COLLEGE OF PHYSICIANS & SURGEONS OF ALBERTA

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

AND IN THE MATTER OF A HEARING REGARDING
THE CONDUCT OF DR. MUSBAH ABOUHAMRA

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

I. INTRODUCTION

The Hearing Tribunal held a hearing into the conduct of Dr. Musbah Abouhamra on December 5 and 6, 2017. The members of the Hearing Tribunal were:

Dr. Erica Dance of Edmonton as Chair
Dr. Don Yee of Edmonton
Mr. Ralph Colistro of Edmonton as the public member

Ms. Katrina Haymond acted as independent legal counsel for the Hearing Tribunal.

In attendance at the hearing were Mr. Craig Boyer, legal counsel for the Complaints Director of the College of Physicians & Surgeons of Alberta (the "College"), Dr. Musbah Abouhamra, and Mr. William Hembroff, legal counsel for Dr. Abouhamra.

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

II. ALLEGATION

1. 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 restriction 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;

Dr. Abouhamra denied the allegation made against him. Mr. Hembroff added a point of clarification that the Dr. Abouhamra does not deny that invasive procedures occurred at the Bonnie Doon Medical Centre (the "Bonnie Doon Clinic"), but denies that these procedures were a breach of the Undertaking.

III. OPENING STATEMENTS

Counsel for the Complaints Director

Mr. Boyer presented an opening statement on behalf of the Complaints Director. Here he outlined the history of Dr. Abouhamra's interaction with the College stating that Dr. Abouhamra's first complaint was in 2005. This complaint was investigated, and resolved with an Undertaking signed in February 2007 (the "Undertaking").

In 2009 legislation changed from the previous *Medical Profession Act* to the current *Health Professions Act* (the "HPA") and since then practice permits are required. At the time of the Undertaking, Dr. Abouhamra, an Obstetrician/Gynecologist, was working in the Lloydminster Women's Clinic (the "Lloydminster Clinic") on the Alberta side of Lloydminster, and at the Lloydminster Hospital, on the Saskatchewan side of Lloydminster.

The central issue of concern for this hearing is whether invasive procedures done at a new clinic, the Bonnie Doon Clinic in Edmonton, constituted a violation of the Undertaking and unprofessional conduct on the part of Dr. Abouhamra as defined in the HPA. Mr. Boyer indicated he intended to call three witnesses: Ms. Leanne Minckler, Dr. John Ritchie, and Dr. Susan Ulan. It was also noted that Dr. Abouhamra would testify for himself.

Counsel for Dr. Abouhamra

Mr. Hembroff then presented an opening statement on Dr. Abouhamra's behalf. He stated that the original investigation resulted in the complaint of 2005 being closed. He highlighted that paragraphs 2 through 14 of the Undertaking were all satisfactory, and that the only issue was with paragraph 1 of the Undertaking. This paragraph 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.

Mr. Hembroff stated that no invasive procedures were ever performed in the Lloydminster Clinic, where there were site inspections which did not reveal any problems, and where Dr. Abouhamra's wife was also working under the same Undertaking with no issue. There were also no concerns with Dr. Abouhamra's performance at the hospital. While there had been some questions raised by the College about invasive procedures in the Lloydminster Clinic over the years, these were explained by administrative errors such as billing at the wrong site when the invasive procedure had been done at the Lloydminster Hospital, not the Lloydminster Clinic.

Dr. Abouhamra had wanted the restriction on invasive procedures in the office lifted, and attempted to do so in various ways, but the restriction was never lifted. He therefore continued to perform invasive procedures only at the Lloydminster Hospital. In January 2015 Dr. Abouhamra's privileges at the Lloydminster Hospital were suspended so he could no longer perform procedures there. Given that suspension, the College instructed Dr. Abouhamra that he could not work in a hospital setting in Alberta, and added "Restricted to practicing in an office based practice" to Dr. Abouhamra's practice permit. Of note, Dr. Abouhamra did not have, and had never applied for, hospital privileges in Alberta. The Saskatchewan Court of Queen's Bench quashed the decision to suspend Dr. Abouhamra's hospital privileges in September 2016. The College was notified by Mr. Hembroff of this decision, but it was not until November 2017 when the College lifted this added restriction on Dr. Abouhamra's Alberta practice permit.

Mr. Hembroff stated that during this period of time, due to media attention and small town discussions and rumours, Dr. Abouhamra's practice was damaged significantly, and to make ends meet, he determined it appropriate to start work at the Bonnie Doon Clinic in Edmonton. Dr. Abouhamra, via emails between Dr. Heisler (Complaints Director of the College at the time) and Mr. Hembroff, requested permission to work at the Bonnie Doon Clinic, which was confirmed by Dr. Heisler in March of 2015. Dr. Abouhamra started to work at the Bonnie Doon Clinic and since there had never been issues with sterilization, instruments, or invasive procedures at the Bonnie Doon Clinic, he began doing invasive procedures at that clinic. Dr. Abouhamra knew he was being monitored, and when the College requested information from Dr. Abouhamra about these invasive procedures, he admitted he did the procedures.

This is when he and the College realized that they had interpreted the Undertaking differently. According to Mr. Hembroff, the narrow issue of this hearing would be whether Dr. Abouhamra had a reasonable belief that his interpretation of the Undertaking was accurate.

IV. EVIDENCE

The following Exhibits were submitted at the outset of the hearing as part of an Agreed Exhibit Book**:**

1. Notice of Hearing dated September 19, 2017.
2. Undertaking dated February 16, 2007 with attached Schedules.
3. Notification of Conditions on a Practice Permit dated September 28, 2010.
4. Dr. Janet Wright, Assistant Registrar, letter to Dr. Musbah Abouhamra dated October 1, 2012 regarding conditions on Practice Permit.
5. Dr. Janet Wright, Assistant Registrar, letter to Dr. Musbah Abouhamra dated January 7, 2013 regarding conditions on Practice Permit.
6. Dr. Janet Wright, Assistant Registrar, letter to Dr. Musbah Abouhamra dated August 6, 2013 regarding monitoring of practice conditions.
7. Dr. Musbah Abouhamra letter to Dr. Janet Wright, Assistant Registrar, dated September 26, 2013 regarding reply to monitoring of practice conditions.
8. Leanne Minckler, Physician Health Advisor, letter to Dr. Musbah Abouhamra dated October 2, 2013 regarding monitoring of Practice Permit conditions.
9. Dr. Kate Reed, Assistant Registrar, letter to Musbah Abouhamra regarding conditions on Practice Permit.
10. Leanne Minckler, Physician Health Advisor, letter to Dr. Musbah Abouhamra dated December 16, 2015 regarding monitoring of Practice condition.
11. Shannon Seffern, Lloyd Women's Clinic, letter to Leanne Minckler, Physician Health Advisor, dated January 6, 2016 regarding registration records.
12. Leanne Minckler, Physician Health Advisor, letter to Dr. Michael Caffaro, Assistant Registrar and Complaints Director, dated August 9, 2016 regarding conditions on practice.
13. Katherine Jarvis, Complaint Inquiry Coordinator, letter to Dr. Musbah Abouhamra dated August 31, 2016 regarding complaint.
14. Dr. Musbah Abouhamra letter to Katherine Jarvis, Complaint Inquiry Coordinator, dated November 1, 2016 in response to complaint.
15. Leanne Minckler, Physician Health Advisor, letter to Dr. Michael Caffaro, Assistant Registrar and Complaints Director, dated December 15, 2016 regarding Practice Permit condition monitoring.
16. Leanne Minckler, Physician Health Advisor, letter to Dr. Musbah Abouhamra dated December 15, 2016 regarding practice restrictions.
17. Dr. Michael Caffaro, Assistant Registrar and Complaints Director, email to Mr. Bryan Salte, College of Physicians and Surgeons of Saskatchewan dated May 25, 2011.
18. Dr. Michael Caffaro, Assistant Registrar and Complaints Director, letter to Dr. Musbah Abouhamra dated June 13, 2017 regarding practice restrictions.
19. Alberta Health Services billings for invasive procedures - January 2015 – May 2016.
20. Alberta Health Services billings for invasive procedures - May 2015 – April 2016.
21. Alberta Health Services billings for invasive procedures - June to September 2016.
22. Alberta Health Services billings for invasive procedures - October to December 2016.
23. Dr. Abouhamra's Practice Permits for the years 2012 to 2017.
24. No exhibit for this number; it was a duplicate of information.

The following additional exhibits were entered during the course of the hearing:

25. Letter from Susan Ulan to Musbah Abouhamra dated November 29, 2017.
26. Email from Michael Caffaro to William Hembroff dated November 28, 2017.
27. Email from William Hembroff to Michael Caffaro dated September 16, 2016.
28. Email from Michael Caffaro to William Hembroff dated September 16, 2016.
29. Letter from William Hembroff to Michael Caffaro dated December 15, 2015.
30. Letter from Michael Caffaro to William Hembroff dated November 16, 2015.
31. Email from William Hembroff to Owen Heisler dated April 8, 2015.
32. Letter from Owen Heisler to William Hembroff dated April 1, 2015.
33. Email from Owen Heisler to William Hembroff dated March 10. 2015.
34. Email from William Hembroff to Owen Heisler dated March 10, 2015.
35. Email to Owen Heisler to William Hembroff dated March 10, 2015.
36. Email from Owen Heisler to William Hembroff dated March 9, 2015.
37. Email from Musbah Abouhamra to William Hembroff dated March 3, 2015.
38. Letter from Owen Heisler to Musbah Abouhamra dated January 28, 2015.
39. Letter from T. Elghdewi and M. Abouhamra to Janet L. Wright dated October 25, 2012.
40. Letter from John Ritchie to T. Elghdewi and M. Abouhamra dated February 10, 2009.
41. Certificate of Agreement and Undertaking dated March 24, 2007.
42. Letter from John Ritchie to Dr. T. Elghdewi and Dr. M. Abouhamra Dated February 10, 2009 (Duplicate).
43. Memorandum from John Ritchie dated February 6, 2009.
44. Letter from Karen Mazurek to J.S. Peacock dated December 3, 2007.
45. Letter from Craig Boyer to James Peacock dated February 9, 2007.
46. 2015 RIF for member 021580 (Dr. Musbah Abouhamra).
47. 2016 RIF for member 021580 (Dr. Musbah Abouhamra).
48. 2017 RIF for member 021580 (Dr. Musbah Abouhamra).
49. 2018 RIF for member 021580 (Dr. Musbah Abouhamra).
50. Undertaking between Dr. Musbah Abouhamra and the College of Physicians and Surgeons of Alberta dated February 4, 2015.
51. *Abouhamra v. Prairie North Regional Health Authority*, [2016] S.J. No. 488.

In addition, the following witnesses were called to testify on behalf of the Complaints Director: Ms. Leanne, Minckler, Dr. John Ritchie and Dr. Susan Ulan. Dr. Abouhamra testified on his own behalf. The key testimony of each witness is summarized below.

Ms. Leanne Minckler

Mr. Boyer first called Ms. Minckler as a witness. Ms. Minckler is a registered nurse who graduated from nursing school in 1990 and has had various clinical experiences. Since 2013, she has been working for the College in the role of Physician Health Advisor in the Physician Health Monitoring Program. This role has three main responsibilities: 1) in the physician health department working with physicians who have health conditions, 2) monitoring the chaperone audit program, and 3) working with physicians who have practice permit conditions. Here she develops a process to ensure compliance and adherence to those conditions. Ms. Minckler works under the supervision of an Assistant Registrar, who was at that time Dr. Janet Wright, then Dr. Susan Ulan, and is now Dr. Jeremy Beach.

Ms. Minckler described how she reviews billings from Alberta Health to determine compliance with practice conditions. She first communicated with Dr. Abouhamra in October 2013 requesting clarification of some billing concerns noted. After clarification of billing or location errors by Dr. Abouhamra and his office staff, Ms. Minckler was satisfied with the explanations given and did not feel these represented breaches of the Undertaking. Similarly, Dr. Abouhamra and his staff communicated with Ms. Minckler in December 2015 and January 2016 again determining the issue was with billing errors, not with a breach of the Undertaking.

Ms. Minckler testified that in August 2016 she noted a significant number of invasive procedures performed between May 2015 and April 2016, primarily at the Bonnie Doon Clinic. After consultation with Dr. Ulan, the Assistant Registrar with whom she was working at the time, they determined this represented an overt violation of Dr. Abouhamra's practice condition and referred the matter to Dr. Caffaro, the Complaints Director of the College. She did not at that time notify Dr. Abouhamra herself. Dr. Caffaro then sent a letter notifying Dr. Abouhamra that a complaint file was opened in response to these concerns. Dr. Abouhamra responded in November 2016. In December 2016, further review of billing information revealed additional invasive procedures performed between June and September 2016, and an update to this effect was sent to Dr. Caffaro in December 2016. At that time, Ms. Minckler notified Dr. Abouhamra of her concerns and of the notification to Dr. Caffaro.

Ms. Minckler was then cross-examined by Mr. Hembroff. She confirmed that Dr. Abouhamra had been compliant and cooperative with her, and that there had been no other breaches or discussion about invasive procedures at other clinics prior to the issues at the Bonnie Doon Clinic. She confirmed that she dealt with the issues in December 2016 differently than she had the prior issues in that she did not first question or clarify with Dr. Abouhamra, but instead, after consultation with Dr. Ulan, proceeded to the Complaints Director. She stated this was due to the distinct change in the pattern of Dr. Abouhamra's billing. She admitted that she and Dr. Ulan were not in the role when the Undertaking was first drafted, and that they did not discuss the issue with anyone who was in the role at that time, namely Dr. John Ritchie. Ms. Minckler stated that of 275 practice conditions which she monitors, this is the only case she is aware of where the physician has a specific restriction to not perform invasive procedures in the office. Ms. Minckler confirmed that she interpreted the original Undertaking as referring to 'any' clinic in that it did not specify a specific location. She agreed that Dr. Abouhamra had only worked at one clinic prior to the Bonnie Doon Clinic.

Mr. Boyer did not have any further questions for the witness, nor did the Hearing Tribunal.

Dr. John Ritchie

Mr. Boyer's second witness was Dr. John Ritchie. Dr. Ritchie is a physician who graduated from medical school in 1977. Dr. Ritchie worked as a general practitioner, and took a position at the College in 2005. His current role is Senior Medical Advisor in the Professional Conduct Department and he is also the Associate Complaints Director. His primary role is investigating complaints which have a quality of care component. Dr. Ritchie confirmed that he was involved both in the original complaint of 2005, as well as the more recent complaint of 2016.

Dr. Ritchie confirmed that he was involved in the unannounced site visits which took place for two years after the resolution of the original complaint. After the last inspection of February 2009, Dr. Ritchie has no recollection of substantive nor of any ongoing interaction with Dr. Abouhamra, and specifically was not aware of any request for approval to reprocess equipment or perform invasive procedures in the office.

Dr. Ritchie was then cross-examined by Mr. Hembroff. Dr. Ritchie confirmed that the issue of concern in Dr. Abouhamra's case was one of infection prevention and control in the office environment, and while not directly a concern of competency, infection prevention and control is part of the quality of care provided by a physician. Dr. Ritchie confirmed that the office had been cleaned up appropriately and that a letter had been written in December 2007 to Dr. Abouhamra's legal counsel from the Complaints Director at that time stating that the complaint file was closed. In that letter, the conditions which would need to be met to perform invasive procedures in his office were outlined, including having instruments sterilized at the Lloydminster Hospital.

Dr. Ritchie stated that he was not aware of any prior breaches of the Undertaking. He believes that Dr. Abouhamra had been compliant with the Undertaking, including not performing invasive procedures at the Lloydminster Clinic, cooperation with site inspections which revealed no significant concerns, and preparation of an infection prevention and control procedural manual. Dr. Ritchie confirmed that the College had not requested of Dr. Abouhamra to take any relevant educational courses in this case.

Dr. Ritchie reviewed his letter to Dr. Abouhamra from February 2009 where he wrote "no invasive procedures will be performed in your office". Dr. Ritchie was questioned as to what he meant by "your office" and whether this would refer specifically to the Lloydminster Clinic where Dr. Abouhamra was working at the time. Dr. Ritchie feels this would mean any office that Dr. Abouhamra was working in, and that the behaviors of concern would follow the physician from clinic to clinic. Dr. Ritchie was questioned about how it was then acceptable for Dr. Abouhamra to do procedures in the hospital if the concerns would follow him from setting to setting. Dr. Ritchie explained that he felt the hospital setting was different as hospitals are accredited, physicians are not responsible for sterilization themselves, and that there is a team of people, including nurses and anesthetists, in the operating room who would be monitoring for breaches in infection control procedures. Dr. Ritchie stated that he intended to reflect the original wording of the Undertaking. Here the specific wording of the Undertaking was reviewed, both in paragraph 1 where it is worded "in the Physician's office", as well as in paragraph 6 where it states, "the Physician shall continue to perform all invasive procedures only in a hospital setting".

Dr. Ritchie stated that he was not aware of the request made to work at an alternate clinic, nor was he aware of any discussion on whether the restriction would apply to other offices, or of any request to remove the restriction.

Mr. Boyer re-examined the witness by asking Dr. Ritchie to clarify a comment made about the increased complexity of infection prevention and control procedures since 2007. Dr. Ritchie described some of the changes that took place with regards to proper sterilization techniques, and biological monitoring needed for infection prevention and control since 2008.

The Hearing Tribunal then asked Dr. Ritchie several questions of clarification. The Hearing Tribunal asked Dr. Ritchie to elaborate on the concerns found in the original site inspection in 2005. Dr. Ritchie described several concerns noted on that first inspection, the most egregious of which was that metal instruments were being soaked in a disinfectant solution called Cidex Activated Glutaraldehyde Solution (Cidex). This solution was not an approved mechanism for sterilization of metal instruments, which require an autoclave to reprocess. Additionally, there was a large rubber container where disposable plastic speculums, not meant for re-use in any case, were being soaked in this solution for apparent re-use. There was a question as to how the clinic had access to the large volumes of this disinfectant solution which would have been needed given that it cannot be diluted. There was also a concern for inappropriate

cleaning of the laundry, a large open jar of ultrasound gel which would be repeatedly used, rusted metal instruments, and dirty cabinets and countertops.

Dr. Ritchie then reviewed what the process might look like to approve a clinic for on-site reprocessing of equipment, and what inspections of a clinic which reprocesses on-site would look like. Dr. Ritchie also clarified what he meant when he referred to physician behaviors which affect the sterilization of equipment, separate from clinic based issues, pointing to the example of reusing disposable equipment not meant for reuse regardless of cleaning. Dr. Ritchie specified that this case was not an issue of skipping one step, for example, but one of a "total disregard for the basic tenants of reprocessing", it "just was not being done".

Dr. Susan Ulan

The final witness called on behalf of the Complaints Director was Dr. Susan Ulan. Dr. Ulan is a physician who graduated from medical school in 1998 and worked clinically as a family physician. She started working for the College in 2009, and is currently the Assistant Registrar responsible for registration and practice readiness. Dr. Ulan explained that under the HPA, when a physician is registered in Alberta they are given a practice permit. The permit is good for one year and outlines any practice conditions or restrictions. Dr. Abouhamra's practice permits for 2012, 2013 and 2014 were reviewed, all of which had the same practice condition listed, "Restricted from performing invasive procedures in the office". In 2015, a second restriction was added, "Restricted to practice in an office based practice" which remained in place for the 2016 and 2017 permits. Dr. Ulan confirmed that her office is responsible for these practice permits and the conditions listed, regardless of which office had imposed the condition. Dr. Ulan confirmed that her office had not received any request to remove the restriction from performing invasive procedures in the office from Dr. Abouhamra's practice permit.

Mr. Hembroff then cross-examined Dr. Ulan and asked her to clarify the process of removing a condition from a practice permit. Dr. Ulan stated that the request for removal would need to be made to the original office who placed the condition, in this case it would be the office of Professional Conduct. If approved, that office would notify her office and her office would change the permit in the database as well as send out a "section 119" letter, to notify relevant stakeholders and workplaces of the change in the practice permit. When asked about the delay in removing the other practice condition, that of only working in an office based setting, she was unable to explain why there was a delay but that her office was not informed until the time when it was removed.

Dr. Ulan confirmed that she was not involved in the original drafting of the Undertaking in 2007 and cannot explain why it was worded in the way it was. Mr. Hembroff then asked questions relating to when Dr. Ulan was in the Physician Health Monitoring Program, working with Ms. Minckler. He asked about the decision to send the most recent concerns in 2016 regarding performing invasive procedures in the office directly to the Complaints Director instead of asking Dr. Abouhamra about it as had been done by their office in the past. Dr. Ulan qualified her answers with the fact that she had not reviewed her notes from when she was in that office and would no longer have access to this information so she must rely on her memory from over one year prior. She explained that the volume of procedures was great enough to raise concern requiring further investigation, which must be referred to the Professional Conduct department. Mr. Hembroff pointed out that the volume of procedures in the more recent concern was actually fewer than that in the previous concerns, which they dealt with directly with Dr. Abouhamra. Dr. Ulan admitted that she and Dr. Wright, the Assistant Registrar of that office before her, did things differently. Dr. Ulan explained that the fact that these procedures were done in an alternate clinic, the Bonnie Doon Clinic instead of the Lloydminster Clinic would not be specifically relevant to her, as neither were a hospital setting. She did not feel that the fact that Dr. Abouhamra had complied with the Undertaking in the prior 8 years was relevant as in her experience physician behavior changes, so previous compliance does not predict future compliance.

Dr. Ulan was asked about the apparent interruption in oversight of Dr. Abouhamra's monitoring by the College given that he started doing procedures in April 2015 but was not contacted by the College to explain those procedures until August 2016. Despite this, Dr. Ulan felt that the College had increased their focus on oversight of compliance and gave several potential reasons for this particular delay. She felt the largest delay was getting the information from Alberta Health, and further delays would be due to the large number of cases requiring prioritization for review, and the time it would take to organize and review the material itself.

Mr. Boyer did not have any further questions for the witness, nor did the Hearing Tribunal.

Dr. Musbah Abouhamra

Mr. Hembroff called his first and only witness, Dr. Abouhamra, to testify on his own behalf. Dr. Abouhamra is from Libya, where he graduated from medical school in 1988. He received a scholarship to come to Canada and completed Obstetrics and Gynecology training in Calgary, receiving his Royal College designation after successfully completing the certification exams. He started working in the Lloydminster Hospital and later opened the Lloydminster Clinic with his wife in 2004.

In 2005, a staff member who had recently quit working in the Lloydminster Clinic complained to the College which resulted in an unannounced site visit, and this was the first Dr. Abouhamra heard of any concerns. Dr. Abouhamra felt any clinic would have appeared similar to his, if someone came in unannounced, stating: "where you walk into surprising visit to any clinic, probably… you're going to find the same thing, without any previous notification". He did not feel it was reasonable for the College to come without warning. He explained that he was in the middle of a full clinic, with patients in the waiting room and one on an examination table. He felt that much of what was found was due to the unexpected nature of the visit and the interruption to the clinic. For example, the dirty linen Dr. Ritchie noted was that way because there had just been a patient in that room, and that Dr. Ritchie did not focus on the clean folded linen which was also present. Dr. Abouhamra explained that he was using the Cidex solution for cleaning as that is what they were using at the hospital at that time, and only later learned about the other requirements for sterilization.

After the inspection, Dr. Abouhamra changed many things to improve the practices at the Lloydminster Clinic as suggested by Dr. Ritchie. They stopped doing invasive procedures so no longer needed the cleaning solution, they hired a professional janitorial service, they changed to paper linen which would not require laundering, and they placed hand sanitizer in each room as they were unable to install sinks, despite requesting the landlord to do so. Dr. Abouhamra felt that Dr. Ritchie was pleased with the changes and did not have any substantive ongoing concerns after the final inspection in 2009. Despite no mandate by the College to do so, he, his wife, and their office staff took courses on proper sterilization techniques.

Dr. Abouhamra testified that prior to hearing Dr. Ritchie testify in this hearing, he was never told, nor did he feel that the concerns were related to his behavior, but only to the clinic environment. For example, when he moved his invasive procedures to the hospital, he felt that the process was the same, just done at the hospital instead of the clinic. If there were physician behavior concerns, he feels the hospital should have been notified. Dr. Abouhamra felt the only issue was with the Lloydminster Clinic and that this was clearly the concern of the first complaint and all the publicity that surrounded the issues.

Dr. Abouhamra highlighted the stress of these events, the fact that he was fully aware that the College could do an unannounced clinic visit at any time, that his billings were being monitored, and that he cared for his patients. As a result, he states that he never took chances and was very cautious to follow the instructions and conditions imposed by the College.

Dr. Abouhamra explained how he was suspended from working in the Lloydminster Hospital in late 2014. He highlighted that this stemmed from a conflict he had with a superior physician, and had nothing to do with sterilization or infection prevention and control. Given that he could no longer do invasive

procedures in the hospital in Saskatchewan, and was also unable to work in a hospital in Alberta, his clinic was "dying off". In order to survive, and to pay his bills, he needed an alternate source of income which lead him to investigate an opportunity to work in the Bonnie Doon Clinic. To be cautious, given all that was going on at the time, he waited until he received permission from the College to work in the Bonnie Doon Clinic which he did starting in April 2015. After months of doing invasive procedures at the Bonnie Doon Clinic, he received the December 2015 request from Ms. Minckler to clarify certain billing issues from the Lloydminster Clinic, which he provided. Given that the College did not question his current work at the Bonnie Doon Clinic, he did not feel there was any further concern.

Dr. Abouhamra discussed his practice at the Bonnie Doon Clinic and how he insisted on only using disposable equipment so there would be no issue with sterilization at this new clinic. He states that he was the one to advise the clinic they should follow the most appropriate sterilization standards and ensured there were staff there who were trained in these updated techniques. Dr. Abouhamra confirmed that he never thought that doing invasive procedures at the Bonnie Doon Clinic would be a violation of the Undertaking and that his full understanding was that the Undertaking only referred to the Lloydminster Clinic.

Dr. Abouhamra states that he attempted many times in various ways to have this practice condition removed from his permit. He states that he contacted Dr. Ritchie multiple times and cannot understand why Dr. Ritchie denied remembering this in his earlier testimony. He also stated that he placed a comment in the available area at the end of every Renewal Information Form (RIF) that all physicians complete for the College annually. He also included a comment in his response to this most recent complaint, in November 2016, asking again for the restriction to be lifted. Despite these attempts, he never heard back from the College and was not able to get the restriction lifted.

Mr. Boyer then cross-examined Dr. Abouhamra. Mr. Boyer entered exhibits #46 to 49, which are Dr. Abouhamra's RIFs from 2015 through to 2018. Mr. Boyer clarified the location listed as Dr. Abouhamra's professional address on each RIF including noting that on the 2018 RIF, completed in December 2017, Dr. Abouhamra lists the new location of the Lloydminster Clinic, which he moved into in April 2017. Some time was also spent clarifying the two recent complaints against Dr. Abouhamra, #160477.1.1, pertaining to the practice condition not to do invasive procedures in the office, and #150041.1.1, pertaining to the restriction to work only in the clinic, because of the Saskatchewan hospital suspension. Exhibit #50 was entered to confirm the second file number. Mr. Boyer then entered Exhibit #51, which was the decision of the Saskatchewan Court of Queen's Bench in *Abouhamra v. Prairie North Regional Health Authority*, where the Court quashed the decision of the Practitioner Staff Appeals Tribunal to order an interim suspension of Dr. Abouhamra's hospital privileges. Mr. Hembroff did not object to the admission of Exhibit #51, but questioned the relevance of this document.

Mr. Boyer questioned Dr. Abouhamra about whether he appealed the practice permit restrictions under Section 31 of the HPA. Dr. Abouhamra stated that prior to his recent suspension, he was not familiar with the HPA, nor with his medical staff bylaws or hospital bylaws and that he felt it was not reasonable for a physician like himself, without legal training, to be able to understand these documents. Dr. Abouhamra agreed that there was no specific discussion with Dr. Heisler about performing invasive procedures at the Bonnie Doon Clinic, which he felt was ongoing evidence that it was permitted for him to do the procedures there. Dr. Abouhamra reconfirmed that he never did any invasive procedures at the Lloydminster Clinic once the Undertaking was in place.

Mr. Boyer asked Dr. Abouhamra to confirm that he did perform all the invasive procedures that are listed in the Exhibit Book as being done at the Bonnie Doon Clinic, which Dr. Abouhamra did confirm, aside from a few minor exceptions which were included in error. In the past, when other invasive procedures were attributed to the Lloydminster Clinic, these were errors either on the part of Alberta Health, or on the part of Dr. Abouhamra's clinic staff in the way the procedures were entered.

Dr. Abouhamra reviewed the Undertaking signed in 2007, and again asserted that he felt the restriction outlined in paragraph 1 "the Physician's office" only applied to his Lloydminster Clinic. He felt this referred to both the new and old location of that clinic as both where his own offices. When referring specifically to paragraph 6 of the Undertaking, where it states, "perform all invasive procedures only in a hospital setting", Dr. Abouhamra agreed that the Bonnie Doon Clinic was not a hospital setting. If it were a hospital setting, he could not have worked there given his second restriction of only working in a clinic setting.

The Hearing Tribunal then asked Dr. Abouhamra several questions to clarify aspects of the evidence. Dr. Abouhamra clarified that the Lloydminster Clinic moved buildings from 3308 50th Avenue to the new location at #7 1812 50th Avenue. Despite the change in location, Dr. Abouhamra confirmed that it was the same two specialists working there (he and his wife), the same equipment, responsibility for cleaning, and administrative oversight. Therefore, he felt that the restrictions placed at the first location followed him to the new location. In contrast, he did not feel the Bonnie Doon Clinic was 'his' clinic as he was only there every two to four weeks, he was not doing administrative work, and was not responsible for the equipment. Given that he did not interpret the Bonnie Doon Clinic as being 'his' clinic the restriction would not be relevant.

The Hearing Tribunal raised a question of why Dr. Abouhamra continued to perform invasive procedures from September to December 2016, after having been informed by Dr. Caffaro that his work at the Bonnie Doon Clinic was not in compliance with the Undertaking, as interpreted by the College. Dr. Abouhamra explained that he did not immediately stop doing invasive procedures at the Bonnie Doon Clinic because he initially felt this was going to be a similar process to previous. He felt he would just need to explain his understanding of the restriction, and that the procedures were all done at the Bonnie Doon Clinic, not at the Lloydminster Clinic. Once he realized that this would be referred for a hearing, and that it was a more significant issue than the previous ones, he did stop performing those invasive procedures in the Bonnie Doon Clinic.

Mr. Hembroff did not have any further questions for Dr. Abouhamra.

V. SUBMISSIONS

Counsel for the Complaints Director

Mr. Boyer provided closing submissions on behalf of the Complaints Director. Mr. Boyer reminded the Hearing Tribunal that as per Justice Green's decision in the Newfoundland Court of Appeal in a case called *Walsh v. Council of Licensed Practical Nurses*, there are three functions that the Hearing Tribunal is required to perform: 1) make findings of fact using a balance of probability, 2) determine the standard against which the conduct is measured, and 3) take the facts as the Hearing Tribunal finds them, and apply them to this standard.

Mr. Boyer first referred the Hearing Tribunal to the case of *Faryna v. Chorney* where it refers to the credibility of a witness. Mr. Boyer referred to paragraph 11 of that decision, quoting (in part):

> "The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions."

Mr. Boyer summarized this by saying "… you look at all of the facts put before you, and you then say what would a reasonable and informed person think of that description.". Mr. Boyer highlighted that the Undertaking must be interpreted as a whole, including both paragraph 1, where it refers to "the Physician's office" as well as paragraph 6, where it specifies that invasive procedures can only be performed in a hospital setting. Dr. Abouhamra admitted that the Bonnie Doon Clinic is not a hospital setting. Given that Dr. Abouhamra only had privileges at the Lloydminster Hospital when the Undertaking was signed, a reasonable person would believe that invasive procedures could only be done at that hospital.

Dr. Abouhamra had stated that the Bonnie Doon Clinic was a new clinic, and that it was he who provided advice to them about proper sterilization techniques. He was given permission to work at the Bonnie Doon Clinic and was advised to share his practice restrictions with them, but was not given explicit permission to do invasive procedures there. Despite the existence of a formal process to lift practice restrictions, and the lack of any process toward this goal as outlined by Dr. Ritchie, it was clear that the restriction was in place. Proper infection prevention and control is a physician's responsibility regardless of where they work. Given all this, Mr. Boyer asserts that it is not reasonable or plausible to interpret the undertaking as allowing Dr. Abouhamra to do invasive procedures at the Bonnie Doon Clinic.

Mr. Boyer reminded the Hearing Tribunal that self-regulation is a privilege. With that privilege, the regulated member is expected to comply with the requirements, restrictions and obligations of their College, generally through the Standards of Practice and Code of Ethics, as well as specific restrictions that are imposed. This is reflected in the HPA where one of the grounds of unprofessional conduct is a failure to comply with a practice permit condition or restriction.

The protection of the public and the public's best interest cannot be fulfilled if the regulatory body is not aware of what is going on. It was not sufficient for Dr. Abouhamra to inform the Complaints Director and not Registration of his plan to move to a new location, and he should have included that on his RIF. While there was a delay between when Dr. Abouhamra began doing invasive procedures in the Bonnie Doon Clinic and when this was noticed by the College, this delay cannot be used as a justification of the behavior.

Mr. Boyer submitted that the fact that Dr. Abouhamra cleaned up the practice, and the lack of transmission of infection or evidence of patient harm, does not make Dr. Abouhamra's behavior appropriate. He suggests to instead consider those factors at the time of sanction determination. Mr. Boyer pointed to both the volume of procedures and the length of time over which the procedures took place as a marked departure from the standard in this case.

Mr. Boyer provided the Hearing Tribunal with a Brief of Law on the issue of compliance with an undertaking. The first case he referred to is that of the *CPSO v. Maytham*, 2007 ONCPSD 25. In this case, Dr. Maytham signed an undertaking with the College in which he agreed to stop prescribing drugs listed in Schedules 1 to 4 of the *Controlled Drugs and Substances Act*, but he mistakenly interpreted his undertaking to only prohibit him from prescribing narcotics. This failure to inform himself of the scope of his undertaking contributed to the finding of unprofessional conduct. The Discipline Committee found:

> "An undertaking between a physician member and the College is a serious matter as the College must be able to govern its members and protect the public. When a physician has signed an undertaking with the College, the College must be able to rely on the physician to regard the undertaking with the utmost seriousness and to inform himself as to its scope and abide by it".

The second case Mr. Boyer raised was with the same physician in *CPSO v Maytham*, 2011 ONCPSD 18. Here Dr. Maytham was found to not have kept appropriate records of the patients for which he was prescribing controlled substances. The Discipline Committee stated that:

> "Even if Dr. Maytham's actions on this occasion were not deliberate contraventions of his undertaking, they do represent a clear lack of responsibility on his part".

The third case Mr. Boyer highlighted is *CPSO v Saul*, 2014 ONCPSD 29. Here Dr. Saul continued to provide medical declarations for medical marijuana after he entered into an undertaking with the College not to do so. Dr. Saul stated that he did so because he did not understand when the undertaking came into effect. The Discipline Committee found:

> "Dr. Saul understood or ought to have understood what his obligations in signing the Undertaking entailed. It can be inferred that he chose to ignore his duty in this respect or dismissed his obligations to the College as lacking importance. At no time did he consult with the College as to his obligations, rather he disregarded the authority of the College and unreasonably substituted his own interpretation of the Undertaking. He acted in a self-serving and convenient manner…"

Mr. Boyer stated that Dr. Abouhamra also acted in a self-serving manner by interpreting the Undertaking in a way that would allow him to do invasive procedures at the Bonnie Doon Clinic. At that time, he was suspended from the Lloydminster Hospital and admitted to his financial challenges as a result.

The next case Mr. Boyer referred to is the Alberta Court of Appeal's decision in *Wachtler v CPSA*, 2012 ABCA. Here Dr. Wachtler had restrictions imposed on his prescribing practices which he did not follow. This resulted in Dr. Wachtler being found guilty of unprofessional conduct and having sanctions imposed. Dr. Wachtler appealed this decision to the Court of Appeal in Alberta with one of his reasons being that the restriction was ambiguous. The Court found:

> "The suggestion that the restrictions themselves were ambiguous has no merit. They are clear and unambiguous. Those restrictions were upheld by this Court on April 2, 2009 and are not now subject to attack."

Mr. Boyer also referred to *R v Nqumayo* – Unreported Reasons for Judgement of Justice Sanderman – Affirmed in R v Nqumayo, 2010 ABCA, and *Law Society of Alberta v Beaver*, 2016 ABQB 250. These two cases highlight the importance of undertakings. In the first of these cases, the court compares an undertaking to "a sacred promise", a premise also reflected in the Court's decision on the second of these cases.

Mr. Boyer submitted that the question of why Dr. Abouhamra, after years of compliance, would breach his agreement is something that could be considered in the sanctions phase. He closed by stating that there is a preponderance of evidence on a balance of probabilities, that the condition on Dr. Abouhamra's practice permit was in place, and when the Undertaking is read in entirety, it shows that the charge of breaching this condition has been proven and that the conduct does amount to unprofessional conduct.

Counsel for Dr. Abouhamra

Mr. Hembroff offered submissions on behalf of Dr. Abouhamra. He started with Mr. Boyer's question of why Dr. Abouhamra would intentionally breach his undertaking after 8 years of compliance and while knowing he was being monitored. Mr. Hembroff pointed to the case of Mr. Beaver stating that Mr. Beaver is "a completely ungovernable professional", which is not demonstrated by Dr. Abouhamra's history of compliance and cooperation. With each concern raised or request made by the College, Dr. Abouhamra replied promptly and participated fully as he was expected to do. Mr. Hembroff questioned if something else was driving this issue, referring to an email from Dr. Caffaro of the College to Mr. Bryan

Salte of the College of Physicians and Surgeons of Saskatchewan which stated, "I believe that the regional health authority was going to have one more kick at him (possibly relating again to his privileges)" even though the Saskatchewan Court of Queen's Bench had already quashed the health authority's decision.

Mr. Hembroff stated that there does not appear to be a formal process for removing practice restrictions as previously mentioned by Mr. Boyer. Mr. Hembroff stated that all he had to do was email with Dr. Caffaro to make this request, and while there was significant delay in this coming to effect, that it did not require a formal application process. Dr. Abouhamra attempted to inform the College of his practice move, so while he did not put the Bonnie Doon Clinic on his RIF, he did email all the information to Dr. Heisler and would have expected this information to be passed on appropriately. Dr. Abouhamra could not be expected to understand the inner workings and firewalls of the College. In his 2016 RIF, Dr. Abouhamra highlights an electronic medical record he is using in the Bonnie Doon Clinic, so while he may not have filled out his RIF correctly, he was not trying to hide that he was working at the Bonnie Doon location.

Mr. Hembroff agreed with the seriousness of undertakings but stated that this is shown not by the wording of the undertaking, but by the actions of Dr. Abouhamra. He complied for years and years, including when he moved to a new location in Lloydminster. Time passed, and while we could say now that he should have re-read the Undertaking, one must remember that the original context for the Undertaking was concerns relating to the cleanliness and reprocessing of instruments specifically in the Lloydminster Clinic.

Dr. Abouhamra clearly took the Undertaking seriously and did all that was expected of him and more, in that he took courses on sterilization that were not mandated by the College. Mr. Hembroff submitted that Dr. Abouhamra is not an ungovernable professional. Mr. Hembroff cautioned the Hearing Tribunal from using financial gain as a reason for his actions as he feels this question was not posed to Dr. Abouhamra for response. He submitted that the only reason Dr. Abouhamra would move to the Bonnie Doon Clinic was if he believed he could do procedures there so that he could appropriately care for his patients. If he was not able to do that, he would have stayed in Lloydminster doing a non-procedure based office practice, but adds that he could not make ends meet in that case.

Mr. Hembroff stated there are two main questions for the Hearing Tribunal: 1) was the Undertaking really meant to cover all of Alberta, or only the Lloydminster Clinic? and 2) if it was meant to cover all clinics, did Dr. Abouhamra have a mistaken, but genuine belief, that he was not in breach of that Undertaking?

Mr. Hembroff discussed the stress on Dr. Abouhamra after his suspension in Saskatchewan, and how he did not want any further trouble from any regulating body. He was simply trying to get on with his life and had no reason to cause himself further trouble. The only reason for his actions that makes any sense is that he did not do this knowingly.

Mr. Boyer then clarified two issues from Mr. Hembroff's statements. The first was the implication that Mr. Boyer had raised an improper argument in referring to financial motivation on the part of Dr. Abouhamra. Mr. Boyer clarified that this statement came from Dr. Abouhamra's own testimony, and was not being challenged by Mr. Boyer. Mr. Boyer was reiterating Dr. Abouhamra's testimony, and that the Hearing Tribunal can accept some, all or none of the evidence provided by a witness. He also highlighted that while Mr. Hembroff made a comment to the effect of Dr. Abouhamra requesting hospital privileges in Alberta after the court's decision to quash the suspension in Saskatchewan, there is no evidence that any such request for privileges in Alberta was ever made. This point was agreed to by Mr. Hembroff.

Questions by the Hearing Tribunal

The Hearing Tribunal then asked questions of counsel for both parties. Prior to doing so, Ms. Haymond provided a summary of the Court's decision in the case of *Sussman v. College of Alberta Psychologists.* In this case, the psychologist was charged with not making chart entries on a patient which did not meet

the College's standards of practice and which the Tribunal therefore felt represented unprofessional conduct. This decision was appealed to the Court of Appeal where the decision was overturned. The Court of Appeal felt that a contextual analysis is required, and that not all breaches of a standard of practice rise to the level of unprofessional conduct.

The Hearing Tribunal then outlined four possible outcomes and asked the both parties to comment:

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.

Mr. Boyer addressed this question by first clarifying that the *Sussman* case happened before the Court's decision in the *Newfoundland Nurses* case, which had highlighted the need for tribunals to give clear reasons for decisions made. The issue in the *Sussman* case was the "zero tolerance" with no clear reasons. Here, Mr. Boyer stated, it was up to the Hearing Tribunal to determine if Dr. Abouhamra's interpretation of the Undertaking was reasonable and consider the contextual analysis he had given. He also highlighted that in the *Sussman* case, there was a question of the psychologist's desire to protect his patient's confidentiality, where here it is a question of public safety with respect to infection prevention and control provisions.

Mr. Boyer submitted that Dr. Abouhamra's interpretation of the Undertaking was not reasonable. Mr. Boyer suggested that the language of the Undertaking was plain, especially if you take both paragraph 1 and paragraph 6 into context. He therefore submitted that options 1 and 2 above cannot be supported. Therefore, there is a question with respect to whether Dr. Abouhamra knowingly breached the Undertaking, an egregious act and ungovernable attitude, or if he believed he had a reasonable interpretation which he was following. The *Maytham* case recognizes that to be unaware of an undertaking's intent and meaning when one breaches it is still unprofessional conduct.

Mr. Hembroff stated that option 1 is indeed possible, and does not feel there is any evidence of option 3, that Dr. Abouhamra knowingly breached the Undertaking. He submitted that options 2 and 4 above are similar, and that either of these options would allow for a finding of no unprofessional conduct. Mr. Hembroff reminded the Hearing Tribunal that the Undertaking was written in 2007, and that it would be reasonable for one not to review it, but to instead refer to the wording of the restrictions as written on the practice permit. The practice permit says not to do invasive procedures in the clinic, and the only clinic Dr. Abouhamra was working in at that time was the Lloydminster Clinic. The permit did not specify that Dr. Abouhamra must only do invasive procedures in the hospital, as it does in paragraph 6 of the Undertaking. His pattern of behavior with respect to following these restrictions at the new location of the same Lloydminster Clinic would support this interpretation. Mr. Hembroff asks what a reasonable person was expected to do in this situation, keeping in mind that Dr. Abouhamra had been under stress and concerned for his livelihood.

Mr. Hembroff stated that if the Hearing Tribunal decides that this was a mistaken interpretation, that does not necessarily mean it was unprofessional conduct. He went on to say that if it were to be unprofessional conduct, the issue would be about not being aware of the proper interpretation of the Undertaking, not the volume of procedures. The volume of procedures was more a result of internal College issues with monitoring, leading to a delay in notification to Dr. Abouhamra of the concern.

VI. FINDINGS AND REASONS

> **Allegation**: 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 restriction 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 Hearing Tribunal found that, on a balance of probabilities, the allegation against Dr. Abouhamra is proven, and that his conduct amounts to unprofessional conduct.

To come to this determination, the Hearing Tribunal considered each element of the allegation, having regard to the evidence and the submissions of the parties. The Hearing Tribunal's reasons for its decision are set out below.

The Hearing Tribunal first considered whether Dr. Abouhamra performed invasive procedures on over 50 occasions on patients he saw at the Bonnie Doon Clinic between April 1, 2015 and December 3, 2016. Exhibits 19-22 were printouts of procedures performed by Dr. Abouhamra that he billed to Alberta Health. These exhibits demonstrate that there were a number of invasive procedures performed at the Bonnie Doon Clinic between April 1, 2015 and December 3, 2016. The invasive procedures that were performed included uterine biopsy, insertion of vaginal pessary, insertion and removal of intra-uterine contraception devices, and destruction of lesions by cauterization. The printouts demonstrate that invasive procedures were performed on over 50 occasions. Dr. Abouhamra testified that there were some errors in the printouts where a procedure had mistakenly been listed as being done at Bonnie Doon Clinic but acknowledged that he had performed over 50 invasive procedures at the Bonnie Doon Clinic on the dates listed. Accordingly, this element of the allegation was proven and was not in dispute.

The Hearing Tribunal then considered if these invasive procedures were contrary to the restriction on Dr. Abouhamra's practice as described in both the Undertaking and condition imposed on his practice permit. To make this determination, the Hearing Tribunal considered the specific wording of the Undertaking and the condition, the circumstances in which the Undertaking arose, and the testimony on behalf of each party with respect to the appropriate interpretation of the Undertaking.

The Undertaking was signed by Dr. Abouhamra on February 16, 2007 and includes a Preamble which sets out the background that gave rise to the Undertaking. The Preamble clarifies that the College received a complaint about the adequacy of Dr. Abouhamra's procedures and practice with respect to appropriate levels of cleanliness and sterilization in his medical office. As a result of the complaint, the College made an unannounced visit to the clinic, and prepared a report of inspection. The College requested that Dr. Abouhamra prepare a manual outlining the procedures followed in the Physician's office to ensure appropriate levels of cleanliness and sterilization. The College then obtained an independent opinion, which concluded that the practice of cleaning, disinfecting, and sterilizing of Dr. Abouhamra's medical instruments and supplies, and the cleanliness of the office did not meet the minimum standards of medical practice. Although it was determined that there was sufficient evidence to refer the matter to a hearing, the College was prepared to accept an undertaking from Dr. Abouhamra in lieu of proceeding to a hearing.

Paragraph 1 of the Undertaking signed in February of 2007 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.

Paragraph 2 of the Undertaking required Dr. Abouhamra to determine which patients underwent invasive procedures in the "Physician's office" prior to February 24, 2005, and paragraph 3 requires Dr. Abouhamra to advise patients who underwent an invasive procedure in the "Physician's Office" of their potential exposure.

Paragraph 6 of the Undertaking reads:

> The Physician shall prepare a procedure manual, as approved by the Registrar (the "Manual") setting forth the minimum standards of cleanliness, disinfection and sterilization for the Physician's office. Until the Registrar approves otherwise, the Physician shall continue to perform all invasive procedures only in a hospital setting.

"Physician's office" is not specifically defined in the Undertaking.

The Hearing Tribunal first looked at the wording and possible interpretations of the Undertaking signed in 2007. In the Preamble of the Undertaking, there are references to 'the Physician's office', and the "Physician's office" also appears in paragraphs 2 and 3 of the Undertaking but "Physician's office" is not further defined in the Undertaking, and the Lloydminster Clinic is not specifically mentioned in the Undertaking. Given that the concerns were identified while Dr. Abouhamra was practicing at the Lloydminster Clinic, and given the requirement to contact those patients who had been subject to an invasive procedure at that clinic, 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 Undertaking must be considered in its entirety. The restriction contained in paragraph 1 must be interpreted in a manner that is consistent with the other provisions of the Undertaking. The last sentence of paragraph 6 states clearly that "Until the Registrar approves otherwise, the Physician shall continue to perform all invasive procedures only in a hospital setting" [emphasis added]. Paragraph 6 in the Undertaking does not leave any room for interpretation when it states that Dr. Abouhamra should only have been performing invasive procedures in the hospital. Dr. Abouhamra recognized in his testimony that the Bonnie Doon Clinic is not a hospital setting.

Although Dr. Abouhamra stated repeatedly that he thought that the Undertaking only applied while he was practicing at the Lloydminster Clinic, he was unable to explain how his interpretation was consistent with paragraph 6. Even though "Physician's office" is not specifically defined in the Undertaking, the Hearing Tribunal rejects Dr. Abouhamra's suggestion that the Undertaking only applied to the Lloydminster Clinic, and finds that it was intended to apply more broadly to any setting outside of a hospital where Dr. Abouhamra was practicing.

The Hearing Tribunal also considered the condition placed on Dr. Abouhamra's practice permit. The condition was imposed in response to the Undertaking, once practice permits were required by the HPA, and has been in place continuously since imposed. The wording of the condition is: "Restricted from performing invasive procedures in the office". This wording also supports an interpretation that is broader than the interpretation proposed by Dr. Abouhamra. The practice permit refers to the 'office' in a more general way, and there is no preamble which may appear to be referring to a specific office. The Hearing Tribunal finds that this condition refers to all offices in which the physician would be working. Importantly the Hearing Tribunal felt that a patient entering Dr. Abouhamra's office, who was given a copy of the practice condition or checked it on the College's website, and was given no background information or history of how the condition arose, would, on its plain wording, expect that Dr. Abouhamra would not be able to perform invasive procedures in an office setting in any location.

The Tribunal also considered witness testimony in determining how to interpret the Undertaking and practice permit condition. Neither Ms. Minckler nor Dr. Ulan was involved in Dr. Abouhamra's case at the time when the Undertaking was drafted. While both agreed that these documents referred to all

clinics, the opinions they provided were not helpful to the Hearing Tribunal in determining the intent of the Undertaking. Dr. Ritchie, who was involved in this original compliant, also believed that the Undertaking and condition covered any clinic in which Dr. Abouhamra would be working. In his testimony, he explained how infection prevention and control is a physician's responsibility and that many of the concerns he noted in his first inspection of Dr. Abouhamra's office were related to physician behavior, which would follow a physician from office to office.

The Hearing Tribunal agrees that concerns relating to infection prevention and control are not specific to a particular office location. The issues that arose were not only relevant to Dr. Abouhamra's practice at the Lloydminster Clinic and there were concerns regarding Dr. Abouhamra's understanding of the requirements for infection prevention and control more generally. The Hearing Tribunal finds that the interpretation of the Undertaking advanced on behalf of the Complaints Director also makes sense in light of the concerns identified in the original inspection.

The Hearing Tribunal considered the fact that Dr. Abouhamra wanted the conditions lifted, and that he testified how hard he tried to have them lifted. While the Hearing Tribunal empathized with the difficulty Dr. Abouhamra faced in navigating the College's processes around this, the conditions remained in place, and he was aware of that. It is not within the Hearing Tribunal's purview to determine if it were appropriate for Dr. Abouhamra to have these conditions removed, nor does his desire to have them removed change the interpretation or importance of the conditions. What it would have taken to remove the conditions, and whether he would have been able to have them removed with further investigation and inspection, was not relevant in determining whether the allegation was proven.

The Hearing Tribunal considered why Dr. Abouhamra would have interpreted the Undertaking and conditions in the manner he did, and the credibility of his testimony in determining if this breach reached the level of unprofessional conduct. Dr. Abouhamra testified that he had been under a great deal of stress leading up to his decision to work in the Bonnie Doon Clinic due to the previous issues with the College, the public attention this had brought to him, as well as the strain of his recent hospital suspension. He felt he was taking extra steps to avoid further concern by asking permission from Dr. Heisler to work at the Bonnie Doon Clinic, which he did not specifically have to do. Dr. Abouhamra interpreted these email exchanges between his legal counsel and Dr. Heisler as permission to not only work in the Bonnie Doon Clinic, but also to do invasive procedures there. The Hearing Tribunal did not find the request for permission, nor the permission granted, to be specific to the question of invasive procedures. Dr. Abouhamra was reminded at that time to share his practice permit conditions with his employer. The Hearing Tribunal therefore finds that this communication should not have been mistaken as a lifting of the condition on his practice permit, or permission to do invasive procedures at the Bonnie Doon Clinic.

The Hearing Tribunal found it unfortunate that despite all Dr. Abouhamra had been through with the College and the health authority in Saskatchewan, that he was not fully aware of process and procedure relating to his practice. Dr. Abouhamra admitted that he had not reviewed his Undertaking recently, and while he might not consider doing this on a regular basis, re-reading the document when he embarked on a change in practice (moving to a new clinic) would have been expected and prudent. Similarly, he did not have a basic understanding of the HPA, which permitted him to appeal the condition that had been imposed on his practice permit. In addition, he did not have an understanding that there were two distinct complaint files opened about him, one relating to the issue that arose in Saskatchewan, and one relating to the alleged breach of the Undertaking and practice permit condition, which might have helped him to understand the College's concerns and avoid further difficulty.

The Hearing Tribunal did take into consideration Dr. Abouhamra's many years of compliance with the Undertaking and believes that the change in his professional situation once he was unable to work at the Lloydminster Hospital adequately explains his change in compliance. Dr. Abouhamra testified to the decimation of his clinical practice after his suspension, and the need to survive and pay his bills by finding alternate work. Given this change in his practice, Dr. Abouhamra may have been inclined to interpret the Undertaking and condition on his practice permit in a more personally favorable or beneficial

way. On the balance of probabilities, and taking into consideration a reasonable person's interpretation of the Undertaking and the condition on his practice permit, the Tribunal determined that Dr. Abouhamra was willfully blind in his chosen interpretation.

As noted above, the Hearing Tribunal finds that Dr. Abouhamra's interpretation of the Undertaking and the condition on the practice permit is not consistent with the College's intent in imposing it, nor is it consistent with the plain wording of the Undertaking or the language of the practice permit. Dr. Abouhamra did not review the wording of the Undertaking prior to performing invasive procedures at the Bonnie Doon Clinic. Had he done so, it should have been apparent to him that he could not perform invasive procedures in any office until the condition was lifted by the Registrar. Although Dr. Abouhamra's legal counsel contacted Dr. Heisler, the Complaints Director, to ask whether he could work at the Bonnie Doon Clinic, the Undertaking and the condition on the practice permit was not specifically mentioned. Moreover, Dr. Heisler did not purport to remove the condition when he responded to the query from Dr. Abouhamra's counsel.

The Hearing Tribunal also considered whether Dr. Abouhamra's conduct constitutes unprofessional conduct, as defined in the HPA. Section 1(1)(pp)(viii) defines unprofessional conduct to include contravening conditions imposed on a practice permit. Section 1(1)(pp)(xii) defines unprofessional conduct to include conduct that harms the integrity of the profession. The Hearing Tribunal accepts that the fact that Dr. Abouhamra breached the Undertaking and the condition on his practice permit does not lead to the automatic conclusion that he is guilty of unprofessional conduct, and acknowledges that the context must be considered. The Hearing Tribunal finds that Dr. Abouhamra's conduct was sufficient to rise to the level of unprofessional conduct.

The Hearing Tribunal recognizes the privilege physicians have in being a self-governing profession. The public must be comfortable with the fact that physicians are complying with the general standards of the profession, as well as any specific restrictions or conditions imposed by the regulating body. Public interest and safety in this case was weighed most heavily by the Hearing Tribunal's determination of unprofessional conduct. Cleanliness, proper sterilization of equipment, and infection prevention and control procedures are vital components of patient care and safety. While many members of the medical team would participate in these processes, the physician remains primarily responsible for safe and appropriate care of their patients, regardless of the setting.

In this case, the College imposed a condition on Dr. Abouhamra's practice permit as a result of serious concerns that were identified relating to infection prevention and control. Although Dr. Abouhamra testified that he undertook additional training in these areas, and his follow up inspections were compliant with medical standards, the College had not completed whatever process would have been required for the condition to be lifted. Accordingly, the risk to the public of having Dr. Abouhamra perform invasive procedures in the office, without appropriate review of his condition, was greater than the risk to the public of him not doing those procedures. The Hearing Tribunal felt strongly that the public expects the College, as the regulatory body of a self-governing profession, to take these concerns seriously, and to ensure appropriate remediation before a condition of this nature is lifted.
The Hearing Tribunal considered the cases presented on behalf of the Complaints Director. The Hearing Tribunal agreed with the submissions on behalf of Dr. Abouhamra that not all cases (such as *Beaver v. Law Society* and *Wachtler v. CPSA)* were relevant here given the significant difference in case details or conduct at issue. However, the principles established in some of the decisions cited were applicable.

In particular, in *CPSO v. Maytham* (2007), Dr. Maytham was charged with breaching an undertaking to stop prescribing drugs in Schedules 1-4 of the *Controlled Drugs and Substances Act*. Dr. Maytham indicated that he thought he was only prohibited from prescribing narcotics. The Discipline Committee found that Dr. Maytham's failure to inform himself of the scope of the undertaking contributed to the finding of unprofessional conduct. The Discipline Committee stated the following:

> "An undertaking between a physician member and the College is a serious matter as the College must be able to govern its members and protect the public. When a physician has signed an undertaking with the College, the College must be able to rely on the physician to regard the undertaking with the utmost seriousness and to inform himself as to its scope and abide by it."

The Hearing Tribunal agrees with the Discipline Committee's comments, and finds that Dr. Abouhamra had an obligation to comply with the Undertaking and the condition on his practice permit, and to seek clarification and confirmation that the Undertaking had been lifted prior to engaging in invasive procedures at the Bonnie Doon Clinic.

The Hearing Tribunal also considered whether the volume of procedures that were performed by Dr. Abouhamra was relevant to its finding that the conduct constituted unprofessional conduct. Although the Hearing Tribunal has made a finding of unprofessional conduct, the volume of procedures was not a determinative factor in its decision. There were several considerations that lead to such a large number of procedures being done before the College brought this concern to Dr. Abouhamra's attention. The Hearing Tribunal recognized that from Dr. Abouhamra's perspective there had been an even greater number of procedures questioned by the College in the past, which once explained, were not found to be of concern. The Hearing Tribunal felt that Dr. Abouhamra appeared to genuinely care for his patients, and there was no evidence that he meant any patient harm by continuing to do these procedures. The Hearing Tribunal appreciated the fact that Dr. Abouhamra recognized the inconvenience he imposed both to patients and the system for the period he was restricted from invasive procedures in any office and unable to work in the hospital.

Conclusion

The Hearing Tribunal found that, on a balance of probabilities, the allegation against Dr. Abouhamra is proven, and that this does amount to unprofessional conduct. The Hearing Tribunal felt that Dr. Abouhamra was willfully blind in his chosen interpretation of the Undertaking signed in 2007 and the practice permit condition in place. Furthermore, this action was unprofessional due to the risk it posed to the public, and the importance of undertakings in a self-governing profession.

VII. ORDERS / SANCTIONS

The Hearing Tribunal will consider submissions from the parties with respect to appropriate orders or sanctions at a later date, as arranged by the Hearing Director.

Signed on behalf of the Hearing Tribunal by the Chair

Dated: February 10, 2018

Dr. Erica Dance

COLLEGE OF PHYSICIANS & SURGEONS OF ALBERTA

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

AND IN THE MATTER OF A HEARING REGARDING
THE CONDUCT OF DR. MUSBAH ABOUHAMRA

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

INTRODUCTION

A hearing into the conduct of Dr. Musbah Abouhamra was held on December 5 and 6, 2017. A decision dated February 10, 2018 was sent to the parties February 12, 2018. The Hearing Tribunal found that, on a balance of probabilities, the allegation against Dr. Abouhamra was proven, and that it did amount to unprofessional conduct. The Hearing Tribunal felt that Dr. Abouhamra was willfully blind in his chosen interpretation of the Undertaking signed in 2007 and the practice permit condition in place. Furthermore, the Hearing Tribunal found that this action was unprofessional due to the risk it posed to the public, and the importance of undertakings in a self-governing profession.

The parties were subsequently contacted to determine whether they wished to reconvene to address penalty in person, or whether they wished to make submissions on penalty in writing. Neither of the parties requested verbal submissions or an in-person hearing. Accordingly, the parties were informed of the opportunity to make submissions in writing.

The Hearing Tribunal received the following information on behalf of the parties:

1. Written Submissions on Sanction of the Complaints Director, dated March 20, 2018;
2. Written Submissions on Sanction of Dr. Abouhamra, dated April 11, 2018;
3. Letter from Mr. Boyer to the Members of the Hearing Tribunal, dated April 16, 2018; and
4. Email from Mr. Hembroff, dated April 16, 2018.

The Hearing Tribunal met via teleconference on May 17, 2018 to consider the written submissions of the parties and the additional documentation submitted on behalf of Dr. Abouhamra.

The members of the Hearing Tribunal present were:

Dr. Erica Dance of Edmonton as Chair
Dr. Don Yee of Edmonton
Mr. Ralph Colistro of Edmonton as the public member

Ms. Katrina Haymond, independent legal counsel for the Hearing Tribunal, was also present.

Subsequently, the Hearing Tribunal also received an email from Mr. Hembroff, dated May 29, 2018, and an email from Mr. Boyer, dated May 30, 2018.

SUBMISSIONS

Counsel for the Complaints Director

Mr. Craig Boyer provided a written submission on sanctions for the Hearing Tribunal's consideration on behalf of the Complaints Director of the College of Physician and Surgeons of Alberta ("the Complaints Director"). The Complaints Director requested that the Hearing Tribunal order a suspension of Dr. Abouhamra's practice permit for a period of two months, and that he be required to pay the costs of the investigation and hearing.

Mr. Boyer reminded the Hearing Tribunal of the purpose of orders in a discipline proceeding. Using an excerpt from James Casey's *Regulation of Professions in Canada* (pages 14-5 to 14-7), Mr. Boyer reviewed the need to protect the public, maintain the integrity of the profession, be fair to the member, and use deterrence to prevent similar unacceptable conduct in the future.

Mr. Boyer used the decision of *Jaswal v Newfoundland Medical Board* to review the factors that should be considered when determining what sanction(s) would be appropriate in this case. Specifically referring to paragraph 36, he highlighted the following as a non-exhaustive list of factors to consider:

1. The nature and gravity of the proven allegations
2. The age and experience of the offending physician
3. The previous character of the physician and in particular the presence or absence of any prior complaints or convictions
4. The age and mental condition of the offended patient
5. The number of times the offence was proven to have occurred
6. The role of the physician in acknowledging what had occurred
7. Whether the offending physician had already suffered other serious financial or other penalties as a result of the allegations having been made
8. The impact of the incident on the offended patient
9. The presence or absence of any mitigating circumstances
10. The need to promote specific and general deterrence and, thereby, to protect the public and ensure the safe and proper practice of medicine
11. The need to maintain the public's confidence in the integrity of the medical profession
12. The degree to which the offensive conduct that was found to have occurred was clearly regarded, by consensus, as being the type of conduct that would fall outside the range of permitted conduct
13. The range of sentence in other similar cases

Mr. Boyer then reviewed each of these considerations as they relate to Dr. Abouhamra's case. Mr. Boyer submitted that:

- There were serious concerns regarding infection prevention and control in Dr. Abouhamra's office when the College of Physicians and Surgeons of Alberta (the "College") first entered into an Undertaking with Dr. Abouhamra in 2007.
- The Hearing Tribunal rejected Dr. Abouhamra's assertion that his interpretation of the Undertaking and subsequent practice conditions imposed was reasonable and that he had done nothing wrong. The Hearing Tribunal found this action reached the level of unprofessional conduct.
- Dr. Abouhamra is an experienced physician.
- The lack of patient offence or harm may be used as a mitigating factor in this case, but the Hearing Tribunal concluded that there is an expectation of self-regulated professionals to practice in accordance with the general standards of the profession and to comply with any specific restrictions or conditions imposed by the regulating body.
- Dr. Abouhamra performed over 50 invasive procedures in the office between April 1, 2015 and December 3, 2015.

- Dr. Abouhamra denied having breached his practice restriction.
- While Dr. Abouhamra testified to his financial challenges after his temporary loss of privileges in Saskatchewan, this was not caused by, or related to, the practice restriction against performing invasive procedures in the office.
- The Hearing Tribunal acknowledged that physicians are granted the privilege of self-regulation and are required to govern in a manner that protects the public. Therefore sanction orders should provide both general and specific deterrence to ensure that the profession is aware that this conduct will not be condoned by the College.
- The cases of *CPSO v Maytham* and *CPSO v Saul*, which were provided at the hearing, highlight that the two-month suspension being proposed by the Complaints Director falls within the range of sanctions in similar cases.

With respect to determining costs to impose on a disciplined professional, Mr. Boyer again highlighted the *Jaswal* case, paragraph 51, for a non-exhaustive list of factors to consider before deciding to impose an order for payment of expenses:

1. The degree of success, if any, of the physician in resisting any or all of the charges.
2. The necessity for calling all of the witnesses who gave evidence or for incurring other expenses associated with the hearing.
3. Whether the persons presenting the case against the doctor could reasonably have anticipated the result based upon what they knew prior to the hearing.
4. Whether those presenting the case against the doctor could reasonably have anticipated the lack of need for certain witnesses or incurring certain expenses in light of what they knew prior to the hearing.
5. Whether the doctor cooperated with respect to the investigation and offered to facilitate proof by admissions, etc.
6. The financial circumstances of the doctor and the degree to which his financial position has already been affected by other aspects of any penalty that has been imposed.

Mr. Boyer referred to *Alberta College of Physical Therapists v Fitzpatrick*, where the Alberta Court of Appeal found that daily discipline hearing costs were typically in the range of $23,000.

Mr. Boyer also highlighted two cases relevant to the decision of imposing costs. In *Chen v College of Denturists of Ontario* the Ontario Superior Court of Justice stated that "the Member… bears some of the responsibility for overall costs. The costs of the investigation and discipline process cannot solely be the onus of the rest of the College's membership".

In *Hoff v Alberta Pharmaceutical Association*, the Alberta Court of Queen's Bench stated that: "Proceedings like this must be conducted by the respondent association… Its costs in so doing may properly be borne by the member whose conduct is at issue and has been found wanting". Mr. Boyer submitted that while Dr. Abouhamra was able to avoid a full hearing on the matter which lead to the 2007 Undertaking, his denial of this current charge is the reason a contested hearing was required. It is noted in Mr. Boyer's submissions that as of March 14, 2018 the College had incurred costs of $36,497.41 in relation to the investigation and hearing.
In conclusion, the Complaints Director submitted that the Hearing Tribunal should make the following orders in accordance with s. 82 of the HPA:

a. Dr. Abouhamra's practice permit shall be suspended for a period of two (2) months, to be served starting on a date acceptable to the Complaints Director and being no later than thirty (30) days after the date of the Hearing Tribunal's decision on sanction; and

b. Dr. Abouhamra shall be responsible for the full costs of the investigation and hearing with payment to be made by equal installments within 24 months from the date the College provides Dr. Abouhamra with the statement of costs incurred up to, and including, the issuance of the Hearing Tribunal's decision on sanction.

Counsel for Dr. Abouhamra

Mr. Hembroff provided written submissions on behalf of Dr. Abouhamra in response to the Complaints Director's submissions. Mr. Hembroff introduced his submission by highlighting that some of the testimony given at the hearing; particularly that of Dr. Ritchie, came as a surprise to Dr. Abouhamra. This prompted a review of the original complaint file from 2005. As a result, a number of additional letters and documents were appended to Dr. Abouhamra's written submissions at tabs (a) – (p).

Mr. Hembroff stated that while Dr. Abouhamra cannot ask the Hearing Tribunal for a reconsideration of its decision, it is hoped that additional information gleaned from this review of the former counsel's file would support an argument that no sanction beyond a reprimand should be given to Dr. Abouhamra, and that the costs of the investigation and hearing should be borne by the College.

Mr. Hembroff reviewed the events which took place from 2005 to 2009 referring to the original complaint and inspection of the Lloydminster Women's Clinic ("LWC") as well as the drafting of the Undertaking. He highlighted that the final signed version of the Undertaking from 2007, presented at the hearing, contains "altered wording" from the previous drafts which he feels supported Dr. Abouhamra's original assertion that the "practice restriction was entirely about the practices at the LWC".

Mr. Hembroff provided a detailed review of the communications between Dr. Abouhamra's counsel at the time and the College regarding the creation of the Undertaking. Included here is discussion about what would be included and how it would be worded, any monitoring which would take place, and acceptance of a procedure manual. Mr. Hembroff submitted that this review shows that "reference to 'hospital setting' in para. 6 of the signed Undertaking was clearly a hold-over and throw-in from original drafts, and not at all relevant to the signed Undertaking or its interpretation". It is also noted that the "Physician concedes that it would have been prudent to confirm the scope of the Undertaking with Dr. Heisler at the time he advised him of, and sought his approval for, his intention to work with the BDC [Bonnie Doon Clinic]".

Mr. Hembroff stated that the hearing could have been avoided if Dr. Abouhamra had sought and received this permission, or if the College had lifted the specific restriction in response to years of compliance and production of a policy manual. He also highlighted that the College approached the most recent concern differently than they had previous concerns, and that in his opinion, the witnesses at the hearing appeared to testify in a way that supported a finding against Dr. Abouhamra. Mr. Hembroff submitted that the Hearing Tribunal should not "further punish Dr. Abouhamra with a suspension, nor with adverse costs as requested by the College".

Mr. Hembroff then reviewed the *Jaswal* Factors, stating:

- Dr. Abouhamra breached the undertaking for the first time, after 10 years of compliance.
- While the Hearing Tribunal found him to be willfully blind to the correct interpretation of the Undertaking, he has not been found ungovernable, and had in fact been responsive to the complaint and cooperative throughout his dealings with the College.
- Dr. Abouhamra is well experienced.
- Other than the complaint which lead to the restriction and Undertaking in 2007, Dr. Abouhamra had a good record and showed himself to be fully governable and respectful to the College.
- There were no offended patients, and no negative impact on patients.
- The Hearing Tribunal found that the number of invasive procedures was irrelevant to its finding and interpretation of the issue.
- Dr. Abouhamra agreed to all material facts in question but maintains his position on his understanding of the scope and intention of the Undertaking and restriction, which is his right.
- Dr. Abouhamra has already suffered significant financial strain from the imposition of the restriction including paying for inspections, alterations to the clinic, development of a policy manual, monitoring of these practices, and (successful) response to the College's allegations in the past. Further, Dr. Abouhamra's practice was destroyed by another governing body's actions in Saskatchewan, which was later quashed by a superior court. Despite numerous attempts to have the restrictions lifted by the College, he was not able to perform invasive procedures at the LWC. Dr. Abouhamra's "financial punishment thus continues" and he "has clearly been financially punished enough".
- The added information provided about how Dr. Abouhamra came to his interpretation of the Undertaking shows that no serious sanction is required to ensure the Physician's safe and proper practice or his compliance with College directions. Specifically, further punishment in this case would be no deterrent.
- Maintaining public confidence is important but not applicable in this case. The College "could have revisited the restriction instead of launching into a complaint process, and determined the restriction was unwarranted and removed it". The fact that Dr. Abouhamra was monitored and knew he was being monitored is sufficient to maintain public confidence in the College.
- The conduct of Dr. Abouhamra was not characterized as egregious and only negatively impacted Dr. Abouhamra.
- The cases provided by Mr. Boyer were reviewed but are not relevant. As per Ms. Minckler's testimony in the hearing, Dr. Abouhamra's was the only case the College had where a physician was restricted from performing invasive procedures in their office. Mr. Hembroff could not find any sanction decisions referencing a finding of willful blindness to the scope of an undertaking or restriction, and breaches of other Undertakings by other physicians in other situations are not a fair comparison.

In summary Mr. Hembroff stated that the Hearing Tribunal's decision was devastating to Dr. Abouhamra especially in light of the other challenges Dr. Abouhamra has had with administrative bodies recently. A suspension is not needed and would be solely punitive. Similarly, Dr. Abouhamra should not be further financially punished and should pay a nominal amount if anything. Instead, the College should be required to pay the cost for failing to put forward evidence which reflected the evolution of the Undertaking at issue, and for calling witnesses that were unhelpful.

In his conclusion, Mr. Hembroff pre-empts any concerns which may be raised in regards to the Hearing Tribunal considering evidence which was not before it at the time its decision of unprofessional conduct was made. He stated that Dr. Abouhamra was not requesting the Hearing Tribunal to change its decision, but to recognize that this evidence was in possession of the College at the time of the hearing, and to know that Dr. Abouhamra believed the College would put forward oral evidence which supported his position regarding his understanding of the practice restriction. While Dr. Abouhamra cannot ask the Hearing Tribunal to reconsider its finding of unprofessional conduct, he does ask that this additional information be fully and fairly considered in determining sanctions.

With respect to costs, Mr. Hembroff reminded the Hearing Tribunal that Dr. Abouhamra attempted to resolve this matter without a hearing, but could not admit that he purposefully breached the Undertaking as he did not genuinely believe he did this. Also, Dr. Abouhamra attempted to narrow the scope of the hearing by limiting the issues, providing timely admissions, and not calling unnecessary witnesses. The College was the complainant here and had the discretion to resolve the matter practically and consensually without a hearing. The College is requesting costs which go beyond what a successful party would be awarded in a court proceeding, which typically amounts to 50% of the actual costs. Further, a party to litigation is entitled to a review of legal accounts by a Review Officer.

Mr. Hembroff submitted that "the College instigated the complaint, without first contacting Dr. Abouhamra as it had done in the past, to seek an explanation and redress, and went full steam ahead to a Hearing, ignoring past information and physician conduct/cooperation and practicality and perhaps even fairness to the Physician. That approach, when the public has not been harmed, and is not being harmed, should be wholly discouraged by forcing the College to pay for its own chosen approach."

Dr. Abouhamra requests that the Hearing Tribunal make the following order:

> A reprimand; which remains unpublished pending the results of any appeal of the Panel's decisions with investigation and Hearing costs to be borne by the parties who/which incurred them.

Response from Counsel for the Complaints Director

On behalf of the Complaints Director, Mr. Boyer submitted a letter in response to Dr. Abouhamra's submissions. Mr. Boyer submitted that a number of the documents submitted on behalf of Dr. Abouhamra were not in evidence at the hearing. The Complaints Director was not consulted and did not agree to have those additional documents entered as evidence. Specifically, it is noted that many of the documents pre-date the execution of the Undertaking in question and involve discussions between legal counsel as to the ultimate wording of the Undertaking, which would not be relevant to the issue of sanction. Of note, "the earlier drafts of the Undertaking do not include the penultimate paragraph #6" which is highlighted in the Hearing Tribunal's decision as expressly requiring Dr. Abouhamra to perform invasive procedures only in a hospital setting.

Mr. Boyer submitted that it is not appropriate to attempt to re-litigate the findings of the Hearing Tribunal. The Complaints Director objected to the Hearing Tribunal giving any consideration to records that were not put into evidence as it would be contrary to a fair hearing process. Finally, Mr. Boyer objected to the suggestion that the Hearing Tribunal was misled in the process of the hearing.

Response from Counsel for Dr. Abouhamra

Mr. Hembroff responded to Mr. Boyer's objections by stating that the hearing was unnecessary and unwarranted, and that the Undertaking was "never intended to be interpreted as claimed by the College at the Hearing". Mr. Hembroff stated that all the information provided in his submission on behalf of Dr. Abouhamra was received by and in possession of the College, and is all relevant to the issue of sanction.

Further discussion between Counsel for the Complaints Director and Counsel for Dr. Abouhamra

On May 29, 2018 Mr. Hembroff contacted the College and the Hearing Tribunal, via email communication with Ms. Haymond, to inform them that Dr. Abouhamra had removed himself from practice between March 20 to May 28, 2018; a period of over two months. He therefore submitted that if the Hearing Tribunal determined a suspension was in order, he requested the Hearing Tribunal consider the suspension already served, or make the start date of the suspension retroactive to March 20, 2018.

Mr. Boyer responded on behalf of the Complaints Director that he had no objection to this request or suggestion.

DECISION

(a) Additional Documentation Submitted on Behalf of Dr. Abouhamra

The Hearing Tribunal reviewed and carefully considered all the information provided by both parties in their submissions. Before determining sanctions, the Hearing Tribunal first looked at the new information provided by Mr. Hembroff and the objections to the submission of this information on behalf of the Complaints Director.

The written submissions and the new information provided further historical background with respect to the evolution of the Undertaking. Ultimately, Dr. Abouhamra submitted that the additional information supported his interpretation, which was that the Undertaking only prohibited him from performing invasive procedures at the Lloydminster Women's Clinic. In his penalty submissions, Dr. Abouhamra reviewed the new information in detail, and how his interpretation of the Undertaking was reasonable in light of the new evidence, stating the following at para. 26:

> "The reference to "hospital <u>setting</u>" in para. 6 of the signed Undertaking was clearly a hold-over and throw-in from original drafts, and not at all relevant to the signed Undertaking or its interpretation."

The Hearing Tribunal finds that the introduction of the new information at this stage is an attempt to provide further evidence and arguments in support of Dr. Abouhamra's position at the hearing, where he provided testimony with respect to his understanding of the scope of the Undertaking. Given 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. Accordingly, the Hearing Tribunal is not in a position to reconsider its findings.

Even if the Hearing Tribunal could reconsider its findings, it would not be appropriate for the Hearing Tribunal to do so. Although the strict rules of evidence do not apply to hearings before the Hearing Tribunal, the Hearing Tribunal agrees with the submission on behalf of the Complaints Director that relying on the documentation, without putting the documentation to the appropriate witness and providing the opportunity for cross-examination would be unfair.

The Hearing Tribunal also considered if the new information was relevant or helpful with respect to sanction. The added information provided by Mr. Hembroff highlighted the complexity of the discussions, the challenges faced in determining the final wording of conditions and undertakings, and the difficulty Dr. Abouhamra had in trying to have certain conditions removed. However, this complexity was noted by the Hearing Tribunal in its decision. The Hearing Tribunal stated in its decision that it "empathized with the difficulty Dr. Abouhamra faced in navigating the College's processes" (page 18). Therefore, even if the new information could be submitted and relied upon without being admitted through a witness, the new information merely supported the Hearing Tribunal's prior findings in this regard, and did not provide the Hearing Tribunal with any new information with respect to penalty.

(b) Considerations with Respect to Penalty

The Hearing Tribunal then reviewed the conduct of Dr. Abouhamra, taking the *Jaswal* factors into consideration. It also considered the information highlighted in James Casey's *Regulation of Professions in Canada* (pages 14-5 to 14-7), including protection of the public, maintaining the integrity of the profession, fairness to the member and deterrence, both specific deterrence to the member in question and general deterrence for other members of the profession.

The Hearing Tribunal considered the Complaints Director's request for a two-month suspension, and Dr. Abouhamra's request to have no suspension, or to have his recent voluntary removal from practice for a period of over two months taken into consideration.

The core issue was Dr. Abouhamra's breach of the Undertaking with the College, and the importance of undertakings in a self-regulated profession. Patients should have confidence that the physicians from whom they are receiving medical care are appropriately trained, licensed and regulated. Patients do not always have the ability to choose their own physician and so should have confidence that all physicians are following their regulatory body's conditions and regulations.

The Hearing Tribunal reviewed the cases provided by Mr. Boyer supporting the Complaint Director's request for suspension. In the case of *CPSO v Saul*, 2014 ONCPSD 29, Dr. Saul continued to provide medical declarations for medical marijuana after he entered into an undertaking with the College not to do so. Dr. Saul stated that he did so because he did not understand when the undertaking came into effect. The Discipline Committee found:

> "Dr. Saul understood or ought to have understood what his obligations in signing the Undertaking entailed. It can be inferred that he chose to ignore his duty in this respect or dismissed his obligations to the College as lacking importance. At no time did he consult with the College as to his obligations, rather he disregarded the authority of the College and unreasonably substituted his own interpretation of the Undertaking. He acted in a self-serving and convenient manner…"

The second case was *CPSO v Maytham*, 2011 ONCPSD 18. Dr. Maytham was found to not have kept appropriate records of the patients for which he was prescribing controlled substances. Mr. Boyer noted that "the Discipline Committee ordered a four-month suspension for conduct that it found disregarded the College's responsibility for professional governance in a manner that 'significantly exceeded carelessness or sloppiness'".

While the Hearing Tribunal accepts there are similarities in the unprofessional conduct of these cases to Dr. Abouhamra's, it also feels there are differences. Dr. Abouhamra's breach was not as severe as prescribing medications inappropriately or inadequate record keeping. No patients were harmed or

offended in Dr. Abouhamra's case, and Dr. Abouhamra was performing these invasive procedures in a clinic which did not have a history of sterilization or cleanliness concerns, so the previous concern for infection prevention and control was mitigated.

Dr. Abouhamra wanted his conditions lifted and, again, the Hearing Tribunal was empathetic to Dr. Abouhamra's challenge in having the conditions removed. There could have been a more straight forward mechanism to have this request heard, and Dr. Abouhamra could have been better guided on how to do this. These were mitigating factors in the Hearing Tribunal's decision on penalty.

The Hearing Tribunal did not feel that suspension specifically for public protection was needed in this case as Dr. Abouhamra responded appropriately once he was informed of this error in practice. It also did not feel that heavy penalty was required for specific deterrence as Dr. Abouhamra cooperated with the College in suspending invasive procedures in the office once the gravity of this situation was made clear to him. The Hearing Tribunal is confident that Dr. Abouhamra is not likely to misinterpret conditions set out by the College again.

However, the Hearing Tribunal did feel that a short period of suspension was required in order to maintain the integrity of the profession, and for general deterrence. The profession and the public need to know there are serious consequences for breaching an undertaking or practice condition, especially given that the undertaking arose following serious concerns with the infection prevention and control procedures at Dr. Abouhamra's clinic. While a period of suspension was warranted, given the unique facts of this case, a short suspension of seven days is sufficient, rather than the lengthier period sought by the Complaints Director.

In addition, further to the submissions of the parties, the Hearing Tribunal accepts that Dr. Abouhamra was not working for a period of time, and agrees with the parties that Dr. Abouhamra may be given credit for the period of time he was away from practice.

The Hearing Tribunal did consider Dr. Abouhamra's submissions regarding the application of the *Jaswal* factors. The Hearing Tribunal agrees that Dr. Abouhamra had the right to contest the allegation, and the fact that he decided to proceed to a contested hearing was not relevant to the Hearing Tribunal's decision to order a suspension.

The Hearing Tribunal also considered the other submissions advanced on Dr. Abouhamra's behalf, including that he had been adversely affected by the imposition of the restriction in the first case, and that there is no reason for the restriction to be continued. While the Hearing Tribunal notes that Dr. Abouhamra has been affected by the undertaking, it is not within the Hearing Tribunal's purview to determine if it is appropriate for these conditions to be removed. Whether or not it would be possible to remove the restrictions is not relevant in determining penalty. Dr. Abouhamra can take steps to have the condition lifted, and if he is not successful, he can appeal the decision to impose the condition on his permit to Council when his practice permit is renewed.

With respect to cost of the investigation and hearing, the Hearing Tribunal notes that costs are discretionary, and the Hearing Tribunal is not obliged to order costs following a finding of unprofessional conduct in all cases. While they have a detrimental impact on an investigated person, they are not a penalty, but are rather intended to indemnify the College for costs that have been incurred.

Mr. Boyer provided a Summary of Expenses that shows that the College has incurred costs of $36,497.41 as of March 14, 2018. The Hearing Tribunal finds that the costs incurred to date are reasonable, given the length of the hearing, and the nature of the evidence and submissions made by the parties. The Hearing

Tribunal recognizes that there will be additional costs incurred to address penalty. The Complaints Director submitted that Dr. Abouhamra should be required to pay full costs of the hearing over a 24 month period. Mr. Hembroff submitted that Dr. Abouhamra should not have to bear any of the costs.

The Hearing Tribunal again considered all arguments carefully. The Hearing Tribunal finds that it is appropriate, given the facts in this case, for Dr. Abouhamra to pay 50% of the costs of the investigation and hearing, to a maximum of $30,000.00. This is to be paid in a lump sum within 60 days of receiving this decision, or in installments over a period of 24 months, or within a longer period of time if agreed to by the Complaints Director. While the Hearing Tribunal recognizes that a costs order will have an impact on Dr. Abouhamra, the opportunity to pay costs over time does mitigate the impact on Dr. Abouhamra to some degree.

In considering whether to order costs and the amount of costs to order, the Hearing Tribunal considered the submissions of the parties.

Mr. Boyer gave two case examples to support the Complaints Director's request for Dr. Abouhamra to pay for the full cost of the investigation and hearing. Mr. Boyer referred to the decision in *Chen v College of Denturists of Ontario*, which states the following:

> "[w]hile the Member has the right to a thorough investigation and the right to a hearing, he also bears some responsibility for the overall costs. The costs of the investigative and discipline process cannot solely be the onus of the rest of the College's membership."

Mr. Boyer also referred to *Hoff v Alberta Pharmaceutical Association* where the Court stated:

> As a member of the pharmacy profession the appellant enjoys many privileges. One of them is being part of a self-governing profession. Proceedings like this must be conducted by the respondent association as part of its public mandate to assure to the public competent and ethical pharmacists. Its costs in so doing may properly be borne by the member whose conduct is at issue and has been found wanting. Appellant's request for cancellation or reduction is accordingly refused.

The Hearing Tribunal specifically considered the case of *Jaswal v Newfoundland Medical Board* with respect to costs, and finds that the following factors were relevant:

1. **The degree of success, if any, of the physician in resisting any or all of the charges**

While the Hearing Tribunal cannot increase the penalty as a result of the fact that a member chooses to proceed to a contested hearing, a costs order is not a penalty, but is indemnification for costs incurred by the College associated with the investigation and hearing. Accordingly, as in *Jaswal,* it is appropriate to consider the degree of success in defending the charges. Dr. Abouhamra did dispute the allegation against him necessitating a contested hearing.

2. **The necessity for calling all of the witnesses who gave evidence or for incurring other expenses associated with the hearing**
3. **Whether those presenting the case against the doctor could reasonably have anticipated the lack of need for certain witnesses or incurring certain expenses in light of what they knew prior to the hearing**

Dr. Abouhamra did not call any witnesses and only testified on his own behalf. The College called three witnesses. In its decision, the Hearing Tribunal did not find two of those three witnesses' (Ms. Minckler's or Dr. Ulan's) testimony to be helpful in determining the correct

interpretation of the Undertaking especially considering they were not involved in the original drafting of the Undertaking. The Hearing Tribunal considered if the College could have foreseen this lack of relevance or need for these two witnesses to the outcome of the case, and therefore if a one-day hearing may have been possible, thereby lessening the cost of the hearing. The Hearing Tribunal found that Ms. Minckler's testimony and a good deal of Dr. Ulan's testimony was not relevant. Accordingly, there is a possibility that the hearing could have been shortened, thereby reducing the overall costs. This was one of the factors considered by the Hearing Tribunal in ordering 50% of the costs of the investigation hearing, rather than 100% of the costs.

Mr. Hembroff submitted that the College should have dealt with this matter informally and without a hearing at all. However, it is not within the Hearing Tribunal's purview to determine if an alternate resolution process would have been appropriate in this case and therefore did not consider this question in determining costs.

4. **Whether the doctor cooperated with respect to the investigation and offered to facilitate proof by admissions, etc.**

Dr. Abouhamra admitted to some of the facts during the course of the hearing but maintained his interpretation of the Undertaking, thereby necessitating a contested hearing.

5. **The financial circumstances of the doctor and the degree to which his financial position has already been affected by other aspects of any penalty that has been imposed.**

Dr. Abouhamra's financial situation was taken into consideration by the Hearing Tribunal. Mr. Boyer submitted that Dr. Abouhamra's financial situation came from the loss of hospital privileges in Saskatchewan and not from the practice restriction against performing procedures in the office. However, the Hearing Tribunal agrees with Mr. Hembroff when he highlighted the costs that would have fallen on Dr. Abouhamra from this restriction. These included the costs to update his office, produce an infection prevention and control manual, and respond to previous requests for information from the College on concerns that were not, prior to this current complaint, founded. The previously mentioned complex administrative task of lifting the restriction which Dr. Abouhamra faced, made it difficult for him to improve his work place flexibility and contributed to the serious financial situation he found himself in when he was no longer able to perform invasive procedures at the Lloydminster Hospital. Whether caused by the Undertaking and associated restriction or not, both parties recognize that Dr. Abouhamra faced significant financial hardship leading up to this hearing. The Hearing Tribunal notes that a costs order should not deliver a crushing financial blow to a regulated member, and therefore it is appropriate to take Dr. Abouhamra's financial position into account when determining whether to order costs, and if so, what proportion and amount of costs Dr. Abouhamra should bear.

Finally, Dr. Abouhamra, in his requested relief, specifies that this decision should remain "unpublished pending the results of any appeal of the Panel's decision". The decision to publish is in fact the decision of the Registrar of the College, not that of the Hearing Tribunal as per section 119 of the HPA. The Hearing Tribunal will therefore leave this consideration to the Registrar.

ORDERS

The Hearing Tribunal makes the following orders pursuant to section 82 of the HPA:

1) Dr. Abouhamra's practice permit is suspended for a period of seven (7) days. Dr. Abouhamra will be given credit for the time he was away from practice, such that the period of suspension is considered to have been served.

2) Dr. Abouhamra will pay 50% of the costs of the investigation and hearing, to a maximum of $30,000. Dr. Abouhamra may pay the costs in a lump sum, within sixty (60) days of receiving confirmation of the total amount of costs. Alternatively, he may elect to pay costs in equal monthly installments over a 24 month period, with the first payment being due within sixty (60) days of receiving confirmation of the total amount of costs, or on such other terms as are acceptable to the Complaints Director.

Signed on behalf of the Hearing Tribunal by the Chair,

Dated: June 28, 2018

Dr. Erica Dance