'s testimony elicited using leading questions during his direct examination. Most of ■■■'s testimony about the core allegations came from leading questions, such as "Did Dr. Gebhardt ask you to touch his penis?" ■■■ responded "yes" to several questions framed in this way. Answers given to leading questions should be given less weight, but Dr. Gebhardt submitted that this was particularly problematic because the Complaints Director's own expert had opined that ■■■ would not necessarily respond accurately to "yes" or "no" questions. The expert had opined that ■■■ would answer such questions in a way to please the questioner and stop the questioning.
23. Dr. Gebhardt next submitted that the Tribunal misapprehended ■■■'s evidence by finding it had been consistent on the core allegations since the June 6, 2017 alleged incident, including at the criminal trial and the hearing before the Hearing Tribunal. Dr. Gebhardt pointed to several inconsistencies in ■■■'s reports. For example, at the College hearing ■■■ testified that Dr. Gebhardt had caused him to ejaculate. This was the first time ■■■ had made this allegation. The Hearing Tribunal also failed to identify and address acknowledged inconsistencies in ■■■'s direct testimony at the hearing. This undermined the transparency, intelligibility and justification of the Tribunal's decision. Dr. Gebhardt further submitted that it is an error to rely on the corroborative value of prior consistent statements to assess a witness' credibility. Repetition does not equate to truthfulness. Despite acknowledging this, the Tribunal did rely on its view of ■■■'s testimony as consistent to find him credible.
24. Dr. Gebhardt next addressed his arguments that the Hearing Tribunal made an error with respect to the expert evidence:
  - i. in admitting expert evidence that was irrelevant, oath-helping, and biased;
  - ii. in placing undue weight on the Complaints Director's expert evidence, without addressing the frailties in the experts' evidence or reconciling conflicting expert evidence; and in relying on inadmissible expert evidence to bolster the Complainant's credibility.



25. Dr. Gebhardt submitted that the Complaints Director's experts, Drs. N█████ and H█████, should not have been permitted to testify. Their evidence lacked probative value. The Hearing Tribunal failed to analyze whether their evidence should be admitted in the face of Dr. Gebhardt's objection and failed to give reasons for admitting the evidence.
26. Dr. Gebhardt also submitted that Drs. N█████ and H█████' had never formally assessed ██████ to determine his specific skills, functionalities or limitations. They did not speak to him about the allegations to form their own impressions of his ability to recall specific events. They had no firsthand information upon which to assess ██████'s ability to recall and communicate the alleged assault. Preference should always be given to expert witnesses who have had personal and regular contact with the subjects of their assessment.<sup>9</sup> They also based their opinion on facts that were incorrect.
27. Dr. Gebhardt submitted that Drs. N█████ and H█████' evidence was impermissible oath-helping. The Complaints Director tendered their evidence to establish that ██████ was credible and telling the truth. This usurped the role of the Hearing Tribunal and risked the Tribunal too easily adopting the experts' opinion as a convenient basis to resolve frailties in the evidence. Both risks materialized even though the Tribunal said it wasn't relying on the experts to assess whether ██████ was telling the truth. Among several examples identified by Dr. Gebhardt, Drs. N█████ and H█████' joint expert report stated in part "...[█████] does not have the cognitive skills to be able to lie effectively and to be able to maintain a fiction". In his testimony, Dr. H█████ asserted that ██████ "would not say that something happened that didn't happen."
28. Dr. Gebhardt further submitted that Drs. N█████'s and H█████' evidence was not fair, objective and non-partisan. Dr. H█████ admitted that she did not know her report would be used for the hearing and she did not think she owed a duty of fairness to anyone but ██████. They also asserted conclusions about what happened on June 6, 2017, thereby assuming the role of advocates for the Complaints Director and undermining their role as expert witnesses. They had opined that the alleged assault occurred, despite not speaking with either of ██████ or Dr. Gebhardt about it. It was not sufficient to let the Hearing Tribunal assess the weight to be given to their opinions. Their evidence should have been excluded.<sup>10</sup>
29. Dr. Gebhardt next submitted that if Drs. N█████ and H█████' joint expert report was admissible, the Hearing Tribunal was mistaken in placing any weight on it. The Tribunal failed to consider Drs. N█████ and H█████' credibility. They failed to consider Dr. N█████'s credibility in particular, given the inconsistencies between his first report where he concluded he could not say that Dr. Gebhardt assaulted ██████, and the joint report. The Tribunal also failed to reconcile contradictions between their opinions and the opinion of

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<sup>9</sup> *R v DAI* 2012 SCC 5 para. 80

<sup>10</sup> *Deemar v. College of Veterinarians (Ontario)*, 2008 ONCA 600 at paras. 8, 22, 28

Dr. Gebhardt's expert Dr. D■■■■, that was also admitted into evidence. For example, Dr. D■■■■ had testified that "There is no such thing as a person who doesn't have the ability to lie. That's – that's just ridiculous... So the idea that a clinical group does not have the capacity to lie is absurd and violates everything we know about human behaviour."<sup>11</sup>

30. The Tribunal unfairly relied on Drs. N■■■■ and Dr. H■■■■' evidence to overcome inconsistencies in ■■■■'s evidence. ■■■■ had a documented history of lying, but Drs. N■■■■ and H■■■■' characterized these as "simple lies" to avoid getting into trouble. Dr. H■■■■' testified that ■■■■ lacked the capacity to "put together a sequence of events that would describe a more complex fabrication or lie."<sup>12</sup> The Tribunal adopted Drs. N■■■■ and H■■■■' evidence when it found that ■■■■'s past lies were "simple lies" that were different from his allegations against Dr. Gebhardt.
31. The Tribunal also unfairly relied on Drs. N■■■■ and H■■■■' opinion evidence to determine that some parts of ■■■■'s testimony were reliable, while other parts were not. The Tribunal effectively allowed Drs. N■■■■ and H■■■■ to define certain types of questions that would elicit reliable evidence from ■■■■, while questions asked in other manners would not. The Tribunal was not entitled to draw those artificial distinctions.
32. Dr. Gebhardt next addressed his arguments that the Hearing Tribunal made errors with respect to the fairness and reasonableness of its process and reasoning:
  - i. in denying Dr. Gebhardt the ability to test the Complainant's direct evidence through cross-examination;
  - ii. in selectively relying on hearsay to compensate for the lack of direct evidence; and
  - iii. in applying undue scrutiny to Dr. Gebhardt's evidence.
33. Dr. Gebhardt submitted that the Hearing Tribunal breached the duty of fairness when it effectively denied him the ability to test ■■■■'s evidence through cross-examination. The Tribunal refused to treat ■■■■'s cross-examination as evidence and "dismissed" the entirety of it because ■■■■ had been asked leading questions, but the Tribunal gave Dr. Gebhardt no notice that it would only consider answers to questions asked in particular ways.
34. The Tribunal also improperly accepted and relied upon the transcript of ■■■■'s testimony from the criminal trial as his direct evidence, and for the truth of its contents, even though ■■■■ did not remember testifying at the criminal trial and testified to different facts before the Tribunal.

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<sup>11</sup> Transcript, p. 436, lines 15-18 and p.

<sup>12</sup> Transcript, p. 243, lines 25-26, pg. 244, lines 9-11

35. Dr. Gebhardt submitted that the Hearing Tribunal made an error by treating hearsay evidence as a complete account of ■■■'s life experiences and by relying on select pieces of evidence that supported the Complaints Director's case without addressing others that contradicted it. The Tribunal treated the subset of notes from CORE, ■■■'s care program, as representing a complete history of his experiences. A small subset of notes reporting some lies that ■■■ told cannot be used to entirely rule out other lies that weren't captured in notes. Similarly, the Tribunal unfairly relied on the absence of notes about past similar sexual experiences to conclude that ■■■ had never had similar sexual experiences that could result in blended memories. The Tribunal also accepted Dr. H■■■■' evidence that ■■■ only told "simple lies" to avoid getting into trouble and that he lacked the cognitive capacity to organize a narrative that could be considered a lie. In doing so, the Tribunal discounted evidence that ■■■ had taken fruit to his room to masturbate and then said that "his doctor" told him to use fruit to masturbate, which his mother confirmed was not true. This was an example of ■■■ creating a false narrative and blaming a specific person – his doctor. The Tribunal also failed to address evidence that ■■■ had lied to a bank teller to withdraw money from his account without using his debit card. To do so ■■■ had organized a narrative, taken steps to carry it out and intentionally lied to get what he wanted.
36. Dr. Gebhardt further submitted the Hearing Tribunal made an error by applying stricter scrutiny to his evidence than ■■■'s. It explained away significant inconsistencies in ■■■'s testimony while going to unfair lengths to find issue with Dr. Gebhardt's evidence. For example, The Tribunal found Dr. Gebhardt's credibility was undermined because he allowed the examination to proceed without a chaperone in the room, but the Tribunal had acknowledged that ■■■ did not want his caregivers in the room and had asked them to leave. The Tribunal also found Dr. Gebhardt's ability to recall the appointment to be irreconcilable with his inability to recall ■■■'s caregiver's name or to recognize her. It was unreasonable to expect Dr. Gebhardt to remember the caregiver's name or appearance. She was not his patient.
37. Dr. Gebhardt next explained his arguments that the Hearing Tribunal's ultimate conclusions were unfair and unreasonable. Dr. Gebhardt submitted that the Tribunal made legal errors, breached procedural fairness and came to conclusions not supported by the evidence.
38. The Tribunal accepted ■■■'s testimony "as a whole" without explaining how the evidence met the burden of proof. For some of the particular allegations the only evidence was a one-word answer from ■■■ in response to a "yes" or "no" question. The Tribunal omitted to explain its reasoning for finding that each particular allegation happened. There was no direct evidence at all for the allegation about stroking Dr. Gebhardt's penis, or about Dr. Gebhardt asking ■■■ to place ■■■'s mouth on Dr. Gebhardt's penis. The evidence was contradictory and confusing about ■■■ in fact putting his mouth on Dr. Gebhardt's penis. The testimony of ■■■ and the Complaints Director's experts was also inadmissible and it was unfair and unreasonable for the

Tribunal to rely on the remaining hearsay evidence to find the allegation proven.

39. Dr. Gebhardt requested that the Hearing Tribunal's decisions and orders be quashed. He submitted that in light of the serious issues with the Complainant's testimonial competence and the amount of time that has passed since the alleged incident, there would be no utility in directing a re-hearing.

### **Submissions of the Complaints Director**

40. The Complaints Director submitted that the Hearing Tribunal considered ■■■'s testamentary capacity and found that he could perceive, remember and communicate. The similarities between ■■■'s description of June 6, 2017 and Dr. Gebhardt's description supported these abilities.
41. The Tribunal also heard expert evidence from Drs. N■■■ and H■■■ and from Dr. D■■■ about the nature of ASD and the ability of an ASD individual to perceive, remember and communicate. The Tribunal considered whether this evidence supported that ■■■ was telling the truth or lying, blending memories, or fabricating events from past experiences. The Tribunal concluded that ■■■ was capable of distinguishing the truth from a lie.<sup>13</sup> There was some evidence of ■■■ lying in the past, but the Tribunal found no parallels between the past reports of ■■■ lying and the allegations in this case that ■■■ repeated many times over several years.
42. The Complaints Director submitted that fairness does not require perfection or the most favorable possible procedure. Fairness depends on the context and as a general rule requires an opportunity for parties to know the opposing party's case so that they may address evidence prejudicial to their case and bring evidence to prove their position.
43. Dr. Gebhardt was permitted to cross-examine ■■■, but the evidence obtained through cross-examination was given little to no weight. This was done in light of the expert evidence and there is no basis to overturn the Hearing Tribunal's assessment.
44. In response to Dr. Gebhardt's arguments about the treatment of ■■■'s evidence, the Complaints Director submitted that the Hearing Tribunal appropriately applied section 79(5) of the HPA. Section 79(5) states that evidence may be given before the Hearing Tribunal in any manner the Tribunal considers appropriate, and the Tribunal is not bound by the rules of law respecting evidence in judicial hearings. The Tribunal appropriately applied its discretion in admitting and weighing evidence at the hearing.
45. The Complaints Director submitted that the threshold for testimonial competence for adults with mental disabilities must not be set too high, since

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<sup>13</sup> Merits Decision, para. 294

a witness may be capable of giving useful, relevant and reliable evidence that can then be tested by cross-examination. The trier of fact can then assess whether to accept none of the witness' evidence, accept only part of their evidence or reduce its weight, or accept all of it.<sup>14</sup> ■■■ met the minimum threshold of being able to perceive, remember and recount the events of June 6, 2017, as found by the Hearing Tribunal. ■■■ explained in his testimony his recollection of what happened.

46. The Complaints Director only asked leading questions of ■■■ after ■■■ had already described Dr. Gebhardt's conduct unprompted. The leading questions were used to seek clarification, not new evidence. Dr. Gebhardt is asking the Panel to ignore the expert evidence about "traditional" cross-examination being incomprehensible to ■■■ and to ignore the distinct advantage that the Hearing Tribunal had in observing and directly questioning ■■■.
47. In response to Dr. Gebhardt's arguments about the Hearing Tribunal's treatment of the expert evidence, the Complaints Director submitted that the experts were properly qualified and their evidence was relevant and necessary and met the criteria for admission. The Hearing Tribunal's decision to admit the expert evidence was discretionary and entitled to significant deference.
48. Expert evidence on the ultimate credibility of a witness is inadmissible, but expert evidence may be admitted when assessing a specific witness' credibility requires expertise beyond that of the decision-maker, such as the assessment of individuals with developmental disorders like ■■■. Expert evidence may be admitted on issues like human conduct and the psychological and physical factors that may lead to certain behaviors relevant to credibility.<sup>15</sup> The Hearing Tribunal's use of the expert evidence was consistent with the law.
49. Expert opinion evidence may rely on secondhand evidence, such as a document review. When read as a whole, the expert evidence was focused on ■■■'s general mental capabilities and cognitive limitations. It was not used to prove that ■■■ had been telling the truth and was properly admitted and relied upon.
50. In response to Dr. Gebhardt's arguments about the Hearing Tribunal's process and reasoning, the Complaints Director submitted that the hearing was fair. The Tribunal did not deny his right to cross-examine ■■■; it merely took issue with the evidence adduced through cross-examination due to the way the questions were posed. There is no absolute right of cross-examination before a body like the Hearing Tribunal. Section 72(2) of the HPA is permissive and empowering. It does not provide a right to examine any witness. Decision-makers have the discretion to dismiss evidence from

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<sup>14</sup> *R. v. DAI*, 2012 SCC 5 at para. 72

<sup>15</sup> *R. v. Marquard*, 1993 CanLII 37 at para. 51

cross-examination where its use is abused and its prejudicial effect outweighs any probative value.<sup>16</sup>

51. The Hearing Tribunal's references to ■■■'s CORE notes were not used as a complete history of ■■■'s experiences. The Tribunal considered the CORE notes and concluded there was insufficient evidence to suggest a history of lying or a blending of memories.
52. The Hearing Tribunal did not unduly scrutinize Dr. Gebhardt's evidence. The Tribunal provided ample reasoning for its decision to accept ■■■'s evidence and rejected Dr. Gebhardt's evidence as lacking credibility. The Tribunal conducted an appropriate credibility assessment applying appropriate factors. They found several inconsistencies and implausibilities in Dr. Gebhardt's testimony, for which there was little explanation. Further, the Tribunal applied its expertise in comparing Dr. Gebhardt's testimony with his chart notes and his decision to carry out sensitive examinations without a chaperone present. Its assessments of credibility are entitled to deference and its decision on the merits was reasonable.

## **VI. DECISION**

53. The appeal is allowed and the findings of unprofessional conduct against Dr. Gebhardt, the sanctions and costs orders are quashed. The cross-appeal is dismissed. The Panel determined not to refer the matter for a rehearing.

## **VII. FINDINGS AND REASONS**

### **Treatment of the Complainant's Evidence**

54. Dr. Gebhardt's first ground of appeal asserted that the Hearing Tribunal made errors with respect to the Complainant's evidence:
  - i. in admitting the Complainant's evidence when he was not competent to testify;
  - ii. in failing to consider the Complainant's reliability;
  - iii. in relying on evidence elicited from leading questions in direct examination, in misapprehending the Complainant's evidence by finding that his evidence had been consistent when it was not; and
  - iv. in concluding that the Complainant's prior statements made his in-court testimony more believable.

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<sup>16</sup> *R. v. Lyttle*, 2004 SCC 5 at para. 44

## █'s Capacity to Testify

55. The Hearing Tribunal's determination of █'s capacity to testify was a question of mixed fact and law. It resulted from a consideration of the evidence as a whole and is entitled to deference from the Panel. The Panel will only intervene if the Tribunal's decision was unreasonable.
56. Dr. Gebhardt objected to █'s capacity to testify prior to him giving evidence. Capacity is presumed and the Hearing Tribunal decided to hear █'s testimony and determine his capacity for itself. The Tribunal held that it would determine the weight to give to █'s testimony in light of the expert evidence about the ASD population and their understanding of truth-telling and their ability to fabricate statements.<sup>17</sup>
57. █'s testimony included the following:
  - a. The first time █ refers to Dr. Gebhardt putting his mouth on █'s penis was in response to the following questions from counsel for the Complaints Director "Did Dr. Gebhardt use any part of his body to touch your penis?" to which █ initially responded "No", and "Did Dr. Gebhardt use his mouth?"<sup>18</sup>
  - b. The first time █ refers to putting his mouth on Dr. Gebhardt's penis was in response to the following question from counsel for the Complaints Director "Okay. And did you use your mouth when you were being examined by Dr. Gebhardt?" and "What did you do with your mouth?"<sup>19</sup>
  - c. In cross-examination, █ agreed that while he said that Dr. Gebhardt had touched his penis, Dr. Gebhardt had actually been touching and examining his testicles.<sup>20</sup>
  - d. █ acknowledged that he couldn't be certain if he was telling the truth because it was hard to remember back to the alleged incident in June 2017.<sup>21</sup>
  - e. █ agreed that he gets confused about what happened at the appointment with Dr. Gebhardt.<sup>22</sup>
  - f. █ told his mother after the appointment that he didn't know if he was lying or telling the truth about what happened.<sup>23</sup>

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<sup>17</sup> Merits Decision, para. 135-136

<sup>18</sup> Direct examination of █, Transcript pg. 320, lines 23-26

<sup>19</sup> Direct examination of █, Transcript pg. 321, lines 7-11

<sup>20</sup> Cross-examination of █, Transcript pg. 329, lines 14-18

<sup>21</sup> Cross-examination of █, Transcript pg. 325, lines 11-22

<sup>22</sup> Cross-examination of █, Transcript pg. 326, lines 7-10

<sup>23</sup> Cross-examination of █, Transcript pg. 327, lines 12-17

- g. ■ agreed that he was not certain the incident with Dr. Gebhardt happened and he didn't really know what happened that day.<sup>24</sup>
  - h. ■ agreed that it was possible he was confusing other sexual events in his life with what happened at the appointment with Dr. Gebhardt.<sup>25</sup>
  - i. ■ agreed that he was lying "a little bit, yeah" about Dr. Gebhardt placing his hand on ■'s penis.<sup>26</sup>
  - j. ■ agreed he was lying about Dr. Gebhardt putting his mouth on ■'s penis, and about ■ putting his mouth on Dr. Gebhardt's penis.<sup>27</sup>
  - k. ■ agreed he was lying about Dr. Gebhardt touching and stroking his penis "so the white stuff came out".<sup>28</sup>
  - l. When asked in re-direct whether he had been lying to counsel for the Complaints Director he said "I don't think I was lying to you."<sup>29</sup>
58. The Hearing Tribunal entirely "dismissed" ■'s cross-examination evidence based on the manner in which the questions were posed.<sup>30</sup> The Tribunal dealt with ■'s cross-examination by concluding that he "answered 'yes' or 'no' to most of these questions, generally agreeing with" counsel for Dr. Gebhardt.<sup>31</sup> This included several questions in which counsel for Dr. Gebhardt asked ■ if he was lying and ■ agreed that he was.<sup>32</sup>
59. The Hearing Tribunal based this analysis on its understanding of the expert evidence of Drs. H■■ and N■■, who jointly opined that ■ is easily confused with any open-ended questions, complex terms or comments and has difficulty expressing when he does not understand what others are asking or communicating. Drs. H■■ and N■■ opined that ■ would tend to agree with others' statements when he is confused or does not understand:<sup>33</sup> "[y]es or no questions will not necessarily provide accurate information especially if they use phrases like, 'Do you agree that...', or if they contain abstract words. He will agree with the statement to please the listener."<sup>34</sup>
60. While the Hearing Tribunal "dismissed" ■'s cross-examination based on the manner in which the questions were asked, it said that it "placed significant

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<sup>24</sup> Cross-examination of ■, Transcript pg. 327, lines 18-23

<sup>25</sup> Cross-examination of ■, Transcript pg. 330, lines 22-25

<sup>26</sup> Cross-examination of ■, Transcript pg. 331, lines 1-4

<sup>27</sup> Cross-examination of ■, Transcript pg. 331, lines 5-10

<sup>28</sup> Cross-examination of ■, Transcript pg. 331, lines 11-13

<sup>29</sup> Re-direct examination of ■, Transcript pg. 332, lines 1-5

<sup>30</sup> Merits Decision, para. 311

<sup>31</sup> Merits Decision, paras. 145-147

<sup>32</sup> Merits Decision, para. 299

<sup>33</sup> Record, Exhibit 1, pg. 279

<sup>34</sup> Merits Decision, para. 309 Record, Exhibit 1, pg. 288



weight on the testimony obtained in direct examination by Mr. Boyer, counsel for the Complaints Director, which used a method of questioning in line with advice from Dr. [REDACTED].<sup>35</sup> The Hearing Tribunal did not address how [REDACTED]'s responses to questions in direct examination that were posed in a leading manner, or in a similar manner to questions in cross-examination could be relied upon. For example:

- a. In his direct examination, [REDACTED] initially said he told "[REDACTED]" about Dr. Gebhardt doing a physical on him, but was then asked, "Did you tell Dr. – or did you tell J[REDACTED] about the touching that happened?" and "Did you tell J[REDACTED] about the mouth on the penis?" [REDACTED] answered "Yes" to both questions.<sup>36</sup>
  - b. [REDACTED] next said he talked to his mother about Dr. Gebhardt doing a physical on him. [REDACTED] said he told her Dr. Gebhardt had touched his penis and his "butt crack", but [REDACTED] was then asked "Okay. Did you talk to your mom about the mouth?" [REDACTED] answered "Yes."<sup>37</sup>
  - c. In re-direct, [REDACTED] was asked an abstract question "what is a lie?", which he defined as "not very nice" because you can get in trouble. [REDACTED] was then asked if he had been lying in his direct examination. He answered that he didn't "think" so.<sup>38</sup>
61. The Hearing Tribunal concluded that [REDACTED] could distinguish the truth from a lie and that based on his testimony as a whole, he could perceive, remember and communicate a believable report. The Tribunal concluded that [REDACTED]'s direct testimony could be relied upon, though it was given in the manner of an ASD individual.<sup>39</sup>
  62. In our view, the Hearing Tribunal's determination that [REDACTED] was capable of testifying was unreasonable.
  63. Dr. Gebhardt referred us to *R. v. D.A.I.*, where the Supreme Court of Canada discussed testimonial capacity for adults with mental disabilities under the *Canada Evidence Act*, and held that adult witnesses with mental disabilities will be competent to testify if: (1) the witness can communicate the evidence; and (2) the witness promises to tell the truth. The witness must be able to relate concrete events with some independence and by understanding and responding to questions, and to differentiate between true and false factual statements.<sup>40</sup> The witnesses' testimony must not come entirely in response to suggestive questions.<sup>41</sup> The Supreme Court added that expert evidence on these points may be adduced if it meets the criteria

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<sup>35</sup> Merits Decision, para. 311

<sup>36</sup> Direct examination of [REDACTED], Transcript pg. 321, line 27, pg. 322, lines 1-7

<sup>37</sup> Direct examination of [REDACTED], Transcript pg. 322, lines 8-27, pg. 323, lines 1-11

<sup>38</sup> Re-direct Examination of [REDACTED], Transcript pg. 331, lines 23-27, pg. 332, lines 1-5

<sup>39</sup> Merits Decision, para. 294

<sup>40</sup> *R. v. D.A.I.*, 2012 SCC 5 at paras. 71-82

<sup>41</sup> *R. v. Tracey*, 2018 ONSC 1721 at para. 14

for admissibility, but preference should always be given to expert witnesses who have had personal and regular contact with the proposed witness.<sup>42</sup>

64. The Complaints Director responded that the threshold for testimonial capacity is low. Adults with mental disabilities may be capable of giving useful, relevant and reliable evidence and allowing their testimony is only the first step, as their evidence may be tested through cross-examination and weighed by the trier of fact. The direct questioning of ■■■ was done in a manner consistent with the expert evidence and the Tribunal's discretion to accept evidence in any manner it considers appropriate. ■■■'s resulting evidence was reliable.
65. The Panel carefully reviewed the record of the hearing. The Hearing Tribunal was not bound to apply the *Canada Evidence Act* test for testimonial capacity, but the case law provided helpful guidance on witnesses' capacity to testify.
66. ■■■ required prompting during his direct examination to describe at least some of the alleged conduct.
67. It is apparent from the transcript of ■■■'s cross-examination that he was unable to relate concrete events independently and by understanding and responding to questions about those events, yet the Hearing Tribunal dismissed and disregarded the cross-examination altogether. ■■■ admitted in cross-examination that he was unable to differentiate between true and false factual statements. He didn't know if he was lying or telling the truth and he didn't really know what happened during his appointment with Dr. Gebhardt. ■■■ agreed that he was lying during the hearing and it was possible he was confusing other sexual events with what happened during the appointment with Dr. Gebhardt.
68. The Panel considered whether the expert evidence could explain these problems with ■■■'s ability to independently relate concrete events, understand and respond to questions, and to differentiate between true and false factual statements.
69. Drs. H■■■ and N■■■ jointly opined that ■■■ is easily confused with any open-ended questions, complex terms or comments and has difficulty expressing when he does not understand what others are asking or communicating. He tends to agree with others' statements when he is confused or does not understand.<sup>43</sup> Drs. H■■■ and N■■■ opined that "[y]es or no questions will not necessarily provide accurate information especially if they use phrases like, 'Do you agree that...', or if they contain abstract words. He will agree with the statement to please the listener."<sup>44</sup> Dr. N■■■ had also opined in an earlier report about ■■■ that "[m]any of the

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<sup>42</sup> Ibid at para. 80

<sup>43</sup> Record, Exhibit 1, pg. 279

<sup>44</sup> Merits Decision, para. 309 Record, Exhibit 1, pg. 288

clients I have dealt with over the years or functioning at this level of cognitive functioning will struggle in court situations to accurately report their thoughts and ideas.”<sup>45</sup>

70. The problems with ■■■’s testimonial capacity cannot be explained away by the expert evidence. ■■■’s omission to describe the allegations of oral sex without prompting during his direct examination demonstrates a lack of ability to relate concrete facts independently. More concerning are his statements that he wasn’t sure if he was telling the truth, and that he thought he was telling the truth, but also agreed that he was lying. These contradictory statements demonstrate his inability to differentiate true and false factual statements.
71. The Panel considered whether ■■■’s contradictory statements could be attributed to the manner in which questions were posed to him, according to the expert evidence. ■■■ did not simply agree with questions put to him in cross-examination. In response to some questions, like “but its also true that you can’t always be certain if you’re telling the truth, right?” ■■■ responded “Yes”.<sup>46</sup> In response to others, like “[a]nd your memory of what happened in that exam room, that’s not – that memory is not very good either, is it?” ■■■ responded “No.”<sup>47</sup> In response to still other questions, like “Is it possible you are confusing Dr. Gebhardt with someone else?” ■■■ did not say “yes” or “no”. He answered “I – I don’t know about that one, so.”<sup>48</sup> In response to a question about whether he was lying about Dr. Gebhart placing his hand on ■■■’s penis, ■■■ did not simply say “yes” or “no”. He agreed he was lying, but qualified it by saying “a little bit, yeah”.<sup>49</sup>
72. The Hearing Tribunal generalized ■■■’s responses to the questions put to him in cross-examination by concluding that he largely agreed with them. The Tribunal held that this manner of questioning was unlikely to result in accurate information, based on the expert evidence of Drs. H■■■ and N■■■. The Tribunal omitted to actually examine what ■■■ said in response to the questions and whether he was likely agreeing to please the questioner or whether his answers demonstrated a failure to differentiate the truth and a lack of testimonial capacity. The Tribunal found that ■■■ could give reliable testimony based on what he said to Mr. Boyer, but a number of Mr. Boyer’s questions were also phrased as “yes” or “no” questions. For example, in direct examination Mr. Boyer asked, “Did Dr. Gebhardt ask you to touch his penis?” and “Did you touch Dr. Gebhardt’s penis?” ■■■ answered “Yes” to both questions, but the Tribunal did not consider whether this evidence could be relied upon.<sup>50</sup> The Tribunal failed to consider the problems with ■■■’s

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<sup>45</sup> Record, Exhibit 1, page 270

<sup>46</sup> Cross-examination of ■■■ Transcript, pg. 325, lines 17-19

<sup>47</sup> Cross-examination of ■■■ Transcript, pg. 325, lines 25-27, p. 326, line 1

<sup>48</sup> Cross-examination of ■■■ Transcript, pg. 326, lines 11-13, pg. 327, lines 8-11

<sup>49</sup> Cross-examination of ■■■, Transcript pg. 331, lines 1-4

<sup>50</sup> Direct examination of ■■■, Transcript pg. 320, lines 19-22

testimonial capacity. Its decision lacked transparency and justification and failed to account for the evidence. It was unreasonable.

73. ■■■ lacked testimonial capacity for all of the reasons above. A referral for rehearing would not be appropriate.

### **■■■'s Credibility and Reliability**

74. The Hearing Tribunal's assessment of ■■■'s credibility and reliability is entitled to significant deference. The Panel will only intervene if the Tribunal's decision was unreasonable.
75. Dr. Gebhardt asserted that the Hearing Tribunal made errors by failing to consider ■■■'s credibility and reliability in light of his responses to leading questions, inconsistencies in his evidence and by placing weight on his prior consistent statements.
76. The Complaints Director submitted that the Hearing Tribunal appropriately admitted and weighed ■■■'s evidence. Leading questions were only used to obtain clarification after ■■■ had described Dr. Gebhardt's conduct unprompted. Dr. Gebhardt is asking the Panel to ignore the advantage that the Hearing Tribunal had in hearing and assessing ■■■'s credibility and reliability itself.
77. The Hearing Tribunal concluded that ■■■'s direct testimony could be relied upon, even though it was given in the manner of an ASD individual.<sup>51</sup> In addition to the issues described above, the Tribunal did not deal with a number of other issues and inconsistencies in the evidence. For example:
- a. The Hearing Tribunal relied on what it said were similarities between ■■■'s testimony at the criminal trial and his direct evidence at the hearing.<sup>52</sup> In the criminal trial transcript of ■■■'s direct examination he was asked whether June 6, 2017 was his first visit with Dr. Gebhardt. He responded "Yeah, first time, yeah"<sup>53</sup> but later in his direct examination he agreed that he'd had previous physical exams with Dr. Gebhardt.<sup>54</sup>
  - b. ■■■'s mother testified that ■■■ had never previously complained about anything at a visit with Dr. Gebhardt, but ■■■ "didn't like him very much".<sup>55</sup>
  - c. In the criminal trial transcript, ■■■ makes no mention of Dr. Gebhardt performing oral sex on him and agrees that he gave a different

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<sup>51</sup> Merits Decision, para. 294

<sup>52</sup> Merits Decision, paras. 312-313

<sup>53</sup> Record, Exhibit 1, pg. 80, lines 20-21

<sup>54</sup> Record, Exhibit 1, pg. 92, lines 21-25

<sup>55</sup> Transcript, pg. 37, lines 7-11

account of what happened to the police.<sup>56</sup> In the hearing before the Hearing Tribunal, ■■■ was asked "Did Dr. Gebhardt use his mouth when he was examining you?" before ■■■ responded that Dr. Gebhardt put his mouth on ■■■'s penis.<sup>57</sup>

- d. In the criminal trial transcript, ■■■ makes no mention of Dr. Gebhardt masturbating him. In the transcript of ■■■'s evidence before the Hearing Tribunal, ■■■ testified that Dr. Gebhardt made him ejaculate: "He was making or – making my penis to feel good because the – making the white stuff to come out of my penis."<sup>58</sup>
- e. In the criminal trial, ■■■ was asked what Dr. Gebhardt said to him about keeping a secret and ■■■ responded, "Keeping the secret and not saying that to anybody else at work."<sup>59</sup> ■■■ had a job at a local movie theatre, but there was no consideration by the Hearing Tribunal of why ■■■ mentioned "anybody else at work".
- f. In the criminal trial transcript, ■■■ was asked how he could remember the secret Dr. Gebhardt asked him to keep even though he hadn't remembered it when talking to the police. ■■■ replied, "I don't know." ■■■ was then asked if he had been talking to people about it. He agreed that he had been talking to his parents, "J■■■" and one of the workers at CORE.<sup>60</sup>
- g. At the hearing before the Hearing Tribunal, ■■■ was asked in direct examination if anyone had been in the room with him and Dr. Gebhardt before the physical exam. ■■■ responded "I don't think so. No."<sup>61</sup> In cross-examination ■■■ agreed that "J■■■" and "E■■■" had been in the examination room with him before Dr. Gebhardt came in.<sup>62</sup> ■■■ had asked them to leave so he could have privacy for the physical examination.<sup>63</sup> ■■■'s CORE worker, J■■■ S■■■ also testified that she and "E■■■" had been in the room with ■■■ and Dr. Gebhardt before the physical exam.<sup>64</sup>

78. The Hearing Tribunal noted that ■■■ had answered "yes" to several cross-examination questions about whether he was lying, but the Tribunal omitted to deal with the inconsistency between this evidence and ■■■'s testimony in redirect that he did not "think" he was lying.<sup>65</sup> The Tribunal instead purported

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<sup>56</sup> Record, Exhibit 1, pg. 99, lines 2-8

<sup>57</sup> Transcript, pg. 320, line 23 – pg. 321, line 6

<sup>58</sup> Transcript, pg. 323, lines 23 – pg. 324, line 10

<sup>59</sup> Record, Exhibit 1, pg. 89, lines 16-17

<sup>60</sup> Record, Exhibit 1, pg. 102, ne 24 – pg. 103, line 8

<sup>61</sup> Transcript pg. 321, lines 15-17

<sup>62</sup> Transcript pg. 328, lines 1-8

<sup>63</sup> Transcript pg. 329, lines 3-5

<sup>64</sup> Transcript pg. 81, line 24 – pg. 82, line 12

<sup>65</sup> Merits Decision, para 299

to dismiss all of ■■■'s cross-examination evidence.<sup>66</sup> The Tribunal failed to consider ■■■'s numerous admissions set out above, including that he wasn't certain the incident with Dr. Gebhardt really happened and that it was possible he was confusing other sexual events in his life with the June 6, 2017 appointment.

79. The Hearing Tribunal was not required to address every minor inconsistency and issue with ■■■'s evidence. It was required to consider the overall number of inconsistencies and issues and their impact on ■■■'s credibility and reliability.<sup>67</sup>
80. The Hearing Tribunal dealt with some issues. It dealt with ■■■'s documented history of telling some lies by finding that those were "simple lies" limited to situations in which ■■■ was trying to avoid getting into trouble. The Tribunal held there was no parallel between ■■■'s documented "simple lies" and the "complex" allegation in this case.<sup>68</sup> The Tribunal did not address the evidence that ■■■ had previously made up at least one story about a doctor advising him to do something sexual. ■■■'s mother testified that ■■■ had told his CORE worker that a doctor had told him he could use fruit to masturbate. ■■■'s mother confirmed that ■■■ had been lying about this.<sup>69</sup>
81. The Hearing Tribunal rejected the possibility that ■■■ had blended his memory of his visit with Dr. Gebhardt with memories of sexual interactions with other individuals. The Tribunal considered the CORE records and held they were very helpful but said there was no evidence that ■■■ had any sexual experiences of the nature described on June 6, 2017 that could have been blended.<sup>70</sup> The Tribunal did not consider that the CORE notes contained several reports of sexualized interactions between ■■■ and other males.
82. One of these incidents involved ■■■ and another male alone in ■■■'s bedroom. Another incident occurred outside a bowling alley and involved another male fondling ■■■'s genitals.<sup>71</sup> Another incident involved ■■■ being seen coming out of a bathroom with the same male and declining to say what they had been doing in the bathroom.<sup>72</sup> There were also reports of ■■■ being preoccupied with masturbation and another male peer and that they "lie on each other".<sup>73</sup> These types of incidents continued in 2017, immediately prior to the June 6, 2017 visit with Dr. Gebhardt.<sup>74</sup> The evidence was of a number of sexualized interactions that occurred in private. It was not possible to say

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<sup>66</sup> Merits Decision, para. 311

<sup>67</sup> *F.H. v. McDougall*, 2008 SCC 53 at para. 57, *Cron v. Libby*, 2024 ABCA 25 at para. 12

<sup>68</sup> Merits Decision, paras. 302-303

<sup>69</sup> Transcript, pg. 48, line 11 – pg. 49, line 13

<sup>70</sup> Merits Decision, para. 305-306

<sup>71</sup> Record, Exhibit 1, pg. 192

<sup>72</sup> Record, Exhibit 1, pg. 194-195

<sup>73</sup> Record, Exhibit 1, pg. 128

<sup>74</sup> Record, Exhibit 1, pg. 234, 239

what happened in those interactions, but it was not possible to say what did not happen either.

83. The Hearing Tribunal held that it placed significant weight on ■■■'s "immediate and unprompted" reports to his CORE worker and to his mother and grandmother after the June 6, 2017 visit to Dr. Gebhardt, and did not find there to be issues with ■■■'s memory. The Tribunal also said there had been consistency in how ■■■ described the events of June 6, 2017, but without addressing the above inconsistencies in the evidence.<sup>75</sup>
84. The Hearing Tribunal's assessment of ■■■'s credibility and reliability lacked transparency and justification and failed to account for the evidence. It was unreasonable.
85. ■■■'s testimony was the only direct evidence in support of the allegation. The Panel is mindful that we will never know with certainty what happened on June 6, 2017, but the standard of proof requires evidence to be "clear, convincing and cogent to satisfy the balance of probabilities test".<sup>76</sup> The evidence in support of the allegation did not meet that standard.

### **Treatment of Expert Evidence**

86. The Hearing Tribunal's discretionary decision to admit Dr. H■■■ and N■■■'s expert evidence is entitled to significant deference. The Panel applied the reasonableness standard of review to this ground of appeal.
87. The Hearing Tribunal held that it would accept Dr. H■■■ and N■■■'s joint expert report and hear their evidence about individuals with severe developmental delays as it would likely be of assistance.<sup>77</sup> The Tribunal held that it would determine the weight to place on their expert report and their testimony after having heard from the witnesses.
88. Dr. Gebhardt submitted that the Hearing Tribunal made errors in admitting the expert evidence of Drs. H■■■ and N■■■ as it was irrelevant, oath-helping, and biased, and that it made errors in placing undue weight on their expert evidence without addressing the frailties in the evidence and using it to bolster ■■■'s credibility.
89. The Complaints Director submitted that Drs. H■■■ and N■■■ were properly qualified and their evidence was relevant and necessary. While evidence about the credibility of a witness would be inadmissible, expert evidence about the abilities and behaviors of individuals with developmental disorders like ■■■ is admissible.

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<sup>75</sup> Merits Decision, para. 313

<sup>76</sup> *F.H. v. McDougall*, supra at para. 46

<sup>77</sup> Merits Decision, para. 87

90. The Hearing Tribunal noted Dr. N█████'s evidence that █████ displays classic signs of ASD, including that "reporting to trusted people is usual", "honesty is usual" and that blended memories were possible, but unlikely. The Tribunal also accepted Dr. N█████'s evidence that it is generally difficult for people with autism, if they are fabricating, to sustain the fabrication.<sup>78</sup> The Tribunal accepted Dr. N█████'s testimony testified that what was helpful for him was the consistency in █████'s reports and statements.<sup>79</sup>
91. The Hearing Tribunal next described Dr. H█████' evidence. Dr. H█████ said that she and Dr. N█████ had jointly assessed █████'s credibility.<sup>80</sup> The Tribunal noted Dr. H█████ testified that █████ "is concrete in his memory of experiences and tends to be very forthright and honest".<sup>81</sup> Dr. H█████ agreed that everyone has the ability to lie, but she said that there were examples of █████ using only a "simple" form of deception. Dr. H█████ said that █████ does not have "the capacity to fabricate, create, organize a narrative, or put together a sequence of events that would describe a complex fabrication or a lie."<sup>82</sup> She said that █████ would not blend memories and "would not say something happened that did not happen."<sup>83</sup> The Tribunal further noted Dr. H█████ testimony that █████ had learned to say "yes" or "no" when he is confused so that people will stop talking about things that he does not understand.<sup>84</sup>
92. The Hearing Tribunal properly held that only it could determine the credibility of the witnesses.<sup>85</sup> It could admit the expert evidence to assist in understanding someone with █████'s developmental disability, but it could choose to place no weight on the expert evidence if the experts strayed into the role of the decision-maker or showed bias. The Tribunal held that it was accepting Dr. D█████'s evidence that all populations are made up of people with varied abilities to create false memories and tell lies.<sup>86</sup>
93. The Hearing Tribunal's decision to admit the joint expert report and the testimony of Drs. N█████ and H█████ is entitled to deference. The Tribunal was entitled to receive evidence in any manner that it considered appropriate and it was not bound by the rules of evidence in Courts: HPA s. 79(5). That decision was reasonable.
94. The Panel finds that the Hearing Tribunal improperly and unreasonably relied on the expert evidence of Drs. N█████ and H█████ in assessing █████'s credibility. The Hearing Tribunal said that it considered the likelihood that █████ fabricated his report about June 6, 2017. The Tribunal held that the CORE notes contained examples of █████ telling lies, but these were "simple

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<sup>78</sup> Merits Decision, paras. 99-100, 102, 109

<sup>79</sup> Merits Decision, para. 109

<sup>80</sup> Merits Decision, para. 118

<sup>81</sup> Merits Decision, para. 112

<sup>82</sup> Merits Decision, para. 115

<sup>83</sup> Merits Decision, para. 123

<sup>84</sup> Merits Decision, para. 113-114

<sup>85</sup> Merits Decision, paras. 87, 287

<sup>86</sup> Merits Decision, para. 292



lies" and not "complex" allegations like in this case. In so finding, the Hearing Tribunal adopted Drs. N [REDACTED] and H [REDACTED] evidence of a distinction between "simple" and "complex" lies and their evidence that [REDACTED] lacked the capacity to create a complex fabrication. In effect, the Tribunal allowed the expert evidence of [REDACTED]'s capacity to lie to take the place of its assessment of his credibility. Their analysis failed to account for the many significant problems with [REDACTED]'s credibility and reliability described above.

### **Fairness and Reasonableness of the Process and Reasoning**

95. The Panel is not required to defer and may intervene in cases of procedural unfairness. The Panel assessed the Hearing Tribunal's overall reasoning for reasonableness.
96. Dr. Gebhardt asserted that the Hearing Tribunal made errors by denying him the ability to test [REDACTED]'s direct evidence through cross-examination, by relying on hearsay evidence to compensate for the lack of direct evidence and in applying undue scrutiny to Dr. Gebhardt's evidence.
97. The Complaints Director responded that Dr. Gebhardt was not denied the opportunity to cross-examine [REDACTED]. He was permitted to cross-examine, but the way the questions were posed caused the Hearing Tribunal to give no weight to [REDACTED]'s answers. The Complaints Director also submitted that section 72(2) of the HPA is permissive and empowering; it does not create a right to examine any witness. Decision-makers can dismiss evidence obtained on cross-examination where it is obtained through abuse or its prejudicial effects outweigh its probative value. The Tribunal did not improperly rely on hearsay evidence or unduly scrutinize Dr. Gebhardt's evidence.
98. The Hearing Tribunal found that [REDACTED]'s direct examination evidence could be relied upon, although it was given in the manner of an ASD individual, and the Tribunal placed significant weight on it. The Tribunal "dismissed" all of [REDACTED]'s cross-examination evidence due to the way the questions were asked and due to the expert evidence. The Tribunal focused on some of the questions that were asked and omitted to consider what [REDACTED] said in cross-examination. It omitted to consider whether he was confused and agreeing to please the questioner or whether his answers could be relied upon as evidence. The Tribunal effectively denied Dr. Gebhardt the benefits of cross-examining [REDACTED] and having [REDACTED]'s cross-examination evidence weighed as part of the assessment of his credibility.
99. This conflicted with section 72(2) of the HPA and was unfair. Section 72(2) provides that the investigated person or their legal counsel may examine any witness appearing before the Hearing Tribunal. The language of section 72(2) is permissive, but the Panel interprets it to mean that Dr. Gebhardt was entitled to cross-examine [REDACTED] and he was entitled to have the Tribunal consider [REDACTED]'s cross-examination evidence. It was up to the Hearing Tribunal to weigh [REDACTED]'s cross-examination evidence and determine its effect on his

credibility. The Tribunal was not permitted to dismiss or disregard the cross-examination altogether.

100. In *R. v. D.A.I.*,<sup>87</sup> the Supreme Court of Canada discussed the threshold for permitting adults with mental disabilities to testify. The Supreme Court held that adult witnesses with mental disabilities may give useful, relevant and reliable evidence, but allowing them to testify is only the first step.<sup>88</sup> The Court said that their evidence will be tested by cross-examination. The trier of fact will observe their demeanor and the way they answer questions. The trier of fact will then decide whether to accept their evidence, accept only part of it, or reduce the weight to assign to it. By “dismissing” ■■■’s cross-examination evidence, the Hearing Tribunal left his evidence incomplete and denied Dr. Gebhardt a fair opportunity to challenge the case against him and defend himself.
101. It was unfair to Dr. Gebhardt to accept and place weight on ■■■’s direct testimony, but to entirely dismiss the evidence from his cross-examination.
102. Dr. Gebhardt asserted that the Hearing Tribunal improperly accepted and relied upon the transcript of ■■■’s testimony in the criminal trial as his evidence, even though ■■■ did not remember testifying at the criminal trial and couldn’t be cross-examined on it. The Hearing Tribunal was not bound by rules of evidence and could consider the transcript of ■■■’s testimony at the criminal trial. The Hearing Tribunal relied on what it said were consistencies between ■■■’s direct testimony at the criminal trial and his direct testimony before the Hearing Tribunal,<sup>89</sup> but it failed to consider the impacts of ■■■’s cross-examination evidence at the criminal trial on his overall credibility.
103. Dr Gebhardt said the Hearing Tribunal was also wrong to treat the CORE program notes as a complete account of ■■■’s life experiences. The Hearing Tribunal was entitled to consider the CORE notes as evidence from which to form an impression of ■■■ and his developmental age.<sup>90</sup> The Tribunal used the notes to understand ■■■ as a vulnerable individual, but it also inferred from the notes and the testimony at the hearing that the allegation against Dr. Gebhardt was “unique in the history of the patient”. As above, there was some evidence of ■■■ having engaged in several sexualized interactions in private. It was not possible to say what happened in those interactions, but it was not possible to say what did not happen either. The Panel does not agree that the Hearing Tribunal used the CORE notes as a complete account of ■■■’s life experiences. It was reasonable for the Hearing Tribunal to find there was no evidence before them of ■■■ having previously engaged in conduct similar to the alleged conduct of Dr. Gebhardt.

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<sup>87</sup> *R. v. DAI*, 2012 SCC 5

<sup>88</sup> *Ibid* at para. 72

<sup>89</sup> Merits Decision, para. 312

<sup>90</sup> Merits Decision, para. 278

104. Dr. Gebhardt also said the Hearing Tribunal applied undue scrutiny to his evidence and made arbitrary and irrelevant credibility findings against him.
105. The Tribunal found that Dr. Gebhardt “categorically denied” touching [REDACTED]’s penis, but the Tribunal found this implausible, concluding that incidental touching of the penis through a drape during a testicular examination was likely to occur.<sup>91</sup> The Tribunal did not consider that if incidental contact with the penis through a drape had occurred, that would be quite different from the direct touching of [REDACTED]’s penis. Dr. Gebhardt was responding to the questions “Put more broadly, did you touch [REDACTED]’s penis at any time, in any way during this examination of June 6<sup>th</sup>, 2017?” and “Did you have any contact whatsoever with [REDACTED]’s genital area in any non-clinical, sexualized manner at any time during this examination for June 6, 2017?” Dr. Gebhardt replied “No” and “it was just a normal testicular exam.” Dr. Gebhardt was not asked whether incidental contact with the penis through a drape was possible during a normal testicular exam.
106. The Hearing Tribunal also found Dr. Gebhardt’s credibility undermined by his testimony that “Yeah, there’s no real – there’s no penis exam, right. What are you going to examine on a penis?”<sup>92</sup> The Tribunal did not consider the rest of Dr. Gebhardt’s answer where he added “There are no lumps to palpate.” The Tribunal found Dr. Gebhardt’s answer inconsistent with his charting where over the course of years he had documented “genitourinary” and “genitalia” examinations, including checking for “genital sores”, “venereal disease”, “persistent itch penis scrotum”, and “No genital anomaly seen” on [REDACTED].<sup>93</sup> The question Dr. Gebhardt had been asked was “Now, did I understand you to say that you are assuming or you are suggesting that [REDACTED] confused his testicular exam with what he described as being a penile exam?”<sup>94</sup> Dr. Gebhardt was distinguishing a testicular exam which involves feeling the testicles for abnormalities, from the visual observation of a penis as part of a normal physical examination. Dr. Gebhardt was explaining that there is no need to feel the penis for abnormalities, like there is with the testicles. Dr. Gebhardt’s evidence was not inconsistent.
107. The Hearing Tribunal also found Dr. Gebhardt’s credibility undermined by his decision to perform sensitive medical examinations on [REDACTED] without a chaperone in the room.<sup>95</sup> The Tribunal said that it was left to question this decision, but there was evidence that [REDACTED] had been asking his caregivers to step out of the room for medical examinations since he was 20 years old.<sup>96</sup> Dr. Gebhardt testified to this, as did [REDACTED]’s caregiver,<sup>97</sup> and [REDACTED] agreed in cross-examination that he had asked his caregivers to leave the examination

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<sup>91</sup> Merits Decision, para. 327

<sup>92</sup> Transcript, pg. 383, lines 5-11

<sup>93</sup> Merits Decision, para. 328

<sup>94</sup> Transcript, pg. 383, lines 5-11

<sup>95</sup> Merits Decision, para. 338

<sup>96</sup> Merits Decision, paras. 336-337

<sup>97</sup> Transcript, pg. 102, lines 2-11

room for privacy.<sup>98</sup> The Tribunal did not explain why ■■■'s developmental delay meant that Dr. Gebhardt should have disregarded ■■■'s express wishes and insisted on a chaperone, or how Dr. Gebhardt's decision to respect ■■■'s wishes undermined his credibility.

108. The Hearing Tribunal also found it implausible for Dr. Gebhardt to have a detailed recall of his examination of ■■■, when at the hearing Dr. Gebhardt was unable recall the caregivers' names and to recognize them. The Tribunal held that this undermined Dr. Gebhardt's credibility.<sup>99</sup> The Tribunal did not explain why Dr. Gebhardt should be able to recall the names and appearance of people who were not his patients and who were not in the examination room at the time. As Dr. Gebhardt had testified in his direct examination, "I don't really pay that much attention to the workers. I pay more attention to my patients."<sup>100</sup>
109. The Panel was also concerned at the Hearing Tribunal's conclusion that Dr. Gebhardt had "downplayed" the nature of his discussions with ■■■ about sexuality and sexual interests, contrary to his charting.<sup>101</sup> Dr. Gebhardt had been asked what information he had prior to June 6, 2017 about ■■■'s sexuality and sexual interests. Dr. Gebhardt answered "Well, prior to this stuff, not much." Dr. Gebhardt said he had been aware of ■■■ masturbating with fruit, and aware of a man coming to ■■■'s apartment and watching him urinate, but Dr. Gebhardt said he hadn't known about ■■■ going into bathrooms with other people or putting hands down people's pants.<sup>102</sup> There were some references in ■■■'s charting to discussions of sexuality, but they amounted to six discussions over a period of nearly seven years, ending on June 6, 2017. All but one reference suggested that ■■■ or his caregivers initiated the discussion. The only one that appeared Dr. Gebhardt may have initiated was on September 8, 2010 when he asked whether ■■■ was sexually active.<sup>103</sup> Dr. Gebhardt's evidence about his awareness of ■■■'s sexuality and sexual interests was not inconsistent with the charting.
110. The Hearing Tribunal's analysis of Dr. Gebhardt's credibility was unjustified, failed to account for the evidence and was unreasonable.

### **Fairness and Reasonableness of the Ultimate Conclusion**

111. The Panel again assesses the Hearing Tribunal's reasoning for reasonableness.
112. Dr. Gebhardt's final ground of appeal asserted that the Hearing Tribunal's ultimate conclusions were unfair and unreasonable. He said that the Tribunal

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<sup>98</sup> Transcript, pg. 328, line 26 to pg. 329, line 5

<sup>99</sup> Merits Decision, para. 345-346

<sup>100</sup> Transcript, pg. 358, lines 3-5

<sup>101</sup> Merits Decision, para. 331-333

<sup>102</sup> Transcript, pg. 376, lines 1-27

<sup>103</sup> Merits Decision, para. 331

accepted ■■■'s testimony without explaining how his evidence met the burden of proof and without making findings of fact for each particular allegation. Dr. Gebhardt asserted that there was no direct evidence that ■■■ had stroked Dr. Gebhardt's penis, or that Dr. Gebhardt asked ■■■ to place ■■■'s mouth on Dr. Gebhardt's penis. Dr. Gebhardt said it was unfair and unreasonable to rely on hearsay evidence to find these particular allegations proven.

113. The Hearing Tribunal found particulars (a), (b), (c), (d) and (e) were proven on a balance of probabilities by preferring the evidence of ■■■ to that of Dr. Gebhardt.<sup>104</sup>
114. ■■■ had testified in his direct examination that Dr. Gebhardt asked him to touch Dr. Gebhardt's penis and that he did touch it. ■■■ also testified in direct examination that Dr. Gebhardt put his mouth on ■■■'s penis and that ■■■ put his mouth on Dr. Gebhardt's penis. There was no direct evidence at the hearing that Dr. Gebhardt had ■■■ stroke his penis or that Dr. Gebhardt asked ■■■ to place his mouth on Dr. Gebhardt's penis.
115. The evidence of ■■■'s mother and ■■■'s CORE care worker about ■■■'s reports on June 6, 2017 was hearsay. The Hearing Tribunal understood that the evidence of ■■■'s mother and his CORE worker to whom he reported the alleged conduct did not prove that it occurred, but the Tribunal said it relied on their evidence.<sup>105</sup> ■■■'s mother testified that she understood Dr. Gebhardt asked ■■■ to put his mouth on Dr. Gebhardt's penis and that Dr. Gebhardt had masturbated ■■■.<sup>106</sup> Her notes also stated that ■■■ told her Dr. Gebhardt asked ■■■ to put his mouth on Dr. Gebhardt's penis.<sup>107</sup> ■■■'s care worker Ms. S■■■■ had testified that ■■■ reported to her that Dr. Gebhardt put his mouth on ■■■'s penis and that ■■■ put his mouth on Dr. Gebhardt's penis. The only other evidence of what occurred on June 6, 2017 was the transcript of ■■■'s testimony at Dr. Gebhardt's criminal trial, but ■■■ did not remember testifying there.<sup>108</sup>
116. The Hearing Tribunal's reasons did not expressly make findings of fact for each of particular (a), (b), (c), (d) and (e), but the Tribunal's findings were supported by evidence, some of which was hearsay evidence from ■■■'s mother, CORE care worker and the criminal trial transcript. The Panel dismisses this ground of appeal.

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<sup>104</sup> Merits Decision, para. 250, 352

<sup>105</sup> Merits Decision, para. 266, 270, 276

<sup>106</sup> Merits Decision, para. 23

<sup>107</sup> Merits Decision, para. 41

<sup>108</sup> Transcript, pg. 326, lines 14-pg. 327, line 11

## Cross Appeal on Sanctions

117. In the event we are wrong, it is necessary to address the Complaints Director's cross-appeal on the issue of sanctions. The Complaints Director raised the following grounds:
  - a. The Hearing Tribunal's failure to impose cancellation was unreasonable given its findings on the gravity of Dr. Gebhardt's conduct, ■■■'s vulnerability and the need to ensure good character and reputation and public confidence in the College.
  - b. The Hearing Tribunal failed to provide responsive justification for its decision to impose a suspension over cancellation.
118. The Complaints Director submitted that the Hearing Tribunal's decision to suspend Dr. Gebhardt's practice permit rather than cancel his registration was unreasonable, given the gravity of the proven conduct, ■■■'s vulnerability and the need for public confidence in the medical profession.
119. The Complaints Director referred to several cases in which physicians' registrations were cancelled after being found to have engaged in similar unprofessional conduct. The Hearing Tribunal had distinguished these cases on the basis that they involved multiple victims, multiple occurrences, or other related misconduct that called into question the College's ability to effectively regulate the physicians. The Complaints Director submitted that the Tribunal did not rationally address why the decisions should be distinguished. The Complaints Director also submitted that the Tribunal failed to consider evolving societal expectations that past sanctions in cases of sexual misconduct reflected an outdated perspective on their seriousness.
120. The Complaints Director said that the Hearing Tribunal considered Dr. Gebhardt's many letters of reference, but without acknowledging the limited weight that should be assigned to these letters. Character evidence such as letters of reference should be given little weight where the physician's public persona may not align with his private behaviour.<sup>109</sup> The authors of Dr. Gebhardt's letters of reference were not in a position to speak to his behaviour behind closed doors. Relying on character evidence for something that occurred in private is a reversible error that the Panel should correct.
121. The Complaints Director next submitted that the Hearing Tribunal failed to provide responsive justification for its determination that cancellation was not warranted. Decisions with significant consequences for affected individuals must include an explanation as to why the decision best reflects the legislature's intention. They must demonstrate the decision-makers' consideration of the consequences of the decision and satisfaction that those

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<sup>109</sup> *Ontario (College of Physicians and Surgeons of Ontario) v. Sazant*, 2009 ONCPSD 26 (CanLII)

consequences are justified.<sup>110</sup> The failure to do so renders a decision unreasonable.

122. The Complaints Director submitted that the Hearing Tribunal held that Dr. Gebhardt's conduct should attract the most serious of sanctions but then failed to order cancellation. He submitted the Tribunal also failed to consider how Dr. Gebhardt remained of good character and reputation to justify the continued privilege of being a regulated member of the medical profession and it failed to explain how its sanction would serve and protect the public interest and public confidence. It failed to consider how Dr. Gebhardt's conduct could warrant a report to the Minister of Justice under section 80(2) of the HPA but not warrant cancellation.
123. Dr. Gebhardt submitted that the Hearing Tribunal's sanctions decision is entitled to deference and there is no basis to interfere with it. The Complaints Director proposed a suspension of 18-24 months and a multidisciplinary assessment as an alternative to cancellation in her submissions to the Hearing Tribunal. The Complaints Director cannot now suggest that the Tribunal's acceptance of her alternative position on sanctions was unreasonable.
124. The Hearing Tribunal imposed serious sanctions including a 20-month suspension. This aligned with cases placed before the Hearing Tribunal demonstrating a range of suspensions from 15 to 18 months in duration. The Tribunal also imposed an indefinite chaperone-condition for all of Dr. Gebhardt's patient interactions and a multidisciplinary assessment and substantial costs.
125. The Hearing Tribunal's decision met the requirements of responsive justification and explicitly considered the cancellation cases provided by the Complaints Director and distinguished them because they differed from Dr. Gebhardt's case. This was within the Tribunal's discretion and was reasonable. The Tribunal also explicitly considered evolving societal expectations and held its job was to render a decision that would clearly denounce sexual unprofessional conduct and protect the public.
126. The Hearing Tribunal was not required to assess how Dr. Gebhardt's could maintain his character or reputation given the findings made against him. The issue was only what sanctions the Hearing Tribunal should order to protect the public.

## **Findings and Reasons**

127. The Panel reviewed the Hearing Tribunal's sanctions decision for reasonableness. Questions of the appropriate sanctions are questions of

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<sup>110</sup> *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 133-135

mixed fact and law calling for deference when the decision results from a consideration of the evidence as a whole.<sup>111</sup>

128. The Complaints Director and Dr. Gebhardt agreed that provisions of the *Health Professions Act* mandating cancellation in cases of patient sexual abuse that came into effect on April 1, 2019 do not apply in this case. The Hearing Tribunal weighed the evidence before them and relevant sanctioning factors and ordered sanctions according to the *Health Professions Act* as it existed at the time of Dr. Gebhardt's appointment with ■■■, on June 6, 2017.
129. It is not appropriate for the Panel to reweigh the evidence and the relevant factors and substitute its opinion on sanctions for that of the Hearing Tribunal, even if the Panel might have imposed a more serious sanction. When applying the reasonableness standard, the Panel's role is to review the Tribunal's sanctions decision for errors.
130. The Panel has reviewed the Hearing Tribunal's February 12, 2024 Sanctions Decision. The Tribunal held that it was an exceptionally difficult decision to make.<sup>112</sup> It recognized the need to capture the impact of the proven conduct on various stakeholders including ■■■ and his family, Dr. Gebhardt and his other patients. The Tribunal also recognized the "culture shift" that had taken place in relation to the sexual abuse of patients and the need for clear denunciation. The Tribunal recognized its task was to balance those interests and render a decision in the public interest that would protect the public.<sup>113</sup>
131. The Hearing Tribunal's reasons expressly considered the nature and gravity of the conduct, Dr. Gebhardt's age and experience, his lack of any prior discipline history and the letters of reference, ■■■'s age and vulnerability, the isolated nature of the conduct, the 17.5 months of interim suspension of Dr. Gebhardt's practice during the criminal proceedings, the costs incurred by Dr. Gebhardt for a chaperone after resuming practice, the impacts on ■■■, other mitigating circumstances, the need for deterrence, the need to maintain public confidence in the medical profession, the degree of departure of the conduct from the acceptable, and the sanctions imposed in other comparable cases.
132. The Hearing Tribunal expressly considered the *Bhardwaj (Re)*, *Klein (Re)*, *Ahmad (Re)*, *Levin (Re)*, and *Sazant v. CPSO* cases provided by the Complaints Director where cancellations were ordered. The Tribunal explained that it distinguished these cases based on the number of patients who had been abused, the number of times the conduct occurred, the period of time over which the conduct occurred, and other types of unprofessional conduct engaged in by the physician.

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<sup>111</sup> *Zuk v. Alberta Dental Association and College*, 2020 ABCA 162 at para. 15

<sup>112</sup> Sanctions Decision, para. 15

<sup>113</sup> Sanctions Decision, para. 15



133. The Tribunal also considered cases provided by the Complaints Director where long suspensions were ordered. The Tribunal held that while the facts of every case are unique, the nature of the unprofessional conduct in these cases broadly corresponded to Dr. Gebhardt's conduct in terms of its nature and frequency. Having considered all of the relevant sanctioning factors, the Tribunal concluded that the public interest favored a long suspension, combined with orders to eliminate the risk of similar future conduct.
134. The Hearing Tribunal explained how it decided that a suspension was more appropriate than cancellation. It stated that it would have ordered cancellation, but for specific factors. The Tribunal held that Dr. Gebhardt's conduct was an isolated incident in an otherwise unblemished career, he had cooperated with the College, his patients would be adversely affected by an order for cancellation, and the Tribunal could impose conditions to protect the public going forward. It said that in the circumstances, a suspension of 20 months was appropriate to convey the seriousness of the sanction and to condemn Dr. Gebhardt's conduct, with 17.5 of those months deemed to have been served and the balance held in abeyance to ensure Dr. Gebhardt's compliance with the other sanctions.
135. The Tribunal stated that the condition requiring an indefinite chaperone would ensure that no patient would be at risk of similar conduct in the future, as well as act as ongoing reminder of financial and reputational harms. The requirement for a multidisciplinary assessment would help to uncover and address any risks that might arise in the future.
136. The Hearing Tribunal's decision did not suffer from a lack of responsive justification and was reasonable.
137. The Tribunal weighed and applied the appropriate factors. It expressly considered the gravity of the conduct it found proven, ■■■'s vulnerability due to his developmental delay and the need to maintain public confidence in the medical profession. It gave rational explanations for distinguishing cases in which cancellation had been ordered. It explained that it considered evolving societal expectations for serious sanctions in cases of sexual conduct. The Tribunal also considered the letters of reference in support of Dr. Gebhart as evidence that many of his patients continued to have trust in him despite knowing the findings in the Merits Decision. The Tribunal did not fail to consider the limits of character evidence in cases of sexual conduct.
138. The Tribunal expressly considered whether to order cancellation but held that specific factors weighed in favor of a long suspension, which had been proposed by the Complaints Director as an alternative to cancellation. The Hearing Tribunal demonstrated it was aware of and had considered the consequences of its decision.

**VIII. ORDERS**

139. The appeal is allowed and the findings of unprofessional conduct, sanctions and costs orders against Dr. Gebhardt are quashed. The Panel determined not to refer the matter for a rehearing due to ■■■'s lack of testamentary capacity and due to the passage of time.

140. The cross-appeal is dismissed.

Signed on behalf of the Panel by the Chair:

A handwritten signature in black ink, appearing to read 'Ian Walker', with a long horizontal flourish extending to the right.

Dr. Ian Walker

Dated this 26<sup>th</sup> day of March, 2025.