IN THE MATTER OF THE *HEALTH PROFESSIONS Act*, RSA 2000, c C-7
REGARDING DR. MUSBAH ABOUHAMRA

IN THE MATTER OF AN APPEAL FROM THE DECISIONS OF THE HEARING TRIBUNAL OF THE COLLEGE OF PHYSICIANS AND SURGEONS OF ALBERTA DATED FEBRUARY 10, 2018.

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

## I. Introduction

**[1]** An appeal was held before a panel of the Appeal Committee of Council (the "Review Panel") of the College of Physicians & Surgeons of Alberta (the "College") on January 15, 2019 at the offices of the College in Edmonton, Alberta. In attendance were:

Council members:

Dr. G. Campbell (Chair)
Dr. J. Bradley
Ms. L. Louie
Ms. L. Steinbach
Ms. K. Wood

Also in attendance were:

Mr. Craig Boyer and Mr. James Arendt (student-at-law), legal counsel for the College
Dr. Michael Caffaro, Complaints Director for the College
Mr. William Hembroff, legal counsel for Dr. Abouhamra
Dr. M. Abouhamra, Appellant
Mr. Fred Kozak, Q.C. independent legal counsel to Council

**[2]** Ms. Levonne Louie noted that she had previously been retained to act as an expert witness by Bennett Jones LLP on behalf of one of its clients regarding an unrelated matter. Ms. Louie's involvement was brought to the attention of the parties in advance of the appeal. Counsel for both parties confirmed there was no objection to Ms. Louie's participation in the appeal.

**[3]** Prior to the appeal, Dr. Graham Campbell noted that he had known and worked with Dr. Abouhamra as a resident physician in Calgary in 1998-99 but that he had not had contact with Dr. Abouhamra since that time (and in fact was unaware of the link until seeing Dr. Abouhamra in person at the Appeal). This was brought to the attention of the parties in advance of the appeal. Counsel for both parties confirmed that there was no objection to Dr. Campbell's participation in the appeal.

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

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

- Notice of Appeal dated August 1, 2018
- Email correspondence between Dr. Michael Caffaro and David Kay regarding stay of Hearing Tribunal's decision
- Email correspondence regarding extension of time to hear appeal
- Written Submissions of Dr. Abouhamra dated December 10, 2018
- Materials and Authorities of Dr. Abouhamra
  - Undertaking of Dr. Abouhamra to the College dated February 16, 2007
  - Practice Permit issued to Dr. Abouhamra effective February 4, 2015
  - Email correspondence between Mr. Hembroff and Dr. Caffaro dated September 16, 2016
  - Email correspondence between Mr. Hembroff and Dr. Heisler dated March 10, 2015
  - Notice of Hearing dated September 19, 2017
  - *Health Professions Act*, RSA 2000, c H-7
  - *Hunter v College of Physicians & Surgeons of Alberta,* 2014 ABCA 262
  - *Lum v Alberta Dental Association & College (Review Panel),* 2016 ABCA 154
  - *Sussman v College of Alberta Psychologists,* 2010 ABCA 300
  - *Dunsmuir v New Brunswick,* [2008] 1 SCR 190 [*Dunsmuir*]
  - *Lycka v Alberta (Information and Privacy Commissioner),* 2009 ABQB 245
  - *Malton v Attia,* 2016 ABCA 130
  - *Hennig v Institute of Chartered Accountants of Alberta,* 2008 ABCA 241
  - *R. v Palmer,* [1980] 1 SCR 759 [*Palmer*]
  - *Zuk v Alberta Dental Association and College,* 2018 ABCA 270 [*Zuk*]
  - *Ontario (College of Physicians and Surgeons of Ontario) v Maytham,* 2007 ONCPSD 25 [*Maytham*]
  - *Sabean v Portage LaPrairie Mutual Insurance Company,* 2017 SCC 7
  - *Creston Moly Corp. v Sattva Capital Corp.,* 2014 SCC 53
  - *IFP Technologies (Canada) Inc. v EnCana Midstream and Marketing,* 2017 ABCA 157
  - Member Practice Permits issued to Dr. Musbah Abouhamra, Effective Dates: January 1, 2012, December 6, 2012, December 17, 2013, February 4, 2015, November 23, 2015 and January 1, 2017
  - *R v Briscoe*, 2010 SCC 13 [*Briscoe*]
  - *R v Farmer*, 2014 ONCA 823
  - *Toliver v Koepke*, 2008 ABQB 37
- Exhibit Book of Dr. Abouhamra
- Written Submissions of the Complaints Director of the College of Physicians and Surgeons
  - Dr. Abouhamra's written submissions on sanction provided to the Hearing Tribunal on April 11, 2018
  - *Arabian Muslim Association v. The Canadian Islamic Centre,* 2006 ABCA 152
  - *Dechant v. Law Society of Alberta*, 2000 ABCA 265
  - *Hoffinger v. Law Society of Alberta*, 2010 ABCA 302
  - *Nelson v. Alberta Association of Registered Nurses,* 2005 ABCA 229

    - *Moll v. College of Alberta Psychologists*, 2011 ABCA 110
    - *College of Physical Therapists of Alberta v. J.H.,* 2010 ABCA 303
    - *College of Physicians & Surgeons of Alberta v. Ali*, 2017 ABCA 442
    - *Ho v. Alberta Association of Architects*, 2015 ABCA 68
    - *Moreau-Bérubé v. New Brunswick (Judicial Council),* 2002 SCC 11
    - *Litchfield v. College of Physicians and Surgeons of Alberta*, 2005 ABQB 962
    - *Innovative Insurance Corp. v. E.P.A. Ultimate Concepts Inc.,* 2007 ABCA 358
    - *IFP Technologies (Canada) Inv. v. EnCana Midstream and Marketing*, 2017 ABCA 157
    - *Toliver v. Koepke*, 2008 ABQB 37
    - Excerpts from Law Society of Alberta Code of Professional Conduct - Introduction, Chapter 1 and Chapter 5
- Transcript of the Hearing into the conduct of Dr. Abouhamra held on December 5 and 6, 2017 [Hearing Transcript]
- Consolidated Exhibits 1-51
- Decision of the Hearing Tribunal in the matter of a hearing regarding the conduct of Dr. Musbah Abouhamra dated February 10, 2018
- Decision of the Hearing Tribunal regarding sanction of Dr. Abouhamra dated June 28, 2018
- Authorities referenced by the Review Panel:
    - *Torbey v College of Physicians and Surgeons of Alberta,* 2018 ABCA 285 [*Torbey*]
    - *Baker v Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 [*Baker*]

**[6]** When Dr. Abouhamra filed his appeal, he sought a stay of the decision of the Hearing Tribunal regarding the sanction to be imposed on him, and in particular, the costs award against him. Dr. Caffaro, Assistant Registrar and Complaints Director for the College, agreed to the stay of the Hearing Tribunal's sanction decision on August 10, 2018. Accordingly, the Review Panel notes that the decision requiring Dr. Abouhamra to pay a portion of the costs of the investigation and hearing regarding his conduct is stayed pending the outcome of this appeal.

**[7]** In connection with this appeal, Dr. Abouhamra applied to adduce fresh evidence before the Review Panel which was not considered by the Hearing Tribunal. Dr. Abouhamra provided the Review Panel with two affidavits appending the evidence he sought to adduce on this appeal. The affidavits included the following:

- Affidavit of Dr. Musbah Abouhamra sworn on December 7, 2018, which includes:
    - CPSA "General Infection Prevention & Control Standards Assessment form"

- Affidavit of Dr. Musbah Abouhamra sworn on December 7, 2018, which includes:
    - Correspondence of Dr. Ritchie to Dr. Elghdewi, dated March 14, 2005
    - Correspondence of Mr. Peacock to Dr. Ritchie, dated August 24, 2005
    - Draft Undertaking, dated August 2005
    - Draft Undertaking #2, dated August 2005
    - Correspondence of Mr. Peacock to Mr. Boyer, dated June 6, 2006
    - Draft Undertaking, dated 2006
    - Correspondence of Mr. Peacock to Mr. Boyer, dated August 14, 2006
    - Correspondence of Mr. Boyer to Mr. Peacock, dated September 19, 2006
    - Correspondence of Mr. Peacock to Mr. Boyer, dated October 3, 2006
    - Correspondence of Mr. Peacock to Mr. Boyer, dated November 23, 2006

- Correspondence of Mr. Boyer to Mr. Peacock, dated February 9, 2007
- Correspondence of Mr. Boyer to Mr. Peacock, dated March 26, 2007
- Correspondence of Dr. Mazurek to Ms. Zubiak, dated May 14, 2007
- Correspondence of Dr. Mazurek to Mr. Peacock, dated December 3, 2007
- Memorandum to File from Dr. Ritchie, dated February 6, 2009

## II. Background

**[8]** This appeal concerns the decision of the Hearing Tribunal, dated February 10, 2018, finding Dr. Abouhamra guilty of unprofessional conduct (the "Conduct Decision") in relation to Dr. Abouhamra's breach of an undertaking to the College imposing restrictions on his ability to perform invasive procedures. The scope of the undertaking restricting Dr. Abouhamra's practice and Dr. Abouhamra's understanding of the scope of that undertaking were the central issues before the Hearing Tribunal.

**[9]** In 2005, the College received a complaint (the "Complaint") from a former staff member of the Lloyd Women's Clinic (the "LWC"), the clinic run by Dr. Abouhamra and his wife, regarding concerns about the cleanliness and sterilization processes at the LWC. Shortly thereafter, the College performed an unannounced site visit and confirmed that the implemented practice of cleaning, disinfecting and sterilizing the medical instruments, supplies, and the office did not meet the minimum standards of practice of the College. The College directed that the physicians working at the LWC immediately cease performing invasive procedures at the LWC.

**[10]** Dr. Abouhamra took steps to address the deficiencies identified by the College and, as directed by the College, prepared a manual outlining the procedures to be followed at the LWC to ensure appropriate levels of cleanliness and sterilization. The Investigation Chair of the College agreed to forego a direction that the issue of cleanliness and sterilization at the LWC proceed to a hearing before an Investigating Committee if Dr. Abouhamra signed an undertaking in which he agreed to take certain steps to ensure compliance with the minimum standards of practice (the "Undertaking", signed February 16, 2007). This included that Dr. Abouhamra agree to refrain from performing invasive procedures in his office until he received further approval from the College, and that Dr. Abouhamra prepare and adhere to a procedure manual, to be approved by the College, regarding sterilization and cleanliness procedures at the LWC.

**[11]** The Undertaking permitted Dr. Abouhamra to continue to perform invasive procedures in a hospital setting. Dr. Abouhamra's Practice Permit noted that he was "Restricted from performing invasive procedures in the office."

**[12]** In 2015, Dr. Abouhamra's privileges at Lloydminster Hospital were suspended by the College of Physicians and Surgeons of Saskatchewan, such that he could no longer perform invasive procedures in the Lloydminster Hospital. The College in Alberta added a restriction to Dr. Abouhamra's practice permit noting that his practice was "Restricted to practicing in an office based practice."

**[13]** In September of 2016, the Saskatchewan Court of Queen's Bench quashed the decision to suspend Dr. Abouhamra's hospital privileges. In November 2017, the College in Alberta removed the restriction relating to office-only practice.

**[14]** Because of the limitations placed on his practice in Lloydminster, and in an effort to continue the viability of his practice while also addressing perceived need, Dr. Abouhamra sought permission from the College to work at the Bonnie Doon Clinic in Edmonton (the "BDC"). That permission was confirmed by the Complaints Director in March of 2015.

**[15]** Dr. Abouhamra performed invasive procedures at the BDC, and upon request of the College, provided the details of the invasive procedures that he had performed to the College. Shortly thereafter, the College alleged:

> That between April 1, 2015 and December 3, 2016, you did perform invasive procedures on over 50 occasions on patients seen by you at the Bonnie Doon Medical Centre contrary to the restrictions on your practice set out in paragraph 1 of your Undertaking to the College of Physicians & Surgeons of Alberta dated February 16, 2007 and the condition imposed on your Practice Permit.
>
> (the "Charge")

## III. Summary of the decision of the Hearing Tribunal

**[16]** The Hearing Tribunal held a hearing into the conduct of Dr. Abouhamra on December 5 and 6, 2017. The Hearing Tribunal heard from three witnesses on behalf of the College:

- Ms. Leanne Minkler, who is a Registered Nurse and Physician Health Advisor in the Physician Health Monitoring Program at the College;
- Dr. Ritchie, the physician who investigated the Complaint, conducted the unannounced site visits at the LWC and investigated the alleged breach of the Undertaking in 2016 leading to the Charge; and,
- Dr. Susan Ulan, the Assistant Registrar responsible for registration and practice readiness at the College.

**[17]** These witnesses gave evidence in support of the College's argument that the practice restriction prevented Dr. Abouhamra from performing invasive procedures in any setting other than a hospital setting.

**[18]** Dr. Abouhamra gave evidence on his own behalf before the Hearing Tribunal. He readily admitted to having performed the invasive procedures at the BDC as set out in the Charge. Dr. Abouhamra submitted that the Undertaking did not restrict his ability to perform invasive procedures at the BDC, arguing that the scope of the undertaking did not extend to Dr. Abouhamra's ability to perform invasive procedures at an office other than the LWC.

**[19]** In the alternative, Dr. Abouhamra argued that he understood the scope, effect and intent of the Undertaking to apply only to performing invasive procedures at the LWC, and that he could perform invasive procedures at the BDC.

**[20]** The Hearing Tribunal found that the Undertaking was clear and unambiguous: Dr. Abouhamra was restricted to performing invasive procedures in a hospital setting only. The Hearing

Tribunal found that, when read as a whole, the Undertaking was clearly intended to apply more broadly to any setting outside of a hospital where Dr. Abouhamra was practicing.

**[21]** With respect to Dr. Abouhamra's understanding of the scope of the Undertaking, the Hearing Tribunal found that Dr. Abouhamra's interpretation was inconsistent with the College's intent in imposing the Undertaking, and inconsistent with a plain reading of the language contained in the Undertaking and the Practice Permit. The Hearing Tribunal then found Dr. Abouhamra to have been willfully blind in his chosen interpretation of the Undertaking.

**[22]** In its written decision on February 10, 2018, the Hearing Tribunal determined that Dr. Abouhamra's conduct in performing invasive procedures at BDC amounted to unprofessional conduct because he breached his Undertaking with the College and because his performance of invasive procedures posed a risk to the public.

**[23]** On June 28, 2018, the Hearing Tribunal issued its decision on the appropriate sanction for the finding that Dr. Abouhamra was guilty of unprofessional conduct, and imposed a seven day suspension which it determined had already been served (the "Sanction Decision"). It also awarded a portion of the costs of the investigation and hearing to be payable by Dr. Abouhamra.

## IV. Grounds of Appeal

**[24]** The Notice of Appeal sets out five grounds of appeal regarding the Conduct Decision:

1. There was evidence available to the College related to the manner and intended scope of the practice restriction/Undertaking, which, if produced by the College before the Tribunal, would have offered support for Dr. Abouhamra's position.
2. The lawyer representing the College at the Hearing was directly involved in the drafting of the Undertaking at issue and had knowledge of the intended meaning, purpose and scope of the Undertaking and practice restriction, and should therefore have more properly attended the Hearing as a witness as opposed to an advocate for the College.
3. The Tribunal gave undue weight to irrelevant facts and ignored or failed to adequately consider relevant facts when attempting to interpret the meaning and intended scope of the practice/Undertaking.
4. The Tribunal erred in finding that Dr. Abouhamra was "willfully blind" to the intended meaning and scope of the practice restriction/Undertaking.
5. The Tribunal erred in concluding that the public was at risk when Dr. Abouhamra performed invasive procedures in the BDC.

## V. Preliminary Matters

### a. Application to Adduce Fresh Evidence

**[25]** Dr. Abouhamra applied to adduce new evidence on appeal. He asked the Review Panel to consider an affidavit sworn by him with attached correspondence related to the Undertaking, as itemized above. According to Dr. Abouhamra, this evidence informed the intended scope and meaning of the Undertaking because it illustrated how the scope of the Undertaking was conveyed to Dr. Abouhamra. In turn, Dr. Abouhamra's understanding of the Undertaking was formed in part based on the way in which the undertaking and practice restriction was communicated to him over time by the College.

**[26]** The fresh evidence consists of the entire chain of communication between Dr. Abouhamra's counsel at the time, Mr. Peacock, and the College between 2005 and 2009 concerning the Complaint and Dr. Abouhamra's Undertaking. In Dr. Abouhamra's submission, it was unfair for the College to introduce into evidence only one side of the chain of email correspondence, being the correspondence that conveyed a restrictive interpretation of the Undertaking.

**[27]** Dr. Abouhamra argued that the College had this information within its possession, and that it would have offered support for Dr. Abouhamra's position before the Hearing Tribunal. The "missing" correspondence was not in Dr. Abouhamra's possession at the time of the Hearing. His current counsel had not obtained the entire file including additional correspondence between Dr. Abouhamra's past counsel and the College until after the Hearing had concluded.

**[28]** Counsel for Dr. Abouhamra first attempted to introduce this evidence to the Hearing Tribunal at the sanction hearing. He asked that the Hearing Tribunal consider the new evidence in determining the appropriate sanction for unprofessional conduct, but Dr. Abouhamra's counsel did not request re-consideration of their decision regarding unprofessional conduct in light of this information. The Hearing Tribunal found that the new information was an attempt to provide further evidence and arguments in support of Dr. Abouhamra's position at the conduct hearing, "[and]…[g]iven that that the hearing on the merits is concluded, and the Hearing Tribunal has already issued its finding that the allegation is proven on a balance of probabilities, the Hearing Tribunal is *functus officio*. Neither party suggested otherwise" (Sanction Decision, at p. 8). Accordingly, the Hearing Tribunal decided it was not in a position to reconsider its findings, and even if it could, it would not be appropriate to do so without putting the documentation to the appropriate witness and providing opportunity for cross-examination (Sanction Decision, at p. 8).

**[29]** The Hearing Tribunal found that with respect to sanction, even if the fresh evidence could be admitted and relied upon, it would not "provide the Hearing Tribunal with any new information with respect to penalty" (Sanction Decision, at p. 9). Therefore, the Hearing Tribunal did not consider the new evidence in determining an appropriate sanction.

**[30]** The issue of whether new evidence ought to have been considered by the Hearing Tribunal is an issue of procedural fairness, and is therefore reviewable on a standard of correctness. Although it was not challenged on appeal, Council agrees with the Hearing Tribunal's analysis of the relevance and use it could make of the fresh evidence in relation to the Sanction Decision.

**[31]** The question before the Review Panel now is whether the evidence ought to be admitted on appeal. The test to resolve whether an appellant may adduce new evidence on appeal is set out in *Palmer* at p. 775. In order to be successful in his request to adduce new evidence, Dr. Abouhamra must demonstrate that the new evidence fulfills each of the following requirements, that the new evidence:

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

**[32]** The Review Panel finds that Dr. Abouhamra has not satisfied the first requirement of the *Palmer* test. While it is true that the information was available to the College, it does not follow that the College had a duty to disclose such information. First, the information does not materially affect the College's understanding of the Undertaking, nor is it a full answer to the Charge. Second, this information was readily available to counsel for Dr. Abouhamra had he been inclined to seek it. It should have been clear to Dr. Abouhamra that one of the major issues at the Hearing would be his understanding of the scope of the practice restriction given that the allegation was that he failed to abide by the practice restriction. Even though Dr. Abouhamra's current counsel was not representing him at the time of the Complaint or at the time that the Undertaking was drafted and signed, it should have been apparent to Dr. Abouhamra that the context of that Undertaking informed the Charge against him. Dr. Abouhamra bears the onus of ensuring that he has gathered all relevant information in relation to the Charge to meet the case against him. The relative ease in obtaining this information from Mr. Peacock after the Hearing and prior to Sanction illustrates that had Dr. Abouhamra or his counsel exercised due diligence, Dr. Abouhamra could have had the benefit of that information before the Hearing Tribunal. After the Hearing, when the relevance of such information became even more apparent, Dr. Abouhamra's counsel was able to obtain the information in a timely manner from Dr. Abouhamra's former counsel. This weighs against finding in favour of Dr. Abouhamra's application to adduce fresh evidence.

**[33]** Given that the Review Panel has found that Dr. Abouhamra has failed to satisfy the *Palmer* test on the basis that he has not passed the first requirement of the test, the Review Panel will assess the remaining steps to provide a fulsome record of the Review Panel's decision.

**[34]** The Review Panel finds that the fresh evidence is related to a potentially determinative issue at the Hearing, namely Dr. Abouhamra's and the College's understanding of a practice restriction, and that it appears credible, therefore parts two and three of the *Palmer* test are met.

**[35]** Finally, the Review Panel finds that Dr. Abouhamra has not satisfied the fourth requirement of the *Palmer* test, though not for the reason submitted by the Complaints Director. The Complaints Director submitted that the "Hearing Tribunal confirmed that the new records would not change its finding that Dr. Abouhamra had breached his practice restriction and that such conduct amounted to unprofessional conduct, which means the fourth branch of the *Palmer* test is not met."

**[36]** In our reading, the Hearing Tribunal specifically stated that procedural fairness concerns did not allow it to reconsider its findings as it was *functus officio*, and even if it could, it would be inappropriate to do so "without putting the documentation to the appropriate witness and providing opportunity for cross-examination". Therefore, the Hearing Tribunal did not determine whether the fresh evidence would have an impact on its findings, and the Hearing Tribunal emphasized that it was not asked to do so (Sanction Decision, at p. 8). In the Review Panel's view, contrary to the argument of the Complaints Director, the Hearing Tribunal's comments are properly confined to whether the new information would be relevant or helpful with respect to sanction, and the Hearing Tribunal determined that it would not.

**[37]** The Review Panel dismisses Dr. Abouhamra's request to consider new evidence on the basis that Dr. Abouhamra has not satisfied each of the *Palmer* requirements. However, even though Dr. Abouhamra has not discharged his burden to have the Review Panel consider this evidence in the context of this appeal, it is open to the Review Panel to exercise its discretion to order a new hearing. This would provide a mechanism in which Dr. Abouhamra could have the opportunity to adduce that evidence at a rehearing of the charge against him.

**[38]** It would only be appropriate for the Review Panel to exercise its discretion to order a rehearing if there was a clear and compelling argument that the outcome at the Hearing would have been different had the additional evidence been adduced at trial. This is, in essence, the fourth requirement of the *Palmer* test.

**[39]** Based upon its review of Dr. Abouhamra's affidavit evidence including the full correspondence chain between 2005 and 2009 relating to his Undertaking and practice restriction, the Review Panel concludes that there is no compelling reason that this evidence would have impacted the outcome of the Hearing.

**[40]** The Hearing Tribunal was first tasked with determining whether the Undertaking is unclear or ambiguous as written. The information provided constitutes some evidence to indicate what was in the minds of the parties during the time that the Undertaking was drafted, but does not change the text of the Undertaking or a proper understanding of it.

**[41]** Second, the Hearing Tribunal had to consider whether Dr. Abouhamra had a reasonable belief that he was in compliance with the undertaking when he performed invasive procedures at BDC. The discrepancy regarding Dr. Abouhamra's understanding of the scope of the Undertaking and the College's understanding of the scope of the Undertaking is clear from the evidence that was adduced at the Hearing. The Review Panel finds that the additional evidence, if adduced at the Hearing and considered by the Hearing Tribunal, would not have changed the Hearing Tribunal's decision.

## VI. Standard of Review

**[42]** The parties are agreed on the appropriate standard of review on this appeal.

**[43]** The standard of review for the purposes of the Review Panel's review of a decision of the Hearing Tribunal in relation to the conduct of a regulated member and the sanction is

reasonableness, except for issues of procedural fairness, which are reviewed on the correctness standard (*Torbey* at para 8).

**[44]** Findings of fact, inferences of fact and the exercise of discretion are all subject to the reasonableness standard. Likewise, the Hearing Tribunal's interpretation of the appropriate standard of conduct and the application of the facts against that standard of conduct in determining what constitutes unprofessional conduct must be afforded deference and will only be disturbed if those findings are unreasonable. On appeal, the Review Panel may not substitute its own findings for that of the Hearing Tribunal unless those findings are truly outside a range of possible acceptable outcomes, given the facts and law (*Dunsmuir* at para 47).

**[45]** Matters of procedural fairness are an exception to the default rule of reasonableness and are instead subject to the correctness standard. The role of the Review Panel is not to afford deference to the decision of the Hearing Tribunal with respect to matters of procedural fairness, but to instead consider whether the process undertaken by the Hearing Tribunal met the appropriate level of fairness required by law (*Baker* at paras 22-28; *Ho* at para 19).

**[46]** The duty of fairness requires that the investigated member know the case he is being asked to meet, have the opportunity to present his case, and have the matter heard before an impartial decision maker.

## VII. Findings and Decision

### 1. There was evidence available to the College related to the manner and intended scope of the practice restriction/Undertaking, which, if produced by the College before the Tribunal, would have offered support for Dr. Abouhamra's position

**[47]** This ground of appeal raises a question of procedural fairness. The Review Panel must consider whether the College's failure to enter the complete chain of email correspondence between the College and Dr. Abouhamra's previous counsel, Mr. Peacock, during the period of 2005-2009 (the "Additional Correspondence") resulted in a lack of procedural fairness in the hearing. In other words, the Review Panel must consider whether it was correct for the College to not produce the Additional Correspondence either to Dr. Abouhamra or to the Hearing Tribunal for its consideration.

**[48]** The Review Panel finds that the Additional Correspondence was not material to the determination of the intended scope of the Undertaking, nor was it material to determining Dr. Abouhamra's understanding of his Undertaking.

**[49]** Dr. Abouhamra points to earlier drafts of the Undertaking which are included in the Additional Correspondence as evidence that in Dr. Abouhamra's view, the practice restriction was intended to address the practices for infection prevention and control at the LWC, and not to address a more general concern about Dr. Abouhamra's knowledge of appropriate infection prevention and control measures. However, Dr. Abouhamra's interpretation was clearly conveyed to the Hearing Tribunal in his testimony, particularly evidence of his candid and forthcoming manner of communicating with the College.

**[50]** In the result, the Hearing Tribunal had a sufficient evidentiary foundation upon which to base its decision of the actual scope of the Undertaking, as well as Dr. Abouhamra's understanding of its scope. The Additional Evidence would not have affected the result, therefore Dr. Abouhamra was not deprived of a fair hearing because of the College's decision to admit only part of the record of correspondence between 2005 and 2009 into evidence.

**2. The lawyer representing the College at the Hearing was directly involved in the drafting of the Undertaking at issue and had knowledge of the intended meaning, purpose and scope of the Undertaking and practice restriction, and should therefore have more properly attended the Hearing as a witness as opposed to an advocate for the College.**

**[51]** The Review Panel agrees with the Complaints Director's submission that "the focus of the Hearing Tribunal's inquiry was the objective interpretation of the practice restriction as set out in the Undertaking and in the annual practice permit." The fact that counsel representing the Complaints Director at hearing also happened to be counsel for the Complaints Director when the undertaking was drafted is not germane to the understanding of that Undertaking.

**[52]** Counsel's subjective understanding of the drafting process is not at issue, nor even his desired outcome in drafting the Undertaking. Rather, the issue is the objective understanding of the Undertaking and the reasonableness of Dr. Abouhamra's subjective understanding. Further, if counsel's involvement was necessary to mount a defense for Dr. Abouhamra, it was Dr. Abouhamra's prerogative to request him as a witness, which was not done. It was never alleged that counsel for the Complaints Director had information dispositive to the Hearing or this appeal, and therefore to allege that he should have more properly been a witness is disingenuous, as neither party asserted that his information was necessary. Further, it is entirely expected that College counsel could be involved in drafting restrictions and also be involved in their prosecution. This allegation is therefore without merit and is dismissed.

**[53]** In connection to this argument, Dr. Abouhamra argued that he was subjected to a Hearing that was patently unfair. In his view, because the Complaints Director presented witnesses to the Hearing Tribunal who had no helpful information and served only to try to support a finding of guilt against Dr. Abouhamra, the Complaints Director was improperly focused on securing a finding that Dr. Abouhamra was guilty of unprofessional conduct. Dr. Abouhamra argued that "the purpose of the Hearing and the role of the College and its lawyer is simply to assist the Hearing Tribunal in seeking the truth, rather than to secure a finding of guilt."

**[54]** Dr. Abouhamra also argues that the witnesses "were confident in the evidence in support of such a finding, but conveniently forgetful and evasive in regard to any evidence which may support Dr. Abouhamra's position" (Written Argument of Dr. Abouhamra, at p. 28). He asserts that as "a result of witnesses before, and not before, the Tribunal, the Hearing was patently unfair to Dr. Abouhamra" (Written Argument of Dr. Abouhamra, at p. 28).

**[55]** For clarity, it is apparent that the Complaints Director had evidence that Dr. Abouhamra was in violation of the Undertaking based upon the College's investigation, and the Complaints Director believed there was sufficient evidence to warrant a hearing. The Complaints Director's role at the hearing is to convince the Hearing Tribunal of his position. This is not improper, in fact, it is consistent with the Complaints Director's mandate. It is up to counsel for the investigated member

to expose weaknesses, if any, in the Complaints Director's case, including cross-examining witnesses where appropriate.

**[56]** The College also provides independent legal counsel to the Hearing Tribunal to ensure the Tribunal is fair and impartial when adjudicating both the evidence from the College's Complaints Director and the person responding to the complaint. The Review Panel agrees that the testimony as read in the Transcript of the Hearing from Dr. Ulan and her exchange with Mr. Hembroff may have seemed equivocal and unresponsive. But that is something to be considered by the Hearing Tribunal in weighing her testimony, and it appears that the Hearing Tribunal did just that when deciding that Dr. Ulan's opinion was not "helpful to the Hearing Tribunal in determining the intent of the Undertaking" (Conduct Decision, p. 18).

**[57]** The issue of fairness is whether Dr. Abouhamra had the opportunity and appropriate procedural opportunities to present his case and to challenge the case presented by the Complaints Director. Dr. Abouhamra did both. He had the opportunity, through his counsel, to cross-examine witnesses and expose weaknesses in testimony, and he did so. Dr. Abouhamra exposed inconsistencies in the presentation of evidence by a witness, and that testimony was not considered, perhaps as a result. If there were other witnesses that would have been valuable to Dr. Abouhamra's submissions, it was incumbent upon Dr. Abouhamra to compel their attendance at the Hearing. If there was evidence that arose during the Hearing that required an unexpected response, Dr. Abouhamra could have requested an adjournment and an opportunity to present rebuttal evidence, but he chose not to do so.

**[58]** The Hearing was clearly fair to Dr. Abouhamra, and the fact that the Complaints Director presented his case in the best possible light is not grounds for finding procedural unfairness. The assertion is without merit and is dismissed.

**3. The Tribunal gave undue weight to irrelevant facts and ignored or failed to adequately consider relevant facts when attempting to interpret the meaning and intended scope of the practice/Undertaking.**

**[59]** Dr. Abouhamra argues that a sanction ought not to be ordered against a regulated member for breach of an undertaking unless that undertaking is clear and unequivocal (Dr. Abouhamra's Written Argument, at p. 15 citing *Zuk* at para 158). Dr. Abouhamra further argues that the fact that the scope of the Undertaking is central to the Hearing and to this appeal should be taken as proof that the Undertaking is too ambiguous to garner sanction.

**[60]** It is alleged that between April 1, 2015 and December 3, 2016, Dr. Abouhamra performed invasive procedures on over 50 occasions on patients seen at the BDC contrary to the restriction on his practice set out in paragraph 1 of his Undertaking and the condition imposed on his Practice Permit (Exhibit 1).

**[61]** Paragraph 1 of the Undertaking reads:

> Until the Physician receives further approval in writing from the registrar of the College (the "Registrar"), the Physician will not perform any invasive procedures in the Physician's office,

including but not limited to endometrial biopsy, interureteral device insertion, cervical polypectomy, tissue biopsy, vaginal cyst excision and punch biopsy." (Exhibit 2)

**[62]** The Practice Permit condition specifies: "Restricted from performing invasive procedures in the office" (Exhibit 23).

**[63]** Dr. Abouhamra admits that such procedures were performed at the BDC, but submits that his performing those invasive procedures was not contrary to the restriction as set out in paragraph 1 of the Undertaking and the condition on the Practice Permit.

**[64]** Dr. Abouhamra essentially argues that the very fact of a disagreement between a regulated member and its professional regulating body regarding the interpretation of an agreement between those parties implies that the enforcement of the agreement is impossible. In the Review Panel's view, that assumption goes beyond what the Court of Appeal found in *Zuk*.

**[65]** In *Zuk*, Dr. Zuk had agreed to a restriction on the content of his radio and internet advertising, and was found by a tribunal to be in breach of that undertaking when advertisements on a bus stop bench and coupons for limited time discounts did not satisfy the restrictions he had promised in relation to advertising. The Alberta Dental Association & College Council upheld the tribunal's determination that the thrust of the undertaking related to the nature of the advertisements being made and the medium in which they were transmitted. However, the Court found it unreasonable to conclude that Dr. Zuk should have read the restriction on his "radio and internet" advertisements to include all forms of advertising when the undertaking clearly said otherwise. It is in this context that the Court of Appeal insisted that for a disciplinary body to sanction a professional member for breach of an undertaking, that undertaking must be clear and unequivocal. The Court of Appeal stated, "[w]ords must not be given meaning they cannot possibly bear" (*Zuk* at paras 157-159).

**[66]** In the present case, the parties disagree whether the words "Physician's office" in paragraph 1 of the Undertaking includes the BDC, but this is not a case of extrapolating meaning beyond that which the words could bear. This is not so ambiguous as to render the Undertaking moot. Obviously, if Dr. Abouhamra had done such procedures in his own office, the LWC, he would have been in breach of the Undertaking and this would warrant a finding of unprofessional conduct and sanction. But "Physician's office" could also conceivably include any office where the physician was working, whereas "radio and internet" cannot possibly include "bus stop bench" and "coupons." The parties disagree, but this is not a case where either party asserts a position that the words cannot bear. Therefore, the argument that the Undertaking is too ambiguous to warrant sanction must fail.

**[67]** In Dr. Abouhamra's view, the Hearing Tribunal's finding that the Undertaking was clearly intended to restrict his ability to perform invasive procedures in any office setting, as opposed only to the LWC, the office in which he worked exclusively at the time that the Undertaking was given, was unreasonable.

**[68]** According to Dr. Abouhamra, each reference to the "Physician's office" in the Undertaking was in fact, intended to reference Dr. Abouhamra's then current office. Therefore, paragraph 1 of

the Undertaking ought to properly be read as restricting the performance of invasive procedures from being performed at the LWC.

**[69]** The Review Panel may only allow Dr. Abouhamra's appeal on this ground if it finds that the Hearing Tribunal was unreasonable in its finding that the Undertaking applied more broadly than simply the LWC, but in fact restricted Dr. Abouhamra's ability to perform invasive procedures in any clinic.

**[70]** The Hearing Tribunal carefully considered Dr. Abouhamra's arguments on this point. In fact, the Hearing Tribunal states that after reading paragraphs 1, 2 and 3, "one possible interpretation of the Undertaking is that it only applies to Dr. Abouhamra while he is practicing at the Lloydminster Clinic, and that it would not apply to other locations where he might also be practicing." However, the Hearing Tribunal proceeds to consider paragraph 6 of the Undertaking, which provides that "[u]ntil the Registrar approves otherwise, the Physician shall continue to perform all invasive procedures only in a hospital setting." The Hearing Tribunal emphasizes that this clause leaves no room for interpretation. Invasive procedures must only be performed in a hospital setting. Dr. Abouhamra acknowledged that the BDC was not a hospital setting, and therefore, he was in violation of the restriction when performing invasive procedures at BDC (Conduct Decision, at p.17).

**[71]** The Hearing Tribunal clearly articulated its conclusions regarding the scope of the Undertaking, based upon the evidence. The Hearing Tribunal acknowledged the parties' competing views and articulated clear reasoning for its conclusion that the Undertaking precluded Dr. Abouhamra from performing procedures in a non-hospital setting without the registrar's approval.

**[72]** The Hearing Tribunal also considered the wording of the practice permit, and the conclusion that a member of the public would reach about Dr. Abouhamra's practice restrictions having regard to the wording of the practice permit. The Hearing Tribunal determined that a member of the public reading such a condition would conclude that the restriction applied to performance of invasive procedures in any clinic setting (Conduct Decision, at p.17).

**[73]** In reaching their conclusion, the Hearing Tribunal also considered the testimony of Dr. Ritchie. His evidence highlighted that the concerns regarding infection prevention and control were centered on the judgment of this physician, and therefore would follow him from office to office. Having regard to that context, it was reasonable for the Hearing Tribunal to conclude that the practice restriction would similarly follow (Conduct Decision, at p.18).

**[74]** The Review Panel finds that the decision of the Hearing Tribunal regarding the intended scope of the practice permit is rooted in logical consideration of the evidence as a whole. Therefore, the Hearing Tribunal's conclusions in this regard are reasonable and upheld.

**4. The Tribunal erred in finding that Dr. Abouhamra was "willfully blind" to the intended meaning and scope of the practice restriction/Undertaking.**

**[75]** The Hearing Tribunal outlines four possible scenarios posed to counsel for the Complaints Director and counsel for Dr. Abouhamra (Conduct Decision, at p. 15):

> 1) Dr. Abouhamra was fully compliant with an appropriate interpretation of the Undertaking, and satisfied the conditions of it.

2) Dr. Abouhamra had a reasonable and genuine, even if incorrect, interpretation of the Undertaking and believed he was compliant with it.

3) Dr. Abouhamra knew of the College's interpretation of the Undertaking and he knowingly breached it.

4) Dr. Abouhamra was willfully blind as to what the Undertaking meant and breached it with intentional disregard.

**[76]** Given the Hearing Tribunal's conclusions with respect to the intended scope of the Undertaking as described above, the first option is rejected as Dr. Abouhamra was not compliant with the Hearing Tribunal's interpretation of the Undertaking. With respect to the third option, there is no evidence to suggest that Dr. Abouhamra knew of the College's interpretation of the Undertaking, and chose to ignore it.

**[77]** The Hearing Tribunal found that Dr. Abouhamra should not have interpreted the email exchange with the former Complaints Director as consent to perform invasive procedures at the BDC. Dr. Abouhamra's request did not include a specific request for permission to perform invasive procedures, nor did the permission granted include a specific request in relation to invasive procedures (Conduct Decision, at p. 18).

**[78]** The Hearing Tribunal concluded that on account of the change in Dr. Abouhamra's practice resulting from the suspension of his hospital privileges at Lloydminster Hospital, and the resulting financial pressures impacting Dr. Abouhamra at that time, he would be more inclined to view the restrictions on his Undertaking in a more favourable light. On a balance of probabilities, the Hearing Tribunal found that "Dr. Abouhamra was willfully blind in his chosen interpretation" (Conduct Decision, at p. 19).

**[79]** With respect, the Review Panel finds that conclusion to be unreasonable in light of the evidence.

**[80]** The doctrine of willful blindness imputes knowledge to an individual whose suspicion is aroused to the point where he or she sees the need for further inquiries, but deliberately chooses not to make those inquiries. In the criminal law context, willful blindness has been held to be equivalent to actual knowledge (*Briscoe* at para 21). Willful blindness describes a state of deliberate ignorance of a certain fact, not merely a failure to inquire (*Briscoe* at para 24).

**[81]** To imply that Dr. Abouhamra possessed willful blindness as to his practice restrictions, it is not enough to find that Dr. Abouhamra was wrong about his practice restrictions. It is not even enough that Dr. Abouhamra failed to inquire whether he might be wrong. Willful blindness requires that Dr. Abouhamra knew or should have known that his interpretation was wrong and, according to the Hearing Tribunal, he breached it with intentional disregard. This is a step too far from what the evidence demonstrates.

**[82]** With respect to Dr. Abouhamra's interpretation of the Undertaking, the Hearing Tribunal adequately explained why it viewed the Undertaking differently than he did, but it did not explain how Dr. Abouhamra intentionally disregarded the Hearing Tribunal's preferred interpretation. The

Hearing Tribunal explained that Dr. Abouhamra should have come to a different conclusion than he did, especially had he reviewed the Undertaking at the time of the decision to work at BDC, but the Hearing Tribunal did not point to any evidence demonstrating that Dr. Abouhamra's conclusion was a deliberate or considered attempt to avoid the Hearing Tribunal's preferred interpretation (Conduct Decision, at p. 19).

**[83]** In fact, the Hearing Tribunal highlighted passages demonstrating that Dr. Abouhamra's interpretation might be reasonable and genuine, even if incorrect. The Hearing Tribunal specifically acknowledged that "one possible interpretation of the Undertaking is that it only applies to Dr. Abouhamra while he is practicing at the LWC, and that it would not apply to other locations where he might also be practicing" (Conduct Decision, at p. 17). Ultimately, the Hearing Tribunal concluded that Dr. Abouhamra's interpretation was incorrect, but it was found by the Hearing Tribunal to be a reasonable conclusion of the scope of the Undertaking, and one that Dr. Abouhamra believed to be applicable.

**[84]** It is clear that the words "Physician's office" are not defined in the Undertaking. But the term "Physician" is defined and applies to Dr. Abouhamra. Using the plain and ordinary meaning of the possessive nature of "Physician's office", it is certainly reasonable to assume that the paragraph applies to any office owned or under the control of the Physician in question. Indeed, at the time the Undertaking was drafted, for the purposes of invasive procedures performed by this physician, it appears from the Undertaking that only two options were considered: either the Physician could perform such invasive procedures in the hospital setting (paragraph 6) or in his office (which was forbidden under paragraph 1). The condition in the Practice Permit could be read either way, as it only indicates that Dr. Abouhamra is restricted from performing invasive procedures in the office. Again, since at the time of the permit there was only one office, it is arguable that the condition applied only to that office.

**[85]** In summary, Dr. Abouhamra's interpretation is reasonable, in light of the qualification contained in paragraph 6 which emphasizes that Dr. Abouhamra could perform invasive procedures, but only in the hospital as that was the only other venue then available.

**[86]** With this in mind, the Undertaking appears silent or at least unclear on the question of whether Dr. Abouhamra could perform invasive procedures in an office setting that was not owned or controlled by him, perhaps because such a scenario was not contemplated at the time of the Undertaking. The concern giving rise to the Undertaking was specific to Dr. Abouhamra's knowledge and implementation of infection prevention and control, and accordingly Dr. Abouhamra was forbidden from performing invasive procedures when he was the one responsible for determining those infection controls (at his office). But, Dr. Abouhamra was allowed to continue to perform invasive procedures in the hospital, presumably because the processes of infection prevention and control at the hospital were compliant with accepted standards of practice, and not subject to Dr. Abouhamra's control.

**[87]** A reasonable conclusion is that a clinic setting where Dr. Abouhamra was not responsible for determining infection prevention and control measures could be akin to a hospital setting in this context. In either setting, the specific concern with respect to Dr. Abouhamra's control and oversight of infection prevention does not arise, and therefore need not be ameliorated by a practice restriction.

**[88]** Given the ambiguity of the Undertaking as to the specific location of its applicability, and the evidence that the concern was primarily related to Dr. Abouhamra's oversight of infection and prevention and control, which was rendered moot in a clinic such as BDC, the Review Panel finds that though the Hearing Tribunal may be correct in its interpretation of the Undertaking, it is unreasonable to find that Dr. Abouhamra could not genuinely and reasonably believe differently, and therefore was willfully blind to the notion that the Undertaking applied to performing invasive procedures in any clinic setting.

**[89]** Further, the evidence is compelling that Dr. Abouhamra took the Undertaking and his practice restriction very seriously. From the time the restriction was imposed in 2007 to date, he abided by the restrictions imposed in relation to performing invasive procedures at LWC. He has not performed any invasive procedures in his office, the LWC. He continued to respect the restriction when the location of his office changed, indicating that he understood it was specific to concern with respect to his knowledge and implementation of infection control measures.

**[90]** Dr. Abouhamra was aware that he was being monitored for breaches of the Undertaking. In response to every concern raised by the College that some billings for invasive procedures originated at his office, Dr. Abouhamra explained fully and satisfactorily to the College that these were bookkeeping errors and that, in fact, all invasive procedures had been performed at the hospital.

**[91]** In addition, the Undertaking allows Dr. Abouhamra to perform invasive procedures outside the hospital setting if the Registrar approves otherwise. Though the Review Panel agrees with the Hearing Tribunal's findings that specific permission for performance of invasive procedures was neither explicitly requested nor granted in the email correspondence available, Dr. Abouhamra clearly requested permission from the College to work at the BDC and received that permission.

**[92]** As Dr. Abouhamra does not need permission to work at any clinic in Alberta, it is reasonable for him to have interpreted this permission as being related to performance of the full spectrum of procedures that are regularly performed at that clinic, including invasive procedures. Even if Dr. Abouhamra was incorrect in his conclusion that he had such permission, Dr. Abouhamra's interpretation is reasonable given his decision to seek permission prior to commencement of work at that facility. Such a request certainly belies a willful blindness to the practice restriction he was facing, especially in light of Dr. Abouhamra's knowledge that the College was closely monitoring his billing details.

**[93]** Moreover, it would seem on the evidence that Dr. Abouhamra's subjective conclusion that he was acting in accordance with his Undertaking by seeking permission to work at BDC was shared by those at BDC, and therefore reasonable from an objective standard. There is evidence that BDC was aware of his practice restrictions. Dr. Abouhamra was advised to inform BDC of the conditions on his permit and no one suggested that he did not provide this information. In addition, BDC was informed of his conditions separately by the College. This is clear from Dr. Ulan's testimony that the CPSA was under an obligation pursuant to the *HPA* to send out a section 119 letter to a new place of work (in this case, BDC) as the College does not rely on physicians voluntarily disclosing practice restrictions imposed on them (Hearing Transcripts, at pp. 96-97).

**[94]** Therefore, if BDC was informed by Dr. Abouhamra of the conditions on his permit and restrictions on his practice, and BDC was also informed via a section 119 letter from the College, which the College is obligated to provide, and according to Dr. Ulan, would have been sent, then BDC appears to have interpreted the restrictions in the same manner as Dr. Abouhamra. This does not indicate that the Tribunal was unreasonable in its interpretation of the restrictions, but it does demonstrate that the Hearing Tribunal was unreasonable in concluding that Dr. Abouhamra was deliberately ignorant in his interpretation of the restrictions. Dr. Abouhamra's interpretation appears to be one shared by others, which indicates that it is objectively believable and reasonable.

**[95]** In summary, it strains credulity that someone who had abided by imposed practice restrictions fastidiously for nearly a decade, and who knew he was being monitored closely by the College, would then willfully misinterpret the restrictions he had been trying to respect, seek permission to work at a different location to purport to avoid adhering to a restriction, and begin performing invasive procedures in direct contradiction to that restriction. To find that Dr. Abouhamra purposefully interpreted the restriction on his practice in a more favourable light for personal gain, particularly where he was clearly aware that his misinterpretation would likely be discovered, is contrary to any reasonable interpretation of the evidence of this physician's behavior.

**[96]** Based on the evidence presented, the only logical conclusion is that Dr. Abouhamra genuinely and reasonably believed that he was acting in accordance with his restrictions. If working at the BDC was contrary to the original restrictions, in Dr. Abouhamra's view, in seeking permission from the College to work at the BDC, he was obtaining the permission from the Registrar to work outside the hospital setting while continuing to abide by the imposed restrictions.

**5. The Tribunal erred in concluding that the public was at risk when Dr. Abouhamra performed invasive procedures in the BDC**

**[97]** The Review Panel acknowledges that breach of an Undertaking may still be considered unprofessional conduct even if the breach was unintentional and the person who breached the Undertaking was unaware of the meaning and intent of the Undertaking (*Maytham*). Indeed, the *HPA* specifies that the breach of an Undertaking can be an example of unprofessional conduct.

**[98]** The Hearing Tribunal observed that in this case, the College imposed a condition on Dr. Abouhamra's practice permit as a result of serious concerns that the College identified relating to infection prevention and control. However, Dr. Abouhamra testified that he undertook additional training in these areas, and his follow up inspections were compliant with College standards. It is true that the College had not completed the approval process that was required to remove the restrictions of the Undertaking. However, Dr. Abouhamra was given permission to perform invasive procedures in a hospital setting, as in that setting, Dr. Abouhamra was not directly responsible for infection prevention measures.

**[99]** This was also the case at BDC, where the only adjustments Dr. Abouhamra made to the policies and procedures in place at that clinic were made to decrease the risk of infection spread by using disposable equipment. Accordingly, the risk to the public in having Dr. Abouhamra perform invasive procedures in the BDC without the review of his condition was low and did not amount to a serious threat to patient safety. Moreover, any threat to patient safety flowing from Dr. Abouhamra's performance of invasive procedures in a hospital or clinic setting was ameliorated by

implementing a restriction whereby Dr. Abouhamra would not control the infection prevention regimen but could perform invasive procedures.

**[100]** Dr. Abouhamra sought permission prior to commencing work at the BDC and received permission contingent on informing the BDC of his practice permit restriction. There is no indication that Dr. Abouhamra did not inform the BDC. There was no risk to the public in having Dr. Abouhamra perform invasive procedures at BDC and the Hearing Tribunal was unreasonable in finding otherwise.

**[101]** Further, in this light, performing invasive procedures at the BDC does not amount to unprofessional conduct. Rather, it is a question of interpretation. Dr. Abouhamra intended and attempted to abide by the restriction imposed on his practice and sought permission regarding an area that he felt to be uncertain with respect to his practice restriction. Dr. Abouhamra's desire to abide by the restrictions is evident in his willingness to comply with every restriction in place. Once he understood that this was not a simple misunderstanding (as the earlier billing restrictions had been), but rather was the result of differing interpretations of the conditions of his Undertaking and permit, he ceased the activity immediately.

**[102]** In short, Dr. Abouhamra has shown a consistent willingness to abide by College directives for over a decade, and all of the evidence consistently demonstrated that he took all of the College's recommendations seriously. The Review Panel finds that Dr. Abouhamra mistakenly believed that the permission he sought to work at the BDC included the permission to perform invasive procedures, which he was already permitted to perform in hospitals. The evidence does not support, and it was unreasonable to find, that Dr. Abouhamra was being willfully blind. Dr. Abouhamra immediately ceased performing invasive procedures when he understood that the College interpreted his actions as being contrary to his restrictions, and at no time did he put the public at risk or willfully risk the health of the public in his inadvertent contravention of his practice restrictions. His actions do not rise to the level of unprofessional conduct worthy of sanction.

## VIII. Orders of The Review Panel

**[103]** The Review Panel grants Dr. Abouhamra's appeal, and dismisses the Charge against him.

**[104]** Dr. Abouhamra had been ordered to pay a portion of the costs of the investigation and hearing into his conduct pursuant to the Sanction Decision. The Review Panel vacates that order.

Signed on behalf of Council this 9th day of April, 2019

Dr. Graham Campbell, Chair